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<sup>4</sup> Became Chief Justice January 12, 1904

<sup>b</sup> Re-elected January 12, 1904.

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# THE PACIFIC REPORTER.

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In re BOYCE. (No. 1,647.)

(Supreme Court of Nevada. Jan. 11, 1904.)

**EIGHT-HOUR LAW—CONSTITUTIONALITY—STATUTES—EXPEDIENCY—POWER OF COURTS.**

1. The act of February 23, 1903 (St. 1903, p. 33, c. 10), providing an eight-hour day for all workmen in mines, smelters, and mills for the reduction of ores, is not void, under section 1 of article 1 of our state Constitution, guaranteeing to citizens the right to acquire and possess property; nor is the statute in conflict with section 21 of article 4, which provides that, in all cases where a general law can be made applicable, all laws must be general and of uniform operation throughout the state.

2. Nor is the act mentioned inimical to the fourteenth amendment to the federal Constitution, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life or liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

3. The people, and through them the Legislature, have supreme power in all matters of government where not prohibited by constitutional limitations; and, while the powers of the federal government are restricted to those delegated, those of the state government embrace all that are not forbidden.

4. All acts of the Legislature are presumed to be valid until it is clearly shown that they violate some constitutional restriction.

5. The Legislature has inherent authority, under the general police power of the state, to enact laws for the promotion of the health, safety, and welfare of the people, and its arm cannot be stayed when exercised for these purposes.

6. If the restriction of the hours of labor be deemed a regulation or limitation on the right to acquire property, the occupations to which the act applies are not considered healthful; and it was therefore within the power and discretion of the Legislature to enact the statute for the protection of the health and prolongation of the lives of the workmen affected, and the resulting welfare of the state.

7. Questions relating to the wisdom, policy, and expediency of statutes are for the people's representatives in the Legislature assembled, and not for the courts, to determine.

Belknap, C. J., dissenting.

(Syllabus by the Court.)

In the matter of the application of William G. Boyce for writ of habeas corpus. Writ denied.

F. M. Huffaker, for petitioner. James G. Sweeney, Atty. Gen., H. F. Bartine, F. P. Langan, and John H. Murphy, for the State. Alfred Chartz, amicus curiæ.

TALBOT, J. Plaintiff was arrested, convicted, and sentenced for working in an underground mine more than eight hours in one day, contrary to the provisions of an act passed by our last Legislature which provides:

"Section 1. The period of employment of working men in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 2. The period of employment of working men in smelters and in all institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 3. Any person who violates either of the preceding sections of this act, or any person, corporation, employer or his or its agent, who hires, contracts with, or causes any person to work in an underground mine or other underground workings, or any smelter or any other institution or place for the reduction or refining of ores or metals for a period of time longer than eight hours during one day unless life or property shall be in imminent danger shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

"Sec. 4. This act shall take effect sixty days from and after its passage."

St. Nev. 1903, p. 33, c. 10.

Upon his failure to pay the fine of \$100 imposed, he was committed to the custody of the sheriff. He applies to this court for his liberty, and on his behalf it is urged that his conviction is void because the statute conflicts with section 1 of article 1 of our state Constitution, which declares that "all men are, by nature, free and equal, and have certain inalienable rights, among which are

¶ 2. See Constitutional Law, vol. 10, Cent. Dig. §§ 623, 846.

those of enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness," and that the act is inimical to the fourteenth amendment to the federal Constitution, which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of its laws."

Although the constitutionality of this eight-hour law is now challenged before us for the first time, and questions of much interest and great import are involved, the fundamental principles which govern the determination of its validity have heretofore been recognized and enunciated by this court and by the Supreme Court of the United States, the earthly tribunals having final jurisdiction in this commonwealth; and the purpose, force, and validity of similar statutes have been carefully considered by that court and others in several states. It will be seen that the act does not attempt in any way to regulate the amount of wages which an employer shall pay, or an employé receive, for services by the day or otherwise performed. The language forbids any person from working in underground mines, smelters, or mills for the reduction of ores more than eight hours per day, and the penalty is imposed alike on the man who labors in those places longer than the time prescribed, and on the owner who hires, and thereby encourages an infraction of the statute by others in his service. If he worked more than eight hours in his own mine, he would be subject to the same punishment as the man who labors for others, and the effect of the statute is to prevent all persons from working in the places named more than the designated number of hours. The employer is not required to pay any more per hour for the labor or value he receives than he paid previous to the passage of the act. He may hire as many men as he may choose, and he and the employé are as free to fix the compensation for services performed on the basis of their actual value as before. Both are prohibited from having the latter work more than eight hours per day in the employments effected, but if loss, temporary or otherwise, be occasioned by this curtailment of labor, it is apparent that the statute does not require it to be borne by the employer. Labor properly directed creates wealth, and all honest toil is noble and commendable. The right to acquire and hold property guaranteed by our constitution is one of the most essential for the existence and happiness of man, and for our purposes here we may consider it to be the cornerstone in the temple of our liberties, and that it implies and includes the right to labor. It may also be granted that labor, the poor man's patrimony, the creator

of wealth, and upon which all must depend for sustenance, is the highest species of property, and the right to toil is as sacred and secure as the millions of the wealthy; but individual rights, however great, are subject to certain limitations necessary for the good of others and the community, and inherent in every well-regulated government. While we are not forgetful of the important rights and constitutional guaranties of the individual, they are, at the most, only branches of the common tree, while the welfare of the state, which includes the protection of the health and lives of the people in their various industrial pursuits, is the trunk, without which the tree could not stand or bear fruit. The public good and the health of a considerable portion of our population, when placed in the balance, must outweigh and turn the scale, regardless of slight inconveniences and reasonable restrictions which individuals may suffer. This principle is of greater importance to every one than his more direct personal rights, for, without the prevalence and enforcement of this doctrine, no government could sustain itself and extend protection to its citizens. Broadly speaking, the right to acquire and hold property, which presupposes the one to labor at all ordinary pursuits, is subordinate to this greater obligation not to injure others, individually or collectively, and to contribute and aid in the support of the government in all its legitimate objects, among which we may consider the protection of the health and lives of that large portion of the people in this state who delve in the earth in search of the precious metals that help enrich the commerce of the world, and who there and in the smelters and ore reduction works come in contact with poisonous minerals, and breathe dust, foul air, and obnoxious fumes and gases. In this connection it should be remembered that the statute applies to underground mines, and not to placer claims, or to men working in the open above the surface. That a large proportion of our population are engaged in the pursuits in which the hours of labor are restricted is a matter of general knowledge. The Legislature in 1875 declared the mining, milling, and smelting of ores to be for the public use, and, when necessary for these purposes, authorized the taking of private property by way of eminent domain. Comp. Laws, § 283. And in 1887 they declared that mining was the paramount interest of the state, and authorized condemnation proceedings for its promotion in certain instances. Comp. Laws, § 281.

We cannot close our eyes, and deny that employment in the places named in the statute is unhealthful, when it is so commonly known that men contract rheumatism and miner's consumption working underground in powder smoke, and damp, bad air; that they become leaded from the fumes in smelters; and that the most of those em-

ployed in one of the largest quartzmills in the state during the past several years became afflicted in from a few to several months with fine particles of flinty dust, which, with the inflation and contraction in breathing, cut the lungs, and resulted in premature and early death. We are not prepared to say that the mining, milling, and smelting of ores are not avocations so unhealthy and hazardous that they may not come under the protecting arm of the Legislature; but to recognize these conditions, and pass measures for their amelioration, and which may protect the health and prolong the lives of the men so employed, we think, is within the legitimate powers of the lawmaking branch of our government. As we will indicate later, the Supreme Courts of Utah and the United States have held these occupations to be unhealthful in that state, and there is no apparent reason why they are not equally so here. If these matters were uncertain when their existence is necessary to sustain the law, the doubt should be resolved in favor of the statute, for, as held by this court in several decisions, its validity will be presumed until it is clearly shown to be unconstitutional. Justice Harlan, in delivering the opinion of the Supreme Court of the United States a few weeks since in the case involving the Kansas law making eight hours a day for all engaged on public work, state, city, or county—a different question than that involved here—made these pertinent statements: "So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon the legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of justice or reason and wisdom, annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts, in cases before them, to regard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true, indeed, the public interests imperatively demand—that legislative enactments be recognized and enforced by the courts, as embodying the will of the people, unless they are plainly and palpably, and beyond all question, in violation of the fundamental law of the Constitution."

In *Wallace v. Mayor and City of Reno*, 73 Pac. 531, 27 Nev. —, we held that the people, and through them the Legislature, had supreme power in all matters of government, where not restricted by constitutional limitations; and, adopting the language of the Supreme Court of the United States, we said: "Whatever differences of opinion may exist

as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, 'Salus populi suprema est lex,' and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. All rights are held subject to the police power of the state." The cases holding that the Legislature may pass measures for the protection of the health, safety, and lives of the citizens are too numerous to require citation. These have been enacted and upheld in a variety of forms which limit in a greater or less degree the control and acquisition of property. Quarantine regulations, state and national, for the protection of the many and in restraint of the individual, and affecting people and various animals, prevail generally. The use of safety devices has been enforced in mining, mills, and factories, and on railroads. By ordinance, vestibules are required on street cars to protect motormen from the inclemency of the weather. Various trades are prohibited or regulated, so as not to injure the health of those employed or others. A proportion of private property is exacted by way of taxation for the support of schools, asylums, hospitals, and for other public and beneficial purposes, present and future. More directly, laws have been sustained shortening the hours of labor in bakeries, barber shops, and laundries—places less unhealthy and affecting a smaller class than mines and smelters—and for women in manufacturing establishments. Considerations peculiar to sex have been advanced in some instances in support of the latter, but to have strong, healthy men, instead of sickly and disabled ones, without earning and self-supporting capacity, and resultant widows and orphans dependent upon private and public charity, is quite as important to the state in time of peace or war; and the health and lives of all the people, wherever endangered, should receive care and protection.

Of the statute we have under consideration, sections 1 and 2 are copied literally, and section 3 substantially, from an act found in the Session Laws of Utah for 1896, at page 219, c. 72, which was sustained as being not unconstitutional by the Supreme Court of that state and of the United States. *State v. Holden*, 14 Utah, 71, 46 Pac. 756, 37 L. R. A. 103; *Id.*, 14 Utah, 96, 46 Pac. 1105, 37 L. R. A. 108; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Short v. Mining Co.*, 20 Utah, 20, 57 Pac. 720, 45 L. R. A. 603.

The Utah Bill of Rights, in slightly vary-

ing language, contains the same guaranty as ours for acquiring and holding property, but section 6 of article 18 in the Constitution of that state directs that "the Legislature shall pass laws to provide for the health and safety of employees in factories, smelters and mines." This must be regarded as a command to the Legislature there on a subject in regard to which our Constitution is silent, but the validity of the statute under challenge depends upon power which may exist without the command. This direction to the Legislature would imply and supply power if it did not otherwise exist, but, as we have already seen, the authority to provide for the health, safety, and welfare of the citizen is inherent in the police power of the Legislature, without any express provision. Our Constitution being silent in that regard, our Legislature could exercise the power at their discretion, while there the command made action obligatory. Here the Legislature is the uninstructed general agent of the people, free to exercise its own judgment in matters coming within the police powers of the state; and the power necessary to sustain the validity of the statute exists here as well as there, and would exist there regardless of the command. It should be remembered that the Utah Constitution does not direct the Legislature to regulate the hours of labor in mines and smelters, but only to provide for the health and safety of employees therein, and that this law in that state can be sustained only as a health regulation, such as are within the general police powers regardless of the constitutional command, for otherwise it is not authorized any more there than here. The extent of the command is for the Legislature to provide for the health of these employees. Every Legislature is authorized to provide for the health of the people, where endangered, and for their welfare in other ways. The power is as inherent here as it is complete there, and, if the curtailment to eight of the hours of labor in the mines and smelters in Utah promotes the health of the employees, ergo it does the same here. Since the Constitution of Utah confers no power that is not possessed by our Legislature, and the conditions in mines and smelters may not be considered materially different there from what they are here, it is presumed that when our Legislature adopted this statute it adopted the construction which had been placed upon it at the time of its adoption by the Supreme Court of that state and the United States. It was said in *State v. Robey*, 8 Nev. 320, that "it is well settled that when a statute has received a judicial construction, and is afterwards adopted by another state, the construction as well as the terms of the statute will be deemed adopted." To the same effect are *Williams v. Glasgow*, 1 Nev. 533, and *McLane v. Abrams*, 2 Nev. 199; and in *Gould v. Wise*, 18 Nev. 254, 3 Pac. 30, it was held that the re-enactment of the statute aff-

er an authoritative construction by the courts, and in that case by the United States District Court, was a legislative adoption of the court's construction.

The questions involved have been carefully considered and ably discussed in a number of decisions from which we quote:

*State v. Holden*, supra:

"If the power to pass the law is conceded, the court cannot set it aside because it may deem its enactment unnecessary or injudicious, or because the court may think that experience has proven it so, or because the court may think itself more sagacious than the Legislature, and can therefore see more clearly that the law will retard, rather than promote, progress and prosperity, and will be a detriment to the common good when actually applied to human affairs amid the conditions of the future.

"This brings us to the question, Is the first section of the statute, limiting the period of employment of laboring men in underground mines to eight hours per day, except in cases of emergency, where life or property is in imminent danger, calculated to protect the health of such laboring men? The effort necessary to successful mining, if performed upon the surface of the earth, in pure air and in the sunlight, prolonged beyond eight hours, might not be injurious, nor affect the health of able-bodied men. When so extended beneath the surface, in atmosphere laden with gas, and sometimes with smoke, away from the sunlight, it might injuriously affect the health of such persons. It is necessary to use artificial means to supply pure air to men laboring any considerable distance from the surface. That being so, it is reasonable to assume that the air introduced, when mixed with the impure air beneath the surface, is not as healthful as the free air upon the surface. The fact must be conceded that the breathing of pure air is wholesome, and that the breathing of impure air is unwholesome. We cannot say that this law, limiting the period of labor in underground mines to eight hours each day, is not calculated to promote health; that it is not adapted to the protection of the health of the class of men who work in underground mines. While the provision of the Constitution under consideration makes it the duty of the Legislature to enact laws to protect the health and to secure the safety of men working in underground mines, and in factories and smelters, it does not prohibit the Legislature from enacting other laws protecting such classes, to promote the general welfare. The authority of the general government is ascertained from the powers delegated, while those of the state government are ascertained from those not prohibited. This leaves the state Legislature in the possession of all the lawmaking power not prohibited to it by the Constitution of the United States, or the laws made in pursuance of it, or by the state Constitution. The enact-

ment of some laws is made mandatory. The enactment of others is left to the discretion of the Legislature as the public welfare may demand. The fourteenth amendment of the federal Constitution forbids the denial to any class of persons of the equal protection of the laws by any state, and we have no doubt that class legislation is forbidden. But some pursuits are attended with peculiar hazard and perils, the injurious consequences from which may be largely prevented by precautionary means, and laws may be passed calculated to protect the classes of people engaged in such pursuits. It is not necessary to extend the protection to persons engaged in other pursuits not attended with similar dangers. To them the law would be inappropriate and idle. So, if underground mining is attended with dangers peculiar to it, laws adapted to the protection of such miners from such danger should be confined to that class of mining, and should not include other employments not subject to them. And if men engaged in underground mining are liable to be injured in their health or otherwise by too many hours' labor each day, a law to protect them should be aimed at that peculiar wrong. In this way laws are enacted to protect people from perils from the operation of railroads, by requiring bells to be rung and whistles sounded at road crossings, and the slackening of the speed of trains in cities. So the sale of liquors is regulated to lessen the evils of the liquor traffic, and other classes of business are regulated by appropriate laws. In this way laws are designed and adapted to the peculiarities attending each class of business. By such laws different classes of people are protected by various acts and provisions. In this way various classes of business are regulated, and the people protected by appropriate laws from dangers and evils that beset them, safety is secured, health preserved, and the happiness and welfare of humanity promoted. All persons engaged in business that may be attended by peculiar injury to health or otherwise if not regulated or controlled should be subject to the same law; otherwise the law should be adapted to the special circumstances.

"An ordinance of the city and county of San Francisco prohibited the washing and ironing of clothes in public laundries and washhouses within certain prescribed limits of the city and county from ten o'clock at night until six o'clock on the morning of the following day; and one Soon Hing was fined and imprisoned for a violation of it, and he petitioned for a writ of habeas corpus, on the ground that the ordinance was void, because it discriminated between the classes of laborers engaged in the laundry business and those engaged in other kinds of business, and it discriminated between laborers beyond the designated limits and those within them; that it deprived the petitioner of the right to labor, and, as

a necessary consequence, of the right to acquire property; and that the board had no power to pass it. The writ was denied by the lower court, and the judgment was brought before the Supreme Court of the United States, and affirmed by that court. Among other things, that court said in its opinion: 'The specific regulations for one kind of business which may be necessary for the protection of the public can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discriminations can be said to impair that equal right which all can claim in the enforcement of the laws.' *Soon Hing v. Crowley*, 113 U. S. 703 [5 Sup. Ct. 730, 28 L. Ed. 1145]; *Barbier v. Connolly*, 113 U. S. 27 [5 Sup. Ct. 357, 28 L. Ed. 923].

"Judge Cooley says: 'Whether a statute is constitutional or not is always a question of power; that is, a question whether the Legislature, in the particular case, in respect to the subject-matter of the act, the matter in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits, and observed the constitutional limits. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. We must assume that the legislative discretion has been properly exercised.' *Cooley, Const. Lim.* (6th Ed.) p. 220.

"The Supreme Court of Massachusetts, in the case of *Com. v. Hamilton Mfg. Co.*, 120 Mass. 383, held that a law declaring that a woman should not be employed at labor by any person, firm, or corporation in any manufacturing establishment more than ten hours in any one day, except in certain cases, and in no case more than sixty hours a week, was constitutional and valid. The court said: 'It does not forbid any person, firm, or corporation from employing as many persons or as much labor as such person, firm, or corporation may desire; nor does it forbid any person to work as many hours a day or a week as he chooses. It merely provides that, in an employment which the Legislature has evidently deemed dangerous to some extent to health, no woman shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation can be maintained, either as a health or police regulation, if it were necessary to resort to either of these sources for power. This principle has been so frequently recognized in this commonwealth that reference to the decisions is unnecessary.'

"The section of the statute of which the constitutionality is involved in this case in-

cludes all employes and employers engaged in working underground mines. None are omitted who may be subject to the peculiar conditions that attend such mining. And we are not authorized to hold that the law in question is not calculated and adapted in any degree to promote the health and safety of persons working in mines and smelters. Were we to do so, and declare it void, we would usurp the powers intrusted by the Constitution to the lawmaking power."

In affirming the decision of the supreme Court of Utah, the Supreme Court of the United States, in *Holden v. Hardy*, made a clear and elaborate statement, which is peculiarly applicable here, and of which we reproduce a part of the most direct paragraphs:

"This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employes as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases *Davidson v. New Orleans*, 96 U. S. 97 [24 L. Ed. 616], and *Yick Wo v. Hopkins*, 118 U. S. 356 [6 Sup. Ct. 1064, 30 L. Ed. 220], that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.' *Lawton v. Steele*, 152 U. S. 136 [14 Sup. Ct. 501, 38 L. Ed. 385].

"The extent and limitations upon this power are admirably stated by Chief Justice Shaw in the following extract from his opinion in *Commonwealth v. Alger*, 7 Cush. 53, 84:

"We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the Con-

stitution, may think necessary and expedient."

"This power, legitimately exercised, can neither be limited by contract, nor bartered away by legislation.

"While this power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist. Certain profitable employments, such as lotteries and the sale of intoxicating liquors, which were then considered to be legitimate, have since fallen under the ban of public opinion, and are now either altogether prohibited, or made subject to stringent police regulations. The power to do this has been repeatedly affirmed by this court. *Stone v. Mississippi*, 101 U. S. 814 [25 L. Ed. 1079]; *Douglas v. Kentucky*, 168 U. S. 488 [18 Sup. Ct. 199, 42 L. Ed. 553]; *Giozza v. Tiernan*, 148 U. S. 657 [13 Sup. Ct. 721, 37 L. Ed. 599]; *Kidd v. Pearson*, 128 U. S. 1 [9 Sup. Ct. 6, 32 L. Ed. 346]; *Crowley v. Christensen*, 137 U. S. 86 [11 Sup. Ct. 13, 34 L. Ed. 620].

"While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way, and by such primitive methods that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives; but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies, and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes from hotels, theaters, factories, and other large buildings, a municipal inspection of boilers, and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, elevator shafts, and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signaling the surface, for the supply of fresh air, and the elimination, as far as possible, of dangerous gases, for



safe means of hoisting and lowering cages, for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the top of shafts, besides other similar precautions.

"These statutes have been repeatedly enforced by the courts of the several states, their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional.

"In *Daniels v. Hilgard*, 77 Ill. 640, it was held that the Legislature had power, under the Constitution, to establish police regulations for the operating of mines and collieries, and that an act providing for the health and safety of persons employed in coal mines, which required the owner or agent of every coal mine or colliery employing ten men or more to make or cause to be made an accurate map or plan of the workings of such coal mine or colliery, was not unconstitutional, and that the question whether certain requirements are a part of a system of police regulations adopted to aid in the protection of life and health was properly one of legislative determination, and that a court should not lightly interfere with such determination unless the Legislature had manifestly transcended its province. See, also, *Litchfield Coal Co. v. Taylor*, 81 Ill. 590.

"In *Commonwealth v. Bonnell et al.*, 8 Phila. 534, a law providing for the ventilation of coal mines, for speaking tubes, and the protection of cages, was held to be constitutional, and subject to strict enforcement. *Commonwealth v. Conyngham*, 66 Pa. 99; *Durant v. Lexington Coal Mining Co.*, 97 Mo. 62 [10 S. W. 484].

"But if it be within the power of the Legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the state that the public health should be preserved as that life should be made secure.

"Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the state. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the Legislature has judged to be detrimental to the health of the employes; and, so long as there are reasonable grounds for believing that this is so, its decisions upon this subject cannot be reviewed by the courts.

"While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when car-

ried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases generated by the processes of refining or smelting."

Continuing, the United States Supreme Court said:

"We concur in the following observations of the Supreme Court of Utah in this connection in its opinion in No. 2:

"The conditions with respect to health of laborers in underground mines doubtless differ from those in which they labor in smelters and other reduction works on the surface. Unquestionably the atmosphere and other conditions in mines and reduction works differ. Poisonous gases, dust, and impalpable substances arise and float in the air in stampmills, smelters, and other works in which ores containing metals, combined with arsenic or other poisonous elements or agencies, are treated, reduced, and refined; and there can be no doubt that prolonged effort day after day, subject to such conditions and agencies, will produce morbid, noxious, and often deadly effects in the human system. Some organisms and systems will resist and endure such conditions and effects longer than others. It may be said that labor in such conditions must be performed. Granting that, the period of labor each day should be of a reasonable length. Twelve hours per day would be less injurious than fourteen, ten than twelve, and eight than ten. The Legislature has named eight. Such a period was deemed reasonable. The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the Legislature can fix the hours of labor in other employments. Though reasonable doubts may exist as to the power of the Legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order or promote the general welfare, we must resolve them in favor of the right of that department of government. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.' The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual

health, safety, and welfare are sacrificed or neglected, the state must suffer.

"We are of the opinion that the act in question was a valid exercise of the police power of the state, and the judgments of the Supreme Court of Utah are therefore affirmed."

In *People v. Lochner* (Sup.) 76 N. Y. Supp. 399, the Supreme Court of New York said: "The police power of the state is the power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far-reaching, but it is not without its limitations. The line between the valid exercise of the police power and the invasion of the private rights is clearly drawn by Judge Earl in his opinion in *Re Jacobs*, 98 N. Y. 110, 50 Am. Rep. 636. He says: 'Generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and while its measures are calculated, intended, convenient, and appropriate to accomplish those ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. If the act and the Constitution can be construed so as to enable both to stand, and each can be given a proper and legitimate office to perform, it is the duty of the court to adopt such legislation. The Legislature, under the police power, may certainly regulate or even prohibit the carrying on of any business in such manner and in such place as to become dangerous or detrimental to the health, morals, or good order of the community.' Judge Vann, in discussing the statute entitled 'An act to regulate barbering on Sunday,' in *People v. Havnor*, 149 N. Y. 204, 43 N. E. 544, 31 L. R. A. 689, 52 Am. St. Rep. 707, says: 'As barbers generally work more hours each day than most men, the Legislature may well have concluded that legislation was necessary for the protection of their health.' And at page 203, 149 N. Y., and page 544, 43 N. E., 31 L. R. A. 689, 52 Am. St. Rep. 707, he says: 'It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork, and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare.' It was held in *People v. Warden of City Prison*, 144 N. Y. 536, 39 N. E. 688, 27 L. R. A. 718, that 'the restraint of personal action is justified when it manifestly tends to the protection of the health and comfort of the community, and no constitutional guarantee is then violated.' In *Health Department of City of New York v. Rector of Trinity Church*, 145 N. Y. 32, 39 N. E. 833, 45 Am. St. Rep. 579, the court laid down the rule that the Legislature, in the exercise of its power to conserve the public health,

safety, and welfare, may direct that certain improvements or alterations shall be made in tenant houses at the owners' expense, and that suitable appliances be supplied to receive and distribute a supply of water for domestic use. Judge Peckham, in discussing the constitutionality of the act (page 43, 145 N. Y., and page 836, 39 N. E., 45 Am. St. Rep. 579), says: 'Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner.' In *Tied. Lim. Police Power*, 181, the author states: 'If the law did not interfere, the feverish, intense desire to acquire wealth, inciting a relentless rivalry and competition, would ultimately prevent not only the wage earner, but likewise the capitalist and employers themselves, from yielding to the warnings of nature, and obeying the instinct of self-preservation by resting periodically from labor.' If the statute under consideration invades the right of property and the liberty of the individual, then many of the statutes of this state that have been held to be constitutional, and their enactment within the police power of the state, are subject to the same criticism. The statute in question does not restrict the right of the defendant to carry on his business, or to engage as many persons as he sees fit in such business, but it simply prohibits him from requiring or compelling his employees to work more than ten hours in any one day, or more than sixty hours in any one week. In other words, the statute does not prohibit any right, but regulates it; and there is a wide difference between regulation and prohibition—between prescribing the terms by which the right may be enjoyed, and the denial of that right altogether. The defendant is not deprived of any right or privilege which is not denied to others in a similar business. The provisions of the statute in question are directed to all persons engaged in the bakery business. It neither confers special privileges, nor makes unjust discrimination. All who are engaged in that business are entitled to its benefits and subjected to its restrictions."

The opinions in California and Ohio holding that statutes limiting the hours of labor on public works were unconstitutional, although not in point, may no longer be considered of weight, in the face of the recent decision to the contrary by the Supreme Court of the United States in the Kansas case. The employment was not shown or claimed to endanger health or life, nor could this be said of all the various occupations covered by the Nebraska act. When such strong considerations of public policy demand, it is not difficult to distinguish in principle between the cases relating to avocations unhealthful and dangerous, and those which are not, and

we are unaware that any court where the conditions are the same has rendered an opinion contrary to the views we hold and express, excepting in *Re Morgan*, 26 Colo. 415, 58 Pac. 1071, where the Supreme Court of that state took occasion to criticise the decision in *Holden v. Hardy*, and held contrary to the lucid opinion of the United States Supreme Court in that case, declaring that the protection of the health and lives of employés in mines and smelters was within the police power of the state, and that the Utah statute, from which ours is taken was valid, and not objectionable as class legislation. Nor are we prepared to agree with the bald assertion in the Colorado opinion that the state may not protect the individual against injury to himself, but we do not wish to be understood as placing the decision here on such narrow ground. Under the common law the man who tries to commit suicide and fails may be punished for the attempt to take his own life. A perusal of the decision in *Re Morgan* would lead to the inference that the Utah Supreme Court was not affirmed by the Supreme Court of the United States in *Holden v. Hardy*, when three courts, including the latter at different times, have asserted to the contrary. The Utah Constitution not only does not, but if a different construction be claimed for it, as was done in the Colorado case, it could not, as against the fourteenth amendment, to which all conflicting provisions of state Constitutions, as well as statutes, must yield, convey any authority for legislation abridging the rights, privileges, or immunities of citizens, or for depriving any person of property or liberty without due process of law, or for denying to any person the equal protection of the laws. The opinion in *Re Morgan* implies a warrant in the Utah Constitution which did not exist in Colorado, as a basis of the opinion of the Supreme Court of the United States, when, under well-known elementary principles, the Utah Constitution was of no more force against the federal Constitution and its amendments than the Colorado statute. It was the conclusion of the court in *Re Morgan* that the statute "unjustly and arbitrarily singled out a class of persons, and imposed upon them restrictions from which others similarly situated and substantially in the same condition were exempt, and that it was not a valid exercise of the police power of the state." As we have seen, the United States Supreme Court held differently on both these propositions, when the prohibitions which may relate to them are as broad in controlling under the fourteenth amendment as under the Constitution of Colorado. The conflict in these cases is evident, and it is apparent that the Colorado court had no different and substantial reason for deciding contrarily to the Supreme Court of the United States. When, as held by the highest court in the land, the power of the Legislature, as applied to a similar statute in Utah, cannot

be stayed by the fourteenth amendment, we must conclude that it is not nullified by the state Constitution—an instrument less potential, and not broader in its relevant guarantees.

Notwithstanding the attempt of the Supreme Court of Colorado to discredit and overrule the doctrines announced by the Supreme Court of the United States in *Holden v. Hardy*, the latter tribunal has continued to affirm those principles, and in later decisions has stated regarding the case:

*Orient Insurance Company v. Daggs*, 172 U. S. 563, 19 Sup. Ct. 283, 43 L. Ed. 552: "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. These principles were extended to the right to acquire property and to enter into contracts with respect to property, but it was said, 'This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police duties.' The legislation sustained was an act of the state of Utah making the employment of workmen in all underground mines and workings, and in smelters and all other institutions for the reduction and refining of ores or metals, eight hours per day, except in cases of emergency, where life or property shall be in imminent danger. The violation of the statute was made a misdemeanor. It was undoubtedly a limitation on the right of contract—that of the employer and that of the employed—enforced by a criminal prosecution and penalty on the former, and on his agents and managers. It was held a valid exercise of the police powers of the state." Citing *Holden v. Hardy*.

*Railway v. Paul*, 173 U. S. 409, 19 Sup. Ct. 421, 43 L. Ed. 746: "Inasmuch as the right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the state, we do not think that conclusion, in its application to the power to amend, can be disputed on the ground of infraction of the fourteenth amendment." Citing *Holden v. Hardy*.

*Williams v. Fears*, 179 U. S. 274, 21 Sup. Ct. 129, 45 L. Ed. 186: "And so as to the right to contract. The liberty, of which the deprivation without due process of law is forbidden, 'means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a suc-

cessful conclusion the purposes above mentioned; although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state, as contained in its statutes.' *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 591 [17 Sup. Ct. 427, 41 L. Ed. 832]; *Holden v. Hardy*, 169 U. S. 366 [18 Sup. Ct. 383, 42 L. Ed. 780]."

In *Austin v. Tennessee*, 179 U. S. 369, 21 Sup. Ct. 134, 45 L. Ed. 224, a statute of that state prohibiting the importation and sale of cigarettes: "While as was said in *Holden v. Hardy*, 169 U. S. 366, 392 [18 Sup. Ct. 383, 42 L. Ed. 780], 'the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, and morals, or the abatement of public nuisances; and a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what means are necessary for the protection of such interests.' Thus, while in *Railroad Company v. Husen*, 95 U. S. 465 [24 L. Ed. 527], it was held that a statute of Missouri, prohibiting the driving or bringing of any Texas, Mexican, or Indian cattle into the state was in conflict with the interstate commerce clause of the Constitution, it was subsequently held that the introduction of diseased cattle might be prohibited altogether, or subjected to such regulations as the legislature chose to impose. *Railway v. Haber*, 169 U. S. 613 [18 Sup. Ct. 488, 42 L. Ed. 878]."

*Knoxville Iron Co. v. Harbison*, 183 U. S. 21, 22 Sup. Ct. 4, 46 L. Ed. 55: "In *Holden v. Hardy*, 169 U. S. 366 [18 Sup. Ct. 383, 42 L. Ed. 780], the validity of an act of the state of Utah regulating the employment of workmen in underground mines, and fixing the period of employment at eight hours per day, was in question. There, as here, it was contended that the legislation deprived the employers and employes of the right to make contracts in a lawful way and for lawful purposes; that it was class legislation, and not equal or uniform in its provisions; that it deprived the parties of the equal protection of the laws, abridged the privileges and immunities of the defendant as a citizen of the United States, and deprived him of his property and liberty without due process of law. But it was held, after full review of the previous cases, that the act in question was a valid exercise of the police power of the state, and the judgment of the Supreme Court of Utah sustaining the legislation was affirmed."

*Short v. Mining Co.*, 20 Utah, 24, 57 Pac. 721, 45 L. R. A. 603: "The statute above referred to was held constitutional by the court in *State v. Holden*, 14 Utah, 71 [46 Pac. 756, 37 L. R. A. 103], and the Supreme

Court of the United States affirmed such decision in 169 U. S. 366 [18 Sup. Ct. 383, 42 L. Ed. 780], holding that the act in question was a valid exercise of the police power of the state of Utah."

Similar conclusions are stated in *People v. Lochner* (Sup.) 76 N. Y. Supp. 401.

We think the better reasoning and correct distinction are with the Supreme Court of the United States, and the cases in line with its decisions. As we have already shown, the objection to the statute as being special legislation was held to be untenable by that court, and its opinion based squarely on the fact that the Legislature, in the exercise of its police power, could, by limiting the hours of labor, provide for the protection of the health of the men employed in underground mines and smelters. If the statute had been objectionable as class legislation, that court would have held it to be a denial of the equal protection of the laws under the fourteenth amendment to the federal Constitution. Of necessity, many laws must refer to certain classes, such as those governing towns, cities, various occupations, of which the saloon business has been cited as an instance, quarantine laws to prevent the spread of different diseases peculiar to animals and people and different localities, safety devices; and generally a health regulation must be limited, as a matter of fact, if not in direct statutory terms, to that class which will be affected, for no others could receive protection. It is necessary that the law affect all persons alike in the same class and under similar conditions. These requirements are met by the statute for it controls all alike, and extends to every man who engages in underground mining, or in the smelting and milling of ores, and becomes subject to the dangers incident to those occupations. In sustaining a statute requiring the closing of saloons between 12 at night and 6 o'clock in the morning, this court said: "The act is not local or special, in the sense of the constitutional restriction upon this subject. It applies to all saloons and gaming houses throughout the state which come within the class mentioned in the act, and, as to such classes and places of business, it is of uniform operation throughout the state." *Ex parte Livingston*, 20 Nev. 289, 21 Pac. 322.

In *Wenham v. State*, 91 N. W. 421, 58 L. R. A. 825, the Supreme Court of Nebraska held that an act prohibiting females from laboring more than 10 hours per day, or 60 hours per week, in manufacturing and certain other establishments, was within the police power of the state, and not objectionable as class legislation; and it is said in the opinion: "It would seem at first blush as though a law having the effect to interfere with the business of the one, or shorten the hours of labor of the other, would be repugnant to these constitutional provisions. It must be conceded, however, that every property holder is secured in his title there-

to, and holds it under the implied rule and understanding that its use may be so regarded and restricted that it shall not be injurious to the equal enjoyment of others having the equal right to the enjoyment of their property, or to the rights of the community in which he lives. All property in this state is held subject to rules regulating the common good and the general welfare of our people. This is the price of our advanced civilization, and of the protection afforded by law to the right of ownership, and the use and enjoyment of the property itself. Rights of property, like other social and conventional rights, are subject to reasonable limitations in their enjoyment, and to such reasonable restraints and regulations by law as the Legislature, under the governing and controlling power vested in them by the Constitution, may think expedient."

To the same effect, and upholding a similar statute, is *State v. Buchanan*, 70 Pac. 52, 59 L. R. A. 342, a Washington case.

It may be assumed that, at the time of the adoption of our state Constitution, underground mining had not progressed to such extent that the dangers to health incident were so apparent and well understood as today, and consequently that no provision was made for or against such legislation as that before us, and no consideration given the subject. Time and the light of experience and the progress of the age have shown the desirability of various enactments for the promotion of the happiness and good of the people, regarding which Legislators and statesmen were formerly unmindful. As new conditions and necessities arise in the affairs of men, the law must advance to meet them.

For the reasons indicated, we conclude that it was within the power and discretion of the Legislature to enact the statute for the protection of the health and prolongation of the lives of the workmen affected, and the resulting welfare of the state. The petitioner is remanded to custody.

**FITZGERALD, J. (concurring).** The question for determination is, does the eight-hour enactment of the last session of the Nevada Legislature violate the Nevada Constitution? True, it is claimed in the brief of counsel for petitioner that the said enactment violates also the Constitution of the United States, in its fourteenth amendment, but this contention was abandoned at the oral argument; and the Supreme Court of the United States, which is the supreme authority as to what may constitute a violation of that Constitution, has held that such an enactment does not contravene the national Constitution.

Counsel claim that the enactment violates the Constitution of Nevada (1) in section 21 of article 4, as to generality and uniformity of laws; (2) in section 17 of article 4, as to multiplicity of subjects; (3) in sec-

tion 20 of article 4, as to local and special laws; and (4) in section 1 of article 1, as to (a) class legislation; and (b) its "Bill of Rights," as to, first, personal liberty; and, second, as to acquiring property.

While counsel have cited the foregoing sections as violated by the enactment in question, they have not, in their arguments, kept the discussion on each point separate; but several points are mingled together in their discussion. Hence the discussion here will have, to some extent, to follow the same method. The said points will, however, be separately discussed as far as, under the circumstances, may be practicable.

Section 20 of article 4 provides: "The Legislature shall not pass local or special laws" in certain cases therein named; but the enactment in question here does not seem to come under any of them, unless it be this one: "For the punishment of crimes and misdemeanors." If that be the contention, it will receive attention further on.

Section 21 provides that "in all cases enumerated in the preceding section [see section 20] and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Does counsel claim that a health law could "be made general and of uniform operation throughout the state"; that is, applicable to wholesome and unwholesome employments alike, if there are employments wholesome and employments unwholesome? If so, cases cited in the briefs oppose the contention.

Section 17 of article 4 is, "Each law enacted by the Legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title," etc. The title of this act is as follows: "An act regulating the hours of employment in underground mines and smelters, and ore reduction works, and providing penalties for violation thereof." Does this enactment violate this section as being multifarious in its title? Counsel, though citing the section as violated by the act's title, pay very slight attention to the point in their argument. This fact and the subject itself justify only a brief reference to it here. It is thought that neither the title nor the body of the act violates said section.

This brief reference to the sections of the Constitution claimed to be violated is made to show that all that were cited to the court by counsel received the court's attention. The main contention of counsel will now be considered: Section 1 of article 1, called by counsel the "Bill of Rights," is: "All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." The contention is that the enactment of 1903 violates this section, as (1) interfering with petitioner's "liberty" (that is,

his "liberty to contract"); and (2) his right of "acquiring \* \* \* property." These are the two precise questions in this case. And here, too, counsel have not chosen to discuss each point separately, but have mingled them together in a general manner. Therefore the brief discussion here to be made will be somewhat similar. One remark, however, will be made, to wit, that although courts of great respectability have, it seems, held that the word "liberty," in other Constitutions similar to ours, in said section 1 of article 1, refers to the "right to contract" or "liberty to contract," is it, after all, entirely clear that it does? It would seem that the notion conveyed by the word "liberty" might ordinarily be deemed to be somewhat different from the word "contract," and also the "right to liberty" and the "right to contract" somewhat different from each other. But be that as it may, now to the points thus sharply put to issue:

The question presents itself in two aspects: (1) Its general aspect (that is, in reference to legislative enactments upon the right or liberty of all citizens "to contract in reference to their labor," and the "right of all citizens to acquire property"); and (2) the rights of a special class or special classes of citizens in these respects. The first or general aspect of the question does not arise in the matter now in hearing, and therefore will not be discussed. But the second aspect, to wit, the special one of the legislative power to regulate or restrain contracting as to laboring in underground mines and about smelters and reduction works, does arise, and will be considered.

On the specific question of such regulation and restraint as to laboring in underground mines and about smelting and reduction works but two cases have been cited by counsel. These are the case of *State v. Holden*, 14 Utah, 71, 46 Pac. 756, 37 L. R. A. 103, and the case of *In re Morgan*, 26 Colo. 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 260, and these two cases are directly antagonistic to each other. True, in addition to these two cases there are in Colorado (*In re Labor Bill*, 21 Colo. 29, 39 Pac. 328, and *In re House Bill*, 21 Colo. 32, 39 Pac. 431) judicial responses to legislative inquiries to the same effect as was the decision of the Colorado court in *In re Morgan*. But those responses were not made after argument by counsel, and do not themselves contain argument, but merely assertion. Therefore the case in *In re Morgan* is essentially, as stated above, the only case in point cited by counsel that was precisely antagonistic to the case cited from Utah.

Before considering these cases, let it be remarked that the legislative power to regulate and restrain the hours of labor in employments other than those mentioned in the Nevada statute has been before numerous appellate courts of the Union, and that the decisions thereon are not uniform; some hold-

ing such regulation and restraint constitutional, and others unconstitutional. Therefore whatever aid could be gained from analogy in decisions in other cases would be divided aid—partly in favor of petitioner, and partly against him; but it is believed the preponderance in number and reason is against him.

As counsel for petitioner place great reliance on *In re Morgan*, that case will be examined. Here a puzzling statement appears. The chief justice in the opinion first gives the enactment of the Colorado Legislature in question in the case, which is the same as the one in question in the Utah Case, and also in the case now before us; and, secondly, the clause of the Colorado Constitution claimed to be by it violated, which clause is essentially the same as the clause in the Nevada Constitution, and also as the clause in the Utah Constitution (it is not here overlooked that another clause is in the Utah Constitution enjoining upon its Legislature the enactment of health laws as to laborers in mines, etc.); and then he says that it is "practically admitted to be true that this act contravenes the constitutional provision quoted in the statement. Let us see if, notwithstanding this conflict, it can be justified as a valid exercise of the police power." Curious admission. If admitted, it must have been by the counsel in the case who were endeavoring in their arguments to uphold the enactment of the Colorado Legislature; and, after admitting that the enactment contravened the Constitution, how could counsel, in reason, ask the court to uphold such contravening enactment, under either the police power or under any other power of the Legislature? If the enactment contravened the Colorado Constitution, it would seem that was an end of the matter. Saying or assuming that it did so violate was a petitio principii. It begged the whole question.

Again the Colorado court in *In re Morgan*, says: "If, in our Constitution there was, as there seems to be in that of Utah, a specific affirmative provision enjoining upon the General Assembly the enactment of laws to protect the health of the class of workmen therein enumerated, it might be that acts reasonably appropriate to that end would not be obnoxious to that provision of our Constitution forbidding class legislation, for it could hardly be said that a classification made by the Constitution itself was arbitrary or unfair, or that it clashed with another provision of the same instrument inhibiting class legislation."

Why could not a classification made by a Constitution be "arbitrary" and "unfair"? Clearly such classification might in reality be arbitrary and unfair, but it probably would not lie in the mouths of justices constituting a court under such Constitution to nullify it because of such arbitrariness and unfairness.

In the paragraph just above quoted does

not the Colorado court—that court so much relied upon by those assailing the enactment in question in this court—practically admit that such an enactment as this is a “reasonably appropriate” health regulation? It was only the “health” of the workmen that the Utah Constitution commanded its Legislature to enact laws to protect. It did not say how this health was to be protected. The Utah Legislature deemed protection of miners by regulating and controlling the hours of daily labor “reasonably appropriate” protection, and the Utah Supreme Court likewise held it “reasonably appropriate” and valid. It may be added here that the United States Supreme Court also has held such legislation appropriate and valid. See *infra*.

Now, in essence precisely the same situation existed in Colorado at the time of the decision in *In re Morgan* as did in Utah at the time of the decision in *State against Holden*, and as does now in this state. By universal consent of courts and text-writers on the law, the Legislature has, without express constitutional grant authorizing it, the power to protect the health of the people over whom it has jurisdiction. Therefore, as a question of legislative power, there is not a particle of difference, in essence, between the situation under the Utah Constitution and that under the Colorado and the Nevada Constitutions. And the question here is purely one of legislative power. The expediency, propriety, or wisdom of the enactment is not before this court. If the Legislature has the constitutional power to make the enactment, this court has no power to annul the enactment; and should it, under the case supposed, do so, it could be justly charged with usurpation of power. And courts, the conserving governmental branch under the Constitution or fundamental principles of government, should be most careful not themselves to set the example of usurping power. Let it, however, be said that courts should be equally scrupulous and fearless in preventing others from infractions upon the Constitution which they are sworn to support, protect, and defend. Then, under the direct decision of the Utah Supreme Court that an eight-hour law is a reasonably appropriate provision to protect the health of those engaged in underground mining, and those in and about smelting and reduction works, and the pregnant admission of the Colorado Supreme Court to the same effect, and, again, the direct affirmance of the same doctrine by the Supreme Court of the United States in the following cases in that court: *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Orient Insurance Company v. Daggs*, 172 U. S. 564, 19 Sup. Ct. 281, 43 L. Ed. 552; *St. Louis Iron Mountain & Railway v. Paul*, 173 U. S. 409, 19 Sup. Ct. 419, 43 L. Ed. 746; *Williams v. Fears*, 179 U. S. 274, 21 Sup. Ct. 128, 45 L. Ed. 186; *Austin v. Tennessee*, 179 U. S. 349,

21 Sup. Ct. 132, 45 L. Ed. 224; and *Knoxville Iron Co. v. Harbison*, 183 U. S. 21, 22 Sup. Ct. 1, 46 L. Ed. 55—what of precedent there is in the decisions of other courts is in favor of the validity of the law.

It cannot be said that these decisions of the United States Supreme Court were obiter. They were necessary to the decision of the cases. The contention was that the Utah enactment was in violation of the fourteenth amendment to the United States Constitution, as (1) abridging the privileges and immunities of citizens of the United States; (2) depriving persons of liberty and property without due process of law; and (3) denying persons within its jurisdiction the equal protection of the laws. The court held, in effect, that the Utah enactment did no one of these three things. Why? Because it was a legitimate police regulation. Why a legitimate police regulation? Because it was based on a consideration of health; that laborers in underground mines and those in smelters could reasonably and properly be made into a class, and the health of that class protected by legislative enactment. Had the foundation been imaginary, the court could not have so held. But the foundation (that is, the consideration of health) being real, proper, and reasonable, the court logically and legally upheld the enactment. The fourteenth amendment was violated unless the enactment was a legitimate police regulation, and it was not a legitimate police regulation unless the enactment was based on a legitimate health classification. Therefore the United States Supreme Court directly holds this to be a legitimate health regulation. I cannot say that I am so fully and completely equipped in the doubtful science of medicine as to be able to say that I know that it is not such a reasonably appropriate provision. This is the full extent to which it is necessary to go in this case. Then, too, not a decision of a court that mentions the subject but says that a court cannot set aside an enactment of a Legislature unless the enactment is, beyond doubt, in violation of the Constitution under which both the court and the Legislature act. Can it be said that, under the showing above made, there is not a doubt that the enactment in question here is beyond all doubt in violation of the Constitution of the state of Nevada? It seems to me that it cannot be so said. Therefore I conclude that this enactment is not unconstitutional as being a violation of the “health” element of the Nevada Bill of Rights.

Now to the “class legislation” element in the enactment: Counsel, in their arguments in this case, have mingled the “class legislation” objection implied, they say, in the Bill of Rights, and the “class legislation” inhibited in subsequent parts of the Constitution, to wit, sections 20 and 21 of article 4, and perhaps it may be permissible for me to do the same. Here it cannot truly be

said that all class legislation is bad. Decisions by the hundred and by the thousand may easily be found that hold some class legislation is constitutional and valid. Such are too numerous to need citation of instances. The only question is, is there, or is there not, a real foundation—a foundation in fact, in the nature of things—for the class made? If there is such foundation to support a legislative enactment, then that enactment is constitutional and valid; but, if not, then it is unconstitutional, and therefore void. Should legislators so far forget their duty to God and to man, and so far disregard the oath of office taken by them to support, protect, and defend the Constitution—the only instrument that gives them any power to act at all legislatively—as to join together in an enactment persons or things on a mere imaginary something that has no existence in the natures or situations of those persons or those things, and say that those persons or those things must be governed by said enactment, then it would be class legislation; and at least contrary to sections 20 and 21, above mentioned, and possibly, also, to the Bill of Rights, in section 1 of article 1. But of the latter I do not desire at this place to discourse. For does it not seem that when provision so ample against class legislation, local and special, as that contained in sections 20 and 21 of article 4 of the Nevada Constitution, is made, the inhibitions of the Bill of Rights, in section 1 of article 1, were aimed at other evils? Be that as it may, I conclude that the enactment of the Nevada Legislature in question here is not in violation of the Nevada Constitution, as being "class legislation" of the objectionable kind inhibited in section 20 or 21, or of the objectionable kind that may possibly be inhibited in the Bill of Rights of section 1 of article 1, if there be therein any such inhibition.

In support of this conclusion may be cited the direct decision of the Utah Supreme Court that workers in underground mines and workers in smelters and reduction works may with sound reason be made into classes, and the health of those classes protected by the Legislature. To the same effect is impliedly the decision of the court most relied on in argument here, to wit, the Colorado Supreme Court, in *In re Morgan*. For I think I have above shown that the opinion in the Colorado case impliedly, at least, admits that, with a constitutional provision like that in the Utah Constitution, such legislation might be valid, and also further shown that, in essence, the additional provision of the Utah Constitution did not at all change the situation. True, the Colorado court held such legislation unconstitutional and void; but it would seem that after the facts stated, and after the admissions made by it, its conclusion against the validity of the enactment before it was a non sequitur.

In addition, as stated above, I cannot say

that my knowledge of medical science is so complete that I can, in conscience, say that I know that workers in underground mines or workers in smelters and reduction works are not engaged in unhealthy employments. The Legislature of Nevada, at its session in 1903, impliedly said they were such, and legislated for the protection of such workers; and I cannot, under the reason of the thing, and the authority of the Utah Supreme Court and that of the United States Supreme Court, to say nothing of the pregnant admission of the Colorado Supreme Court (may I be permitted to explain that I mean an admission that is pregnant with a principle that is destructive of the final conclusion to which that court came?), say that the said enactment of the Nevada Legislature for that purpose was, beyond doubt, a violation of the Constitution of Nevada.

For the foregoing reasons I concur in the conclusion of Justice TALBOT that the enactment in question here is not a violation of the Constitution of Nevada, and also in the order that the petitioner be remanded to custody.

BELKNAP, C. J. (dissenting). It is claimed that the law should be upheld as a health law, and was adopted for that purpose by the Legislature in its exercise of the police power. The police power is inherent in the Legislature, and founded upon the duty of the state to protect life, health, and property of the community, and to preserve good order and morality. Prof. Tiedeman, in his treatise upon the subject, says: "The police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil law maxim, '*Sic utere tuo, ut alienum non lædas.*'" This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, "*Sic utere tuo, ut alienum non lædas,*" it being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may use his own as not to injure others. In *Lawton v. Steele*, 152 U. S. 136, 14 Sup. Ct. 500, 38 L. Ed. 385, the court said: "The extent and limits of what is known as the 'police power' has been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a con-



flagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane, or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere whenever the public interests demand it; and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

In the *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, where the court had under consideration a law of New York prohibiting the manufacture of cigars and the preparation of tobacco in any form in tenement houses, after citing decisions to show that the police power is not without limitation, and that in its exercise the Legislature must respect fundamental rights guaranteed by the Constitution, it said: "If this were otherwise the power of the Legislature would be practically without limitation. In the assumed exercise of the police power in the interests of the health, the welfare, or the safety of the public, every right of the citizen might be invaded, and every constitutional barrier swept away. Generally it is for the Legislature to determine what laws or regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the

courts to scrutinize the act and see whether it really relates to, and is convenient and appropriate to promote, the public health. \* \* \* To justify this law, it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manipulation may be injurious to those who are engaged in its preparation and manufacture, but it would have to be injurious to the public health." Again: "When a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has, at least, in fact, some relation to the public health; that the public health is the end actually aimed at; and that it is appropriate and adapted to that end."

To justify the law, it is not sufficient that underground mining and working in smelters may be injurious to the men employed in the mines or smelters, but it must be injurious to the public health. It is not claimed that the law is injurious in this respect. If this law is beneficial to the men working in underground mines and smelters—and that is insufficient, under the authorities—it is so only in a remote degree. Rheumatism, miners' consumption, and lead poisoning, it is said, are the maladies to which men affected by this law are exposed. It is difficult to understand how these afflictions may be prevented by its provisions. Lead poisoning and miners' consumption are caused by inhaling fumes from the smelters, or dust in the deep mines. Any daily exposure for a materially less time than eight hours may result in their contraction. In its most favorable aspect, the statute is not helpful to these men, except that shorter hours of labor tend to preserve the system, while longer hours produce exhaustion and its consequent ill effects. I think the statute was adopted by the Legislature in conformity to the trend of legislation throughout the country, shortening the hours of labor in many industrial pursuits, and not as a health regulation.

The principle upon which the police power is exercised by the Legislature is based upon the maxim, "So use your own as not to injure others," the literal translation of which is, "Enjoy your own property in such a manner as not to injure that of another person." Broom's *Legal Maxims*, p. 364. "Any law which goes beyond that principle—which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and personal security—cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions." Tiedeman, § 1. The maxim can only be invoked in the support of laws for the protection of

the public health, and not for the protection of an individual against himself. There can be no more justification for such a law than laws prohibiting men from working in the manufacture of white lead, because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron smelting works, because the lives of men so engaged are materially shortened. Tiedeman, § 86.

In the case of *In re Morgan*, 26 Colo. 426, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269, a statute similar to the one now under consideration was held unconstitutional. After determining that the statute violated the Bill of Rights, which guaranties to all persons the natural rights of acquiring, possessing, and protecting property, the court proceeded, in an admirable discussion, to the consideration of the question whether the law was a proper exercise of the police power to protect the public health, as follows: "Were the object of the act to protect the public health, and its provisions reasonably appropriate to that end, it might be sustained, for in such a case even the constitutional right of contract may be reasonably limited. But the act before us is not of that character. In selecting a subject for the exercise of the police power, the Legislature must keep within its true scope. The reason for the existence of the power rests upon the theory that one must so use his own as not to injure others, and so as not to interfere with or injure the public health, safety, morals, or general welfare. How can one be said injuriously to affect others or interfere with these great objects by doing an act which confessedly visits its consequences on himself alone? And how can an alleged law that purports to be the result of an exercise of the police power be such in reality, when it has for its only object not the protection of others, or the public health, safety, morals, or general welfare, but the welfare of him whose act is prohibited, when, if committed, it will injure him who commits it, and him only? \* \* \* In this we must not be understood as limiting the Legislature where the facts justify apparent discrimination in passing the health laws affecting only certain classes. Indeed, laws having for their object the protection of small portions of a community have been upheld, as in *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 [24 L. Ed. 1036], when a nuisance, obnoxious probably only to a part of a village, was abated; but what we mean to decide is that in a purely private lawful business, in which no special privilege or license has been granted by the state, and the carrying on of which is attended by no injury to the general public, it is beyond the power of the Legislature, under the guise of the police power, to prohibit any adult man who desires to work thereat from working more than eight hours a day, on the ground that working longer may, or probably will, injure his own health."

*Holden v. Hardy*, 169 U. S. 366, 18 Sup.

Ct. 383, 42 L. Ed. 780, a decision of the Supreme Court of the United States, in which a statute of the state of Utah similar to the one now under consideration was upheld as not being in conflict with the provisions of the fourteenth amendment to the Constitution of the United States, is referred to as an authoritative ruling in support of the law. The Constitution of the state of Utah (article 16, § 6) declares, among other things, "that the Legislature shall pass laws to provide for the health and safety of employes in factories, smelters and mines," and further provides, in the succeeding sections, that "the Legislature by appropriate legislation shall provide for the enforcement of the provisions of this article." In *Holden v. Hardy* it is said: "The Supreme Court of Utah was of opinion that, if authority in the Legislature were needed for the enactment of the statute in question, it was found in that part of article 16 of the Constitution of the state which declared that the Legislature shall pass laws to provide for the health and safety of employes in factories, smelters, and mines." We have no such constitutional provision, and for this reason the case of *Holden v. Hardy* is inapplicable as an authority here. The only question in that case was whether the statute of Utah violated the provisions of the fourteenth amendment to the Constitution of the United States, and the consideration in the opinion of the question of the extent to which the police power may be exercised under the provisions of the state Constitution was not a federal question, and therefore without the jurisdiction of that court, but was one to be determined only by the courts of the state of Utah.

In *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460, Judge Peckham said: "In matters pertaining to its proper construction [the Constitution of the state of New York], our decision is final, excepting that if, as construed by us, the Constitution or our laws deny the existence of some right or privilege claimed by a party by virtue of the federal Constitution or laws, our decision is reviewable by the federal court, not for the purpose of reviewing our construction of our Constitution or laws, but to see whether, under the Constitution or laws as construed by us, any right or privilege existing by virtue of the federal Constitution or laws has been violated or denied, and, if so, to give it effect notwithstanding the state law or Constitution."

In *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, Judge Field said: "In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in conflict with the Constitution and laws of the United States. We cannot pass upon the conformity of that section with the requirements of the Constitution of the state. Our jurisdiction is confined to the federal question involved."

In the *Morgan Case*, *supra*, the Supreme

Court of Colorado was urged to follow the decision in the Holden-Hardy Case, as controlling upon it. After fully considering that decision, and conceding that in the construction of federal questions it is the duty of state courts to be governed by the decisions of the Supreme Court of the United States, the court said: "If the language used by that august tribunal in *Holden v. Hardy* is to be understood as limiting or defining how far a state Legislature may go in the exercise of the police power without transcending any of the limits prescribed by the federal Constitution, we agree with counsel for petitioner that it was needful to the ascertainment of the question before the court. But if it is not to be thus restricted, and if it was employed with the view of determining what are the true limits of the police power of a state under the provisions of the Constitution of that state, the remarks in that connection are wholly obiter, and not authority in that court itself, much less in any other jurisdiction. *Wadsworth v. U. P. Railway Co.*, 18 Colo. 610 [33 Pac. 515, 23 L. R. A. 812, 36 Am. St. Rep. 309]; *Carroll v. Carroll's Lessee*, 16 How. 275 [14 L. Ed. 930]; 2 Black on Judgments, § 611."

Section 1 of article 1 of the Constitution of this state declares: "All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." Substantially the same principles are embodied in the Declaration of Independence and in the Constitutions of the states. "Among these inalienable rights, as proclaimed in the Declaration of Independence," said the Supreme Court of the United States in *Butcher Union Co. v. Crescent City Co.*, 111 U. S. 757, 4 Sup. Ct. 660, 28 L. Ed. 585, "is the right of men to procure their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. It has been well said that, 'the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and

dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' Adam Smith's *Wealth of Nations*, bk. 1, c. 10."

In the same case *Bradley, J.*, said: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States," of which he cannot be deprived without invading his right to liberty, within the meaning of the Constitution. And again: "There is no more sacred right of citizenship than the right to pursue unmo- lested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor." *Live Stock Ass'n v. Crescent City Co.*, 1 Abb. (U. S.) 399, Fed. Cas. No. 8,408.

In *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465, the court said: "The following propositions are firmly established and recognized: A person living under our Constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term 'liberty,' as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. 'Liberty,' in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

In *Ritchie v. People*, 155 Ill. 101, 40 N. E. 457, 29 L. R. A. 79, 46 Am. St. Rep. 315, the court, in considering a statute similar in principle, said: "It substitutes the judgment of the Legislature for the judgment of the employer and employé in a matter about which they are competent to agree with each other. It assumes to dictate to what extent the capacity to labor may be exercised by the employé, and takes away the right of private judgment as to the amount and duration of the labor to be put forth in a specified period. When the Legislature thus undertakes to impose an unreasonable and unnecessary burden upon any one citizen or class of citizens, it transcends the authority intrusted to it by the Constitution, even though it imposes the

same burden upon all other citizens or classes of citizens. \* \* \* Liberty, as has already been stated, includes the right to make contracts as well with reference to the amount and duration of labor to be performed as concerning any other lawful matter. Hence the right to make contracts is an inherent and inalienable one, and any attempt to unreasonably abridge it is opposed to the Constitution."

My conclusion is that the constitutional right of employer and employé is destroyed by the express terms of the act, in this: that its provisions undertake to prevent employer and employé from making their own contracts concerning underground mining and work in smelters, or in any institution or place for the reduction or refining of ores or metals, and that it is not a valid exercise of the police power, as a health regulation. I therefore dissent from the judgment of the court.

(19 Colo. App. 356)

**GILLETTE v. PEABODY et al.**

(Court of Appeals of Colorado. Jan. 11, 1904.)

REPORTS — PUBLICATION — CONSTITUTIONAL AND STATUTORY PROVISIONS — CONTRACTS FOR PUBLICATION — VALIDITY — DISCRIMINATION — DISCRETION OF COMMISSION.

1. Const. art. 5, § 29, provides that the printing and binding and distribution of laws, journals, "department reports," and other printing and binding, shall be performed under contract by lowest responsible bidder below such maximum price and under such regulations as may be prescribed by law. Article 4, § 16, requires all officers of the executive department and public institutions to keep an account of receipts and disbursements, and to make a semiannual report to the Governor. Article 4, § 17, requires the same officers and institutions to make full and complete reports of their actions to the Governor, who shall transmit the same to the General Assembly. Article 6, § 27, makes it the duty of judges of courts inferior to the Supreme Court to report in writing to judges of the Supreme Court on defects and omissions in the law, and all judges of the Supreme Court to report to the Governor, for transmission to the General Assembly, such defects as they may find to exist. *Held*, that these reports so enumerated in articles 4 and 6 of the Constitution are the "department reports" contemplated by article 5, § 29, and that phrase does not include the reports of opinions of the Supreme Court and Court of Appeals.

2. The phrase "other printing and binding" must be construed as having reference only to matters of the same kind as those enumerated, and the things to which the phrase applies must belong in the same category with the laws, journals, and department reports, and does not include the reports of opinions of the Supreme Court and Court of Appeals.

3. Sess. Laws 1891, pp. 369-372, relative to publication of the opinions of the Supreme Court, made applicable to the Court of Appeals by Sess. Laws 1891, p. 120, § 8, and providing for the publication of their reports by a commission consisting of the Governor, Secretary of State, and Attorney General, on "terms most advantageous to the state and the public," vest in the commission a judicial duty, involving the exercise of judgment in determining as to what terms are most advantageous; and, in the absence of fraud, the discretion confided to the

commission is not subject to control by the courts.

4. While it is necessary that a proposal in response to an advertisement for state work must correspond with the offer of the state, a statement in a proposal to publish reports of the Court of Appeals that, if the contract should be awarded to the bidder, the work would be done within the state, and by union labor, does not constitute a part of the proposal, so as to vitiate it on the ground of variance from the state's offer, containing no corresponding stipulation.

5. While discriminating official action in relation to public work, whether by way of statute, ordinance, resolution, or contract, is void, that doctrine does not apply to individuals, who may discriminate as they choose in their private affairs, and in the employment of union or non-union labor; and hence a proposal in a bid to print reports of the Court of Appeals, which contains the statement that the work would be done in the state, and only union labor would be employed, does not render the act of the state officers in awarding the contract to the bidder making such statement a discrimination in official action.

6. A demurrer admits everything that is well pleaded, but a matter which the courts are debarred from considering is not well pleaded.

Appeal from District Court, Arapahoe County.

Action by Andrew W. Gillette against James H. Peabody and others, a commission. From a judgment for defendants, plaintiff appeals. Affirmed.

James H. Brown, Andrew W. Gillette, and John D. Fleming, for appellant. James D. Merwin, J. Warner Mills, N. C. Miller, Atty. Gen., and I. B. Melville, for appellees.

THOMSON, P. J. This action was brought by the appellant, as a citizen and taxpayer of Colorado, to restrain the appellees, a commission created by statute, from awarding a contract to the Mills Publishing Company for the publication and sale of the reports of the opinions of the Court of Appeals, and to compel them to award the contract to the Banks Law Publishing Company. A demurrer was interposed to the complaint, on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff declining to amend, judgment was entered for the defendants. The plaintiff appeals.

The complaint, after stating that the plaintiff was a citizen and taxpayer, and the defendants, respectively, Governor, Secretary of State, and Attorney General, of the state of Colorado, set forth an advertisement by the defendant Mills, as Secretary of State, inviting proposals for the publication of the reports of the Court of Appeals for the period of 10 years, to be opened on a day named by the defendants, as a commission constituted for the purpose, in the presence of the bidders. It was then alleged that on the date specified the defendants met for the purpose of considering the proposals submitted, of which there were a number, including one of the Mills Publishing Company, at

¶ 6. See Pleading, vol. 39, Cent. Dig. § 526.

\$1.39 per volume, and one of the Banks Law Publishing Company, at \$1.24 per volume; that the proposal of the Banks Law Publishing Company was in accordance with the terms of the contract provided by statute to be made; that it offered a lower rate for the publication of the reports than any of the bids; that its terms were the most advantageous to the state and the public; that the Banks Law Publishing Company was entirely reliable and responsible; that it had for a long time previously published the reports of the Supreme Court and the Court of Appeals of Colorado, and that its reliability and responsibility were not questioned by the defendants; that the Mills Publishing Company did not propose to print the reports in accordance with the terms of the contract as provided by statute, in that it contained a statement that, if the contract should be awarded to it, the work would be done within the state, and by union labor; that, notwithstanding the bid of the Banks Law Publishing Company was the lowest, the defendants awarded the contract to the Mills Publishing Company; and that in so doing they were influenced by the statement in that company's proposal that, if the contract should be awarded to it, the work would be done within the state, and by union labor. The proposals were invited pursuant to the provisions of an act in relation to Supreme Court reports, approved March 17, 1891 (Sess. Laws 1891, pp. 369-372), of which the following sections are the only ones necessary to be considered in the discussion of the questions which are raised:

"Section 1. That the opinions of the Supreme Court of the state of Colorado, shall be published in volumes of the size, as nearly as may be, of volume one, two and three of Colorado Reports, and containing not less than six hundred and fifty pages each."

"Sec. 3. The said reports shall be published under the supervision of the justices of the Supreme Court and the reporter, by contracts to be made and entered into by the Governor, Secretary of State and Attorney General (who are hereby on behalf of the state constituted a commission for such purpose), of the one part, and the person or persons to whom such contract shall, in the manner hereinafter set forth, be awarded, of the other part. The officers composing said commission are authorized to make and enter into such contracts for the publication and sale of said reports, in accordance with the provisions of this act, from time to time, as occasion may require, each contract to extend for a period of ten years from the date thereof in the state of Colorado, on terms most advantageous to the state and the public, and at a rate for the publication and sale thereof, not to exceed two dollars per volume, of the size aforesaid."

"Sec. 5. Immediately upon the taking effect of this act, the Secretary of State shall advertise for proposals for the publication

of said reports, for thirty (30) days, in at least two daily newspapers, of general circulation printed and published in the city of Denver. Said advertisements shall state the day and the hour when proposals will be opened. It shall be the duty of said Governor, Secretary of State and Attorney General to consider all proposals for the publication of said reports, which may be made to and filed with them, on or before the time set for opening the same, and to award the contract to the person or persons who may agree to publish and sell the same on the terms specified in section 3 of this act.

"Sec. 6. The contract must require the publisher or publishers to print and publish each volume in good law-book style, and in well-bound volumes, on good book paper, in small pica and brevier type, single leaded, equal in quality of paper and binding to volumes one, two and three of Colorado Reports, within sixty days from the time at which the manuscript of each volume is delivered by the reporter; to sell three hundred copies of each volume to the state at the price fixed in the contract; to keep on hand and for sale to the public of the state of Colorado at the price stipulated in the contract, a sufficient number of copies of each volume to supply all demands for ten years from the publication thereof, and to give bond for the fulfillment of the terms of the contract, in the sum of ten thousand dollars, which bond shall be filed with and approved by the Secretary of State."

By the act creating the Court of Appeals, the foregoing provisions were made applicable to it. Sess. Laws 1891, p. 120, § 8.

No question is made as to the regularity or legality of the advertisement under which the bids were submitted. The plaintiff directs our attention to article 3 of the Constitution, which divides the powers of government of the state into three distinct departments, namely, legislative, executive, and judicial, and to section 29 of article 5, which reads as follows: "All stationery, printing, paper and fuel used in the legislative and other departments of government shall be furnished; and the printing and binding and distribution of the laws, journals, department reports, and other printing and binding; and the repairing and furnishing of the halls and rooms used for the meeting of the General Assembly and its committees; shall be performed under contract; to be given to the lowest responsible bidder, below such maximum price and under such regulations as may be prescribed by law. No member or officer of any department of the government shall be in any way interested in any such contract; and all such contracts shall be subject to the approval of the Governor and State Treasurer." The argument based on the foregoing constitutional provision is that the meaning of the word "department" is fixed by article 3; that, as the Court of Appeals belongs in the judicial department, its

published decisions are department reports, within the meaning of section 29 of article 5; that it was alleged in the complaint and admitted by the demurrer that the Banks Law Publishing Company was a responsible bidder; and that, therefore, its bid being the lowest, no room was left for the exercise of judgment or discretion by the commission, and the duty was mandatory upon it to award the contract to that company. It is further contended that the language of the statute directing the commission to make contracts for the publication of the reports on terms most advantageous to the state and the public must be so construed as to harmonize with the constitutional requirement, and, being so construed, means simply that contracts must be given to the lowest responsible bidder.

A report made by a court, or by its direction, in obedience to some requirement of the law, would, without doubt, be a department report. The meaning of the word "department" is not in controversy. The question is, what were the department reports of which the Constitution speaks intended to embrace? The primary definition of the noun "report," as given by Webster, is an account or statement of the results of examination or inquiry made by request or direction; and, by reference to the following special constitutional provisions in relation to reports, we think it clear that the word "reports," as used in section 29 of article 5, was intended to be understood only in that sense. Section 16 of article 4 requires an account to be kept by the officers of the executive department, and by all public institutions of the state, of all money received by them from all sources, and for every service performed, and all moneys disbursed by them severally, and that they make a semiannual report thereof to the Governor under oath. Section 17 of the same article requires the same officers and institutions, at least 20 days preceding each regular session of the General Assembly, to make full and complete reports of their actions to the Governor, who shall transmit the same to the General Assembly. In relation to the judicial department, section 27 of article 6 makes it the duty of judges of courts inferior to the Supreme Court, on or before the 1st day of July of each year, to report in writing to the judges of the Supreme Court such defects and omissions in the law as their knowledge and experience may suggest; and of the judges of the Supreme Court, on or before the 1st day of December of each year, to report in writing to the Governor, for transmission by him to the General Assembly, together with his message, such defects and omissions in the Constitution and laws as they may find to exist, together with appropriate bills for curing the same. Since, after specifying to whom contracts for printing department reports shall be given, the Constitution specially designates the officers from

whom such reports are required, and to whom they shall be made, and prescribes the subject-matter of the reports, it must be assumed that these are the reports contemplated by the general language of section 29 of article 5. But the latter section follows the words "department reports" with the words "and other printing and binding," and it is said that the latter words, in connection with those which precede them, are broad enough to include the printing and binding of the opinions of the appellate courts. But by the rule *ejusdem generis*, these general words must be construed as having reference only to matters of the same kind as those enumerated, and the things to which "other printing and binding" apply must belong in the same category with laws, journals, or department reports. *Hurd v. McClellan*, 14 Colo. 213, 23 Pac. 792; *Morse v. Morrison*, 16 Colo. App. 449, 66 Pac. 169.

The final judgment of a court is never called a "report"; neither is the opinion giving the reasons on which the judgment is based. In appellate tribunals, when, in a given case, the court has reached its conclusion, and is ready to pronounce its judgment, some member of the court is usually designated to prepare the opinion, but he is never said to report it. The opinion is delivered, not reported, by him. After the opinions are printed and bound in book form, the volumes containing them are denominated "reports." But the name so given is used in a special and peculiar sense. Such reports are not reports within the ordinary meaning of the term. They cannot be classed with department reports, as defined by the Constitution. Neither are they of the nature of laws—that is, acts of the Legislature—or of journals, so that the words "other printing and binding" would not include them.

The validity of the action of the commission in awarding the contract must therefore be tested by the statute. Section 5 makes it the duty of the commission to award the contract to the person or persons who may agree to publish and sell the reports on the terms specified in section 3. The only terms mentioned in section 3 are "terms most advantageous to the state and the public." The determination of the question what terms are most advantageous to the state and the public is left to the commission. Reasons may exist why, as between two bids, the interests of the state and the public demand that the higher should be preferred, each of the bidders being equally responsible. Thus the duty cast upon the commission is, in its nature, judicial. To reach a conclusion as to what terms are most advantageous to the state and the public, involves the exercise of judgment; and, in the absence of fraud, the judicial discretion confided to the commission is not subject to control by the courts. *Johnson v. Sanitary*

District, 163 Ill. 285, 45 N. E. 213; *Peoples v. Byrd*, 98 Ga. 688, 25 S. E. 677; *Douglass v. Commonwealth*, 108 Pa. 559; *Mechem on Public Officers*, § 991; *Throop on Public Officers*, § 849.

But the complaint alleges that in and by its bid the Banks Law Publishing Company proposed to print the reports in accordance with the terms of the contract as provided by statute, and as set forth in the advertisement, whereas the bid of the Mills Publishing Company did not propose to print the reports in accordance with those terms, but contained other and different terms, in that it provided that if the contract should be awarded to it, the work required in the performance of the contract would be done in the state of Colorado, and by union labor. The argument is that it is essential that the bidders' proposals should agree with the offer of the state; that, in order to secure competition between them, the bids should all be made upon the same terms of offer requested by the statute and the advertisement; and that therefore the bid of the Mills Company, purporting to accept the offer of the state on terms varying from the offer, cannot be considered. To the general proposition concerning the necessity of conformity of the proposals with the offer of the state we assent, but whether it appears from the complaint that in such respect the bid of the Mills Company failed must be determined from the averments in that pleading.

The language of the proposals is not set forth in the complaint, but the only variance alleged between the proposal of the Mills Company and the offer of the state consists in the statement that, if the contract should be awarded to that company, the work would be done within the state, and by union labor. That its bid otherwise met the requirements of the law and responded to the advertisement is not questioned, and must therefore be assumed. Now the statement objected to spoke of the contract as something distinct from itself, and of which it did not propose to become a part. What it suggested was conditioned upon the award of the contract to the Mills Company. What contract? Manifestly, the contract required by section 6 of the statute. It could refer to no other. It contemplated no variance from the prescribed terms of that contract. It was expressive merely of an intention which the bidder entertained respecting the course it would pursue in case the contract which the statute authorized should be awarded to it, and related, not to the terms of the contract, but the place where, and the persons by whom, after its due execution, the work necessary in its performance would be done. It constituted no part of the proposal. The bidder had a lawful right to select the place where it would perform its contract, and to employ such labor as it might see fit for the purpose; and how an expres-

sion of an intention as to the manner in which a contract duly awarded to it should be performed could unfavorably affect its proposal, we are unable to perceive.

The cases cited in support of counsel's position are not in point. They are of two classes; one relating to public work for the doing of which bids are called for in pursuance of law, and the other relating to offer and acceptance between private parties. A sample of the first is *State v. Commissioners*, 13 Neb. 57, 12 N. W. 816. The county clerk had advertised, pursuant to the statute, for bids for the furnishing of books, blanks, and stationery to county officers; the contract to be awarded to the lowest competent bidder. The successful bidder proposed to furnish some of the articles "at just what it costs to lay them down," and certain others "at what it cost to deliver the same to the county." The court held that the bid did not conform to the advertisement and the law, in that it did not state the price at which the articles would be furnished. A sample of the second is *Railway v. Rolling Mill*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376. The mill offered to sell the railway from 2,000 to 5,000 tons of iron rails at \$54 per gross ton for spot cash. The railway accepted the offer as to price, but restricted the amount to 1,200 tons. The court held that under the offer the railway company might take, at its election, any number of tons, not less than 2,000, nor more than 5,000, on the terms specified, but that its order for 1,200 tons did not respond to the offer, and amounted, in law, to a rejection of it. The distinction between those cases and the case at bar is obvious.

Another objection to the action of the commission is that the award to the Mills Company operated as a discrimination between different classes of citizens. It has uniformly been held that official action in relation to public work, whether by way of statute, ordinance, resolution, or contract, which undertakes such discrimination, is void. In *Holden v. Alton*, 179 Ill. 318, 53 N. E. 556, the city comptroller advertised for sealed proposals for the printing of bonds to be used by the city for street paving, under an ordinance providing that such work should be let by contract to the lowest bidder. The plaintiff was the lowest bidder, and a printing company was next higher. A petition of a typographical union had been received, asking the council to prohibit the letting of any contract for city printing to any office which could not furnish the label of the union. The printing company employed union labor, and the plaintiff did not. The council thereupon passed an ordinance providing that all city printing should be awarded and let only to such printing houses as employed union labor, and, in pursuance of the ordinance, accepted the bid of the printing company. The court annulled the action as an attempted abuse of power;

saying, however, that "a court of equity would not review the proceedings of a city council in matters left to its discretion, where such discretion has been exercised in good faith." In *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222, the board of education of Chicago entered into an agreement with a labor organization known as the "Building Trades Council," by which the board bound itself to insert in all contracts for work upon school buildings a provision that none but union labor should be employed in such work, and none but union workmen should be placed on the pay rolls of the board. The board afterwards advertised for bids for the construction of a roof on an addition to one of the schools, inserting in the advertisement the following notice: "None but union labor shall be employed on any part of the work where said work is classified under any existing union." John A. Knisely submitted two bids, in one of which he agreed to do the work, and be bound by the condition named in the notice, for \$2,090; and in the other offered to do the same work for \$1,900, provided all conditions as to the employment of union labor were stricken from the specifications, and a contract made accordingly. The higher bid was accepted. Suit was brought by appellant, a taxpayer, to annul the contract. In its discussion of the questions presented, the court said: "It is plain that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition and to increase the cost of work. It is unquestionable that if the Legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should by a statute undertake to require this board, as the agency of the state in the management of school affairs in the city of Chicago, to adopt such a rule or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the Constitution of the state. If such a restriction were sought to be enforced by any law of the state, it would constitute an infringement upon the constitutional rights of citizens, so that the state, in its sovereign capacity, through its Legislature, could not enact such a provision." No cases that we have found go any farther than the foregoing. It is to official action to enforce a preference in favor of one class of citizens to the exclusion of another that the condemnation is directed, but the doctrine is not applicable to persons acting in their private or individual capacity. In managing their private affairs, they are at liberty to determine whom they will or will not employ. They may lawfully discriminate as they choose. It is not alleged that this commission sought to impose any condition upon

bidders by which their free action in the employment of labor might be in any manner restricted. Pursuant to the advertisement, the contract to be awarded to the successful bidder was the contract prescribed by the law, and it does not appear that any other contract was contemplated. The commission was not responsible for the statement of one of the bidders that it would employ union labor, and, if the commission believed that the proposal of such bidder was the most advantageous to the state and the public, a rejection of its bid simply because it announced an intention to do what no law prohibited it from doing would have been unwarranted.

Finally it is said that the allegation that the contract was awarded to the Mills Company because of its proposition to do the work within the state and to employ union labor was admitted by the demurrer, and that the awarding of the contract for that reason was in itself an act of discrimination. It is nowhere averred that in making the award the commission did not act in good faith. Nothing in the nature of fraud is charged against them. In *Johnson v. Sanitary District*, supra, it is said that, in the absence of fraud, it is beyond the province of the court to control a discretion vested in public officers. We have no authority to inquire into the grounds on which this award was made. Those grounds may have been insufficient. The power of the commission to decide involved the power to decide erroneously, but their decision, whether correct or not, cannot be reviewed in this proceeding. In *Douglass v. Commonwealth*, supra, the court said: "If the authorities act in good faith, although erroneously or indiscreetly, mandamus would not lie to compel them to modify or change their decision."

A demurrer admits everything that is well pleaded, but a matter which the courts are debarred from considering is not well pleaded. The complaint is no better with the allegation than it would have been without it.

We think the demurrer was properly sustained and the judgment will be affirmed. Affirmed.

GUNTER, J., not participating.

(19 Colo. App. 341)

#### CUTSHAW v. CITY OF DENVER.

(Court of Appeals of Colorado. Jan. 11, 1904.)  
MUNICIPAL CORPORATION — OFFICER — ORDINANCE — CHARTER — SALARY — ACCEPTANCE OF SERVICES.

1. A city department for the inspection of buildings, created by ordinance, ceased to exist on the passage of an act amending the city charter, naming and defining the executive departments, and assigning to one of them (the department of public health and safety) the duties of the department for the inspection of buildings.

2. A department for the inspection of buildings, created by ordinance, could not survive as a bureau of inspection created by an amended



charter which abolished the department; nor could the head of the department become the head of the bureau, where various duties were assigned to the bureau which had not been assigned to the department.

3. Where a city charter assigns to a commissioner of inspection general charge of the inspection of buildings, and provides for the employment by him of his own assistants, the council is not authorized, by an article of the charter empowering it to provide for the inspection and regulation of buildings, to provide for the appointment of another officer for that purpose, but only to prescribe the manner and circumstances of such inspection.

4. A charter vesting the executive power of a city in officers to be elected by the people, and in a commissioner of inspection and other officers named, and such other officers as may be provided for by ordinance, does not authorize a provision for an assistant to the commissioner of inspection, but only for officers of the same rank as those named.

5. Provisions of a city charter making the mayor the head of the department of public health and safety, of which the bureau of inspection is a part, and providing that the subordinate officers of the departments shall be appointed by the heads of the departments, do not authorize the appointment by the mayor of an assistant to the commissioner of inspection, where another provision of the act is that the commissioner may appoint his own assistants.

6. A city charter authorizing a city council to provide for the employment of such clerks and other persons in any of the departments as the public service may demand applies only to cases not specifically provided for in the charter.

7. Where one was appointed an inspector of buildings of a city after the office was abolished by the charter, and for his services was paid \$150 per month, though his services were accepted, and the ordinance which created the office provided for a salary of \$200 per month, the city is not liable to him for the difference between these sums for the time he served.

Appeal from District Court, Arapahoe County.

Action by Leonard Cutshaw against the city of Denver for balance due on salary as inspector of buildings. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

On the 23d day of November, 1889, the following ordinance was adopted by the city council of the city of Denver:

"Be it enacted by the city council of the City of Denver.

"Article 1.

"Section 1. There shall be in the city of Denver a department to be called the 'Department for the Inspection of Buildings' which shall be supplied with suitable office rooms, and the necessary supplies and printing, for the proper transaction of business, in the same manner as now provided for other executive departments of the city.

"Sec. 2. The chief officer of said department shall be called the inspector of buildings, and shall be appointed by the mayor and confirmed by a majority of the members of the board of supervisors. He shall hold his office for the term of two years, and until his successors shall be appointed and qualified, by, and with the consent of a majority of the board of supervisors, but may

be removed by the mayor for malfeasance, incapacity or neglect of duty. He shall receive a salary of \$2,400 per annum, payable in equal monthly installments, out of the city treasury, and shall receive no other fees or emoluments by virtue of said office."

On the 15th day of April, 1893, M. D. Van Horn, then mayor of the city, appointed the appellant to the office of building inspector, and issued and delivered to him the following certificate of appointment:

"To All to Whom These Presents Shall Come, Greeting: That, having confidence in the ability, sobriety and integrity of Leonard Cutshaw, I, Marlon D. Van Horn, Mayor of Denver, do by these presents constitute and appoint him, the said Leonard Cutshaw of the City of Denver to the office of Building Inspector, to have and to hold said office at the pleasure of the appointing power, with the pay as provided by ordinance, for duty in city.

"In Witness Whereof, I, Marlon D. Van Horn, mayor of the City of Denver, have hereunto set my hand.

"Done at the City of Denver this 15th day of April, A. D. 1893.

"M. D. Van Horn,  
"Mayor."

This appointment was never submitted to the board of supervisors for confirmation. On the 3d day of April, 1893, 12 days before the date of appointment of the appellant, an act of the General Assembly took effect, entitled "An act to revise and amend the charter of the city of Denver." Sess. Laws 1893, pp. 131-235. Section 1 of article 9 of that act provides that all ordinances of the city in force at the time of the taking effect of the act, and not inconsistent with it, shall remain in full force and effect as the ordinances of the city of Denver, until altered or repealed. Section 1 of article 3 provides as follows:

"The executive power of the city shall be vested in a mayor, a city clerk, a city treasurer, a city auditor, a city attorney, a city engineer, a street commissioner and a water commissioner, who shall be elected by the qualified electors of the city; in a board of public works, consisting of a president and two other members who shall be appointed by the Governor of the state of Colorado; in a fire and police board, consisting of three members who shall be appointed by the Governor of the state of Colorado; also in a health commissioner, a commissioner of inspection, a park commission, a superintendent of supplies and such other boards and officers as may be provided for by ordinance, not inconsistent with the provisions of this act, to be appointed by the mayor in writing filed with the city clerk, with power of suspension or removal by the mayor at any time, but not for political reasons."

The following are sections 2, 3, 44, and 79 of article 3.

"Sec. 2. There shall be the following executive departments: (1) A department of finance. (2) A department of law. (3) A department of public works. (4) A department of public health and safety. (5) A department of parks. (6) A department of supplies.

"Sec. 3. The department of finance shall include a bureau of audit and account, of which the city auditor shall be the head, and a bureau of the treasury, of which the city treasurer shall be the head. The city attorney shall be the head of the department of law; the board of public works of the department of public works; the mayor of the department of public health and safety; the park commission of the department of parks; and the superintendent of supplies of the department of supplies. All subordinate officers and employes except of said boards and commission, shall be appointed in writing by the heads of their respective departments, the appointments to be filed with the city clerk; and all subordinate officers and employes of each board or commission shall be appointed by resolution of such board or commission."

"Sec. 44. The department of public health and safety shall include the following officers, who shall respectively be the heads and have active charge of the affairs of the following bureaus, to wit: A fire commissioner, of the bureau of fire. A police commissioner, of the bureau of police. An excise commissioner, of the bureau of excise. A health commissioner, of the bureau of health. A commissioner of inspection, of the bureau of inspection. The fire commissioner, police commissioner and excise commissioner shall constitute the fire and police board of the city of Denver, and all the operations of the bureaus of fire, police and excise, shall be subject to the general control of said board."

"Sec. 79. The commissioner of inspection may employ such assistants as may be authorized by the mayor, and it shall be his duty to enforce the laws and ordinances of the city applicable to the work of said bureau."

Relative to the commissioner of inspection, section 47 of the same article provides as follows: "The commissioner of inspection shall have general charge of the inspection of buildings, and parts of buildings, drains, drain laying, elevators, boilers, gas and electric fittings, gas and electric lights, and all other apparatus and machinery requiring inspection and regulation, as the same may be authorized by ordinance; the inspection and control of electric wires, electric wiring, and all other electrical apparatus and machinery; the location, maintenance, marking, insulation and removal of wires, and the use of all electric wiring, electric wires and conductors for light, heat, power, telegraph, telephone or other commercial purposes, whether public or private; the inspection of weights and measures; the sources of dense

smoke; the erection and care of workhouses, charities and corrections; the care of markets and public baths." By the terms of subdivision 4 of section 20 of article 2, power is conferred upon the city council "to provide for the inspection and regulation, among other things, of buildings and parts of buildings"; and section 23 of the same article authorizes it to provide for the employment of such clerks and other persons in any of the departments of the city government as the exigencies of the public service may require.

The services of the appellant commenced at the time of his appointment, and he acted as inspector of buildings for five years. He received during that time only \$150 per month, protesting frequently that by virtue of the ordinance he was entitled to \$200. Each of the annual appropriation bills passed during the five years set apart \$1,800 for the salary of "the assistant commissioner of inspection in charge of buildings." The total amount received by the appellant for his five years of service was \$9,000. At \$200 per month, the amount would have been \$12,000; and he brought this suit to recover from the city \$3,000, the difference between the two sums. His complaint set forth the ordinance of November 23, 1889; averred his appointment on the 15th day of April, 1893, in pursuance of its provisions; the performance by him of his duties as inspector of buildings for five years; his right to a salary of \$200 per month, amounting for his term of service to \$12,000; and the payment to him of only \$150 per month, or \$9,000 in all. The complaint was demurred to on the ground of insufficiency, and, the demurrer being overruled, an answer was made to the effect that at the time of the plaintiff's appointment the ordinance was no longer in force, having been repealed by the amended charter of April 3, 1893, and that the duties he discharged were those of assistant to the commissioner of inspection, the only compensation for the performance of which was that named in the appropriation ordinances. By the judgment of the court the plaintiff's claim was disallowed, and he has brought the case here by appeal.

F. A. Williams, for appellant. J. M. Ellis, N. B. Batchell, Henry A. Lindsley, and Charles R. Brock, for appellee.

THOMSON, P. J. (after stating the facts). It is conceded that the ordinance in question was consistent with the provisions of the charter in force at the time of its adoption, and, by the terms of section 1 of article 9 of the act of April 3, 1893 (Sess. Laws 1893, p. 231), if it was not inconsistent with the provisions of that act, it remained a valid ordinance. For the plaintiff it is contended that the ordinance, at least in so far as the validity of the plaintiff's appointment and the fixing of his salary are concerned,

was not overthrown by the amended charter, while in behalf of the city it is argued that the effect of that law was to abrogate it in all its parts. We shall therefore compare each of the provisions of the ordinance with the corresponding provision of the amended charter, to see how far the two may stand together.

The ordinance created a new executive department, called the "Department for the Inspection of Buildings," and placed it on the same footing with the other executive departments of the city government. But the charter of 1893 itself established and defined the city's executive departments. It fixed the number, and assigned to each its place in the city government. The inspection of buildings was committed to the department of public health and safety, and placed specially in charge of one of its bureaus, named the "Bureau of Inspection," the head of which was an officer called the "Commissioner of Inspection," upon whom was cast a multiplicity of duties aside from the inspection of buildings. When the department of public health and safety was established, and divided into bureaus, to one of which was assigned the inspection of buildings, the department created by the ordinance ceased to exist. It was displaced by a department of much more extensive scope, but which included all the powers and duties pertaining to it. The ordinance, therefore, in so far as it created a department, was abrogated by the charter. The ordinance provided for a chief officer or head of the department it created, to be appointed by the mayor and confirmed by the board of supervisors, and to be called the "Inspector of Buildings": but, when the department fell, the office of chief or head of the department fell with it. The charter left no room for any such office or any such officer. The head of the department which embraced the bureau of inspection was the mayor himself; and the head of the bureau of inspection was the commissioner of inspection.

It cannot be said that the department of inspection created by the ordinance survived in the charter as the bureau of inspection, or that, in harmony with the charter, the head of the department of inspection might become the head of the bureau of inspection, because the department of inspection was created with reference to but one subject, and the authority of its chief officer extended to but one subject, whereas the functions of the bureau of inspection included a number and variety of subjects in addition to the inspection of buildings, which were placed under the control of its head, and in respect to which the chief of the department of inspection could, in virtue of his appointment under the ordinance, exercise no control.

But it is said that, so far as the provision for the appointment of an inspector of buildings is concerned, the ordinance may still be harmonized with the charter, because the

charter confers upon the city council the power to provide for the inspection and regulation of buildings, and the inspector appointed under the ordinance might, in virtue of his appointment, and the nature of the duties committed to him, consistently with the provisions of the charter, continue the exercise of his functions as assistant to the commissioner of inspection. Let us examine this proposition. Subdivision 4 of section 20 of article 2 does, in terms, empower the city council to provide for the inspection and regulation of buildings; but, in view of the fact that the charter places the inspection of buildings under the exclusive control of the commissioner of inspection, it was certainly not the intention of the Legislature to bring the charter into conflict with itself by authorizing the council to provide for the appointment of some other officer to exercise the same control. That provision would be satisfied by an ordinance prescribing the manner of inspection, the circumstances under which it should be made, and the duties of the inspector and the owner in relation to it. But we find in the charter another and insurmountable objection to the proposition. Section 79 of article 3 provides for the employment by the commissioner of inspection of his own assistants, subject only to the condition that they be authorized by the mayor. Counsel, however, say that the authority of the mayor to make the appointment in question is found elsewhere in the charter, so that an inspector of buildings was not intended to be included among the assistants whom the commissioner might employ. Section 1 of article 3 vests the executive power of the city in a number of officers to be elected by the people, and in a health commissioner, a commissioner of inspection, a park commissioner, a superintendent of supplies, and such other boards and officers as may be provided for by ordinance, not inconsistent with the provisions of the act, to be appointed by the mayor. It is upon the last clause that counsel relies. But by the rule *ejusdem generis*, where there is an enumeration of particular things, followed by general words, the latter shall be construed as having reference only to things of the same kind or class with those specifically mentioned. *St. Louis v. Laughlin*, 49 Mo. 559; *Morse v. Morrison*, 16 Colo. App. 449, 66 Pac. 169; *Bouvier's Law Dictionary*, tit. "*Ejusdem Generis*." The other boards and officers to be provided for by ordinance, whose appointment was given to the mayor, must therefore be boards or officers belonging to the same general class, rank, or grade with those enumerated. The multifarious duties of the commissioner of inspection would doubtless necessitate the employment of a number of assistants; but a mere assistant of an officer to whom certain of the details of the office are intrusted, if he may properly be called an officer at all, is not an officer of the same class, grade, or rank with the officer under whom he serves, and hence

the words "other officers" would not include him.

Section 3 of article 3 makes the city attorney the head of the department of law; the board of public works, of the department of public works; the mayor, of the department of public health and safety; the park commission, of the department of parks; and a superintendent of supplies, of the department of supplies; and then provides that all subordinate officers and employes, except of the board and commission, shall be appointed in writing by the heads of their respective departments, and that subordinate officers and employes of each board or commission shall be appointed by a resolution of the board or commission. A construction of these provisions which would cast on the heads of the departments plenary power as to the appointment of subordinate officers and employes of every degree in all the departments would furnish an argument that, as the mayor is the head of the department of public health and safety, the appointment by him of the plaintiff as inspector of buildings was proper, and that thus far, at least, the ordinance was in harmony with the charter; and this is the view which is urged upon us in behalf of the plaintiff. But such a construction would array different provisions of the charter against each other, because, as to the department of public health and safety, in several instances the power of appointment of subordinates is specially lodged, not in the mayor, but in the officers and boards constituting it. Thus, by the terms of sections 45, 60, 64, and 65 of article 3, the fire and police board, composed of the fire commissioner, police commissioner, and excise commissioner, is empowered to appoint a secretary of the board, a chief, assistant chiefs, and wardens of the fire department, chiefs of police and detectives, and such other officers and assistants as it may deem proper. The general authority of appointment conferred upon the mayor, as head of this department, must therefore be held inapplicable to cases which come within special provisions lodging the power of appointment elsewhere; and one of those provisions is that authorizing the commissioner of inspection, with the approval of the mayor, to appoint his own assistants.

Neither is the ordinance aided by section 23 of article 2, authorizing the city council to provide for the employment of such clerks and other persons in any of the departments of the city government as the exigencies of the public service may demand. That section can be applicable only to cases concerning which there is an absence of provision in the charter. But as we have seen, the charter itself provides the manner in which the assistants of the commissioner of inspection shall be employed.

The result of our comparison of the ordinance with the charter is that the former contained no provision which is not inconsistent with some provision of the latter, and that,

upon the taking effect of the charter, the whole ordinance became void.

But the appointment in question does not seem to have been made upon the authority of the ordinance. It was not the appointment for which the ordinance provided. The ordinance fixed the term of office of the appointee at two years, but the plaintiff was appointed to hold his office during the pleasure of the appointing power. By the terms of the ordinance, the appointment could not take effect until it was confirmed by the board of supervisors, but this appointment was not submitted to the board of supervisors. In making the appointment the mayor probably supposed he was acting by authority of the charter, and independently of the ordinance; but, under the charter, such an appointment by him was a nullity. The plaintiff, however, acted for five years as assistant to the commissioner of inspection, and, having accepted his services, how far the city might be estopped to question the validity or regularity of his employment under the charter, it is unnecessary to inquire, because he was paid for his services. He claims a balance over what he received, on the theory that he was entitled to the salary provided by the ordinance; but that salary was inseparably attached to the office created by the ordinance, and, when the office was abolished by the charter, there was no officer entitled to receive it. The salary, being payable only to the incumbent of the office, became extinct with the office. Except in the annual appropriation bills, no salary was provided for the plaintiff as assistant to the commissioner of inspection, and, beyond the sums appropriated for his benefit, he had no claim to compensation. But those sums were paid to him in full, and, in so far as he ever had a legal demand against the city, that demand was satisfied.

The judgment will be affirmed. Affirmed.

(19 Colo. App. 334)

CARLIN v. FREEMAN et al.

(Court of Appeals of Colorado. Jan. 11, 1904.)

MINES — ABANDONMENT AND RELOCATION —  
CERTIFICATE — DESCRIPTION — SUFFICIENCY — STATUTE.

1. Under Mills' Ann. St. § 3162, providing that the relocater of an abandoned lode claim "may" sink the original shaft 10 feet deeper than it was at the time of abandonment, "may" is used in a permissive, not a mandatory, sense.

2. A location certificate describing the claim as "Beginning at corner No. 1, being the N. E. corner of the said claim, which is situated 550 feet in a southwesterly from Corner No. 4, P. lode patent, survey No. 8870," by tying the claim by course and distance to a patented claim, is a sufficient compliance with the statute requiring the description to refer to some natural object or permanent monument.

3. Error predicated on the refusal of the court to grant a continuance will not be considered on appeal, in the absence of exception having been duly taken to the ruling of the court, and preserved by a bill of exceptions.

4. Error predicated on the refusal of the court to grant a new trial on motion, supported by affidavits, which motion and affidavits appear in

the abstract of the record proper, but not in the abstract of the bill of exceptions, will not be considered on appeal.

5. The recital of an exception in the record proper, immediately following the ruling of the court on a motion, is not equivalent to a preservation of the exception by a bill of exceptions.

Appeal from District Court, La Plata County.

Action by Frank L. Freeman and others against Patrick V. Carlin. From a judgment for plaintiffs, defendant appeals. Affirmed.

Ben B. Lindsey, Fred W. Parks, and Richard McCloud, for appellant. Reese McCloskey, for appellees.

MAXWELL, J. Appellees filed in the United States land office at Durango an adverse to appellant's application for a patent to the Saxon lode, and in apt time commenced this suit in support of their adverse; the complaint averring that plaintiffs were the owners and entitled to the possession of the Gold Dollar lode by virtue of a full compliance upon their part with all of the requirements of the federal and state statutes relating to the acquisition of mineral lands, and also averring that the Gold Dollar was a relocation of the Saxon, which latter was subject to relocation by reason of the failure of the owners thereof, to perform the assessment for 1897.

Appellant's first contention is, that the relocation of the Saxon was not made in conformity with the statutes, and that it was absolutely void and of no effect. The points involved can be best presented by quoting the assignments of error upon which the argument is based: "(2) The court erred in holding that the location certificate of the appellees (plaintiffs below) as set forth in the complaint was good and sufficient; there being no statement in said certificate showing the same was a relocation, or that said location was a location of property claimed to have been abandoned. (3) The court erred in admitting in evidence, over the objections and exceptions of appellant, the said pretended location certificate, as well as the amended location certificate of the Gold Dollar lode mining claim, giving date of location December 15, 1898, and all evidence concerning same, for the reason that said certificate is void under the laws of the state of Colorado." The location certificate admitted over the objection of appellant contained the name of the lode, the name of the locators, the date of location, the number of lineal feet claimed on each side of the center of the discovery cut, the general course of the lode, a statement that the same was in California Mining District, La Plata county, state of Colorado, and this description: "Beginning at Corner No. 1 being the N. E. corner of the said claim, which is situated 530 feet in a southwesterly from Corner No. 4, Platona lode patent, survey No. 8870, and running thence 1500 feet in a southeasterly direction, to Corner No. 2, thence 300 feet in a south-

westerly direction to Corner No. 3, thence 1500 feet in a northwesterly direction to Corner No. 4, thence 300 feet in a northeasterly direction to Corner No. 1, the place of beginning." Mills' Ann. St. § 3162, relied upon by appellant, provides: "The re-location of abandoned lode-claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the re-locator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property." Appellant insists that the word "may," in the last paragraph of the above statute, should be construed to mean "shall" or "must," and, the location certificate not stating that the whole or any part of the ground included therein was located as abandoned property, the certificate was therefore void, and should have been excluded. In this construction we do not agree. "In a statute the word 'may' may be construed in a mandatory sense only where such construction is necessary to give effect to the clear policy and intention of the Legislature; and, where there is nothing in the connection of the language or in the sense or policy of the provision to require an unusual interpretation, its use is merely permissive and discretionary." 20 Am. & Eng. Ency. 237, and cases. "Where by the use in other provisions of the statute of the word 'shall' or 'must,' it appears that the Legislature intended to distinguish between these words and 'may,' 'may' will not be construed as imperative." Id. 238. Read in the light of the above well-settled rules, it is clear that "may" was used in the statute under consideration in its permissive, and not mandatory, sense. To rule that "may," in this statute, is mandatory, and that the certificate of relocation of abandoned territory is void unless it contains a statement that the ground included therein, in part or whole, is abandoned, would impose upon the locator of such ground the peril of ascertaining that the ground had never previously been located, which in many cases would be impracticable, and would impose an unreasonable requirement, if, indeed, it would not be in direct conflict with Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], which provides that a claim upon which the annual assessment work has not been performed "shall be open to relocation in the same manner as if no location of the same had ever been made."

Appellant also contends that the description contained in the certificate is so indefinite as to render it inadmissible. A reference to the location certificate discloses that

"Corner No. 1, the N. E. corner," is tied to a corner of a patent survey. A description in a location certificate of a mining claim which ties the claim by course and distance to a patented claim is sufficient to comply with the statute requiring the description to refer to some natural object or permanent monument. *Duncan v. Fulton*, 15 Colo. App. 140, 61 Pac. 244; *Drummond v. Long*, 9 Colo. 538, 13 Pac. 543. In all respects the location certificate complies with the requirements of the law, and no error was committed in admitting it in evidence.

Error is assigned upon the refusal of the court to grant a continuance upon the application of appellant. It appears from the abstract of record that two applications for a continuance were made—one based upon the affidavit of counsel for appellant, the other upon the affidavit of appellant. Both of these applications were denied. The abstract of the bill of exceptions fails to show that an exception was saved to the ruling of the court upon either of these applications. It has been settled by numerous decisions of the appellate courts of this state that assignments of error not based upon exceptions duly taken and preserved by a bill of exceptions will not be considered unless such alleged error is apparent from the record proper, and not necessary to be preserved by bill. As bearing upon these questions, see *Brown v. Landon*, 11 Colo. 162, 17 Pac. 515; *Rudolph v. Smith* (Colo. App.) 72 Pac. 817, and cases there cited.

Error is assigned upon the refusal of the court to grant a new trial upon motion, supported by affidavits. The motion for new trial and the affidavits in support thereof appear in the abstract of the record proper, but do not appear in the abstract of the bill of exceptions, which contains a reference to the abstract of the record proper. No exception to this ruling was preserved and brought into the record by a bill of exceptions, so far as shown by the printed abstract of the bill of exceptions. In the record proper, immediately following the ruling of the court upon the motion for a new trial is a recital of an exception. This method of saving exceptions is not sufficient, under our practice. Exceptions reserved must be preserved by a bill of exceptions, or they will not be considered by the appellate courts. *Alta Inv. Co. v. Worden*, 25 Colo. 215, 53 Pac. 1047; *Rudolph v. Smith*, supra. In *Brennan Mercantile Company v. Vickers*, 73 Pac. 46, our Supreme Court said: "In speaking of a similar defect, our Court of Appeals, in *Denver Machinery Company v. Publishing Company*, 4 Colo. App. 146, 35 Pac. 192, said, in substance, that, where the court is unable to determine from an inspection of the abstract whether any error was committed by the trial court, the practice does not require it to look elsewhere for the information. The court, of course, might do so, but it is not obliged to. We are disposed to encourage

conciseness in the preparation of abstracts and briefs. Making the abstract merely a printed literal record of the transcript is objectionable, and entails upon an appellate court a vast amount of unnecessary work. Whenever such violation of our rules is properly brought to our attention, we shall be quick to strike from the files the objectionable document, or require the parties guilty of such infraction to conform to the appropriate practice." See, also, *Thompson v. Ditch Co.*, 25 Colo. 243, 53 Pac. 507; *Otto v. Hill*, 11 Colo. App. 431, 53 Pac. 614. The condition of the docket of this court compels us to insist upon compliance with the rules of court relating to abstracts of record, which rules are designed to facilitate the dispatch of business. If counsel ignore these rules, they must abide the consequences.

The only error assigned, predicated upon exceptions preserved and brought into the record by the bill of exceptions, as shown by the abstract of record in this case, is the one challenging the admission of the location certificate heretofore disposed of.

For the foregoing reasons, the judgment must be affirmed. Affirmed.

(19 Colo. App. 354)

#### JEWELL et al. v. SHAW.

(Court of Appeals of Colorado. Jan. 11, 1904.)

#### APPEAL—REVIEW—EXCEPTIONS—BILL OF EXCEPTIONS.

1. In the absence of an exception to the final judgment, the Appellate Court will not review the judgment or decree upon the facts.

2. Exceptions to the rulings of the court must be brought into the record by the bill of exceptions.

3. Unless the bill of exceptions brings up the evidence on which the findings are based, the Appellate Court will assume that it was sufficient to justify the decree.

Error to District Court, Saguache County.

Action by Quincy A. Shaw against Samuel Jewell, treasurer of School District No. 29, and another. From a judgment for plaintiff, defendants bring error. Affirmed.

See 60 Pac. 363.

McGintle & Andrews and J. W. Davidson, for plaintiffs in error. Wolcott & Vaile, Charles A. Merriman, and Wm. W. Field, for defendant in error.

MAXWELL, J. It is insisted by defendant in error that a necessary party has not been made a defendant to this writ of error, and therefore this court is without jurisdiction to review the decree complained of. The transcript shows that a third supplemental complaint was filed, in which the San Luis Valley Land & Mining Company appears as coplaintiff with Shaw, upon the averment that Shaw had sold and conveyed all his right, title, and interest in the property in controversy to the San Luis Valley Land &

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1597.

Mining Company. A reply to the answer to this third supplemental complaint, filed by defendant in error, is in the name of Shaw alone. The writ of injunction issued pursuant to the mandate of the decree rendered runs in the name of Shaw alone, notwithstanding the court uses the plural "plaintiffs" in the decree. It would seem from the foregoing that the company had abandoned its attempt to become a party to this litigation. The Civil Code (section 17) provides the manner in which a party having an interest in the subject-matter of the litigation may be made a party thereto. No attempt was made to comply with this requirement of the Code. A person may not inject himself into a lawsuit by inserting, or causing to be inserted, his name as a party, in a supplemental pleading, without order of the court therefor.

The facts out of which this litigation arose are set forth in the opinion of this court in *Shaw v. Lockett*, 14 Colo. App. 413, 60 Pac. 363, Jewell having been substituted for Lockett by order of the court below. The abstract of record contains literal copies of the original complaint, amended answer to the original complaint, decree from which the former appeal was taken, decree to which this writ of error is sued out, assignment of errors, and the briefest possible mention of motions, orders, injunctions, supplemental and other pleadings. There is no bill of exceptions; no order with reference to the same. We search in vain the abstract of record and the transcript for an exception saved to any ruling preliminary to the trial or during the trial (which occupied two days), and no exception was taken to the final judgment or decree. The opening paragraph of the decree is: "On consideration whereof, and forasmuch as the plaintiffs have sufficiently established the material facts of their complaint and the supplemental complaints herein, and the defendants have failed to establish facts sufficient to sustain their defense, the court doth order," etc. Not a word of testimony introduced at the trial is preserved by the record here. The Reports of this state are burdened with decisions to the effect that, in the absence of an exception to the final judgment, the Appellate Court will not review the judgment or decree upon the facts; that exceptions to the rulings and decisions of the court must be brought into the record by a bill of exceptions; that assignments of error not based upon exceptions will not be considered; and that, unless the bill of exceptions brings up the evidence upon which the findings are based, the Appellate Court will assume that the evidence was sufficient to justify the decree. A few, only, of the many cases to be found in the Reports of this state which announce the well-settled practice are cited. *Rudolph v. Smith* (Colo. App.) 72 Pac. S17, and cases cited; *Brown v. Landon*, 11 Colo. 162, 17 Pac. 515; *Nevin v. Lulu*,

etc., Co., 10 Colo. 357, 15 Pac. 611. The condition of this record compels an affirmation of the decree.

Affirmed.

GUNTER, J., not participating.

(19 Colo. App. 330)

ANKELE, Sheriff, v. ELDER.

(Court of Appeals of Colorado. Jan. 11, 1904.)

CHATTEL MORTGAGES—DEFAULT—CHANGE OF POSSESSION—STATUTE OF FRAUDS—JUDGMENT CREDITORS—LIEN—POSTPONEMENT BY ACT OF COUNSEL—EXECUTION—SHERIFFS.

1. A chattel mortgagee, on default of the mortgagors, went to the place where the property was, taking with him a witness, and there proclaimed that he took possession, and directed a hostler employed by the mortgagors to remain in possession for him. There was no removal or disturbance of the property. *Held* insufficient as a change of possession, within the requirements of the statute of frauds, though the mortgagee was executor, and acting as such, of the estate owning the building in which the property was located, the mortgagors being in possession thereof as tenants.

2. A chattel mortgage was recorded December 27th, the day after its execution. On November 20th previous a writ of execution was delivered to the sheriff by judgment creditors of the mortgagors, but the levy was not made till February 2d following. There was evidence warranting a finding that by reason of directions to the sheriff by counsel for the owners of the judgment the latter were responsible for the delay. *Held*, that the lien of the judgment creditors was postponed to the lien of the mortgage.

Appeal from District Court, Chaffee County.

Action by George R. Elder, executor of the will of Perley Dodge, deceased, against Charles Ankele, sheriff of Chaffee county, Colo. From a judgment for plaintiff, defendant appeals. Affirmed.

L. A. Hollenbeck, for appellant. George R. Elder, in pro. per.

THOMSON, P. J. Replevin by appellee, as executor of the will of Perley Dodge, deceased, for certain chattels which he alleged were wrongfully taken from his possession by the appellant. Judgment for the plaintiff, and appeal by the defendant.

The following facts are not in dispute: On December 29, 1897, W. F. Asher and Arthur Cummings, constituting a copartnership as Asher & Cummings, the proprietors of a livery stable at Salida, in Chaffee county, executed and delivered to the plaintiff, as executor, a chattel mortgage on certain horses, harness, and vehicles belonging to the stable, to secure the payment of four notes, the last maturing on the 29th day of December, 1899. A considerable portion of the money remaining unpaid, on the 26th day of December, 1899, the plaintiff proceeded to Salida, and, according to his statement as a witness, took "physical possession of the property for a forfeiture of the conditions of the mortgage." The manner of his taking possession was by going to the livery

stable, taking with him a Mr. De Weese as a witness, and proclaiming that he took possession. He then told a hostler employed about the stable that he had possession, and directed the hostler to remain in possession for him. There was no removal or disturbance of the property. Immediately upon assuming possession in the manner described the plaintiff took from Asher & Cummings a bill of sale of the property, Asher signing the firm name to the bill. The plaintiff then made a bill of sale of the property to Asher for \$1,300, taking from him his note for that amount, due December 27, 1900, and a chattel mortgage of the same property securing its payment, and leaving the property with him. The entire transaction did not consume over an hour. The stable in which the property was kept belonged to the estate of Dodge, and was occupied by Asher & Cummings as tenants of the estate. On the 9th day of August, 1899, Seidomridge Bros., a partnership, recovered a judgment against Asher & Cummings before a justice of the peace, and on the 9th day of November, 1899, filed a transcript of the judgment in the district court of Chaffee county. On the same day a writ of execution upon the judgment issued out of that court, directed to the defendant, as sheriff of Chaffee county, commanding him out of the property of Asher to make the judgment and costs. On the 2d day of February, 1900, the defendant, as sheriff, levied the writ upon the property in controversy, being a portion of that embraced in the chattel mortgage last given, and took it into his custody. This action of the sheriff constitutes the wrongful taking mentioned in the complaint. The defendant, in his answer, denied that the taking was unlawful, and justified under the judgment and execution. The plaintiff asserts title by virtue of the mortgage from Asher of December 26, 1899.

For the defendant it is contended that when the plaintiff undertook to foreclose the first mortgage by taking the property there was no such change of possession as to satisfy the requirements of the statute of frauds; that all subsequent proceedings were equally vicious; and that, therefore, as against creditors, the mortgage under which the plaintiff claims title is void. This proposition is controverted by the plaintiff, who maintains that he took legal possession, and that an actual removal of the chattels was unnecessary, because the estate which he represented was the owner of the building in which the property was kept. It is clear that there was no change of possession within the meaning of the statute of frauds. Our Reports are full of decisions that the change must be open and notorious; that the possession taken by the vendee must be actual, and of such a character as to give notice to the public that he has become the owner. The possession taken by a mortgagee for a default must be of the same character with

that taken by a purchaser. *Atchison v. Graham*, 14 Colo. 217, 23 Pac. 876. Simply telling an employé of the stable to take charge of the property for the estate left the possession precisely where it had been. The fact that the estate owned the building is of no consequence. The building was in the possession of the tenants, and not of the landlord. Merely holding the title gave the estate no possession or right of possession either of the building or its contents. *Edinger v. Grace*, 8 Colo. App. 21, 44 Pac. 855.

But a point is made by the plaintiff which is entitled to more consideration. It is that, after the writ of execution was delivered to the sheriff, it was held by him pursuant to direction from the attorney of the owners of the judgment, without attempt to enforce it until after the mortgage from Asher to the plaintiff had been executed and recorded. This mortgage was recorded on the 27th day of December, the day after its execution. The writ was delivered to the sheriff on the 20th day of November, 1899, and the levy was made on the 2d day of February, 1900. Thus 74 days elapsed after the sheriff received the writ before he attempted to execute it. There was evidence to warrant a finding that by reason of directions to the sheriff by counsel for the owners of the judgment the latter were responsible for this long delay, and from its judgment we must assume that the court so found. While, as against creditors asserting their rights with diligence, the attempted foreclosure of the mortgage, the bill of sale from Asher & Cummings to the plaintiff, and the bill of sale from the plaintiff to Asher were void, yet as between the immediate parties those acts were legal and regular, and the mortgage from Asher to the plaintiff was a valid security. Ordinarily, a writ of execution is a lien upon the personal property of the judgment debtor from the time of its delivery to the officer; but where, at the instance of the creditor or his attorney, it lies inactive in the officer's hands, its lien is subordinated to that of another creditor subsequently, and before its levy, securing himself upon the property. *Williams v. Mellor*, 12 Colo. 1, 19 Pac. 839; *Doyle v. Herod*, 9 Colo. App. 257, 47 Pac. 846. By reason of the want of effort, for which the judgment creditors were responsible, to enforce this writ, its lien was postponed to the lien of the mortgage.

The judgment is affirmed. Affirmed.

GUNTER, J., not participating.

(12 N. M. 84)

#### UNITED STATES v. GRIEGO.

(Supreme Court of New Mexico. Jan. 6, 1904.)  
ADULTERY—INSTRUCTIONS—PRESUMPTION OF GUILT.

1. The words, "that circumstance alone raises a presumption of guilt," in an instruction in a criminal case which reads, "If, on the other



band, you find from the evidence, beyond a reasonable doubt, that the defendants within three years previous to \* \* \* occupied the sleeping apartment alone, as a sleeping room, that circumstance alone raises a presumption of guilt," is error, as tending to strip from the defendant the presumption of innocence, with which he is clothed until found guilty by a jury.

McFie, J., dissenting.

(Syllabus by the Court.)

On rehearing. Reversed.

A. B. Renahan, for appellant. William B. Childers, U. S. Dist. Atty., and William C. Reid, Asst. U. S. Dist. Atty.

MILLS, C. J. This case is before us for rehearing, the judgment and sentence of the court below having been sustained by a divided court, as will appear from an inspection of the case, which is reported in 72 Pac. 20.

It is but proper to say that the learned judge who presides regularly over the district court for the First Judicial District did not try this case.

The opinion heretofore handed down by us in this case is reaffirmed, except that part of it which relates to the assignment of error which calls in question one of the instructions given by the trial court, which instruction reads as follows: "If, on the other hand, you find from the evidence, beyond a reasonable doubt, that the defendants within three years previous to March 1, 1901, occupied the sleeping apartment alone, as a sleeping room, that circumstance alone raises a presumption of guilt." It is an elementary principle of criminal law that an accused is presumed to be innocent until his guilt has been proven beyond a reasonable doubt. It needs no citation of authority to sustain this proposition. Such has been the uniform holding of the courts of this country, both federal and state. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U. S. 453, 15 Sup. Ct. 394, 39 L. Ed. 481. If the court charged the jury that if they believed from the evidence, beyond a reasonable doubt, that the defendants, within three years next previous to the date of the returning of the indictment into court (giving the proper date of such return), occupied the sleeping apartment alone as a sleeping room, "that circumstance may be considered by you in arriving at your verdict," such instruction would have been proper; but charging, in a separate and special instruction, "that circumstance alone raises a presumption of guilt," is, we believe, improper, as it tends to take away the presumption of innocence with which the defendant in a criminal case is clothed until a jury finds him guilty.

We will not seek to try to explain how the majority of us came to sign the opinion in

*Griego v. United States*, 72 Pac. 20; but, as it is manifest to us that in so doing we committed error, we will content ourselves with reversing the case, and will remand it to the United States District Court for the First Judicial District, territory of New Mexico, for further proceedings; and it is so ordered.

BAKER and PARKER, JJ., concur. POPE, J., not having heard the argument took no part in this decision.

McFIE, J. I dissent, adhering to the former opinion in this case.

(12 N. M. 99)

#### UNITED STATES v. DENSMORE.

(Supreme Court of New Mexico. Jan. 6, 1904.)

HOMICIDE—INDICTMENT—MANSLAUGHTER—INSTRUCTIONS—PRINCIPAL—EVIDENCE.

1. Under section 1035, Rev. St. U. S. 1878 [U. S. Comp. St. 1901, p. 723], a defendant charged with murder in the first degree may be found guilty of manslaughter, provided there is evidence in the case to sustain such a verdict.

2. It is not reversible error for the court to give an instruction containing the common-law definition of manslaughter when all the evidence shows that the killing was done by one of the forms set out in the act of Congress defining manslaughter; more especially as the court gave an instruction at the request of the defendant limiting manslaughter to the definition contained in the United States statute.

3. A defendant may be convicted as a principal when he takes part in a fracas preceding the homicide and calls on others to kill the deceased.

4. The instructions must be considered as a whole, and their bearing upon all of the evidence introduced in the case must be considered.

5. Evidence of specific acts of lawlessness by the deceased when under the influence of liquor were properly excluded by the court.

6. The calling in of the jury after they have retired and deliberated on their verdict, and asking them as to the possibility of their arriving at a verdict, and sending them to their jury room for further deliberation, are not such instructions as are required to be in writing.

(Syllabus by the Court.)

Appeal from District Court, before Justice Crumpacker.

Lewis E. Densmore was indicted in the United States court, Second Judicial District, territory of New Mexico, for the murder of John Maxwell, on the Navajo Indian reservation, in said district, by shooting him with a rifle. The indictment is in the ordinary form, and charges murder in the first degree. To the indictment the defendant entered a plea of not guilty, and was afterwards tried by a jury, which heard the case, and, after having deliberated for a very considerable length of time, returned a verdict of guilty of manslaughter, and recommended the defendant to "the consideration of the court." Motions for a new trial and in arrest of judgment were duly filed, considered, and overruled by the court, and the defendant was sentenced to serve a term of

¶ 1. See *Indictment and Information*, vol. 27, Cent. Dig. § 593.

imprisonment in the Territorial Penitentiary at Santa Fé, and to pay a small fine and the costs, from which judgment the defendant appealed. Affirmed.

F. W. Clancy, for appellant. William B. Childers, for appellee.

MILLS, C. J. In his able brief counsel for appellant has argued 15 errors which he alleges were committed by the court on the trial of this case. As is usual on appeals of this nature, where so many exceptions are relied on, several go to the same point, and therefore it will not be necessary for us to consider in detail each of the alleged 15 errors, as several of them may properly be classed together, and so considered by us. We will, however, say that we have gone over the entire record with great care, and that we have carefully considered the briefs which have been filed by counsel for the respective parties.

The indictment in this case charges murder in the first degree, and the jury returned a verdict of guilty of manslaughter. Under the laws of the United States and a decision of the Supreme Court of the United States, a defendant charged in an indictment with the crime of murder may be found guilty of the lower grade of crime, viz., manslaughter, provided, of course, that there is some evidence which tends to bear upon that issue. By section 1035 of the Revised Statutes of the United States, revision of 1878 [U. S. Comp. St. 1901, p. 723], it is enacted that "in all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence charged; provided, that each attempt be itself a separate offence." This statute has been considered in *Stevenson v. United States*, 162 U. S. 313, 16 Sup. Ct. 839, 40 L. Ed. 980, and in *U. S. v. Mengher* (C. C.) 37 Fed. 875. Under the laws of the United States the crime of manslaughter is defined in section 5341 of the Revised Statutes of 1878 [U. S. Comp. St. 1901, p. 3628]. That section reads: "Every person who, within any of the places or upon any of the waters described in section 5339, unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter."

Counsel for defendant makes the point that the court committed error in giving the jury instruction No. 15, which is the common-law definition of manslaughter. We do not think that this is reversible error, as the alleged killing, as shown by the evidence in the case, was done by one of the forms expressly set out in the act of Congress de-

fining manslaughter, to wit, by shooting. There is no evidence that Maxwell's death was occasioned by any other cause, and consequently the claim of defendant's counsel that this instruction is much broader than the statutes has no weight, because the evidence shows that deceased was killed by one of the ways mentioned in the statute. In addition to this, the learned court gave instruction No. 2 asked by defendant, which is a correct definition of manslaughter under the United States statute, applicable in this case.

Counsel for appellant contends that Densmore could not be convicted as an accessory to the killing, as there is no United States law which provides for the conviction of any one as an accessory to manslaughter. We do not understand that appellant was convicted as an accessory, but as a principal. But two witnesses testified who were present at the shooting, to wit, Esquibel and appellant, and their testimony varies in very important particulars. Esquibel testifies that, after several shots had been fired, and when both appellant and deceased had fallen to the ground, appellant called out, "Boys, kill him!" and that deceased was then shot by one Baca, he (deceased) then lying on the ground. The testimony of the witness Esquibel evidently was believed by the jury, and that of appellant was not. There can be no doubt but that appellant was present at the time deceased was shot, and that he took part in the fracas which immediately preceded the killing, and, if the jury believed from the evidence that he called out to his associates to kill the deceased, they were justified in returning a verdict against appellant, even if Baca fired the fatal shot, on the ground that Baca's act was the act of the appellant.

Several errors assigned by the appellant go to the instructions given by the court to the jury. Possibly, if these instructions singled out stood alone, some of them might have been erroneous; but this is not the way in which the instructions given by the trial court should be looked at. The instructions must be looked at as a whole, and their bearing upon all of the evidence introduced in the case must be considered. "The judge should instruct the jury as to the law applicable to all the reasonable hypotheses furnished by the evidence, leaving the jury to find the facts and apply the law to the facts as found." 2 Thompson on Trials, § 2324; *King v. King*, 37 Ga. 205. The greatest objection which can be found to the instructions given in this case is their extreme length, and to the fact that the court several times charged in varying language that no appreciable space of time need necessarily intervene between the formation of the intention to kill and the act itself as an ingredient of the crime of murder. We cannot see, however, that this repetition worked any harm to appellant, for the jury did

not find him guilty of murder, but of the lesser crime of manslaughter. Taking the instructions as a whole, we think that they fairly state the case, and that they were not prejudicial to the defendant.

There is nothing in the eleventh error assigned by the appellant, that "the court erred in excluding evidence offered as to Maxwell's character and acts of lawlessness." The evidence sought to be introduced was as to specific acts of lawlessness upon the part of the deceased when under the influence of liquor. The court did allow the appellant to show the general reputation of the deceased in this respect, but, we think, properly refused to admit evidence of specific acts of lawlessness. To have admitted such evidence would have brought in matters tending in no way to prove the issues involved in the trial of the case. The evidence as to the general character of the deceased for lawlessness when under the influence of liquor was admitted in evidence, which is, in our opinion, going quite as far as is allowed by law. The rule of proving similar offenses is only admissible for the purpose of proving knowledge or intent, or where the crime charged in the indictment is so linked with some other crime that, in proving one the same evidence would prove the other. 1 Greenleaf on Ev. § 452. The same rule prevails in many of the states of the Union. "Particular acts of misconduct on the part of the deceased and offenses against the law committed by him, and not connected with the case, are inadmissible." *Dupree v. State*, 73 Am. Dec. 425; *Pritchett v. State*, 58 Am. Dec. 250; *Franklin v. State*, 29 Ala. 14; *State v. Field*, 14 Me. 244, 31 Am. Dec. 52; *State v. Chandler*, 52 Am. Dec. 599. Other courts have also held that on trial on an indictment for murder evidence offered on behalf of defendant of particular instances of exhibitions of violent and ungovernable temper upon the part of the person killed was properly excluded as not being competent. *Eggler v. People*, 56 N. Y. 642; *Thomas v. People*, 67 N. Y. 218; *McKenna v. People*, 18 Hun, 580; *Alexander v. Commonwealth*, 105 Pa. 1. We are aware that some courts hold to the contrary, but we think that the weight of authority largely preponderates in favor of the view we take.

Another point relied on by appellant is that the court committed error in giving an oral instruction to the jury on April 11, 1901. It is true that the Compiled Laws of the territory provide that instructions to the jury shall be in writing, and in the case at bar we think that all of the instructions were given in writing. The record discloses that the jury were instructed and retired to deliberate on April 9, 1901; that at about noon on April 11, 1901, they came into court, "and through one of their members stated, in substance, that the jurors could never agree, no matter how long they might be kept together; that they stood nine to three, and had

taken about one hundred votes; that they had tried to convince the three without success; that the three were not willing to be guided by a consideration of the evidence or the opinion of the majority, and displayed irritation and anger at the course of the majority; and thereupon the court sent the said jurors out for a further consideration of the case, and said, in effect, that the expense of the trial had been great, and that another trial would be an additional expense much greater than would be incurred by keeping the jury together for a further time; to which action of the court, and to his said oral statement to the jurors, defendant, by his counsel, then and there duly excepted." We do not think that these remarks by the court were instructions to the jury such as the statute contemplates should be given in writing. The duty of the court, as defined by our statute (section 2904, Comp. Laws 1897), is to instruct the jury in writing "as to the law of the case." This is the charge to the jury in which the law of the case is stated. We cannot believe that counsel seriously contends that the remarks just above quoted are any part of the instructions. They do not purport to nor do they instruct the jury as to either the law or the facts in the case, and certainly nothing that the court said can be construed as harmful to the appellant. Indeed, the learned counsel for appellant does not take exceptions to what the court said, but only to the fact that he did not first write it out, or have it written out, and then read it to the jury. This assignment of error is not well taken.

The assignment that the court erred in denying the motion for a new trial is not well taken. In his brief filed in this cause the learned counsel for the appellant says that he does "not ignore the well-established rule that the action of a court on a motion for a new trial is a matter of discretion, and, as a general rule, not reviewable on appeal." We think that this statement of counsel fairly states the rule of law. In the federal courts the granting or refusing of a motion for a new trial is universally held to be addressed to the sound discretion of the court, and not to be reviewable. See long list of cases cited in 14 Am. & Eng. Ency. P. & P. p. 955, note 4.

Defendant was indicted on September 28, 1900, and was tried the following April. He had notice that Esquibel was a witness for the government, and would testify on the trial. The affidavit of the appellant filed in support of his motion for a new trial is that he was taken by surprise by the evidence of the witness Esquibel, as he had been told by at least two persons that Esquibel had told them that appellant had nothing to do with the shooting. There are also the affidavits of three persons that Esquibel had told different stories about the shooting, all inconsistent with his evidence in court. It nowhere appears that any effort

was made to have any of these several parties present in court during the trial. Appellant knew that Esquilbel was to testify, and should have been prepared to meet his testimony, if he could have done so. If new trials were granted on such affidavits as those above referred to, trials would never be ended in this territory. We will not interfere with the discretion of the court in refusing to grant the motion for the new trial.

The last alleged error of the appellant is that he was either guilty of murder or that he was innocent. We have heretofore in this opinion gone into the matter of the instruction for homicide. The jury were instructed both as to murder and homicide. They heard all of the evidence in the case, and doubtless concluded that malice, either express or implied, was not proved; hence their verdict of manslaughter, and not murder. We consider this point as not well taken.

There is no reversible error apparent to us in the record, and the judgment entered below is therefore affirmed, and it is so ordered.

PARKER, McFIE, and BAKER, JJ., concur. POPE, J., not having heard the argument in this case, took no part in this decision.

(12 N. M. 87)

#### TERRITORY v. GARCIA.

(Supreme Court of New Mexico. Jan. 6, 1904.)

##### LARCENY—INDICTMENT—INSTRUCTIONS.

1. It is not necessary to allege in an indictment the corporate capacity of a corporation alleged to be the owner of property stolen.

2. It is not necessary in an indictment to use the words "felonious intent," where there are other words in the indictment that convey the same meaning.

3. Where the instructions by the court taken as a whole fairly present the law of the case to the jury, the appellate court will not base an error upon a single instruction.

Parker, J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, San Miguel County; before Chief Justice Mills.

Simon Garcia was convicted of stealing cattle, and appeals. Affirmed.

George P. Money, for appellant. Edward L. Bartlett, Sol. Gen., and C. A. Spliss, Dist. Att., for the Territory

BAKER, J. The defendant in this case was indicted in the district court, San Miguel county, May 27, 1901, for stealing and killing three head of neat cattle, the property of the Red River Valley Company, of the value of \$25 each. Demurrer to indictment was filed and overruled. Trial by jury was had, which resulted in a verdict of guilty.

¶ 1. See Indictment and Information, vol. 27, Cent. Dig. §§ 277, 282; Larceny, vol. 32, Cent. Dig. § 86.

Motions for a new trial and in arrest of judgment were overruled, and an appeal was prayed for and allowed to this court.

A complete answer to the contention of the appellant that the indictment does not state that on the 10th day of December, 1900, the property claimed to have been stolen was the property of the Red River Valley Company, is to quote the language of the indictment (omitting the formal parts) "• • • Do present that Simon Garcia, late of the county of San Miguel, territory of New Mexico, on the tenth day of December, in the year of our Lord one thousand nine hundred, at the county of San Miguel aforesaid, three head of neat cattle, of the value of twenty-five dollars each, of the property of the Red River Valley Company, unlawfully and feloniously did take, steal, and knowingly kill, contrary to the form of the statute," etc.

Appellant complains that the indictment does not say that the Red River Valley Company was a corporation. It is not necessary in an indictment to allege the corporate capacity of the owner of stolen property. State v. Shields, 89 Mo. 259, 1 S. W. 336; Fisher v. State, 40 N. J. Law, 169; 2 Bishop's New Crim. Proc. § 718; Thompson on Law of Corporations, vol. 5, § 6444, and cases cited.

Appellant also objects to the indictment because it did not say that the crime was committed with an intent on the part of the defendant. It is not necessary to go beyond the statute, and allege in specific terms that the crime was committed with intent. The intent is implied in the charge that he did it feloniously and unlawfully; that the defendant feloniously and unlawfully stole the cattle and knowingly killed them. Bishop's New Crim. Proc. § 558, vol. 1.

Appellant's objections to instructions 1 and 2 may be considered together. It is contended that these instructions do not fully and completely state the crime charged. From a careful reading of instructions 1 and 2, together with the instruction requested by the territory and given, it will be observed that the jury were instructed that the essential elements to be proven by the territory were that the defendant did unlawfully and feloniously take and steal and knowingly kill three head of neat cattle, or any one of said cattle, being the property of the Red River Valley Company on the 10th day of December, 1900, in San Miguel county, territory of New Mexico, and that, if the jury so found, they should find the defendant guilty. These are all the essential elements of the crime, as provided by section 79 of the Compiled Laws of 1897, which section reads as follows: "Any person who shall steal • • • or knowingly kill • • • any neat cattle the property of another, shall be punished. • • •"

The objection to instruction No. 7 given by the court is not without some weight; nor does this court approve of this instruction. However, this instruction has been upheld

by the Supreme Court of the United States in *Reagan v. U. S.*, 157 U. S. 304, 15 Sup. Ct. 610, 39 L. Ed. 709, and in *Hicks v. U. S.*, 150 U. S. 450, 14 Sup. Ct. 144, 37 L. Ed. 1137. We are not unmindful, however, that the federal courts in the states are permitted to comment upon the testimony. This instruction is also upheld in *State v. Jones*, 78 Mo. 280, and in *Solander v. People*, 2 Colo. 48. We are of the opinion that this instruction is not so erroneous as to warrant a reversal of the case.

The objection of appellant to the eighth instruction given by the court is not tenable. This instruction is a fair and careful one, guarding the interest of the defendant. It reads as follows: "The court instructs you that you are the sole judges of the weight of the evidence and of the credibility of the witnesses, and if you believe from the evidence that any witness has willfully sworn falsely as to any material fact in this case, you may, unless the same is corroborated by other credible evidence, or facts and circumstances in evidence, disregard the whole or any part of the testimony of such witness; and in passing on the credibility of any witness or the weight to be given to his testimony you may consider his manner and conduct upon the stand, his means of knowledge, the relationship of the parties, if any, and the interest that he may have in the result of the case."

Appellant also objects to the last paragraph of instruction No. 9, whereby the jury are instructed that, "if they should entertain a reasonable doubt of the defendant's guilt, he should be acquitted, although the jury might not be able to find that the alibi was fully proven." The language here employed certainly tells the jury that, if the evidence on the subject of an alibi raises any reasonable doubt in their minds as to the defendant's guilt, he should be acquitted. Instructions to this effect have been given and ratified in almost every jurisdiction.

Appellant assigns as error the language employed in instruction No. 10. This instruction, standing alone, would certainly be prejudicial to the defendant. However, instructions Nos. 8 and 10, when taken together, would seem to simply state to the jury that they are the judges of the credibility of the witnesses, and if they believe that any witness has sworn falsely, or that the testimony of any witness is inconsistent with other testimony which the jury believe to be true, or consistent with the circumstances proven on the trial, then the testimony of one credible witness would be of more value than the evidence of such other witnesses. The term used by the learned judge, "credible," could mean nothing more than such witnesses as the jury gave credit for telling the truth, and is used in the abstract, without reference to any particular witness who testified in the case.

Appellant assigns as error the giving of an instruction requested by the territory, for the reason that it was given untimely; that is, after the arguments of counsel and submission of the case. Whatever might be said concerning this position, this record nowhere discloses the facts contended for by appellant, and the objection will therefore not be considered by this court. It is enough that the instructions as a whole fairly placed the case before the jury, and we think that they did in this case. *Territory v. O'Donnell*, 4 N. M. (Gild.) 210, 12 Pac. 743; *U. S. v. De Amador*, 6 N. M. 178, 27 Pac. 488; *Trujillo v. Territory*, 7 N. M. 43, 32 Pac. 154.

We have carefully read the objections to the admissibility and rejection of testimony on the trial of the case, as well as other assignments of error, and we are of the opinion that there is nothing reversible. It is not the duty of an appellate court to hunt for technicalities whereby criminals can escape punishment. The record discloses the fact of the defendant's guilt, and he should pay the penalty.

The judgment of the district court is affirmed.

McFIE, J., concurs. PARKER, J., dissents. POPE, J., did not participate in this decision.

(12 N. M. 118)

#### MONIER et al. v. CLARKE.

(Supreme Court of New Mexico. Jan. 6, 1904.)

**BUILDING ASSOCIATION — INSOLVENCY — RECEIVER — FORECLOSURE OF MORTGAGE — RIGHTS OF BORROWING MEMBER — CONTRACT — LEX LOCI.**

1. Upon the appointment of a receiver of an insolvent building and loan association, the business of the association ceases, and nothing remains but liquidation.

2. Upon the foreclosure of a mortgage by the receiver of an insolvent building and loan association against one of its members, the mortgagor should be charged with the amount of his loan, or the advancement on his stock, with interest, and credited with interest paid and interest on the installments of interest.

3. The borrowing member of a building and loan association, after the payment of its debts, is entitled to a pro rata dividend with the non-borrowing members upon his stock.

4. The bond being a Minnesota contract, the enforcement of the rights of the parties growing out of the same is governed by the laws of Minnesota. Therefore the \$4,000 advancement bears interest at the legal rate as provided by the statutes of Minnesota.

(Syllabus by the Court.)

Appeal from District Court, Santa Fe County; before Justice John R. McFie.

Suit by M. C. Clarke, receiver of the American Savings & Loan Association of Minneapolis, against Quintin Monier and another. Judgment for plaintiff, and defendants appeal. Affirmed.

The statement of facts in appellants' brief is a fair and complete statement of the facts

¶ 1. See *Building and Loan Associations*, vol. 8, Cent. Dig. § 88.

in the case. It is adopted by the court, as follows: This case was brought in the court below by M. C. Clarke, the Wisconsin ancillary receiver of the American Savings & Loan Association of Minneapolis, Minn., which, by proper proceedings had by the Attorney General of that state, was declared to be insolvent by the proper court, and W. D. Hale was appointed general receiver, in January, 1896. This association was originally incorporated in April, 1887, as the American Building & Loan Association, by which name the contract sued on in this case was made by appellants; and on July 26, 1892, its name was changed to the American Savings & Loan Association. The note and mortgage sued on here were deposited by the Association with the Treasurer of the state of Wisconsin to enable it to do business in that state under its laws, and M. C. Clarke was appointed the Wisconsin receiver of the association, and, by proper order of the court, was directed to bring the proceedings to foreclose the mortgage in this case. The defendants below, Florence Donoghue and Quintin Monier, as partners, applied for membership in the original association December 17, 1888, and subscribed for and received 120 shares of stock, of the par value of \$100 per share, evidenced by a certificate (No. 16,216) dated December 26, 1888, and paid \$120 admission fee, and agreed to pay monthly 60 cents per share thereafter until the maturity of the stock, which was estimated to mature in nine years. On January 22, 1889, Donoghue & Monier applied for and obtained a loan from the association of \$4,000, assigned their stock to the association, and executed as additional security the mortgage and bond mentioned in the record. Afterwards, in 1890, by satisfactory agreement with the association, the number of their shares was reduced to 80, but no new certificate was issued therefor. On the 4th of February, 1890, Donoghue & Monier assigned this certificate of shares to Edward L. Bartlett, as trustee for their creditors, under a deed of trust, in which he assumed to make all payments upon such shares of stock as required by the certificate, bond, and mortgage. This he did, paying all taxes, insurance, the 60 cents per share stipulated for in the certificate, to the amount of \$48 per month, and \$20 per month in addition, making a monthly payment of \$68 down to the time of the insolvency of the association; such payments, in all, amounting to \$5,644 on account of this contract, being \$124 more than the amount of the loan, with the 6 per cent. interest thereon. On July 2, 1893, this suit was filed in the court below by the receiver, M. C. Clarke, praying for a judgment of \$4,000, with interest, attorney's fees, and costs, and foreclosure of the mortgaged property. Jury was waived, and trial had to the court, which on June 9, 1902, entered its final judgment and decree for the sum of \$5,198.50, with \$200 attor-

ney's fees. Appeal therefrom was prayed and allowed, and the case is now here for review upon the sole question of the application of the moneys paid by appellants upon this contract—whether all such money paid should be applied toward the reduction of the mortgage, or the 60 cents per share or \$48 a month should be considered payment on the shares of stock alone, and whether or not the appellee is entitled to any judgment until he has accounted for the shares of stock assigned to the association as collateral security for the loan.

Edward L. Bartlett, for appellants. N. B. Laughlin and Tenneys, Hall & Swanson, for appellee.

BAKER, J. (after stating the facts). Appellants have made seven assignments of error. One to six, inclusive, will be considered together. In fact, they all go to the question of what amount of all moneys paid by appellants shall be credited upon their loan of \$4,000.

One of the first questions to arise for the consideration of a receiver of an insolvent building and loan association is the application of the moneys paid by a borrowing member. If there were no borrowing members, the concern would be settled like any other insolvent institution; the stockholders receiving equal benefits and bearing equal burdens. Does the fact that a nonborrowing member becomes a borrowing member change his relation with the nonborrowing members? Section 2, art. 5, of the by-laws of the American Building & Loan Association, provides that no member can secure a loan from the association until after he shall have been a member at least three months, unless the board of directors shall, for good reason, determine to the contrary. The by-laws also provide that no one can borrow of the association unless he be a member thereof. The appellants Monier & Donoghue made their application to become members of said association on the 17th of December, 1888, and made application for 120 shares of stock, of the par value of \$100 each. On December 26, 1888, a certificate was issued to them for said number of shares. Subsequently, on application of Donoghue & Monier, their number of shares of stock was reduced from 120 to 80; and, such reduction having no bearing upon the issues in this case, it will not be further mentioned. On January 22, 1889, said Donoghue & Monier applied for and obtained a loan from the association of \$4,000. If the association had become insolvent and passed into the hands of the receiver between the dates of December 26, 1888, and January 22, 1889, of course, Donoghue & Monier, through their trustee, would have been entitled to whatever benefits there might be coming to them on their shares of stock, or been required to have borne their share of the burdens.

Does the fact that the insolvency of the concern occurred after they had made their loan change their relationship with the non-borrowing members? The presumption is that they became members of the association for the profit expected to be derived from the investment. Article 4 of the by-laws of the association provides that "there shall be two funds; the loan fund, and the expense fund." The loan fund is derived from many sources—among them, 50 cents per share per month paid on the stock, fines collected for nonpayment of dues, fines for failure to insure property in the time prescribed, fines for failing to pay assessments of taxes when due upon property covered by the loan, and interest on the sums loaned. Section 6, art. 4, of the by-laws, provides that on the 1st day of the months of January, April, July, and October in each year all undivided profits shall be apportioned and credited to the shares in force. It is not incumbent upon any stockholder to become a borrower. If he becomes a borrower, it is at his own volition. The rules and regulations of the concern governing loans are known to the borrowing member. The by-laws of the association also provide that, if any member desires to borrow from the association any given amount of money, he is required to file his application with the president, which is required to be accompanied by a sealed bid stating the amount of premium per share, in addition to 6 per cent. interest, which the applicant is willing to pay for such loan, and further provides that, where there are several applications, in event of a scarcity of money in this fund, the highest bidder shall prevail when the bids are the same, and the one offering the best security shall be first accepted. The by-laws further provide how the bids shall be opened, and that any member or his attorney may be present when the bids are opened. Thus it will be observed that the applicant for a loan must know just what he is doing, in order to secure his loan. The by-laws (section 9, art. 5), under the head of "Loans," provide that "members obtaining loans shall execute such notes or bonds and mortgages as shall be required by the board of directors." The appellants Donoghue & Monier secured from the association, as an advancement on their 80 shares of stock, 50 cents on the dollar. They assigned their 80 shares of stock to the association as collateral security, and gave a bond to the association that they would make all payments as required by the by-laws of the association to mature such stock, which, it was estimated, would mature in nine years; and they further agreed to pay 6 per cent. interest on the \$4,000 advanced or loaned them by the association. It is provided in the bond that, when the 80 shares of stock shall have been fully paid up or matured, the stockholders shall transfer their stock to the association, which was to be accepted by the associa-

tion as full payment of the advancement or loan of \$4,000. Should the association be prosperous, and the profits sufficient to mature said shares before nine years, the matured stock transferred to the association would be payment in full of the loan. To secure said bond, the appellants Florence Donoghue and Antonita G. Donoghue, his wife, and Quintin Monier executed a deed of trust (in effect, a mortgage) upon certain real estate. This mortgage is sought to be foreclosed against the Donoghues and Monier, and Bartlett, trustee, for the payment of \$4,000 advanced on the stock of the said Florence Donoghue and Quintin Monier, the money loaned them, with 7 per cent. interest.

Appellants resist the foreclosure, claiming that they have paid in monthly payments and interest \$5,644 down to the time of the insolvency of the association, which said \$5,644 is \$124 more than the amount of the loan, with 6 per cent. interest, at the date of appellants' last payment, and appellants therefore ask judgment against the association for the said sum of \$124.

It has been held in *Strauss v. Carolina International Building & Loan Association*, 117 N. C. 308, 23 S. E. 450, 30 L. R. A. 693, 53 Am. St. Rep. 585; *Thompson v. N. C. B. & L. Ass'n*, 120 N. C. 420, 27 S. E. 118; *Buist v. Bryan*, 44 S. C. 121, 21 S. E. 537, 29 L. R. A. 127, 51 Am. St. Rep. 787; *Rochester Savings Bank v. Whitmore*, 25 App. Div. 491, 49 N. Y. Supp. 862; and *Randall v. National B. & L. Ass'n*, 42 Neb. 809, 60 N. W. 1091, 29 L. R. A. 133—that a proper and equitable settlement of an insolvent building and loan association is to charge the borrowing member with the amount of the loan or advance on his stock, and to give him credit for all moneys paid the association for fines, penalties, dues, and interest. As between the association, as a unit, and the borrowing member, this would seem to be equitable; but when you consider the nonborrowing member, who went into the association for the same purpose as did the borrowing member, and stood in the same position until after the loan to the borrowing member, it presents a different phase. In cases of an insolvent association, when the association has been fully wound up by the receiver, all stockholders or shareholders should receive their pro rata of the assets of the association. In case the borrowing member is allowed to pay off his loan or advancement on his stock with the moneys paid the association by him, with interest on his payments, and if the assets of the association were sufficient to refund to the nonborrowing members all moneys paid in by them, and interest on each payment at the legal rate to the time of insolvency, and there were still left a large surplus to be distributed to the holders of such stock, it would scarcely be expected that the borrowing members, having settled their interest in the association, would be

permitted to participate in said surplus. Should this condition of affairs exist with an insolvent building and loan association, it is plain to see that the nonborrowing member would receive more for his money invested than the borrowing member, which would be inequitable, and no chancery court would permit such a settlement of an insolvent building and loan association. On the other hand, if the borrowing member is allowed to pay off his loan with his moneys paid in, and, when the insolvent association is wound up, it is ascertained that the assets are insufficient to refund the amount paid in by the nonborrowing members, with legal rate of interest on such payment, or are insufficient to even refund the principal of the moneys paid in by the nonborrowing members, then in that case the borrowing member would receive 100 cents on the dollar, with interest on the moneys paid the association by him, while a nonborrowing member would suffer a loss, either great or small. The injustice of this last proposition is apparent upon its face, considering the fact that the nonborrowing and the borrowing members joined the association and paid their money to the association for the same purpose, to wit, the profits to be made upon their investments; one waiting until the maturity of the stock, that he might take out his money and the profits, and the other selling his stock, or receiving an advance upon it, and contracting to pay enough money upon it to mature his stock. In other words, he simply seeks to take the profits out in advance. Certainly the nonborrowing and the borrowing members should stand upon the same footing. If the association is a winner, they should all share equally in the profits. If it is a loser, then all should lose alike.

Reasoning as we do, we are of the opinion that, so far as the stock is concerned, and the payments thereon, the borrowing and nonborrowing members should equally receive the benefits and bear the burdens; that the borrowing member should pay his loan, with interest, the same as though it were an indebtedness due the association from any other source, and thereafter, when the affairs of the association have been adjusted, that he participate in the assets in the same manner as does the nonborrowing member. *Strohen v. Franklin Saving Fund & Loan Ass'n* (Pa.) 8 Atl. 843; *Sullivan v. Stucky* (C. C.) 86 Fed. 491; *Towle v. Am. B. & L. Society* (C. C.) 61 Fed. 446; *Manorita v. Fidelity Tr. & Loan Co.* (C. C.) 101 Fed. 8; *Post v. B. & L. Ass'n* (Tenn. Sup.) 37 S. W. 216, 34 L. R. A. 201; *Young v. Improvement Loan Ass'n* (W. Va.) 38 S. E. 670. We also cite in support of this position the case of *Hale, Receiver, v. Cairns* (N. D.) 77 N. W. 1010, 44 L. R. A. 261, 73 Am. St. Rep. 746, which is a very carefully considered case, and the many authorities therein cited. The case of *Sullivan v. Stucky*, supra, is strikingly similar to the

one under consideration, and is entirely in accord with the views herein expressed.

The contract between Donoghue & Monier and the association was a Minnesota contract. *Bedford v. B. & L. Ass'n*, 181 U. S. 242, 21 Sup. Ct. 597, 45 L. Ed. 834; *B. & L. Co. v. Miller*, 118 Fed. 369, 55 C. C. A. 195; *McMurray v. Gosney* (C. C.) 106 Fed. 11; *Miles v. B. & L. Co.* (C. C.) 111 Fed. 946. The foregoing citations fully answer the seventh assignment of error, as to the rate of interest allowed appellee.

The learned counsel for appellants, in his statement of facts, employs the following language in speaking of the amount of the judgment rendered in the court below—\$5,198.50, with \$200 attorney's fees: "Appeal therefrom was prayed and allowed, and the case is now here for review upon the sole question of the application of the moneys paid by appellants upon this contract—whether all such moneys should be applied toward the reduction of the mortgage, or the 60 cents per share or \$48 a month should be considered payment on the shares of stock alone, and whether or not the appellee is entitled to any judgment until he has accounted for the shares of stock assigned to the association as collateral security for the loan." We think this fairly represents the status of this case before the court. From what has been said in this case, we are of the opinion that the appellants must pay the amount of their loan, with interest, and that they must look to the receiver, at the final settlement of the affairs of the association, for such dividends, if any, as are to come to them on account of their holdings of stock. When the association became insolvent, neither party could fulfill the terms of the contract. Therefore it is just and equitable that appellants should pay the amount of money by them received at the legal rate of interest, as required by the laws of the state of Minnesota, to wit, 7 per cent., and that they be credited upon said sum for all interest by them paid, and interest upon partial payments of interest.

For the reasons given, we are of the opinion that the judgment of the lower court should be affirmed.

MILLS, C. J., and PARKER, J., concur.  
McFIE, J., having tried the case below, and POPE, J., did not participate in this decision.

(12 N. M. 131)

TERRITORY ex rel. ADAIR et al. v. BEALL et al.

(Supreme Court of New Mexico. Jan. 6, 1904.)

COUNTIES—JUDGMENTS—SATISFACTION.

1. Judgment on appeal from disallowance by board of county commissioners of a claim of a county officer for fees, service, or perquisites can only be satisfied out of taxes collected for the year the indebtedness accrued.

(Syllabus by the Court.)



Appeal from District Court, Taos County; before Justice John R. McFie.

Application by the territory, on the relation of William M. Adair and others, for writ of mandamus to Julian Beall and others. From an order granting the writ, defendants appeal. Reversed.

E. C. Abbott and Edward L. Bartlett, for appellants. R. C. Gortner, for appellees.

BAKER, J. This cause comes here on appeal from the district court of Taos county. Higinio Romero was the sheriff of Taos county during the years 1899 and 1900, and, as such officer, rendered an account against said county for salary as jailer for 15 months, from January 1, 1899, to April, 1900, at \$50 per month, amounting to \$750; also an account against said county for salary as guard at jail from January, 1899, to April, 1900, at \$40 a month, amounting to \$600, upon which last amount was credited the sum of \$75; both of which said accounts were disapproved by the board of county commissioners of said county on the 2d day of July, 1900. From the action of said board in disallowing said accounts, Romero appealed to the district court, and in December, 1901, judgment was rendered upon said appeal in favor of said Romero for \$1,220.40; which judgment was afterwards reduced to \$905.40. Said judgment in favor of Romero recites: "It is, however, further considered, ordered, and adjudged that the payment be, and the same is, subject to the terms and conditions of the statute of this territory commonly known as the 'Bateman Law,' and the laws amendatory thereof, and the satisfaction thereof shall be proratably according to the percentage available to be paid upon the other general indebtedness of said county of Taos for the several quarters of the year involved between the 1st day of January, 1899, and the 1st day of April, 1900." There were a large number of claims against the said county for the years 1899 and 1900 remaining unpaid at the close of said years, owing to a lack of funds. During the year 1901 there were collected delinquent taxes for the years 1898 to 1899, which were available for the payment of accounts remaining unpaid for said years 1899 and 1900. On the 31st of December, 1901, the relators (appellees) procured an alternative writ of mandamus, commanding the respondent board to hold separate and apart the funds collected from the taxes of 1898 and 1899 for the expenses of the years 1899 and 1900, and to prorate the same, and pay out to all creditors for said years, except to said collector Romero. The appellant board, answering the said writ, states that it had obeyed the mandate of the said writ, except it denied that the account of said Higinio Romero for the years 1899 and 1900, which had been merged into a judgment in the last quarter of the year 1901, had been with-

drawn from said year's indebtedness, and, further answering, alleged, although said account of the said Romero had been merged into a judgment in the last quarter of 1901, it still remained a debit against said county for the years 1899 and 1900, the same as though it had not been merged into a judgment. The amount prorated and set aside for the years 1899 and 1900 by the board for said Romero was \$176.55. The court found in favor of appellees, and ordered and directed that the appellant board prorate among the creditors for the years 1899 and 1900, except Higinio Romero, the said \$176.55 heretofore set apart by said appellant board to apply upon the account of said Romero. From this finding and judgment of the court, appellants appealed.

This brings us to the construction of section 303 of the Compiled Laws of 1897, which reads as follows: "Sec. 303. In the event any claimant, during any current year should appeal from the board of county commissioners, as now provided for by law, from the amount allowed him by such board, the commissioners in making their quarterly payments as above provided for, shall estimate and allow such claimant the amount allowed him, and in the event the court should allow such claimant a larger sum than was allowed him by the board of county commissioners the amount so allowed by the court shall be considered and paid as above provided for at the next quarterly settlement after such decision of the court." It would seem that the statute, providing in said section that "in the event the court should allow such claimant a larger sum than was allowed him by the board of county commissioners the amount so allowed by the court shall be considered and paid as above provided for at the next quarterly settlement after such decision of the court," would, if standing alone, mean that it should be paid out of the quarterly funds in which the judgment was rendered. But we must take the statute as a whole, and, if such construction is to be given section 303 as we have indicated, what would be the meaning of that portion of section 299 which reads as follows? "Sec. 299. From and after the date of the passage of this act, it shall be unlawful for any board of county commissioners for any purpose whatever to become indebted or contract any debts of any kind or nature whatsoever during any current year, which at the end of such current year is not and cannot then be paid out of the money actually collected and belonging to that current year, and any and all kind of indebtedness for any current year, which is not paid and cannot be paid as above provided for is hereby declared to be null and void, and any officer of any county \* \* \* who shall issue any certificate or other form of approval of indebtedness separate from the account filed in the first place, or who shall at any time, use the fund belonging to

any current year for any other purpose than paying the current expenses of that year, or who shall violate any of the provisions of this act, shall be deemed guilty of a misdemeanor and upon a conviction thereof shall be fined not less than one hundred nor more than one thousand dollars or be confined in the county jail for a period of not more than six months or by both such fine and imprisonment, in the discretion of the court trying the case." It will readily be observed that section 303, as construed by the lower court, and section 299, are in conflict with each other. It certainly cannot be contended that the judgment rendered in 1901 for current expenses in the years 1899 and 1900 is a current expense for the year 1901. The judgment thus rendered is not a new debt, nor any portion of the expense of the year 1901. In determining the amount of the recovery of Romero on his judgment, the learned judge in the lower court goes back to the years 1899 and 1900, and finds that he shall recover on his judgment the same pro rata allowed other creditors for said years. If the judgment is a claim against the last quarter of the year 1901, it would be prorated, if not paid in full, for that quarter. Certainly the claims of one year cannot be paid on the basis of a pro rata of any other year. It is proper for the court to go behind said judgment rendered for the purpose of showing on what account it was rendered. *A. T. & S. F. Ry. Co. et al. v. Territory (N. M.) 72 Pac. 14.* We therefore conclude that it cannot be contended that the claim allowed by the court was not a part of the current expenses for the years 1899 and 1900. Section 299 provides, "who [meaning the county board] shall at any time, use the fund belonging to any current year for any other purpose than paying the current expenses of that year, shall be deemed guilty of a misdemeanor," etc. Certainly, if the appellant board had, on its own motion, used the funds belonging to the current year of 1901 to pay any of the current expenses of the year 1899 or 1900, it would have been in strict violation of said section 299, and would have been guilty of a misdemeanor, and subject to punishment by fine and imprisonment, or both.

Therefore we conclude that the court, by its order directing said appellant board to pay out of the current funds of the year 1901 a claim for current expenses of the years 1899 and 1900, was acting in violation of the express provision contained in section 299. Section 300 of said Compiled Laws provides as follows: "All fees, salaries and perquisites of the different officers of the several counties shall be reduced in the event there is an insufficient collection of money with which to pay them as provided by law for their services in any current year so that there shall be no violation of the provisions in this act as to incurring indebtedness for any current year over and above the money

actually collected for that current year." It will be observed that section 300 provides that if there is not money enough collected from the taxes of any current year to pay the fees, salaries, and perquisites of officers for such years, each and every one of these claims shall be reduced in proportion to the insufficiency of the collected taxes of such year. If for a certain year the taxes were insufficient to pay the fees, salaries, and perquisites of the different officers of the county, of course they would be prorated, and be paid out of the taxes collected for that year. If, however, one of such officers should appeal from a disallowance, and his claim should be allowed in the district court, and judgment rendered thereon in the following year, and in that year the taxes collected were sufficient to pay all salaries, fees, and perquisites, including such judgment, in full, and such judgment were paid in full, it would, in effect, be abrogating the spirit and intent of section 300. The intent of section 300 is that the officers shall receive all the taxes collected to the amount of their fees, salaries, and perquisites, and, if the taxes are insufficient to pay them, it shall be payment in full for the fees, salaries, and perquisites of that year. Section 301 of the said Compiled Laws provides: "In the event that there is an insufficient amount of money collected during any current year, with which to pay for the services, fees and salaries of the several officers mentioned in section 300, then and in that event the said officers and all creditors shall receive in full payment of their respective claims each his pro rata share of the money collected, and the payment of said pro rata part shall be made quarterly between all officers and creditors, and in the event of an insufficient amount of money to pay in full for any one quarter the officers and creditors remaining unpaid shall not be paid that amount until the salaries and expenses of the next succeeding quarter or quarters shall have been paid, and in the event all the officers and creditors of any one quarter shall have been paid in full and there remains any money for the current year, the same shall then be distributed pro rata among the said officers and creditors." Section 302 provides: "The void indebtedness mentioned in section 299 shall remain valid to the extent and for the sole purpose of receiving any money which may afterwards be collected and belongs to the current year when they were contracted, and the collection thereof, when made, shall be distributed pro rata among the creditors having the void indebtedness, and in the event all the valid and void indebtedness of any current year is paid in full, and there is money for that current year remaining, the sum shall be converted into the fund for the next succeeding current year." Were it not for section 302, all claims for fees, salaries, and perquisites of any county officer that were not and could not have been paid

by the taxes collected at the close of the year when the services were rendered, or the fees and perquisites were contracted, would be absolutely void. Section 302 provides that such void indebtedness shall be validated to the extent only of receiving any money which may afterwards be collected from delinquent taxes belonging to the current year when such claim was contracted, and, when a collection of such taxes is made, that then they shall be distributed pro rata among the creditors having such void indebtedness. It will be observed that section 302 does not provide just when such pro rata payment shall be made, but says that, when collections are made, such collections shall be distributed pro rata. Therefore we can safely conclude that, after the collection of such delinquent taxes, payments should be made in the manner and form as provided for other payments of like taxes; i. e., as provided in section 301, which would be quarterly. The provision for payment quarterly occurs nowhere except in section 301, prior to its use in section 303, where it is provided, "and in the event the court should allow such claimant a larger sum than was allowed him by the board of county commissioners, the amount so allowed by the court shall be considered and paid as above provided for at the next quarterly settlement after such decision of the court." In the use of the expression "paid as above provided for," it would necessarily relate back to sections 302 and 301, where it is provided that they shall be paid quarterly, prorating among the several creditors.

For the reasons given, we cannot understand how a judgment rendered in one year for fees, salaries, or perquisites of an officer for a preceding year can be paid out of any funds except the taxes collected for the current year in which the services were rendered, or the fees and perquisites became due.

For the reasons given, the judgment of the district court is reversed, and the cause dismissed.

MILLS, C. J., and PARKER, J., concur.  
POPE, J., not having heard the argument, did not participate in this case.

(12 N. M. 111)

#### McALISTER v. HUTCHISON.

(Supreme Court of New Mexico. Jan. 6, 1904.)

#### MINING CLAIM—LOCATION—ABANDONMENT—COMMUNITY INTEREST.

1. A locator of a mining claim has no such title or interest in the same, after a conveyance and abandonment thereof, that the community interest of the wife attaches.

(Syllabus by the Court.)

Error to District Court, Grant County; before Justice Frank W. Parker.

Action by Amy McAlister against Jane Hutchison. Judgment for defendant, and plaintiff brings error. Affirmed.

This is a suit to quiet the title to a one-third interest in the mining claim known as the "Scotch Lass." Said mining claim was located by Henry McAlister, husband of the plaintiff in error, on the 16th day of April, 1891. On the 25th of July, 1892, Amy McAlister, plaintiff in error, conveyed by deed to her husband, Henry McAlister, all her right, title, and interest in said mining claim, dower and otherwise, the consideration for which conveyance, and for certain town lots in the town of Central, N. M., was \$150. The deed recites that it was made in pursuance of articles of separation entered into between said husband and wife. On the 1st of April, 1895, Henry McAlister, being the owner of two-thirds interest in the Scotch Lass mining claim by virtue of his location, conveyed said interest by deed to Jane Hutchison, defendant in error. On November 1, 1894, plaintiff in error instituted an action for divorce against her husband, Henry McAlister. No defense was interposed, and a decree pro confesso was rendered against him, and a final decree of divorce was entered on December 23, 1897. Among other things, the plaintiff alleges in her complaint that her husband was the owner of a two-thirds interest in the Scotch Lass mining claim and other property, and claimed an interest in all of the property, including the mining claim, because and by virtue of her relation to the defendant in that proceeding as wife. It was decreed in that case, to which proceeding the defendant in error, Jane Hutchison, was not a party, that two-thirds interest in the said mine owned by Henry McAlister at the date of the institution of the divorce suit was community property, and that Amy McAlister, as wife of Henry McAlister, was entitled to one-half of it, to wit, a one-third interest in the said mining claim. Mr. McAlister was required, by the terms of the decree in the divorce suit, to pay the wife a certain sum of money, failing in which a one-half of his interest in the Scotch Lass mining claim should be sold by a commissioner appointed for that purpose; and one-third was sold by Commissioner Wright, appointed by the court, and the one-third interest so sold was purchased by Amy McAlister, on the 11th day of June, 1898. By virtue of these facts the plaintiff in error, Amy J. McAlister, claims title to the mining claim here in controversy.

Edward C. Wade, for plaintiff in error.  
Colin Neblett and James Fielder, for defendant in error.

BAKER, J. (after stating the facts). What interest had Henry McAlister in the Scotch Lass mining claim by virtue of locator, never having perfected his title by obtaining a patent, and not having made any application to purchase or having paid any of the purchase money? Also what interest did he convey to Jane Hutchison by his deed in

which his wife did not join? In *Black v. Elk Horn Mining Company*, 163 U. S. 450, 16 Sup. Ct. 1101, 41 L. Ed. 221, the court says: "The interest in a mining claim, prior to the payment of any money for the granting of the patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfill which forfeits the locator's interest in the claim. We do not think that under the federal statute the locator takes such an interest in the claim that dower attaches to it." The court in that case further says: "His interest in the claim may also be forfeited by his abandonment with the intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had. \* \* \* If he convey to another a right which may be thus lost, that conveyance would seem to be equivalent to an abandonment by him of all rights under the statute. What could be better evidence of an intention to abandon than an actual conveyance of his right to another, ceasing to do any work thereon, and the giving up of his possession in accordance with his conveyance? The abandonment by simply leaving the land is no more efficacious than conveying his rights to another, and also leaving possession without any intention of returning. His simple abandonment would leave no right remaining in his wife to claim dower upon his death in the interest thus abandoned. If he added a conveyance as a clearer evidence of abandonment, her alleged right to dower is not strengthened. By the terms of the statute there is no grant of any right to the wife. It is granted to the locator and to his heirs and assigns, and there is no condition that hampers the right to convey by encumbering it with the inchoate right of dower, and until he does some act towards paying the purchase money he obtains no vested right of purchase or claim to a patent. *Benson Mining & Smelting Co. v. Alta Mining Company*, 145 U. S. 428 [12 Sup. Ct. 877, 36 L. Ed. 762]; *Shepley v. Cowan*, 91 U. S. 330 [23 L. Ed. 424]." Henry McAllister, on April 1, 1895, conveyed by deed the mining claim in controversy to Jane Hutchison, which deed was duly delivered to her. From that time Jane Hutchison has had possession and has done the assessment work upon said mining claim. This, under the principle laid down in *Black v. Elk Horn Mining Co.*, supra, would give her the right, title, and possession of said mining claim as against every one. The decree of the district court in the divorce case of *McAllister v. McAllister*, entered on December 23, 1897, recites "that two-thirds interest in the Scotch Lass mine was owned by Henry McAllister at the date of the institution of the divorce proceedings,

which was on November 1, 1894," and further recites "that said two-thirds interest in said mine was community property." To this extent said decree is of no validity, and certainly it could have no effect upon the rights of said Jane Hutchison, who was not a party to that suit. Henry McAllister had only a possessory right in the mining claim by virtue of his location. When he conveyed his interest by deed to Jane Hutchison and abandoned the claim, he forfeited all the rights that he ever had in and to said mining claim. The rights, if any, that his said wife had in the mining claim could be of no avail until after he would have acquired title. Then her interest would have attached. But Henry McAllister never reached that position, and therefore her anticipated interest perished when he abandoned said mining claim. Jane Hutchison's rights to said mining claim is by virtue of the conveyance from Henry McAllister to her, followed by her possession and doing the assessment work required by law. The learned counsel for plaintiff in error in his brief says: "How different is that case [referring to *Black v. Elk Horn Mining Co.*, supra] from the one under consideration? In Montana the dower system prevails. Here the civil-law system of community property." Yes, different in name and amount, yet so similar in cases of real estate. In both such cases there must be a marriage and acquiescence property. In the case of *Black v. Elk Horn Mining Company*, supra, dower did not attach, for the reason that the husband never acquired any title in the real estate. So, in this case, Henry McAllister never acquired interest in or title to the Scotch Lass mining claim. True, he had the possessory right, which he could terminate at will by abandonment, which he did. If Mrs. McAllister was a silent partner with her husband by virtue of the civil law when McAllister abandoned the mine, it was her duty and the law required her to continue in possession and to do the assessment work, just the same as any other partner would be required to do. She did no work on the claim from April 1, 1895, to May 26, 1900, at which time this suit was commenced. Plaintiff in error is claiming title to this mine, not to the improvements or personal property connected therewith, if any, left there by her husband. She is claiming title, pure and simple, such as one can acquire under location of a mining claim through the husband. Mr. McAllister acquired no title to said mining claim; consequently she takes nothing. Mr. McAllister had an interest and property right in said mining claim so long as he continued his possession and did the assessment work. As soon as he abandoned it, he terminated all his possessory right and all of his interest in said mining claim. The conveyance by Mr. McAllister to Jane Hutchison not only conveyed all the interest he had in it to her, but it is also evidence of the fact of his

abandonment of the mining claim. *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U. S. 650, 19 Sup. Ct. 61, 43 L. Ed. 320; *Phoenix Mining & Milling Co. v. Scott* (Wash.) 54 Pac. 777. And if Mr. McAllister's possessory right to said mine was community property, the husband had the power to convey not only his interest, but the interest of his wife also. *Ballinger on Community Property*, § 81. This was the law until the passage of the act of 1901 by the Legislative Assembly of New Mexico (section 6, c. 62, p. 113, Sess. Laws, 1901).

Although there is fraud alleged by plaintiff in error on the part of her husband, Henry McAllister, and defendant in error, Jane Hutchison, the lower court evidently found that there was no fraud, and, the evidence in regard thereto being conflicting, and all seeming of equal value, such finding will not be disturbed.

The right and title of Jane Hutchison to said mining claim should be confirmed, quieted, and settled as against the interest claimed by the plaintiff in error.

It is therefore ordered that the judgment of the lower court be affirmed.

MILLS, C. J., and McFIE, J., concur. POPE, J., did not participate in this decision, not having heard argument herein.

(12 N. M. 79)

#### STEWART v. BOARD OF COM'RS OF BERNALILLO COUNTY.

(Supreme Court of New Mexico. Jan. 6, 1904.)

#### TAX SALE—ACTION BY PURCHASER—REFUNDING PAYMENT.

1. A complaint against a county for the refunding of the purchase money at a tax sale of real estate does not state a cause of action unless it alleges, because of a mistake or wrongful act of the collector, clerk, or assessor, or from double assessment, real estate was sold on which no tax was due at the time.

(Syllabus by the Court.)

On Rehearing. Affirmed.

BAKER, J. This case is before us for a rehearing. The opinion in the case was handed down on August 28, 1902, and is reported in 70 Pac. 574.

The complaint alleges that the plaintiff is the assignee of the purchaser of real estate at a tax sale. Therefore, if he can recover at all against the county for the purchase money, it must be by virtue of the statutes. It is a well-settled rule, in the absence of a statute, that a purchaser at a tax sale buys caveat emptor. *Cooley on Taxation*, p. 475; *Desty on Taxation*, p. 850, and voluminous citations; *Logansport v. Humphrey*, 84 Ind. 469. The only statute that permits the recovery of the purchase money paid at a tax sale is section 4072, Comp. Laws N. M. 1897, which reads as follows: "When by mistake or wrongful act of the collector, clerk, assessor, or from double assessment, real estate

has been sold on which no tax was due at the time, the county shall refund to the purchaser the amount paid by him, with interest thereon at the rate of twenty five per cent. per annum; and the collector, clerk or assessor, as the case may be, shall be liable on his official bond to the county for all losses sustained by the county from sales through his mistake or misconduct." In order for the plaintiff to bring himself within said section, he must clearly allege that there was a "mistake or wrongful act of the collector, or of the clerk, or of the assessor, or a double assessment" of the real estate sold. These are the only exceptions to the general rule of purchasing real estate at tax sales at one's peril. The complaint, after setting out the sale, the certificate of purchase, the assignment to the plaintiff by the purchaser, a deed from the collector to the plaintiff, and a failure of title, alleges that "the failure of said tax title was due to erroneous and improper assessment of the real estate." A demurrer was interposed to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff elected to stand upon his complaint, and judgment was thereupon rendered for the defendant. The cause was brought to the Supreme Court, and at a former hearing in this court the action of the lower court in sustaining the demurrer was overruled. In the former opinion of the court is found the following language: "It does not, however, appear by whose mistake or wrongful act the erroneous assessment was made; nor is there any allegation in the complaint that it was through the mistake or wrongful act of the collector, clerk, or assessor, as required by the provisions of section 4072, to entitle the plaintiff to recover on the penalty. The plaintiff is therefore not entitled to recover interest on his claim at the rate of twenty-five per cent. per annum." As one member of the court, I cannot understand how this language escaped my observation, because it is certainly erroneous. It is true that the plaintiff nowhere alleges that it was through the mistake or wrongful act of the collector, clerk, or assessor, or a double assessment, the omission of which makes the complaint fatally defective, and upon which the plaintiff is not entitled to recover. It will be observed that in the former opinion of this court there is considerable said about sections 4070 and 4071, neither of which have anything to do with the issues in this case. In short, the only provision for a tax purchaser to recover his purchase money at a tax sale is in section 4072, and he can recover when, by mistake or wrongful act of the collector, clerk, or assessor, or from double assessment, real estate has been sold. The complaint, as hereinbefore said, nowhere alleges that it was the mistake or wrongful act of the collector, clerk, or assessor, or from double assessment. Therefore the com-

plaint is fatally bad. The demurrer was rightfully sustained by the court below, and the decision in this cause heretofore rendered by this court is overruled.

The judgment of the lower court is affirmed, and the cause dismissed, at the costs of the appellant.

MILLS, C. J., and PARKER and McFIE, JJ., concur. POPE, J., not having heard the argument, took no part in this decision

(141 Cal. 485)

In re SCOTT'S ESTATE. (S. F. 3,600.)\*

WORMELL v. CHAMBERLIN et al.

(Supreme Court of California. Dec. 30, 1903.)

WILL—LEGACY—CONSTRUCTION.

1. A will, after giving a number of specific legacies, gave "all the rest and residue of my property as follows: One-fiftieth thereof to each of the following persons, children of my late brother, namely"—followed by a number of names, including that of E. Other persons were then named, to whom one or more fiftieths were given, until the whole was disposed of. In a codicil testatrix recited that a new distribution had become necessary, and that she desired to revoke some former legacies. The codicil provided that in any respect in which it conflicted with the will testatrix intended that the codicil should control, and that otherwise the will should stand unaffected. After a number of specific gifts the codicil then recited: "I give \* \* \* all the rest and residue of my estate, subject to all unrevoked legacies and bequests of my will, \* \* \* as follows: Of such residue, two-fiftieths thereof to my nephew A."—and then followed gifts of the whole residue by fiftieths to various persons, omitting E. Held, that E. took nothing under the will and codicil.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition by Eugene Wormell for partial distribution to him of an alleged proportionate share in the estate of Angella R. Scott, deceased. From an order denying the petition, Wormell appeals, making Mortimer S. Chamberlin and Rachael Johonnott respondents. Affirmed.

L. Seidenberg and R. P. Clement, for appellant. Houghton & Houghton, for respondent. Philip G. Galpin, for devisees.

McFARLAND, J. The deceased, Angella R. Scott, died testate, and, her estate being in course of administration, Eugene Wormell, the appellant, filed a petition for the partial distribution to him of his alleged proportion of certain moneys in the hands of the executors, claiming that he was a residuary legatee and devisee under the will of the deceased. The court held that he was not such legatee or devisee, and had no interest whatever in the estate, and denied the petition, and from the order denying the petition said Wormell appeals.

Respondents contend that there is no authenticated record before us which presents

the question sought to be raised by appellant; but, as we think that the order appealed from should be affirmed on the merits, we will not consider the alleged insufficiency of the record.

The documents which constitute the last will and testament of the testatrix are an original will and two codicils. The first codicil merely makes a change of the executors named in the will, and is of no consequence here, except, perhaps, as explaining a certain unimportant reference in the second codicil to a former codicil. The questions involved in this appeal arise entirely out of the will and the second codicil. The will was executed November 7, 1891. It contains a number of specific legacies, and then proceeds as follows: "I give, devise and bequeath all the rest and residue of my property as follows: One-fiftieth thereof to each of the following persons, children of my late brother, Amos P. Wormell, namely"—and then a number of such children of said Amos are named, among whom is the appellant herein, Eugene Wormell. A large number of other persons were then named, to whom one or more fiftieths are given, until the entire fifty-fiftieths of the residue is disposed of.

The second codicil, above referred to, was made October 22, 1897, about six years after the will. In the codicil the testatrix refers to the former will, and states that the death of two or three devisees named therein makes a new distribution necessary, and also that she desires to revoke and change some of the former devises and legacies, and to make some new ones, and that she prefers to do this "by way of another codicil to my former will instead of executing a new one." Then follows this clause, "But in any respect in which this codicil shall conflict with the provisions of my former will, I fully intend that this codicil shall control the provisions of the former will, and that otherwise the former will and the codicil thereof shall stand unaffected by it." The testatrix then proceeds, in the codicil, to make a number of specific gifts, and after these specific gifts she used this language: "I give, devise and bequeath all the rest and residue of my estate subject to all unrevoked legacies and bequests of my will, and subject to those herein contained, as follows: Of such residue two-fiftieths thereof to my nephew, Andrew Wormell"—and then follow gifts of the whole residue by fiftieths to various named persons, among whom appellant here is not one.

The case has been argued very fully by counsel for each side and a number of authorities cited, but it is so obvious that appellant takes nothing under the two documents which constitute the last will and testament of the deceased that a review of the authorities or an extended opinion seems uncalled for. By the codicil all the residue of the property of the testatrix, after the specific legacies, is given to persons other than

\*Rehearing denied January 28, 1904.

appellant; this provision is utterly inconsistent with the provision of the original will, by which part of that residue was given to appellant; and the provision of the codicil prevails, not only according to general principles of construction applicable to the subject, but by the express provision of the codicil above quoted.

The order appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(141 Cal. 493)

PEOPLE v. DOWELL. (Cr. 1,011.)

(Supreme Court of California. Dec. 31, 1903.)

BURGLARY—CROSS-EXAMINATION—HARMLESS ERROR—INTOXICATION—INTENTION.

1. On prosecution for burglary a witness testified that he, and not defendant, committed the burglary, though he and defendant had been together all the preceding afternoon, and remained together during the night after the burglary was accomplished; that they had separated the next morning, and that he did not see defendant until some time later. On cross-examination he was shown a memorandum in a diary kept by him, and was asked if an entry therein, stating that on a certain date he left a certain point in company with defendant, was in his handwriting, and on a denial he was again asked the same question, to which he answered that he did not think it was, and was then asked the direct question whether such entry was not made by him. *Held*, that the manner of the inquiry was not prejudicial to defendant.

2. If it was error to make the direct inquiry after denial by the witness, it would not warrant a reversal, the question as to whether defendant and witness left said point in company not being an essential fact in the case necessary to be proven to warrant a conviction.

3. Intoxication has nothing to do with the degree of the crime of burglary, but is only relevant in considering the question of the intent with which the entry was made, but the degree is determined solely by the question as to when the entry was made—whether in the day or at night time.

4. Where, in prosecution for burglary, the sole defense was that defendant did not commit or aid in the commission of the crime, or enter the room, the giving of an instruction to the effect that intoxication might be considered for the purpose of determining the degree of the crime was not prejudicial error.

Department 2. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Ernest Dowell was convicted of burglary in the first degree, and appeals. Affirmed.

W. H. & C. L. Shinn, for appellant. U. S. Webb, Atty. Gen., and E. B. Power, Dep. Atty. Gen., for respondent.

LORIGAN, J. The appellant was convicted of burglary in the first degree, and from the judgment and an order denying his motion for a new trial appeals.

The burglary charged was the felonious entry of a room in the Doty Block, in the city of Pasadena, occupied by several young men employed at the Hotel Green in that city. The result of the entry was the abstraction from said room of a large amount

of wearing apparel belonging to its occupants. Several alleged errors are relied upon for reversal. One F. A. Smith had been jointly informed against with the appellant for the offense, and had pleaded guilty. Both he and appellant were arrested in Peoria, Ill., where they had gone immediately following the alleged burglary. Smith was called as a witness on behalf of appellant, and testified, among other things, that he alone had committed the burglary; that, although he and appellant had been together all the afternoon, and the latter had gone with him to the block where the burglary was committed, and remained with him during the night after the burglary was accomplished, yet appellant had nothing to do with it; that they separated the next morning, and he did not see the appellant again until he met him in Peoria. On cross-examination the witness was shown a small memorandum book kept by him as a diary, and was asked by the district attorney if an entry appearing therein was in his handwriting, to which he responded in the negative. He was again asked the same question, to which he answered that he did not think it was. He was then asked the direct question whether such entry appearing therein, "Left Los Angeles with Jiggers February 4th" (Jiggers was a nickname for the appellant), was not made by him. To this last question he replied that he did not remember ever making it, and did not think any of it was in his handwriting. Appellant complains that the inquiry, in the manner it was made, and after the denial of the witness that the entry was in his handwriting, was prejudicial to him. We do not think so. It was proper in cross-examination for the people to contradict the witness' statement on direct examination that he did not see appellant after the night of the burglary until he met him at Peoria, by calling his attention to an entry found in a diary in all other respects confessedly kept by the witness, tending to show that they had left Los Angeles together. It is true that the witness denied that the entry was in his handwriting, but, as it was found among other entries in the diary made by him, this was sufficient warrant for asking the question directly and pointedly as it was asked. Even if it were error to ask it, it was not such prejudicial error as would warrant a reversal. Whether the appellant and Smith left Los Angeles together next day was not an essential fact in the case necessary to be proven to warrant a conviction. That both of them were together during the day and night of the burglary and left Los Angeles the next day or the day following, and were together in Peoria within about two weeks afterwards, is admitted. How they left Los Angeles, whether separately or in company, was not a matter of grave importance.

The principal ground of complaint, however, is relative to an instruction given by the

court on the matter of intoxication. The court instructed the jury that: "Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution." This instruction should not have been given. It has no relevancy in a trial for burglary. The degree of crime in such a case is not measured by the mental condition of the defendant. Whether he was intoxicated or not is entirely a false quantity to be considered in determining the degree of guilt. The degree is determined solely by reference to the time the felonious entry into the building was made. If in the nighttime, it is burglary in the first degree; if in the daytime, in the second degree. Intoxication has nothing to do with the degree. It is only relevant in considering the question of the intent with which the entry was made, and is to be considered by the jury for the sole purpose of determining whether the person accused was intoxicated to such an extent as to render him incapable of forming the specific criminal intent essential to constitute the crime. But while the giving of such an instruction would be error in a case which properly called for a correct instruction with reference to intoxication as bearing on the question of the intent with which the entry into the building was made, yet in the case at bar the appellant has no ground to complain of the giving of the instruction in question. It was not claimed by him upon the trial that he was intoxicated to such a degree as to render him incapable of forming such criminal intent in entering the building as was essential to constitute burglary. It is true he had been drinking during the day to a considerable extent. He was not sober, but he did not claim that he was so drunk as not to fully know all that happened during the entire afternoon and evening. He gave a full account of all that transpired during that period, with minute detail. It is only on this appeal that his counsel insists that one of the defenses of the appellant was that he was intoxicated on the night of the burglary. Several instructions were asked by the appellant to be given to the jury in his behalf, and they were given; but we find among them no requested instruction on this alleged defense. It is apparent from the entire record that no such defense was urged, and that it is only made now to take advantage of the instruction requested by the people and given by the court, but which was not relevant to any defense made on the trial.

The sole defense relied on by the appellant before the jury was that he did not commit, or in any respect aid in the commission of, the burglary, or enter the room; that he was not with Smith when he entered it, knew nothing of his intention to enter it, did not in any manner participate in the offense, and was not near the Doty

Block when it was committed. His defense was, not that he did not commit the burglary, or, if he did, that he was intoxicated, but solely that he did not commit it or participate in it. In fact, there is no evidence in the case showing that the appellant actually entered the room, and from the instructions of the court and the evidence in the case it would appear that the appellant was prosecuted and convicted upon the theory that, while he did not actually enter the room, he aided and abetted Smith in his entry of it and perpetration of the crime.

Several other errors are alleged, mainly in the admission of evidence, but we do not think they have any merit or require particular mention.

The judgment is affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.

(141 Cal. 437)

CURRAN v. HOLLAND. (S. F. 3,525.)

(Supreme Court of California. Dec. 28, 1903.)

PRINCIPAL AND AGENT — CONTRACT — PAROL EVIDENCE — CONSTRUCTION — FINDING — CONFLICTING EVIDENCE—SUPREME COURT.

1. In an action on a contract signed by G. as principal and H. as witness, parol evidence is admissible to show that G. had no interest in the matter further than to act as a disguise for H., and that the latter was the real party in interest.

2. In an action on a contract providing that plaintiff was authorized to negotiate a loan on defendant's property for which defendant was to pay plaintiff \$500 commissions, authorizing the mortgagee to pay plaintiff that sum out of the loan, and providing further that plaintiff's receipt therefor should be good, the evidence was conflicting whether the commission was to be paid only on condition that the deal went through, but it did not appear that plaintiff ever made such agreement. *Held*, that a finding that the commission was to be paid when plaintiff procured a party ready and willing to make the loan, though the deal did not go through, could not be disturbed by the Supreme Court on appeal.

Commissioners' Decision. Department 2. Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by Charles S. Curran against A. P. Holland. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Sam Bell McKee, for appellant. A. Everett Ball, for respondent.

COOPER, C. Action to recover commission for procuring a loan under an express contract. Findings were filed and judgment entered in favor of plaintiff. This appeal is from the judgment and an order denying defendant a new trial.

It is claimed that the court erred in allowing parol evidence for the purpose of

¶ 1. See Evidence, vol. 20, Cent. Dig. §§ 1906, 1910, 2112.



showing that defendant was the principal in the written agreement as to plaintiff's commission. The agreement was as follows:

"This is to certify that I, David Gregor, hereby authorize Charles S. Curran to negotiate for me a loan upon my property at the northeast corner of Broadway and Tenth Streets, Broadway, Oakland, Alameda County, Cal., for the sum of \$70,000, for which I agree to pay him the sum of \$500 as commission, and I hereby authorize the mortgagee to pay the same to said Curran out of said loan and said Curran's receipt therefor shall be good.

"Witness my hand this 14th day of January, 1902.

"David Gregor.

"Witness: A. P. Holland."

There is no question but that plaintiff performed the services and procured a party ready and willing to make the loan, nor is it questioned that David Gregor is liable by the express words of the agreement. The testimony outside the writing showed that defendant was the real party in interest, and that Gregor signed as agent or for the purpose of keeping secret the name of defendant. This was done at the defendant's request. Defendant's own version of the transaction is as follows: "I had an arrangement with Mr. Mott as to the obtaining of a loan regarding this property. Some time in December I went to Mr. Mott, and asked him if he could procure a loan of \$75,000 on property on Tenth and Broadway. I made it a condition of the loan that I should not make the application, nor should I sign the mortgage papers; and I told him that, if he succeeded in getting the loan, and the deal went through, I explained to him that I had not yet got the property. I didn't at that time have it. If the deal went through, I would pay him \$500. \* \* \* So Gregor and Judge went up to Curran's office, which was the first time I had ever been there. \* \* \* I didn't state or acknowledge that I was the principal in this matter. I had very good reasons for not doing so. \* \* \* I know that the agreement that was signed was for money that was to be used by me for the purchase of this property. \* \* \* When we went into Curran's office we had a general conversation that might have been had under circumstances of that sort. We talked to Mr. Curran about the loan. \* \* \* The money they were trying to borrow was for my use to purchase this property, and I presume I was subsequently notified that they had obtained the loan of \$65,000 flat and \$5,000 in installments, and it was satisfactory to me." The evidence was clearly admissible. The services were performed for defendant. He was the party interested, and who desired to use the money in buying property. Gregor does not appear to have had the remotest interest in the matter. Defendant wanted it fixed so that he would

not be known in it. He said he "had very good reasons for not doing so." If Gregor is responsible, it would be a great injustice to hold him liable for services performed by plaintiff for defendant, when Gregor appears to have acted merely for the accommodation of defendant. If he is not responsible, it would be an injustice to plaintiff to deprive him of the right to recover from the real party in interest. It is said in Reinhard on Agency, § 223: "While extrinsic evidence, except in the instances heretofore pointed out, will not generally be received to vary or contradict the contents of a written instrument, such evidence is always admissible to charge with liability an undisclosed principal, or one who, though disclosed, is not named in the instrument." See, also, *Id.* §§ 303, 328, and cases cited; *Story on Agency*, § 466a. The Supreme Court of the United States in *Ford v. Williams*, 21 How. 289, 16 L. Ed. 36, said: "The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and, notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction." In *Exchange Bank v. Hubbard*, 62 Fed. 116, 10 C. C. A. 295, it is said: "In order to charge the real principal, it is always competent, in whatever form a parol or written contract is executed by an agent, to ascertain by evidence dehors the instrument who is the principal; whether it purports to be the contract of an agent or is made in the name of the agent as principal." See, also, *Higgins v. Senior*, 8 M. & W. 834; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314; *Coleman v. Bank*, 53 N. Y. 393; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617. Nor does it make any difference in this case that defendant signed the agreement as a witness. He was none the less the real principal. It was his intention by so doing to disguise his real character, as he did not want to be known in the matter. As to the contention that the commission was to be paid only on condition that the deal went through, there is at most a conflict in the evidence. It does not appear that plaintiff ever made such agreement, and the writing certainly makes no such condition. The court below heard the evidence and saw the witnesses, and as its finding is based upon sufficient evidence to support it, we cannot disturb it. The nonsuit was properly denied. The evidence sustains the findings complained of, and it would serve no useful purpose to discuss it at greater length.

The judgment and order should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(141 Cal. 441)

MILLER v. GRUNSKY. (Sac. 795.)

(Supreme Court of California. Dec. 28, 1903.)

BOUNDARIES—DEEDS—DESCRIPTION—CALLS  
—MONUMENTS—DISTANCES—INCONSISTENCY—EVIDENCE—COMPETENCE.

1. Code Civ. Proc. § 2077, prescribes rules for construing the descriptive portion of a conveyance when the construction is doubtful. Subdivision 2 provides that, when ascertained monuments are inconsistent with the measurements of lines, the monuments are paramount; and subdivision 6 provides that when the description refers to a map, and the reference is inconsistent with other particulars, it controls if it appear that the parties acted with reference to the map. *Held*, that where there was an inconsistency between the location of a certain ranch according to the United States plat of the township and according to the distance of the call for a boundary of the ranch in a swamp land patent, but the patent referred to a certain survey made by the state officials, which survey showed the ranch where the call in the patent placed it, the survey controlled.

2. It was not prejudicial error as against plaintiff, who claimed that the United States plat should control, to admit state surveys of the same land made prior to plaintiff's application to purchase, there being evidence that at the time they were made the boundary of the ranch was marked, according to a subsequently rejected survey, by monuments, placed according to the call of the patent, and the law not requiring that where state lands have been previously surveyed there shall be a resurvey on an application for purchase, and it being a reasonable presumption that the survey accompanying plaintiff's application was compiled from the previous surveys.

3. Where, in a suit to quiet title, plaintiff was entitled to recover if the lands involved were embraced in the description in a patent to him, but otherwise defendant, who claimed under a subsequent certificate of purchase, was entitled to recover, the erroneous admission in evidence of an alleged protest of plaintiff against the issuance of a certificate of purchase to the defendant was harmless.

McFarland and Henshaw, JJ., dissenting.

On rehearing. Affirmed. For opinion in department, see 66 Pac. 858.

Mastick, Belcher & Mastick and W. B. Treadwell, for appellant. Stanton L. Carter, for respondent.

BEATTY, C. J. Plaintiff sues to quiet his title to the west 20 chains of section 31, and of that part of section 30 lying south of the San Joaquin river, in a certain township in Merced county. Defendant disclaims as to the east  $6\frac{1}{2}$  chains of the premises described in the complaint, but asserts title to the remainder, so that the tract in dispute is the west  $13\frac{1}{2}$  chains of section 31, and of that part of section 30 south of the river. The land is swamp and overflowed, and part of the grant of the United States to the state of California. Each of the parties claims under the state—plaintiff under a patent issued in December, 1873, defendant under a certificate of purchase issued in 1887. If the

land in dispute was conveyed by the patent, the plaintiff has the title; otherwise it belongs to the defendant. The trial court found for the defendant, and entered judgment accordingly. Plaintiff appeals from the judgment upon the ground that the calls of the patent establish his title conclusively, and that the court erred in admitting over his objection incompetent evidence to explain, to vary, and to contradict the patent.

The evidence so objected to consisted principally of the plats and field notes of official surveys made by the county surveyor of Merced county as a basis for the issuance of the patent under which plaintiff claims. These plats and field notes were introduced for the purpose of aiding the court in determining which of two conflicting calls in the patent should prevail. The description in the patent, so far as material, reads as follows: "Survey No. 267 Swamp and Overflowed Lands, Merced County, Township No. 7 South, Range No. 10 East, Mount Diablo Meridian: sections Nos. 19, 20, 28, 29, 30, 31, 32 and 33, portions of said sections, and more particularly described in field notes of said survey, as follows: Beginning at the southeast corner of the southwest quarter of section thirty-three (33) in township seven (7) south, range ten (10) east, Mt. Diablo meridian, thence west 40.00 chs., thence north 20.00 chs., thence west 20.00 chs., thence north 40.00 chs., thence west 60.00 chs., thence south 20.00 chs., thence west 40.00 chs., thence south 20.00 chs., thence west 20.00 chs., thence south 20.00 chs., thence west 6.50 chs. to the Orestimba Rancho, thence N. 0 degrees 20 minutes, E. 126.50 chs., to the San Joaquin river." The remaining calls, which meander the river eastwardly to a designated point and thence south to the place of beginning, may, for the present, be disregarded.

A careful comparison of this description with the government township as defined by the public laws of the United States, of which we take judicial notice, will demonstrate the fact that it does not include, in terms, any portion of the west 13.50 chains of sections 30 and 31, the tract in controversy. It will be seen that it carries the southern boundary from the point of beginning, by various courses, to the southeast corner of the southwest quarter of the southwest quarter of section 31, which, if the township is of the size prescribed by law, we know is just 20 chains east of the southwest corner of the section and of the township. From this point it runs west only 6.50 chains (to the Orestimba Rancho), and thence north, 20 minutes east, 126.50 chains to the river. Now, as to the call for the Orestimba Rancho, which it is contended by appellant controls absolutely, and by an inflexible rule, all inconsistent calls (for courses, distances, and quantity). It is to be observed that we can know nothing judicially of its location. Looking to the patent alone, we would be

bound to assume that a line or corner of the rancho is to be found at a point 6.50 chains west of the southwest corner of the southwest quarter of the southwest quarter of section 31 (this point is hereinafter referred to as "the point noted"), for there is where the description in the patent places it, and it is quite consistent with every law and public record of which we can take judicial notice that the northeast corner of the rancho may coincide with that point. This fact was thoroughly understood by plaintiff, and accordingly he did not in the trial court rest his case upon his patent alone. If he had done so, he must inevitably have been nonsuited. To make any case at all it was necessary for him to introduce evidence aliunde the patent to show that the Orestimba Rancho had an existence, and that it was located more than 6.50 chains west of the point noted. The evidence which he introduced for this purpose was a duly certified copy of the official plat of the United States survey of the township, upon the margin of which in the blank space west of the township line appear the words "Orestimba Rancho." Conceding that this evidence was competent and sufficient to show that there was a tract known as the Orestimba Rancho, the eastern boundary of which coincided with the western boundary of sections 30 and 31, it did not prove such facts as of any earlier date than July 26, 1870, the date of the official approval of the plat, and this date it will be found is material. Nor did this evidence show that the Orestimba Rancho, wherever located, was marked by any inclosure or visible monument whatever. In short, nothing was shown by this evidence except the naked fact that at the date of plaintiff's patent there was a map of the township on file in the office of some federal official (the Surveyor General or registrar of the local land office), upon which the Orestimba Rancho was platted on the west of the township, i. e., 20 chains instead of 6.50 chains west of the point noted. This map is not referred to in the patent, and there is no evidence, or ground to presume, that it was used or examined by any of our state officials concerned in the preparation and issuance of the patent. Considering the character of this evidence offered by plaintiff for the purpose of locating the Orestimba Rancho 20 chains instead of 6.50 chains west of the point noted, thereby producing an ambiguity of description where none appeared before, and all for the purpose of controlling the terms of the patent, it seems singularly inconsistent for him now to contend that the court erred in admitting and considering evidence of the same character when introduced by the defendant, for the purpose of showing that on the maps actually used by our state officials, and referred to in the patent, the eastern boundary of the Orestimba Rancho was located where the call placed it, i. e., 6.50 chains west of the point noted.

Before stating the particulars of the evidence, which plaintiff contends was erroneously admitted over his objections, it may be well to call attention to the fact that the sale of state lands is regulated by statute. When plaintiff's application to purchase was made, in October, 1868, the statute in force was an act passed in April, 1868—a general revision of previous acts regulating the sale of state lands. St. 1867-68, p. 507, c. 415. It contains detailed and minute regulations regarding applications to purchase, and all the steps leading up to the issuance of the patent. For the sale of swamp land the process in brief was as follows: The applicant was required to file with the surveyor of the county where the land was situate an affidavit containing, among other things, a description of the land he desired to purchase, whereupon it became the duty of the surveyor to make and record (except when surveys had already been made) a survey of the land applied for, and to complete and forward to the Surveyor General duplicate copies of such "survey, plat, and field notes," together with the application to purchase. If the surveyor general approved the survey, he issued to the applicant a certificate of his approval, upon presentation of which to the county treasurer the purchase money (\$1 per acre) was accepted and receipted for. Upon proof of payment the Surveyor General certified all the facts to the Governor and Secretary of State, who signed and sealed a patent containing, among other recitals, one to the effect that the "lands hereinafter described have been duly and properly surveyed in accordance with law." This recital, in itself, would be sufficient to connect the description in the patent with the plat and field notes constituting a part of the records of the county surveyor's and Surveyor General's offices; but it will be seen from that portion of the description above quoted from this patent that it makes direct reference to "Survey No. 267, Swamp and Overflowed Lands." This reference to the survey is necessarily a reference to the plat which is an essential part of it, and thereby the description contained in the patent is brought within the operation of subdivision 6 of section 2077 of the Code of Civil Procedure, prescribing the rules for construing the description of lands. That subdivision reads as follows: "When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars."

This rule, of course, applies to ambiguous descriptions—descriptions requiring construction on account of false, conflicting, or equivocal calls—and is peculiarly applicable and absolutely controlling in this case; for, as has been shown, the officers charged with the duty of preparing, executing, and issuing

patents of this character—the Surveyor General, Governor, and Secretary of State—have nothing to guide them in describing the land except the field notes and plat returned by the county surveyor, together with the application to purchase. They must, necessarily, refer to the plat in describing the tract conveyed, and in this case they have actually done so. The plat, therefore, by the express terms of the Code rule, “controls” other and inconsistent particulars in the description, and necessarily determines which of two inconsistent calls must give way whenever it confirms one of them and conflicts with the other. The court, therefore, did not err in admitting plaintiff’s application to purchase and the approved surveys referred to in the patent. Nor was it prejudicial error, if error at all, to admit the prior surveys, made for other parties, of these same lands. Their certificates of purchase had been forfeited (presumably for nonpayment), and Miller’s application was to purchase the lands formerly surveyed for them. The lands having been previously surveyed, the law did not require a resurvey in the field, and presumably the survey accompanying Miller’s application was compiled from the data in the surveyor’s office, consisting of the plats and field notes of the former survey. At all events, there is an exact correspondence between the earlier and later surveys and plats so far as they affect the question before us, and if the survey made for Miller was properly admitted the admission of the others did him no harm, unless he was injured by the additional light they threw on the origin of the mistaken call for the Orestimba Rancho. These earlier surveys, of which the survey for Miller was a mere recompilation, were made in 1865, five years before the government plat of the township was approved—five years, that is to say, before the Orestimba Rancho was located west of the township line according to any evidence that had been introduced in the case at the time when they were offered. They showed that at the time they were made the eastern boundary of the Orestimba Rancho was plainly marked by the posts and mounds of a government survey 6.50 chains west of the point noted, and it was so delineated on the plat of the survey. This fact was subsequently explained by evidence that the rancho had been twice surveyed—once in 1859, and, upon the rejection of that survey, again in 1861. The latter survey—how long after its date does not appear—was finally patented, and then no doubt correctly marked on the township plat at some date prior to its approval in 1870. At the time of the state survey, however, the monuments first erected to mark the boundary of the rancho were still standing—some of them, at least—and this fact explains the call for the Orestimba Rancho at 6.50 chains west of the point noted. The principle upon which the ruling admitting

this evidence may be sustained is illustrated by the decision in *Irving v. Cunningham*, 58 Cal. 306. A deed contained a call for a line running 200 varas to a creek (arroyito). There was no creek upon the course of that line nearer than 500 varas, and the contention was that the natural visible monument must prevail over the call for distance. But it appeared that there was a small gully at about the distance of 200 varas, in which water ran in rainy weather. It was held that the grantor was more likely to have called this gully a creek than to have been so badly mistaken as to the distance, and the call for distance prevailed. So here it not only appears that the agents of the state might have been mistaken as to the boundary of the rancho, but that they were mistaken, and were led into their mistake by the visible monuments of a former boundary. Appellant would have us entirely disregard this natural and excusable mistake, with the consequence of more than trebling the call for distance, and also of violating other important calls of the patent; for, if we extend his southern boundary to the township line, it results in increasing the length of the western line running to the river, changes the courses and distances of the meandering lines along the river from the northwest corner of the survey, and adds 171 acres to the quantity of land contained in the survey as returned and approved, and this 171 acres is land which is sold by the acre, and which has never been paid for.

Further discussion of this point is perhaps unnecessary, for if the admission of survey 267 was not error, as it clearly was not, and if the plat constituting an essential part of that survey proves, as it does, that all parties to this patent understood that the Orestimba Rancho was only 6.50 chains west of the point noted, the admission of other evidence to show how they came to be mistaken, though it may have been superfluous, and even incompetent, could not possibly have been prejudicial.

The proposition advanced by appellant that a patent issued by the state is conclusive as to all matters therein contained, and that extrinsic evidence is not admissible to impeach, vary, or even explain it, etc., if accepted to its full extent would, as we have seen, put him out of court; for his patent not only does not include the land in controversy, but by a description which, read in connection with the law, is exact and definite and complete in itself, clearly excludes it. But qualifying the proposition as it must be qualified, it may be said that the respondent does not controvert it, and we certainly do not question it. A patent is no doubt conclusive between the parties and their privies against any collateral attack, but before it concludes anything it must be construed and its meaning determined, and when it contains conflicting calls they are to be reconciled upon the same principles and by the same

rules that govern the construction of other deeds of conveyance. This proposition is as vital to appellant's contention as to that of the respondent. The whole difference between them consists in the different rule of construction for which they contend. Appellant claiming that the Orestimba Rancho, as platted on the township map, was, at the date of the patent, a monument, insists that the absolute and inflexible rule of law requires all conflicting calls for distance, etc., to give way to the call for the rancho.

But this was never an absolute and inflexible rule. On the contrary, it has always been subject to exceptions and qualifications of various kinds, and the books are full of cases in which the call for visible monuments has been made to yield to other calls in order to carry out the true intention of the parties to conveyances of lands. And our statute (Code Civ. Proc. § 2077) has adopted the rule with all its exceptions and qualifications. It is true that, among other rules prescribed by this section of the Code, it is provided in subdivision 2 that when permanent and visible ascertained boundaries or monuments are inconsistent with the measurement either of lines, angles, or surfaces, the boundaries or monuments are paramount, but this, like every other rule embraced in the section, is subject to the qualification contained in the first clause, that they control only when there are no other sufficient circumstances to determine a doubtful construction, and it is further subject to the rule prescribed by the sixth subdivision, that a map referred to in the deed, and with reference to which the parties acted, controls other particulars. In view of this statutory rule it is hardly necessary to quote the decisions, but this court has more than once resorted to an accompanying map for the purpose of construing a deed. In *Serrano v. Rawson*, 47 Cal. 55, the court said: "In determining the location, the plat of the survey, which is a part of the patent, is often entitled to as much, and perhaps to more, weight than the courses and distances. *Vance v. Fore*, 24 Cal. 435. In all cases of conflicting descriptions, the object of the court is to ascertain the intention of the parties, and the entire description contained in the instrument should be resorted to for the purpose of ascertaining the intention."

Numerous decisions here and elsewhere might be quoted to the same effect, but to do so would unnecessarily extend this opinion.

Appellant cites a number of cases to the proposition that when a boundary line is called for it means the true boundary of the tract, and not what the parties may have supposed the lines to be. In every one of these cases the boundary line was the only call; there was no conflicting call corresponding to what the parties supposed to be the true boundary; there was no survey, and no map

or plat; no reference to any line marked by a fence or other visible monument.

There was some other evidence admitted over appellant's objection, but the rulings of the court were correct, except, perhaps, in admitting the alleged protest of appellant against the issuance of a certificate of purchase to the defendant. We do not see how that evidence could have been considered relevant, but it was certainly harmless.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; LORIGAN, J.

SHAW, J. I concur in the foregoing opinion of the CHIEF JUSTICE, and also in the concurring opinion of Mr. Justice VAN DYKE.

VAN DYKE, J. I concur. It is quite true, as claimed by the appellant, that a patent issued by the United States or the state under provisions of law for the disposal of public land is conclusive as to all the antecedent acts required by law to authorize the issuing of the patent, and that the patent cannot be collaterally attacked by showing that any such acts were not complied with. The evidence here in question, however, was not offered by the defendant for the purpose of impeaching, contradicting, or varying the patent, but to aid the court in reconciling the inconsistent calls in the description of the premises conveyed, so as to arrive at the true meaning of the instrument. It is conceded that there is an error in the description, and the question is as to which one of the conflicting calls controls. The appellant contends that the call "to the Orestimba Rancho" constitutes a designation of a monument which controls in the description over the distance, course, and quantity given. The rule governing the construction of descriptive parts of a conveyance has been carried into our Codes. It is declared that when the construction is doubtful, and there are no other sufficient circumstances to determine it, and that there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false does not frustrate the conveyance, but it is to be considered by the first mentioned particular. That when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either lines, angles, or surfaces, the boundaries or monuments are paramount. When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appears that the parties acted with reference to the map. Code Civ. Proc. § 2077, subds. 1, 2, 6. And it is further provided that for the proper construction of an instrument the circumstances under which it was made, including the situation of the subject of the instrument and all the parties to it, may also

be shown, so that the judge may be placed in the position of those whose language he is to interpret. *Id.* § 1860. The reason why monuments, as a general thing in the determination of boundaries, control courses and distances, is that they are less liable to mistakes. But this rule is not inflexible; it ceases with the reason for it, as when the monuments referred to are not known and visible objects on the ground. Grants or conveyances generally are to be interpreted in like manner as written contracts, and should be so interpreted as to give effect to the mutual intention of the parties at the time of the contract or conveyance. The patent in this case recites that it appears by the certificate of the register of the state land office (giving the date and number) that the tracts of swamp and overflowed lands thereafter described have been duly and properly surveyed in accordance with law, and full payment made to the state for the same, and more particularly described in the field notes of said survey, as follows, etc., then giving the description by courses and distances, containing, as stated, 1,878.26 acres. But to carry the western boundary to the westerly line of the township and the eastern line of the Orestimba Rancho would require 20 chains instead of  $6\frac{1}{2}$ , and would embrace 171 acres more than stated in the patent. Parties to a conveyance are supposed to be on the land or acquainted with the land conveyed, and to have noticed permanent objects constituting the boundary referred to in the description of the property conveyed. Judge Sanderson in *Walsh v. Hill*, 38 Cal. 487, speaking on this question of the descriptive parts in a conveyance, says: "In conclusion, upon this branch of the case, we deem it proper to say that in the construction of written instruments we have never derived much aid from the technical rules of the books. The only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it." It does not appear that there is any monument or object on the ground at the west line of the township and the east line of the Orestimba Rancho, as finally located, but that the same is an imaginary line. It is different, therefore, from a case where there is a permanent object or monument on the ground like a river, or stream, or point of rocks, or known tree, or anything of the kind. There is no reason, therefore, why the call "to the Orestimba Rancho" should control all the other parts of the description inconsistent with it, to wit, courses, distances, and quantity of land conveyed. In *Pico v. Coleman*, 47 Cal. 65, it is said: "In construing a deed all its parts must be consulted, and it must be read in the light of surrounding circumstances, and the intention of the par-

ties arrived at in this way." In *Serrano v. Rawson*, 47 Cal. 55, the court says: "In determining the location, the plat of the survey, which is part of the patent, is often entitled to as much and perhaps to more weight than the courses and distances. In all cases of conflicting description, the object of the court is to ascertain the intention of the parties, and the entire description contained in the instrument should be resorted to for the purpose of ascertaining the intention. Courts will give effect to every part of the description if possible; but, if this cannot be done, they reject that which is repugnant to the general intent of the instrument." And it is also the rule in the interpretation of contracts or conveyances that where uncertainty exists in the contract as between a public officer or body, as such, and a private party, it is presumed all uncertainty was caused by the private party. *Civ. Code*, § 1654. In this case it cannot be presumed that the state or its officers intended to convey by patent to the plaintiff 171 acres more than he paid for, and any mistake in the description which would result in that is presumed to have been caused by the grantee, and not so intended by the grantor. The plaintiff applied to purchase "a certain tract of swamp and overflowed land in Merced county, lying and situate on the left bank of the San Joaquin river, being the lands surveyed for William Wilson, R. M. Wilson, Noah Stitts, N. B. Eldred, and William Miles, in township 7 south, range 10 east, base and meridian of Mount Diablo." In the field notes of the survey for William Wilson, the tract of land bordering on the premises in controversy, it is stated by the surveyor that there was "a well preserved cor. of Orestimba Rancho found 40 chains north, 20 minutes east, of the S. E. cor. of the Rancho." The plat of the survey in question shows a mound at the corner mentioned, which is made the southwest corner of the land so surveyed, and a line from this to the San Joaquin river, as indicated on said map, leaves a strip of land between that and the township line (being the land in controversy), which is marked on said map as part of the Orestimba Rancho. It is quite reasonable to suppose, therefore, that the designation "to the Orestimba Rancho" in the patent was intended to refer to this line from the mound to the river, as indicated by the survey for Wilson. This would reconcile the various calls in the description of the land conveyed. In view of the discrepancy in question, it was entirely proper to admit in evidence the application of the plaintiff to purchase the land, as well as the surveys of the parties from whom he purchased, as they would enable the court to determine which of the calls was erroneous.

We dissent, and adhere to the opinion delivered in department (66 Pac. 858): *McFARLAND, J.; HENSHAW, J.*

(141 Cal. 432)

In re HITTELL'S ESTATE. (S. F. 3,490.)

HITTELL et al. v. GREER.

(Supreme Court of California. Dec. 26, 1903.)

WILL—JOINT INTEREST—TENANCY IN COMMON—SURVIVORSHIP.

1. Under Civ. Code, § 1350, providing that a devise or legacy to more than one person vests in them as owners in common, sections 685 and 683, defining "interest" in common and "joint interest," and section 686, providing that every interest created in favor of several persons shall be in common, unless expressly declared a joint interest, a bequest of all the testator's estate to two persons creates a tenancy in common.

2. A bequest to two persons (naming them) "with whom I live, and whom I regard and treat as my adopted daughters," is not a bequest to a class, entitling one to the entire bequest on the death of the other before the death of the testator.

3. Where a will bequeathed the entire estate to two persons, stating that the testator regarded them as adopted daughters, and giving reasons for making no bequests to his heirs, to the effect that they were already provided for, on the death of one devisee before the testator's death the court will not construe the will to create a right of survivorship in the other, in order to carry out the intent of the testator that his heirs should not take under the will.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings on the estate of John S. Hittell, deceased. From a decree distributing the whole estate to Anna P. Greer, Theodore H. Hittell and others appeal. Reversed.

Theodore H. Hittell, for appellants. Smith & Pringle and W. B. Kohlmyer, for respondent.

McFARLAND, J. The deceased died testate, and this appeal is by heirs at law from a decree of distribution by which the whole of the estate is distributed to the respondent, Anna P. Greer, a devisee named in the will. The contention of appellants is that only one undivided one half of the property of the deceased went to the respondent under the will, and that the other half was undisposed of, and vested in the heirs at law, and this contention must be sustained.

There was before the trial court a photographic copy of the will, and it is in the record on appeal. It is contended by appellants that a certain word in the will is "daughter" (in the singular), and by respondent that it is "daughters" (in the plural). The court below did not expressly find whether the word is singular or plural. The only evidence on the point, outside of what the will itself shows, is the testimony of one Ames, who was called by respondent as an expert on handwriting. He testified that the word "was, as a physical fact, written 'daughter,' in the singular," and then went out of the realm of expert testimony to say that, taking the context, the grammatical construction of the sentence, etc., "he was of the opinion that it was intended to mean

'daughters.'" The court below must have treated the word as plural, for otherwise there would be no pretense for the theory upon which the decree rests. But as, in our opinion, the contention of appellants must be maintained whether the word be held to be singular or plural, we will not pass on that question, and, for the purpose of this opinion, will take it to be "daughters," and so write it in the part of the will hereinafter copied.

The will, omitting the parts which are merely formal or not material here, is as follows: "I bequeath all my real and personal property to Anna P. Greer and Mary M. Greer with whom I live at this house 1216 Hyde St., and whom I regard and treat as my adopted daughters. I give nothing to my brother Theodore because I suppose him to be rich; I give nothing to any of his children,—Catherine, Charles or Frank, because he can provide for them; I give nothing to my sister Mary H. Killinger or to her children, Charles, Flora and John, for a similar reason; and nothing to my niece Mary H. Kingbury because I suppose her husband can provide well for her." The will was made September 8, 1897, and the testator died March 9, 1901. Mary M. Greer, mentioned in the will, died on February 23, 1900—more than a year before the death of the testator. There were no findings or evidence of facts as to the circumstances under which the will was made that give any extrinsic aid to its interpretation. The will itself shows that at the time of its execution the testator and the devisees were living together at a certain place, and the only additional evidence as to that matter was that they had been so living together for "some ten years." It also appears that Mary was "about forty years old," and that Anna was "older"; that they were sisters; that the testator continued to live with Anna until his death; that he and they were unmarried people; and that there "was no relationship of blood or marriage between said testator and either said Anna P. Greer or Mary M. Greer." These are the only facts not shown by the will, and they throw no light upon its meaning. What it means must therefore be gathered from what appears upon its face.

The first apparent and obvious impression which a reading of the instrument leaves on the mind is that the will makes a devise to two persons, Anna and Mary, as tenants in common; that, if they had both outlived the testator, they would have taken as tenants in common, and if, afterwards, one of them had died, her estate would have gone to her heirs or devisees, and not to the other cotenant; and that, upon the death of Mary during the life of the testator, the testamentary disposition to her failed or lapsed, in which event it went to the heirs at law of the testator. Our Code expressly provides that "a devise or legacy given to more than one person vests in them as owners in

common" (Civ. Code, § 1350); that "an interest in common is one owned by several persons not in joint ownership or partnership" (Id. § 685); that, "a joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy" (Id. § 683); and by section 686, Id., that every interest created in favor of several persons is an interest in common, unless a joint interest created as provided in section 683 or held in partnership. By the will in question here, no joint tenancy or right of survivorship of any character is declared or intimated. It creates a clear tenancy in common.

Counsel for respondent, as we understand them, do not seriously contend that the will creates the strict legal relation of joint tenancy. But they contend that their client gets the whole estate, not as a surviving joint tenant, but as the remaining person of a "class." Their contention is that the devise was to Anna and Mary as a class, and that the case comes within the rule that, where there is a devise to a class, those of the class who are in existence at the death of the testator take the whole estate. We think that this position is wholly untenable. The devise in the case at bar is simply to two named individuals, and there is no designation of a "class," within the meaning given that word by the authorities. The statement that the devisees were persons with whom he lived, and treated as his adopted daughters, is of no significance, except, perhaps, as a reason given for his bounty. A common instance of a devise to a class is where a testator gives property, generally to the "children" of a certain person, without naming them—as to "the children of my brother John"; and in such a case it is held that the devise is to such children of John as will be in existence at the time of the testator's death. There are cases where in the devise the individuals and the class are both named—as, for instance, where it is "Charles, James, and Robert, children of my brother John"; and in such cases courts have had some difficulty in determining whether the devise was to the individuals named or to the class. In such a case the general rule is that the persons named take as individuals, and not as a class, unless some other clause of the will, or some evidence outside of it, calls for a different construction. The result of the authorities—and counsel for each side have cited a large number of them—is correctly stated in Page on Wills, § 543, as follows: "Where there is a gift to a number of persons who are indicated by name, and also further described by reference to the class to which they belong, the gift is held prima facie to be a distributive gift, and not a gift to a class;" and, after citations in his notes, he says: "In such cases, if one of the

beneficiaries dies before the testator, there is therefore no right of survivorship to the other named beneficiaries." Indeed, counsel for respondent admit that "a denominative gift to members of a class, without more, is not a gift to the class." Therefore, in the case at bar, even if a class had been named, the gift would have been to the individuals, because there is nothing in the other parts of the will, or in any extrinsic evidence, showing a different intent, and there are no operative words creating any right of survivorship. But as before stated, there was no class named, and this fact is an insurmountable obstacle in the way of respondent's contention.

Although the will has no operative words to create anything other than a tenancy in common, it is contended that a right of survivorship should be judicially forced into it in order to carry out the intent of the testator, because, it is said, the reference in the will by the testator to his relatives, who were his heirs at law, showed that he did not intend that they should have any of his property, while, if there be no survivorship, one-half of his estate would go to such heirs. We see no merit in this contention. The will was made in view of conditions existing at the time of its execution, and as he gave all of his property to the two women, both of them living, of course he intended at that time, and under existing circumstances, that his heirs should take nothing. It was quite natural that, having given nothing to any of his blood relatives, he should state his reasons for his conduct in that respect. These reasons did not intimate any hostility to his relations. They were simply that he supposed them to be well provided for financially. As in the case of innumerable wills, the testator did not anticipate changed conditions, and did not provide for the event of the death during his lifetime of one of the named devisees, which he could easily have done, if he so desired, by giving the property to them, or to the survivor of them. What his actual intent may have been after the conditions were changed by the death of Mary, we have no means of knowing, except from the fact that he allowed the will to stand as originally executed. He may have thought that one-half of his estate would be sufficient for the wants of the remaining woman. At all events, we must apply the law to the will as it reads, and the fact of the death of Mary before that of the testator; and, thus applying it, the conclusion clearly follows that the living devisee, Anna, took one undivided half of the estate, and that the other half vested in the heirs at law.

The decree of distribution appealed from is reversed.

We concur: LORIGAN, J.; HENSHAW, J.



(141 Cal. 466)

BRUSH v. SMITH et al. (S. F. No. 3,289.)  
(Supreme Court of California. Dec. 29, 1903.)  
JUDGMENTS—COLLATERAL ATTACK—JUSTICE  
OF THE PEACE—EXECUTION.

1. Where a justice of the peace had jurisdiction of the parties and subject-matter, the judgment was not void because the complaint did not in fact state a cause of action; and such judgment was not subject to collateral attack in an action to reclaim property sold under execution issued on such judgment.

2. An execution reciting that judgment was recovered "in Justice B.'s court of S. township," instead of reciting that it was recovered in the justice's court of S. township, was amendable, and it would be accorded the same effect, with reference to acts done under it, as if it had been amended.

Commissioner's Decision. Department 2.  
Appeal from Superior Court, Sonoma County;  
S. K. Dougherty, Judge.

Action by J. H. Brush against J. H. Smith and others. Judgment for plaintiff, and defendants appeal. Reversed.

R. W. Miller, J. A. Barham, and Ed. C. Barham, for appellants. R. F. Crawford and Thos. Rutledge, for respondent.

COOPER, C. This action was brought to recover the possession of certain cattle described in the complaint, or the value thereof in case a delivery cannot be had. The case was tried before the court, and findings filed, upon which judgment was ordered and entered for plaintiff. Defendants prosecute this appeal from the judgment and an order denying their motion for a new trial.

The facts are as follows: In September, 1899, defendant King commenced an action against the plaintiff in the justice court of Santa Rosa township to recover the sum of \$299.99, besides interest. The complaint in said case, after being properly entitled, alleged: "That on or about the 19th day of September, 1899, at Santa Rosa, California, the above-named defendant had and received of this plaintiff, to the use and benefit of the defendant, the sum of \$299.99 gold coin of the United States; that the defendant has not paid the same, nor any part thereof; that said sum of \$299.99 is due, and remains wholly unpaid." Judgment was prayed for for said sum, with interest. A summons was duly issued by the said justice, and personally served upon the plaintiff (who was defendant in said action). He made default, and thereupon judgment was duly entered against him for the amount claimed in the complaint. He then moved in said justice court to set aside the default judgment, and his motion was denied. He afterwards appealed from the said judgment to the superior court of Sonoma county, and the judgment rendered in the justice court was affirmed, and became final. An abstract of the justice judgment was filed in the office of the county clerk of Sonoma county, and said judgment duly dock-

eted therein. Plaintiff did not pay the judgment so docketed against him, and, at the request of defendant King an execution was issued in January, 1901, and delivered to defendant Smith, as sheriff of Mendocino county, with directions to levy upon the cattle described in the complaint in this case. The cattle belonged to plaintiff (defendant against whom the execution issued), and defendant Smith in his official capacity<sup>1</sup> levied the said execution upon said cattle, and sold them to satisfy the said judgment held by defendant King against plaintiff. The taking was by virtue of the said execution, and not otherwise. The main contention of plaintiff, upon which the court below decided in his favor, is that the judgment rendered in the justice court is void for the reason that the complaint therein does not state facts sufficient to constitute a cause of action. The complaint therein is claimed to be defective for the reason that the money is alleged to have been paid and received "to the use and benefit of the defendant," instead of plaintiff. If this were not clearly a clerical error, as the context of the complaint shows it to be, it would not avail the plaintiff herein. This is a collateral attack on the judgment in the justice court, and it is too well settled to need citation of authorities that a judgment cannot be collaterally attacked unless it is void. Of course, if it is void, it is in legal effect no judgment, and in such case an execution upon it would not vitalize it, and would be but waste paper. Such an execution would not protect defendant Smith if he had notice that the judgment was void, nor would it protect any one aiding and assisting him. A judgment is not void if the court has jurisdiction and power to grant the relief contained in the judgment. In this case it appears that the amount claimed in the justice court was less than \$300, exclusive of interest, and the justice court therefore had jurisdiction of the subject-matter, and power to enter judgment in such case. The summons was personally served upon the defendant in said action in the justice court, and the court thereafter had jurisdiction of his person. In fact, it is not seriously claimed that the justice court did not have jurisdiction of the subject-matter and of the defendant against whom the judgment was entered, but it is claimed that the complaint was wholly insufficient.

Whether the complaint states a cause of action or not was for the court of original jurisdiction to determine, and it was within the province of such court to allow the pleading to be amended. If the court below should hold a complaint sufficient, when, as a matter of law, it failed to state facts sufficient to constitute a cause of action, such ruling would be erroneous; but nevertheless the court had jurisdiction. It had jurisdiction to determine the question, and to determine it wrong as well as right. If it committed error, the remedy was by appeal. In

<sup>1</sup> See Justices of the Peace, vol. 81, Cent. Dig. § 409.

this case the plaintiff did not appear in the justice court, although notified by the summons and complaint that, if he did not do so, judgment would be taken against him for \$299.99, and interest. If the complaint was fatally defective, he had his remedy by appeal. He did appeal, and the judgment of the justice court was affirmed by the superior court. The sufficiency of the complaint is not a conclusive test of the jurisdiction of the justice court. *Crane v. Cummings*, 137 Cal. 202, 69 Pac. 984; *In re James' Estate*, 99 Cal. 376, 33 Pac. 1122, 37 Am. St. Rep. 60; *Dryden et al. v. Parrotte et al.* (Neb.) 85 N. W. 287; *North Pacific Cycle Co. v. Thomas (Or.)* 38 Pac. 307, 46 Am. St. Rep. 636. In the latter case the correct rule is stated by Bean, C. J.: "If the object of a plaintiff can be ascertained from the allegations of his complaint, and the court has power to grant the relief demanded, and jurisdiction of the parties, the judgment is not vulnerable to a collateral attack, although the complaint may in fact be bad in substance." The plaintiff now claims that the writ of execution was irregular and defective on its face, for the reason that it recites that judgment was recovered "in Justice John Brown's court of Santa Rosa township, county of Sonoma," instead of reciting that it was recovered in the justice's court of Santa Rosa township. If plaintiff could now raise such question when he failed to notify the sheriff of any such alleged defect, but notified him that the execution was issued upon a void judgment, we deem the objection too technical to merit discussion. The writ was certainly amendable in the respect pointed out, and in such case it will be accorded the same effect with reference to acts done in execution of it as if it had been amended. *Brann v. Blum* (Cal. March 19, 1903) 72 Pac. 168; *O'Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389.

It follows that the judgment and order should be reversed.

We concur: HAYNES, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order are reversed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(141 Cal. 427)

**SANCHEZ v. FORDYCE et al.** (L. A. 1,389.)  
(Supreme Court of California. Dec. 26, 1903.)  
**OFFICERS—ELECTION—WRONG NOTICE OF ELECTION—STATUTES—CONSTITUTIONALITY.**

1. Those sections of an act which were amended by the county government act of 1901 (St. 1901, p. 686, c. 234) having been republished as amended, there was a compliance with Const. art. 4, § 24, requiring an act revised or section amended to be published at length as amended.

2. County government act (St. 1901, p. 686, c. 234, § 56), providing that in all townships having less than 6,000 inhabitants only one con-

stable shall be elected, is authorized by Const. art. 11, § 5, conferring the power, by general and uniform laws, to provide for the election of such township officers as convenience may require, the provision of such section authorizing the Legislature to regulate the compensation of county officers in proportion to duties, and to classify counties by population for this purpose, not affecting such power.

3. Though a township board of supervisors, by proclamation, called for the election of two constables where the statute only allowed one, the election is valid as to one where the statutes (Pol. Code, § 1041; St. 1897, p. 474, c. 277, § 56, as amended by St. 1901, p. 686, c. 234, and St. 1897, p. 474, c. 277, § 58) give notice of the time and place of election and the officer to be elected.

**Commissioners' Decision.** Department 2. Appeal from Superior Court, Ventura County; D. K. Trask, Judge.

Contest of election by E. H. Sanchez against Eugene Fordyce and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

W. E. Shepherd, H. L. Poplin, and Blackstock & Orr, for appellants. M. J. Rogers and Thos. O. Toland, for respondent.

**COOPER, C.** Election contest. Prior to the general election held in November, 1902, the Democratic and Republican parties each nominated two candidates for the office of constable of Ventura township, in Ventura county, and the board of supervisors issued an election proclamation calling for the election of two constables for said township. Respondent was nominated by petition. In the contest the ballots were recounted, and the court found that respondent received the greatest number of legal votes, and judgment was accordingly entered in his favor. The court refused to count any ballot cast on which more than one person's name appeared for the said office of constable.

Appellants state that the record presents two questions of law, which they ask to have decided. First, Was the township entitled to elect two constables? Second, If the township was not entitled to two constables, was there any valid election? It is provided in the county government act of 1901 (section 56, c. 234, p. 686, St. 1901) that "in townships having a population less than six thousand there shall be but one justice of the peace and one constable." The undisputed evidence shows that Ventura township contained, at the time of said election, less than 4,000 population. Appellants do not controvert the fact that the county government act, if valid, gives only one constable to said township, but they claim that the said act is void because it was amendatory of the act of 1897 (St. 1897, p. 452, c. 277), and was not republished as amended. The amended sections of the act were republished as amended, and this was a compliance with section 24, art. 4, of the Constitution. The act was held constitutional in the late case of *Beach v. Von Detten* (Cal.; filed June 23, 1903) 73 Pac. 187, followed in

*Rea v. Von Detten* (Cal.) 73 Pac. 1131, and *Davidson v. Von Detten*, Id. 189. We see no reason to depart from the rule there laid down, nor to repeat the reasons as therein stated. The additional point is here made that, as section 5, art. 11, of the Constitution authorizes the Legislature to "regulate the compensation of all such officers (county officers) in proportion to duties, and for this purpose may classify the counties by population," therefore it cannot directly or indirectly classify the counties for any other purpose than the one purpose of regulating the compensation of county officers. We agree with appellants' counsel that under this provision of the Constitution the Legislature can classify counties but for the one purpose, of regulating the compensation of county officers. It has been so held by this court. *Pratt v. Browne*, 135 Cal. 650, 67 Pac. 1082. It cannot classify townships for the purpose of regulating compensation. But the said section of article 11 expressly confers upon the Legislature the power, by general and uniform laws, to provide for the election or appointment of such township officers as convenience may require. It has, by section 56 of the county government act, done this very thing. It has said that, in all townships of the state having a population of less than 6,000, only one constable shall be elected. It has thus determined that public convenience does not require more than one constable for a township having less than 6,000 population. This determination was a matter of legislative discretion. It has nothing to do with the compensation of constables. It is not a classification of townships for the purpose of regulating the compensation of constables, but a mere provision as to the number of township officers of a certain kind. It is general and uniform, because it applies equally to every township in the state. It is founded upon a reason which might rationally be held to justify the provision. It was said in *McDonald v. Conniff*, 99 Cal. 391, 34 Pac. 73: "It is not necessary that a law shall affect all the people of the state in order that it may be general, or that a statute concerning procedure shall be applicable to every action that may be brought in the courts of the state. A statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special. A statute regulating the rights of married women, or which affects all mining corporations, or confers rights upon a municipal corporation of a certain class, or places restrictions upon all foreign corporations, is a general law." In *People v. Lodi High School District*, 124 Cal. 699, 57 Pac. 662, it was held that an act authorizing school districts having a population of 1,000 or more to establish and maintain a high school in such district was constitutional and not special legislation. It was there said: "The law is general in its

operation, for it applies alike to all cities, incorporated towns, and school districts having a population of one thousand inhabitants or more, and it is general in its purpose, for it gives to all inhabitants of the state similarly situated equal opportunity to avail themselves of the benefits to be derived from these schools." It is said that there is no reason why a township containing a population of 5,999 shall be entitled to only one constable, while a township containing 6,000 is entitled to two. If we were to adopt the above rule, we would destroy the power of the Legislature to classify counties, the power to classify school districts in proportion to population for the purpose of assigning teachers, and the power to make many other provisions which the public convenience may require. The Legislature has provided for several classes of cities, according to population, and not for the purpose of regulating the compensation of the officers thereof, and the power to so classify has never been questioned. It is not easy to determine the exact instant of time when the day ceases and night begins, but for this reason laws are not declared void which prescribe a different penalty for crime committed in the nighttime from those committed in the daytime.

As to the second proposition, the election was valid notwithstanding the proclamation of the board of supervisors called for the election of two constables. The statutes gave notice of the time and place of election and the officer to be elected. *Pol. Code*, § 1041; *County Government Act*, St. 1897, p. 474, c. 277, § 56, as amended by St. 1901, p. 686, c. 234, and St. 1897, p. 474, c. 277, § 58. It is said in *Cooley on Court Lim.* (6th Ed.) p. 759: "When both the time and place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it is to give notice of the election has failed in that duty. The notice to be thus given is only additional to that which the statute gives, and is prescribed for the purpose of greater publicity; but the right to hold the election comes from the statute, and not from the official notice. It has therefore been frequently held that when a vacancy exists in an office which the law requires shall be filled at the next general election, the time and place of which are fixed, and that notice of the general election shall also specify the vacancy to be filled, an election at that time and place to fill the vacancy will be valid, notwithstanding the notice is not given, and such election cannot be defeated by showing that a small portion only of the electors were actually aware of the vacancy or cast their votes to fill it." See, also, *Paine on Elections*, § 384; *The People v. Brenham*, 3 Cal. 487; *Carson v. McPhetridge*, 15 Ind. 327; *Dickey v. Hurlburt et al.*, 5 Cal. 344; *State v. Jones*, 19 Ind. 356,

81 Am. Dec. 403; *Jones v. Gridley*, 20 Kan. 584; *Berry v. McCollough*, 94 Ky. 247, 22 S. W. 78; *The People v. Cowles*, 13 N. Y. 356. It was said in *People v. Brenham*, supra: "The time and place of the election being fixed by law, it may have been the duty of the common council to give notice thereof; and should they fail to do so, or to perform any other duty required prior to the election, a writ of mandamus might issue from the courts commanding them to discharge their duty; but this would not afford immediate relief, and it ought not to be in the power of incumbents in office to prevent the election of their successors, at the time and place prescribed by law, by neglect on their part." We therefore conclude that the law required only one constable to be elected in the township; that the election was valid. It is advised that the judgment be affirmed.

We concur: GRAY, C.; HAYNES, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(141 Cal. 497)

HARRIS v. DUARTE et al. (L. A. 1,075.)

(Supreme Court of California. Dec. 31, 1903.)

APPEAL—FINDINGS—MOTION FOR NEW TRIAL—SPECIFICATIONS AS TO INSUFFICIENCY OF EVIDENCE—SUFFICIENCY—HOMESTEAD—DECLARATION—MISTAKE IN DESCRIPTION—EFFECT.

1. A specification, on motion for new trial, that the evidence was insufficient to sustain the finding that defendant had title to the land in dispute, was sufficient without pointing out the particulars in which the evidence was insufficient.

2. Under Civ. Code, § 1263, providing that a declaration of homestead must contain a description of the premises claimed, and a statement that the person making it is residing on the premises described, a declaration that by mistake does not describe the land on which the party resides is no protection to it as a homestead.

Van Dyke, J., dissenting.

In Banc. On rehearing. Reversed.

For opinion in department, see 70 Pac. 298.

BEATTY, C. J. This is an action to quiet title to a strip of land in Los Angeles about 150 feet in width, bounded on the north by Jefferson street, and extending from Alameda street on the east to the line of Glass' land on the west. In the tract bounded by Jefferson street on the north, Alameda street on the east, the land of Glass on the west, and the land of Stanway on the south there are approximately 11½ acres, and the strip in controversy, containing about 1½ acres, is bounded on the south by the north line of the southernmost 10 acres of the whole tract. Numerous parties were named as defendants,

but as to some the action was dismissed. Others were defaulted and others disclaimed, so that there remained as contestants of plaintiff's title only Bellue and wife. Upon a trial of the issues the superior court found in their favor, and plaintiff appeals from an order denying his motion for a new trial.

The principal ground of the motion was insufficiency of the evidence to support the findings of fact, i. e., that Bellue and wife had, and that plaintiff did not have, title to the premises, and the main contention of appellant is that the superior court erred in refusing to grant a new trial on this ground. Respondents object to any consideration of the evidence in the record upon the ground that the statement on motion for new trial does not purport to contain all the evidence, and does not specify the particulars in which the evidence is insufficient to sustain the findings. We think, however, that the specifications are entirely sufficient. They are as specific as the findings themselves, which, it is true, are of the ultimate facts of ownership and absence of ownership. The findings may be obnoxious to the rule stated in *De Molera v. Martin*, 120 Cal. 544, 52 Pac. 825; but that rule has not been followed in any recent case. I have never deemed it a correct rule, and in the opinion of Justice Shaw, concurred in by Justices Henshaw and Angellotti, in the case of *Bell v. Staacke* (decided November 30th last) 74 Pac. 774, it is unequivocally rejected. It may therefore be understood that *De Molera v. Martin* is, as to this point, overruled. A specification is sufficient when it points to a particular finding, or if the motion is directed against a general verdict, or an omnibus finding that all or certain designated allegations of the complaint or answer are true, or a judgment without findings, in any such case it need be no more specific than the issues distinctly made by the pleadings.

Among the facts clearly established by uncontradicted evidence were the following: By a deed made and recorded August 2, 1886, Frederico Pena conveyed to Marius Bellue the southernmost 10 acres of the tract of land bounded on the north by Jefferson street, south by lands of Stanway, west by lands of Glass, and east by Alameda street; that is to say, he conveyed the south 10 acres of the tract containing 11½ acres. Upon receipt of this deed Bellue entered into possession of the whole of the 11½ acres, inclosing in one body not only the 10 acres described in the conveyance from Pena, but also the strip about 150 feet wide, lying between his 10 acres on the south and Jefferson street on the north. He seems to have supposed that his deed covered the entire tract, and Pena does not seem to have made any claim to the contrary. At all events Bellue claimed the whole, paid taxes on the whole, and constructed his house—a dwelling and store—at the corner of Jefferson and Alameda streets, quite outside of the 10 acres described in

¶ 1. See New Trial, vol. 37, Cent. Dig. § 261.

Pena's deed. In this house he was residing with his wife and three children on May 10, 1894, when his wife made and filed a declaration of homestead, the material portion of which reads as follows: "Know all men by these presents: That I do hereby certify and declare that I am the wife of Marius Bellue, and that I do now, at the time of making this declaration, actually reside with my husband and children on the land and premises hereinafter described. That the land and premises on which I reside are bounded and described as follows, to wit: Being the southernmost 10 acres of that certain tract of land in the southeast quarter of section nine, township two south, range 13 west, S. B. M., bounded on the north by Jefferson street or road, on the south by lands lately or now owned by J. S. Stanway, on the west by lands occupied by one Glass, and east by Alameda street or road." It will be observed that this is the same description contained in Pena's deed, and that it does not cover the land upon which Bellue's house was situate or any portion of the strip in controversy, unless the boundaries given can be drawn to the line of Jefferson street by the statement that the land described was the land on which the declarant was residing. But this we do not think can be done. A declaration of homestead must contain a description of the premises claimed, and a statement that the person making it is residing on the premises described. Civ. Code, § 1263. If the declarant makes a mistake, and gives a description of land upon which she does not reside, her statement that she resides upon the land cannot enlarge its boundaries. The strip in controversy was therefore not exempt as a homestead from the claims of creditors. This being its condition on May 12, 1894, Bellue filed his voluntary petition in insolvency under the state law. On the same day he was adjudged insolvent, and in due course transferred all his property to his assignee, from whom plaintiff derives title to the strip in controversy by various mesne conveyances. Upon this evidence we cannot see how the finding of the superior court in favor of Bellue and wife can be sustained. The premises were not covered by the homestead, and passed to the assignee in insolvency, and from him by regular conveyances to the plaintiff.

There is some question made by respondent as to the validity of the assignee's deed, based upon the absence of proof that he made a full report of his proceedings under the order of sale, and the failure to offer proof that the insolvency court made any order confirming the sale preliminary to the execution of the assignee's deed. We are not cited to any law, and we are not aware of any, which requires a party making title under an assignee in insolvency to offer proof of these matters in support of his deed.

The order appealed from is reversed, and the cause remanded.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

VAN DYKE, J. I dissent, and adhere to the opinion rendered herein in department. 70 Pac. 298.

(141 Cal. 462)

BENSON et al. v. BUNTING. (S. F. 2,845.) (Supreme Court of California. Dec. 29, 1903.)

ACTION TO REDEEM—FINDINGS—SUFFICIENCY—IMPROVEMENTS—INTEREST—STREET ASSESSMENTS—VALIDITY—APPEAL.

1. Where, in an action to redeem from a foreclosure sale, the complaint averred that plaintiffs offered to redeem within a certain time, and also that after receiving the commissioner's deed to the property defendants continuously claimed it free from any right of redemption in plaintiffs, a finding that the latter allegation was true rendered a finding of the truth of the former one unnecessary.

2. A purchaser at a foreclosure sale who makes improvements after the commencement of an action to redeem is not entitled to credit for the improvements.

3. A street assessment against too much land is void.

4. Where the purchaser at a foreclosure sale denied the right to redeem, he was not entitled, on the successful prosecution of an action to redeem, to interest at 2 per cent. per month till the time of actual redemption.

5. Errors prejudicial to respondents not appealing cannot be considered.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by F. R. Benson and others against W. L. Bunting. From a judgment for plaintiffs, defendant appeals. Affirmed.

Edward C. Harrison, for appellant. Ben B. Haskell (William B. Sharp, of counsel), for respondents.

McFARLAND, J. This is an action to redeem certain real property from a sale made to defendant on the foreclosure of a mortgage. Judgment went for plaintiffs, and defendant appeals from the judgment and from an order denying his motion for a new trial.

The case was here once before, and is reported in 127 Cal. 532, 59 Pac. 991, 78 Am. St. Rep. 81, and, as the nature of the action is quite fully stated in the opinion rendered on the former appeal, there is no necessity for a general statement of it here. That appeal was from a judgment in favor of defendant following the sustaining of a demurrer to the complaint, and the judgment was reversed, the court holding that the complaint was sufficient. It was there decided that, on account of certain alleged acts and conduct of the parties, the plaintiffs were entitled to redeem, notwithstanding the fact that the statutory period of redemption had expired before the offer to redeem had been made, and therefore their right to redeem upon proof of the material averments of the complaint is

¶ 2. See Mortgages, vol. 35, Cent. Dig. § 1784.

the settled law of the case, and need not be here discussed.

After the remittitur went down the case was tried by the court without a jury, and certain findings were made. Some of the material findings are attacked as not supported by the evidence; but as to those points it is enough to say that, in our opinion, there was sufficient evidence to warrant each of the findings attacked.

It is contended also that the findings do not support the judgment; but this contention is not maintainable. There is only one point on this branch of the case which we deem necessary to specially notice. It is averred in the complaint that the plaintiffs offered to redeem within a certain time, and the averment is denied in the answer, and it is contended that the findings are deficient because there is no specific finding that they did so offer to redeem. We think, however, that, while the finding might have been more specific, the subject is sufficiently covered by another finding. It is averred in the complaint that on February 1, 1898, appellant procured a deed from the commissioner appointed to sell the property, and that appellant "now claims under said deed, and ever since the making thereof has claimed, to be the owner in fee of said premises free from any right of redemption in the plaintiffs, Margaret Reese, Mary E. Dever, and Lizzie V. Reese, or either of them." This averment was not denied, and the court expressly finds it to be true. It having been thus averred, admitted, and found, it was unnecessary for the court to find, in addition, that respondents had performed the vain act of offering to do what appellant denied them the right to do.

In determining the amount which respondents should pay in order to effect the redemption, the court made certain findings and rulings to which appellant excepts. The court allowed respondents to set up against taxes, etc., paid by appellant, the rental value of the premises while in possession of defendant, at \$20 per month, and this allowance is attacked; but we think the evidence fully warranted the court in fixing that amount.

Appellant contends that he should have been allowed for some improvements which he put on the premises; but the alleged improvements were not made until after this present action had been commenced, and appellant had been informed that respondents denied his ownership of or right to the premises, and, under these circumstances, if he chose to make improvements he did it at his own peril. The principle announced in *Malone v. Roy*, 107 Cal. 518, 40 Pac. 1040, and *Mahoney v. Bostwick*, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175, clearly applies here. Appellant knew that he got into possession against the consent and in hostility to the claims of respondents, and he was not entitled to recover from the latter the value of the improvements placed upon the land un-

der an assertion of title hostile to them, and the finding of the court which shows that the date of the alleged improvements was subsequent to the commencement of the action was a sufficient finding on the subject.

Appellant contends that he should have been allowed the amount of an alleged street assessment against the land, which alleged assessment the court found to be void. We do not see that the court erred in so holding; the assessment was against too much land, and therefore void (*Ryan v. Altschul*, 103 Cal. 177, 37 Pac. 339), and it is unnecessary to consider respondents' contention as to the insufficiency of the engineer's certificate.

Appellant contends that the court erred in fixing the amount of interest which respondents must pay in order to redeem, and that more interest should have been required. The court allowed 2 per cent. per month interest during the six-months statutory period of redemption, and thereafter the legal rate of interest of 7 per cent. per annum. The contention of appellant is that 2 per cent. per month should have been allowed until the time of actual redemption under the judgment; but this contention is not maintainable. Appellant having denied the right of redemption, and prevented the exercise of it, cannot recover the extraordinary interest which respondents would have avoided if they could have exercised their right of redemption. Indeed, respondents argue, with great force, that they should not have been required to pay the 7 per cent. per annum interest, or any interest at all, during the long period after the repudiation of their right to redeem; but respondents are not appealing, and we cannot consider any alleged error against them. However, the appellant, if the case was rightly decided against him in other respects, has no just reason to complain as to the amount of interest allowed him.

There are no other points calling for special notice. We think that the judgment is right, and that under all the circumstances of the case, as was said by the court on the former appeal, "no injustice would be done defendant in permitting the plaintiff now to redeem."

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(141 Cal. 471)

MURPHY v. MURPHY et al. (Sac. 1,022.)  
(Supreme Court of California. Dec. 29, 1903.)

REFUSAL TO OPEN DEFAULT—REQUIRING PROOF FROM DEFENDANT—PROPERTY OF PRACTICE—DEED AS MORTGAGE—PRAYER FOR CONVEYANCE—PROPERTY OF RELIEF UNDER PLEADINGS—GRANTEE'S AUTHORITY TO SELL—EFFECT.

1. Code Civ. Proc. § 442, authorizes the filing of a cross-complaint, and section 462 provides that every material allegation of a complaint which is not controverted must be taken as true. After holding that a plaintiff was in default, and was therefore not entitled to introduce

proof, the court required defendant to introduce proof on all material allegations of his cross-complaint, and permitted plaintiff's attorney, as *amicus curiae*, to cross-examine, and also to introduce certain documents. The court refused plaintiff's demand for findings. *Held* that, if it was intended to open the default, plaintiff should have been permitted to answer, and findings should have been made; while, if it was not the court's intention to open the default, it was error to require plaintiff to introduce evidence and to permit plaintiff's attorney to cross-examine, etc.

2. In an action to reform a deed the cross-complaint alleged that the deed had been made under an agreement by which the grantee was to pay an indebtedness for the grantor, and the property, with certain other property of the grantee, was to be sold for not less than a certain sum, and the grantee, after reimbursing himself, was to account for the balance to the grantor. It was alleged that the grantee had paid the indebtedness, but had repudiated the agreement, and claimed the property as his own, and was about to sell it for less than the stipulated amount. Then followed an offer to pay the grantee the amount which he had paid out, but without any allegation as to what it was. The prayer was for reconveyance and for general relief. *Held*, that though, in the absence of an allegation as to the amount due the grantee, the prayer for reconveyance could not be granted, the pleading was sufficient to authorize an adjudication determining the character of the transaction.

Commissioners' Decision. Department 2. Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by John Murphy against J. H. Murphy and another. From a judgment dismissing a cross-complaint and from the denial of a new trial defendants appeal. Reversed.

B. F. Howard, for appellants. Ernest Weyand, for respondent.

SMITH, C. This suit was brought to correct the description in a deed executed by defendants to plaintiff, of date October 4, 1898. But it was admitted on the trial by the defendants that the deed correctly described the land which plaintiff claimed it was intended to convey, consisting of certain subdivisions of the southeast and northeast quarters of sections 3 and 10 in the township referred to in the complaint; and accordingly it was so found by the court, and adjudged that the plaintiff take nothing by his action. There is therefore no question as to the plaintiff's case.

But in the cross-complaint of the defendants it is alleged, in effect, that some time before the date of the deed referred to in the complaint the defendant J. H. Murphy had conveyed to the plaintiff the other subdivisions of the northeast quarter of section 10 and the southeast quarter of section 3 for the sum of \$810; that defendants' deed of October 4, 1898, was made upon, and in pursuance of, an agreement between the parties, by the terms of which plaintiff agreed to pay a debt of \$180, with interest due from the defendants to the Colusa County Bank, and thereafter to sell the two tracts as a whole for a sum not less than \$1,000, and, after deducting from the proceeds \$810 on account

of his own land and the amount paid to the bank, to pay the balance to the defendants; that in pursuance of the agreement the plaintiff paid the amount due to the bank, but has since repudiated the agreement, and now claims the land as his own; and that he is about to sell it to a third party for \$600, and to appropriate the proceeds to his own use. It is further alleged that the defendants before beginning the suit offered to pay plaintiff the amount due for what he had paid to the bank, and all interest thereon, and demanded a conveyance of the land in question, but plaintiff declined the offer; "and that defendants are ready and willing to pay plaintiff the amount he has paid out on account of said piece of land, or any sum the court may decree to be just and equitable," etc. The prayer of the cross-complaint is that the plaintiff be required to reconvey the land in question to defendants upon payment by them of the sum paid to the bank by plaintiff, with interest, and for general relief.

The cross-complaint was filed and served April 25, 1901, and there was attached thereto a memorandum of default by the clerk of date May 13, 1901. But on the trial this was stricken out by the court on the plaintiff's motion on the ground, apparently, that the clerk was not authorized by the law to enter the plaintiff's default. But it was held by the court that plaintiff was in default as a matter of fact, and he was therefore denied the right of introducing any proof or offering any evidence contradicting the allegations of the cross-complaint. Defendants then moved the court for judgment in their favor on the pleadings, but the court denied the motion, and then required defendants to introduce proof on all material allegations of the cross-complaint, and thereafter the plaintiff's attorney was permitted as *amicus curiae* to cross-examine the witnesses, and in the course of the cross-examination to introduce in evidence certain letters written by defendant J. H. Murphy, purporting to give a somewhat different account of the transaction from that alleged in the cross-complaint; all of which rulings were excepted to by defendants, and are now urged as grounds of reversal. Judgment was then entered by the court, as already stated, that the plaintiff take nothing by his action, that defendants take nothing by reason of their cross-complaint, and that the parties respectively pay their own costs. The defendants appeal from the judgment, except "that part which adjudged the description of land named in the deed therein referred to to be a correct description," and from an order denying their motion for a new trial.

As to the first of the errors complained of, it is claimed by appellants, and not disputed by respondent, that the order of the court in striking out the memorandum of default was erroneous, but assuming, for the purposes of the decision, that this was the case, yet plain-

tiff's motion was, in effect, denied, and he was precluded by order of the court from introducing evidence upon the allegations of the cross-complaint. The appellants, therefore, had the case stopped here, would have had no cause to complain. But in requiring the defendants "to introduce proof on all material allegations of the cross-complaint" the effect of this ruling was to that extent nullified; for, the facts alleged in the cross-complaint having been admitted by the failure of the plaintiff to answer, no proof in their support was required (*Herold v. Smith*, 34 Cal. 124; *Jones v. Jones*, 38 Cal. 585; *Stockton, etc., v. Glens Falls Ins. Co.*, 121 Cal. 171, 53 Pac. 565; *Merguire v. O'Donnell*, 103 Cal. 50, 36 Pac. 1033; *Code Civ. Proc.* §§ 442, 462), and in permitting the plaintiff's counsel, as *amicus curiae*, in the course of the cross-examination, to introduce in evidence the letters of the defendant J. H. Murphy as controverting the allegations of the cross-complaint, the court, in effect, opened the default. We are therefore at a loss to determine what was the intention of the court, or the effect of its various rulings; that is to say, whether it was or was not the intention of the court to open the default or to permit the plaintiff to controvert the allegations of the cross-complaint. If it was its intention to permit the allegations of the cross-complaint to be controverted, it should have allowed the plaintiff to answer, or at least it should have complied with defendants' demand for findings. On the other hand, if it was its intention to deny the plaintiff the privilege of answering, it should have taken the allegations of the cross-complaint as true, and granted such relief as, upon the facts admitted, would have been appropriate. It could not, indeed, have entered judgment as prayed for in the cross-complaint, because it does not appear therefrom what amount was paid by the plaintiff to the bank on account of interest, and without proof of this amount a reconveyance would have been improper. But it appears from the admitted facts that the deed of October 4, 1898, was given to secure the repayment of the money to be paid by plaintiff to the bank on account of the defendants, and it was therefore a mortgage only. *Civ. Code*, § 2920. Nor is the character of the deed as a mortgage affected by the oral authority given to plaintiff to sell. *Id.* § 1624, subd. 6. The defendants, therefore, if not entitled to the precise relief demanded, were entitled, on the admitted facts, to some relief; as, for example, an adjudication determining the character of the transaction, or an injunction against the threatened sale of the land. It will be proper, however, for the court, in further proceeding in the case, if it be so advised, to allow plaintiff to answer the cross-complaint, and also to allow the defendants to amend the same in case they desire to do so.

We advise that the judgment and order

appealed from be reversed, and the cause remanded for further proceeding in accordance with the views herein announced.

We concur: COOPER, C.; HAYNES, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for further proceeding in accordance with the views herein announced: *McFARLAND, J.*; *LORIGAN, J.*; *HENSHAW, J.*

On Rehearing.

In Banc.

(January 28, 1904.)

PER CURIAM. The petition for rehearing is denied. The following portion of the opinion heretofore rendered is stricken out: "But it appears from the admitted facts that the deed of October 4, 1898, was given to secure the repayment of the money to be paid by plaintiff to the bank on account of the defendants, and it was therefore a mortgage only. *Civ. Code*, § 2920. Nor is the character of the deed as a mortgage affected by the oral authority given to plaintiff to sell. *Id.* § 1624, subd. 6." Also the following: "Or an injunction against the threatened sale of the land." No opinion is expressed upon the question of whether or not the cross-complaint states a cause of action.

(141 Cal. 488)

PEOPLE v. STEVENS. (Cr. 1,046).\*

(Supreme Court of California. Dec. 30, 1903.)

ROBBERY — INFORMATION — SUFFICIENCY — VALUE OF PROPERTY — EVIDENCE — SUFFICIENCY — INSTRUCTIONS — APPLICABILITY TO EVIDENCE — CREDIBILITY OF WITNESSES — APPEAL — PREJUDICIAL ERROR.

1. Under *Pen. Code*, § 211, defining robbery as the felonious taking of personal property from the person and immediate presence of another by force or fear, and against his will, the value of the property taken is immaterial, and an allegation as to value in the information may be disregarded.

2. An information for robbery, charging the taking of a purse containing a certain sum of money, sufficiently charges the taking of the money as well as the purse, and is good against a motion in arrest of judgment.

3. Under *Pen. Code*, § 211, defining robbery as the felonious taking of personal property from the person and immediate presence of another by force or fear, and against his will, it was robbery, and not larceny, where defendant, though he originally took prosecuting witness' trousers, in which the money taken was, from the headboard of witness' bed, finally procured them by force and fear, and took the money therefrom after witness had first recovered them in a scuffle.

4. In a prosecution for robbery, testimony of a police officer that defendant handed him a \$20 gold piece and certain other coins sufficiently showed that the property taken had some pecuniary value.

5. An allegation in an information for robbery describing the property taken as "lawful money

\*Rehearing denied January 29, 1904.



of the United States" sufficiently showed that it was of intrinsic value.

6. In a prosecution for robbery, where prosecuting witness testified directly to unmistakable robbery, and the defense was that defendant was free from all guilt, and defendant was convicted of robbery, instructions on larceny, the giving or refusing of them, and their correctness, were immaterial, and not prejudicial to defendant.

7. Under Pen. Code, § 211, defining robbery as the felonious taking of personal property from the person and immediate presence of another by force or fear, and against his will, requested instructions ignoring a taking from the "immediate presence" of the owner, and confining the crime to a taking from his person, were properly refused.

8. In a prosecution for robbery, a requested instruction, without evidence to support it, was properly refused.

9. In a prosecution for robbery, a charge, in accordance with Code Civ. Proc. § 2061, subd. 3, to distrust the entire evidence of any witness who had willfully sworn falsely as to a material matter, was proper.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Francis Stevens was convicted of robbery, and appeals. Affirmed.

Milton A. Nathan and Richard P. Henshall, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

GRAY, C. The defendant was convicted of robbery, and appeals from the judgment and from an order denying him a new trial.

1. He complains, first, that the information is insufficient as against the motion in arrest of judgment. The alleged defect consists in the description of the property of which the prosecuting witness is said to have been robbed. The description is as follows: "One purse containing twenty-eight dollars and sixty-two cents in lawful money of the United States of America of the value of twenty-eight dollars and sixty-two cents in lawful money of the United States, the personal property of him, the said Morris Aronstein, then and there in the possession of said Morris Aronstein," etc. The point urged is that the information is uncertain, in that it cannot be told whether the "value" refers to the purse, or to the money contained in the purse, or which the defendant is charged with having stolen." The allegation as to value was unnecessary and immaterial, and may be disregarded. The felonious taking of personal property in the possession of another from his person or immediate presence, and against his will, accomplished by means of force or fear, is robbery, irrespective of the value of the property so taken. Pen. Code, § 211; *People v. Chuey Ying Git*, 100 Cal. 437, 34 Pac. 1080; *People v. Richards*, 136 Cal. 127, 68 Pac. 477. The defendant could not have taken the purse containing the money without taking the money that was in the purse, and it is therefore clear that the information charges

the taking of the money as well as the purse. The information is therefore sufficient as against the motion in arrest of judgment.

2. It is next contended that the evidence disclosed a case of larceny, and not robbery. The prosecuting witness testified that he went to bed with defendant, hanging his pantaloons, containing some \$35 in money, on the headboard of the bed; that soon thereafter he awoke to find the defendant standing up on the bed over him, with these same pantaloons in one hand, and a razor in the other. The prosecuting witness then asked defendant: "What are you doing?" Defendant replied: "I am after your stuff." The prosecuting witness then grabbed the pantaloons from the defendant, and jumped toward the door. He is very confident that the money was still in the pantaloons at this time, and had not been removed from them. The defendant beat him to the door, and stood against it, and threatened and menaced the prosecuting witness with a razor; striking him under the chin with the hand that held the razor. Defendant said: "Now, that is what I got you up here for. I got you up here for your stuff. I want your stuff, and you give it up." The prosecuting witness was very much frightened at this, and threw his pantaloons on the bed to attract the defendant away from the door. As the defendant went for the pantaloons, the prosecuting witness unlocked the door and escaped. The defendant then rifled the pantaloons of the greater portion of the money. These facts disclose a case of robbery. It may very well be that taking the pantaloons down from the headboard while the owner slept constituted a larceny, but the owner recaptured the pantaloons with the money and purse in them, and was thereafter induced, "against his will, accomplished by means of force and fear" to yield up to the defendant the possession of the pantaloons, with the "stuff" in them that the defendant was after. This latter act was, beyond question, a robbery. Pen. Code, § 211. If it be admitted, as is contended by appellant, that the law requires a showing that the property taken was of some pecuniary value, this requirement was fully complied with when the police officer testified: "The money that Stevens handed me was a twenty-dollar gold piece, a one-dollar piece, two dimes, one nickel, and a one-cent piece." It is not necessary that any witness should testify that a \$20 gold piece is of some intrinsic value. The court will know that without any further evidence. It was not necessary to show that the purse was of any intrinsic value, even under the rule contended for. This rule was fully satisfied when any of the articles taken was shown to have intrinsic value. The information met every possible requirement as to "some intrinsic value" when it described the \$28.62 as "lawful money of the United States of America."

3. The instruction of the court as to grand and petit larceny complained of by defendant need not be considered in detail. The evidence was of such a nature that, if the defendant was not convicted of robbery, he should have been acquitted altogether. There was no lesser offense of which the jury could logically find defendant guilty if they were not satisfied beyond a reasonable doubt that he was guilty of robbery. The defense relied on by defendant at the trial was that he was guilty of no crime whatever, and his testimony would have made this good if the jury had believed it. The position of the prosecution was that he was guilty of the very crime charged against him, to wit, robbery, and that he had taken the property by means of force and fear, and could be guilty of nothing less than robbery, if guilty at all. The information was not directed against the act of taking the pantaloons down from the headboard, but against the final act of forcible robbery to which the prosecuting witness testified. Instructions as to larceny were, then, immaterial, and the giving or refusing of them could not injure defendant. *People v. Swist*, 136 Cal. 521, 69 Pac. 223. Nor does it matter whether larceny, grand or petit, was correctly defined in any instruction given, and this for the reason that defendant was not convicted of larceny. *People v. O'Neal*, 67 Cal. 378, 7 Pac. 790.

4. Requested instructions 1, 4, and 10 were properly refused for the reason assigned by the trial judge. Each of them ignored the forcible taking of property from the "immediate presence" of the owner as a possible element of the crime of robbery. In each of them the jury were, in effect, told that the taking must be from the person, to make out the crime of robbery. The law permits a conviction of robbery where the felonious taking is by force or fear from the "immediate presence" of the one in whose possession the property is. Pen. Code, § 211. Requested instruction 5 was based upon the erroneous assumption that there was evidence tending to show that the money was taken from the pantaloons while the owner slept. There was no such evidence, but the evidence was exactly the contrary. The instruction was therefore properly refused.

5. "The court charges you that, if any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust the entire evidence of such witness." The above instruction was proper, and in substantial accord with the statute (Code Civ. Proc. § 2061, subd. 3) as construed in *People v. Fitzgerald*, 138 Cal. 45, 70 Pac. 1014. See, also, *People v. Sprague*, 53 Cal. 491; *People v. Arlington*, 131 Cal. 231, 63 Pac. 347.

We advise that the judgment and order be affirmed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed. *McFARLAND, J.; LORIGAN, J.; HENSHAW, J.*

(9 Idaho, 415)

# PHIPPS et al. v. GROVER.

(Supreme Court of Idaho. Jan. 7, 1904.)

## SHEEP—HERDING AND GRAZING—ACTION FOR DAMAGES.

1. Under section 1210, Rev. St. 1887, which provides that "it is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of such possessory claim," it is not unlawful to drive sheep through the state, or from one place to another, or from one range to another, within the state, even though in so doing they pass within two miles of the dwelling house of a settler.

2. Driving sheep from one range to another is not "herding" them, nor is the occasional eating of grass as they go, or while stopped for needed rest, "grazing," as contemplated by the lawmakers when enacting the above statute.

3. Evidence examined, and held insufficient to support the judgment in this case.

(Syllabus by the Court.)

Appeal from District Court, Washington County; Geo. H. Stewart, Judge.

Action by W. Phipps and G. W. Phipps against Nelson Grover for damages for herding sheep within two miles of the dwelling house of one of the plaintiffs. Judgment for plaintiffs, and defendant appeals. Reversed.

Frank Harris, for appellant. L. L. Burtenshaw, for respondents.

AILSHIE, J. This is an appeal from a judgment for one dollar damages and two dollars costs. It has traveled all the way from the justice's court of Washington county, via the district court of the Third District, but shows no evidence of fatigue nor loss of energy or vitality. From the length of the briefs, one would infer that it must have had succor and comfort from generous counsel.

The action was prosecuted under sections 1210 and 1211 of the Revised Statutes of 1887, commonly designated throughout this state as the "Two Mile Limit Law." The record discloses that on the 19th day of May, 1902, at the precinct of Council, in Washington county, the defendant was driving about 1,000 ewes, together with their lambs, across the open country to reach a summer range—the foothills beyond. The lambs were all very young, many of them being less than 12 hours old. Early in the morning they came within two miles of the dwelling house of plaintiff William Phipps, and drove across the unoccupied public lands, passing beyond the two-mile limit on the opposite side that afternoon. Some time before noon they halted to let the fatigued and

weak ewes and lambs rest, and the herders prepared and ate their dinner. During the stop the sheep scattered out over a space about 250 yards wide, and some rested, while others picked the grass near by. Soon after the noon hour the band moved on and beyond the limit mentioned. It is clearly established that the ewes were very poor and weak, and that many of the lambs had to be carried by the herders,—carrying as many as they could a short distance, and putting them down and going back for others, and so on during the drive. This is the substance of the entire evidence as to the manner of the commission of the wrongs complained of by plaintiffs.

Appellant argues that the evidence is not sufficient to support the verdict for the reason that he was not "herding" or "grazing" his sheep, within the meaning of section 1210, Rev. St. 1887, which is as follows: "It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of such possessory claim."

The important question presented for our consideration is: Does the statute undertake to prohibit the driving of sheep through the state or from one point to another therein? It certainly does not. The Legislature, in making it unlawful to "herd" sheep or permit them to "graze" within two miles of the dwelling house of the settler, never meant to include in those terms the mere driving of sheep through the country, or from one feeding or grazing place to another. If they had meant such a thing, their acts would have been futile and in violation of both the state and federal Constitutions as well as the acts of Congress. We must construe this enactment in the light of the objects the Legislature had in view. We assume that those objects were lawful, and therefore conclude that driving stock from one range to another is not "herding" them, nor is the occasional eating of grass as they go, or while stopped for needed rest, "grazing," as contemplated by the lawmakers when enacting the foregoing statute. This, like any other fact in the case, is a question for the jury, and where there is a substantial conflict in the evidence the verdict will not be disturbed. In this case, however, there is no substantial conflict in the evidence. It is undisputed that defendant was moving his band of sheep across the country to the range, and beyond the two-mile limit of plaintiff's dwelling. It is true that several witnesses testified that the sheep were "grazing" and were being "herded," but these were mere conclusions, and when they testified to the facts from which these conclusions were drawn it was apparent that such conclusions were not justified under the statute.

The judgment is reversed and cause remanded. Costs awarded to appellant.

SULLIVAN, C. J., concurs. STOCKSLAGER, J., concurs in the conclusion reached.

(9 Idaho, 410)

# VILLAGE OF MOUNTAINHOME v. ELMORE COUNTY et al.

(Supreme Court of Idaho. Jan. 6, 1904.)

## COUNTY—PRESENTATION OF CLAIMS—ROAD TAX—CLAIM BY MUNICIPALITY—STATUTE OF LIMITATIONS.

1. *Held*, that section 1773, Rev. St. 1887, which provided that "the board of county commissioners must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within a year after the last item of the account accrued," does not apply to a municipality which claims 25 per cent. of the road taxes collected against property situated within its corporate limits, and that such tax should be paid over by the county without the presentation of a claim therefor.

2. Where a county is by law made the instrument for the levy and collection of taxes for road purposes, to be used by a municipality upon the roads and highways within its corporate limits, it is *held* that the statute of limitations does not begin to run against such municipality until demand is made for the payment of such taxes, or until the municipality has notice of the refusal of the county to pay the same, or that it claims such money in its own right.

(Syllabus by the Court.)

Appeal from District Court, Elmore County; Lyttleton Price, Judge.

Claim was presented by the village of Mountainhome against the county of Elmore for 25 per cent. of the road taxes collected against property situated within the corporate limits of the village, and the claim was disallowed by the board of commissioners, from which order the village appealed to the district court. Judgment rendered and entered in the district court in favor of the village, from which judgment the county appealed to this court. Judgment affirmed.

E. M. Wolfe, for appellant. W. C. Howie, for respondent.

AILSHIE, J. On July 12, 1902, the village of Mountainhome, a municipal corporation organized under the laws of this state, filed with the clerk of the board of county commissioners of Elmore county four several claims against the county for 25 per cent. of the road taxes collected by the county for the years 1898, 1899, 1900, and 1901, from property situated within the corporate limits of the village. This demand for 25 per cent. of the road tax collected within the corporate limits of the village was made under the provisions of subdivision 6 of section 870 of the Revised Statutes of 1887, as amended February 7, 1899 (Sess. Laws 1899, p. 127), as construed and interpreted by this court in *City of Genesee v. Latah County*, 4 Idaho, 141, 36 Pac. 701. The board of commissioners on the 15th day of October, 1902, allow-

ed the claim of the village for the year 1901, and disallowed the claims for the three preceding years. This disallowance seems to have been made under the provisions of section 1773 of the Revised Statutes of 1887, which provides that "the board of commissioners must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within a year after the last item of the account accrued." The village appealed from this order to the district court, where the matter was heard by the district judge, and findings of fact and conclusions of law were made, and thereupon judgment was entered in favor of the village, and directing the board of commissioners to draw their warrants for the amount claimed by the village for the three years covered by its demand. From that judgment the county has appealed to this court.

The first contention made by appellant is that the village not having presented its claim under the provisions of section 1773, supra, within one year after the collection of the tax by the county, it was too late, and that an action cannot be maintained for the collection thereof. We cannot agree with this contention. In the first place, the statute says that the "commissioners must not hear or consider any claim in favor of an individual against the county" unless the same be presented within one year. The claimant in this case was not an individual, but, on the contrary, is a municipality of this state. But waiving this point, the claim here is clearly not such a claim against the county as contemplated in the foregoing section, and for which a regularly itemized and verified claim shall be presented before a payment can be made. It was the duty of the county to pay at least 25 per cent. of these road taxes, as soon as collected, to the proper village authorities; and, although the statute prescribes no specific time at which the same shall be paid, it was clearly the duty of the county, under the statutes of this state, and the authority of *City of Genesee v. Latah County*, to pay over such money, whenever collected, to the municipal authorities, so that the same might be applied upon the highways within the village limits. Section 887, Rev. St. 1887, as amended February 14, 1899 (Sess. Laws 1899, p. 270), constitutes each city or village within the state a separate road district, and gives to the municipal authorities the exclusive control over the highways within their corporate limits. See *City of Genesee v. Latah County*, supra, and *Carson v. City of Genesee* (Idaho) 74 Pac. 862. While it is necessary to make a demand for the payment of these moneys before an action can be maintained, as said in *City of Genesee v. Latah County*, we do not understand this a demand nec-

essary under section 1773, supra, in order to enable the board to allow the claim; and the remark made in that case that the presentation of the account was a sufficient demand was an incidental observation to the effect that it is necessary for some kind of demand to be made before the commencement of the action.

The next and most serious contention made by the appellant is that the claim for the year 1898 is barred by the provisions of subdivision 1 of section 4054 of the Revised Statutes of 1887, which provides that an action must be commenced within three years after the right of action accrues, where it is sought to recover "upon a liability created by statute other than a penalty or forfeiture." It is seriously urged by appellant that respondent's claim is a "liability created by statute," and that, in order to recover, the action must have been commenced within three years from the time the tax was collected. If this is the proper construction to be placed upon this statute as applied to the present action—and we express no opinion as to that—the important question will then arise as to when the statute begins to run in such cases. After a very careful examination of our statutes and the authorities bearing upon the question, we are convinced that the statute in such cases does not begin to run until a demand has been made upon the county by the municipality for its share of the money collected, or until the municipality has notice of the refusal of the county to pay, or that it claims the money in its own right. The county is the mere agent or trustee for the municipality in the collection of these taxes. The duty imposed upon the county by law is to levy and collect the taxes, and to pay over to the municipal authorities at least 25 per cent. thereof. They may pay any greater sum which they deem proper and necessary, but they are specifically directed by statute to pay at least 25 per cent. thereof. It is at once apparent that, to the extent of 25 per cent. of such funds, the county has absolutely no claim or right, and that it is merely the agency provided by law for the levy and collection of such tax. If, then, the county is the agent or trustee of the municipality for the collection of this specific revenue and for this specific purpose, the statute of limitations cannot begin to run against the municipality until demand has been made therefor, or the agent has refused to pay. In 19 A. & E. Enc. of Law (2d Ed.) at page 187, the author says: "As long as the relation of principal and agent continues, there is a privity between the parties, and there is nothing to set the statute in operation as to claims and accounts between them. The position of the agent is that of a trustee, as claims against him are governed by a rule similar to that controlling trustees. The assertion by the agent of an adverse right, or his failure to discharge a

duty to his principal arising out of his agency, does not set the statute in motion until called to the attention of the principal, or until he knows, or with reasonable diligence might have known, thereof."

We therefore hold, first, that it was not necessary for the respondent to file its claim with the board of commissioners within one year after the taxes were collected, and that section 1773 of the Revised Statutes of 1887 does not apply in such cases; second, that the statute of limitations did not, in this case, begin to run against the village until demand was made for payment.

The judgment of the trial court is affirmed, with costs to respondent.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

(9 Idaho, 382)

McCREA et al. v. McGREW et al.

(Supreme Court of Idaho. Dec. 31, 1903.)

APPEALS—NEW TRIAL—MOTIONS TO DISMISS—AFFIRMANCE.

1. Under the provisions of section 4807, Rev. St. 1887, an appeal taken more than one year after the entry of a judgment will be dismissed on motion.

2. Unless good cause is shown for the delay, an appeal from an order denying a new trial, taken more than a year after the entry of judgment, will be dismissed on motion.

3. Where no error affecting the substantial rights of the defendant appears in the record, the judgment will be affirmed.

(Syllabus by the Court.)

Appeal from District Court, Latah County; E. C. Steele, Judge.

Action by E. M. McCrea and others against M. C. McGrew and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Forney & Moore, for appellants. Geo. W. Tannabill and S. S. Denning, for respondents.

SULLIVAN, C. J. This action was brought by respondents, as plaintiffs, against the appellants, as defendants, to recover the sum of \$500 damages for the conversion of 1,067 bushels of wheat alleged to belong to respondents. The complaint contains the proper allegations of copartnership of both the respondents and appellants, which allegations were admitted by the defendants. It is alleged that during the month of September, 1900, one Peter Thompson delivered to the defendants 1,067 bushels of wheat, which allegation is admitted by the defendants' answer. Plaintiffs also allege that, upon the delivery of said wheat, defendants issued to said Thompson a number of wheat receipts or tickets, which are dated at Kendrick, Idaho, signed by the Kendrick Grain Company, by E. Lewellyn, who was then in the employ of defendants, managing and conducting their said warehouse business, and acting as their agent in Nez Perce county, Idaho, all of which is admitted by appellants. It is

further alleged that on or about the — day of December, 1900, the said Thompson, for value, assigned and delivered said wheat receipts or tickets, and the wheat represented by them, to the plaintiffs, who are now the lawful owners and holders thereof, which allegations are denied by appellants. It is also alleged that upon the — day of September, 1900, said defendants transferred said wheat from said Nez Perce county by means of a pipe line, by shooting the said wheat into said pipe across Potlach creek into the county of Latah, and that said wheat evidenced by said tickets subsequent to said time, and the conversion thereof, remained in said Latah county. It is also alleged that defendants have failed and refused to deliver or return the said 1,067 bushels of wheat, or any part thereof, to the said plaintiffs, or to said Thompson, plaintiffs' assignor. This latter allegation is admitted by the appellants. It is also alleged that appellants have converted said wheat to their own use, to the plaintiffs' damage in the sum of \$500, which allegation is denied by defendants. By the answer of defendants it is denied that said 1,067 bushels of wheat is of the value of \$500, or of any other or greater sum than the sum of \$400; and appellants seek to justify their failure to deliver said wheat by their denial that the same was transferred from the said Nez Perce county to said Latah county, and aver that said wheat was destroyed by fire in Nez Perce county on the 11th day of October, 1900. This case was tried on the issues thus made on the 20th day of December, 1901. A verdict of the jury was returned on the 21st day of December, 1901, in favor of the plaintiffs and against the defendants for the sum of \$456.30, and judgment was duly entered in favor of the plaintiffs for said sum on the latter date. Thereafter a motion for a new trial was made by appellants, and denied by the court. The appeal is from the judgment, and from the order denying a motion for a new trial. The respondents interposed a motion to dismiss the appeal—the first from the judgment on the ground that the appeal was not taken from the judgment within one year, and the other from the order denying a new trial on the ground that the appeal from said order was not taken within one year from the date of the judgment.

As to the first motion, the judgment was entered on the 21st day of December, 1901. The notice of appeal from the judgment was not served until the 4th day of April, 1903, about three months and one-half after the year had expired in which an appeal from the judgment may be taken. Section 4807, Rev. St. 1887, provides, *inter alia*, that an appeal may be taken from the district to the Supreme Court from a final judgment in an action or special proceeding within one year after the entry of the judgment. As said appeal was not taken within a year after the entry of said judgment, the motion to dismiss

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1926.

said appeal must be sustained. *Marchand v. Ronaghan* (Idaho) 72 Pac. 731.

As to the motion to dismiss the appeal from the order denying a new trial: It appears from the record that judgment was entered in this case on the 21st day of December, 1901, and the motion for a new trial was denied on the 5th day of February, 1903. Thus it will be seen that more than 13 months had passed from the entry of said judgment until the motion for a new trial was denied by the court. The bill of exceptions and statement of the case contain 129 pages, and was settled on October 9, 1902. It is thus shown that about four months elapsed from the settlement of said statement prior to the order denying a new trial. The record shows such an utter want of diligence in the appellants in prosecuting the appeal that the appeal from the order denying a new trial ought to be sustained. While the statute gives a party the right to appeal from a judgment within a year from its rendition, it also contemplates that, if a motion for a new trial is to be made in the case, the same should be made within a year from the entry of the judgment. If a party, without showing good and sufficient reasons for the delay, does not, or fails to, have his motion for a new trial passed upon within a year from the rendition of the judgment, an appeal from an order denying a new trial in such case ought to be dismissed on proper motion.

For the reason that the writer of this opinion had extended the time for filing the transcript in this case beyond the time prescribed by the rules of this court, and regardless of our views upon said motions to dismiss both appeals, we have examined the transcript and briefs of respective counsel to ascertain whether reversible error had been committed by the trial court. We find no error that would require or justify the reversal of the judgment.

The giving of the following instructions to the jury is specified as error, to wit: "And if you find that the defendants converted said wheat, or any portion of the same, to their own use, as alleged, the measure of damages will be the highest market value for the wheat so converted, at the place of conversion, at any time from the said conversion to the present date." There is some diversity of opinion as to the correctness of said instruction. In *Page v. Fowler et al.*, 39 Cal. 412, 2 Am. Rep. 462, it is held that the correct measure of damages in cases like that at bar, where exemplary damages are not allowed, is the highest market value of such property within a reasonable time after the property was taken, with interest thereon from the time such value was estimated. That is a very instructive case, and many of the authorities pro and con on the question involved are cited and commented upon therein. In *Mashburn & Co. v. Dannenberg Co.* (Ga.) 44 S. E. 97, it was held that the true measure of damages in that case was

the highest proven value of the property taken at any time between the date of conversion and the trial, or its value at the date of the conversion, with interest from that date. *Fish v. Nethercutt et al.* (Wash.) 45 Pac. 44, 53 Am. St. Rep. 892. The counsel for appellants contend that the proper rule in such cases is the value of the property at the date of conversion, with legal interest thereon from that date. Conceding that to be correct, and as appellants admit that said 1,067 bushels of wheat were worth \$400, there is only a difference of less than \$24 between the \$400, with legal interest, and the amount of judgment entered. Under the peculiar facts in this case, we would not feel justified in reversing the judgment for so small a discrepancy, even though we should determine the correct rule to be otherwise than as stated by the trial judge. We therefore express no opinion as to the rule for measure of damages in such cases.

The judgment is affirmed, with costs in favor of respondents.

STOCKSLAGER and AILSHIE, JJ., concur.

(68 Kan. 281)

ATCHISON, T. & S. F. RY. CO. v. GEISER.

(Supreme Court of Kansas. Jan. 9, 1904.)

RAILROADS—FIRES SET BY LOCOMOTIVES—EVIDENCE—DAMAGES.

1. The statute of this state makes causing of fire by the operation of a railroad prima facie evidence of negligence on the part of the company. This being shown, it becomes a question of fact for the jury, not of law for the court, to determine whether such prima facie case is overcome by the evidence of the company that the engine which set out the fire was equipped with the latest devices in good repair, and being carefully managed by competent employes.

2. The fact of the setting out of fire by the operation of a railroad is evidence, not merely presumption, of negligence, and as such must be met and overcome by evidence to the satisfaction of the jury.

3. Either of two methods may be adopted in ascertaining the damage caused by the destruction of fruit trees—their value as a distinct part of the land, if susceptible of such measurement, and the difference in the value of the land before and after their destruction; and where both methods are resorted to in the same case the damage must be ascertained by the jury from all the evidence.

(Syllabus by the Court.)

Error from District Court, Leavenworth County; J. H. Gillpatrick, Judge.

Action by Jacob Geiser against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

A. A. Hurd and Alfred A. Scott, for plaintiff in error. Baker & Baker, for defendant in error.

CUNNINGHAM, J. Defendant in error, as plaintiff below, recovered judgment for his damages occasioned from the burning of his orchard, the fire having been set out by

one of the railroad company's engines. The question here raised of greatest moment, stripped to the bone, is whether it is a question of law for the court or of fact for the jury to determine when the prima facie case of negligence made by showing that the fire was caused by the operation of the railroad is overcome by a showing on the part of the railroad that its engine was equipped with the latest and best appliances and managed in the most careful manner by competent employes. The railroad company puts its claim into the following assertion: "The statutory presumption of negligence on the part of the railway company, raised by the evidence for the plaintiff, having been rebutted by the positive evidence on behalf of the defendant, the plaintiff was not entitled to recover;" and upon the trial claimed that this view should have been given to the jury in the following instruction: "The jury are instructed that under the evidence in this case the plaintiff is not entitled to recover, and therefore you will return a verdict for the defendant." The question presented is one of first instance in this court. Our statute provides (section 5923, Gen. St. 1901): "That in all actions against any railway company organized or doing business in this state for damages by fire caused by the operating of said railroad, it shall be only necessary for the plaintiff in the action to establish the fact that said fire complained of was caused by the operating of said railroad and the amount of his damages, which proof shall be prima facie evidence of negligence on the part of the railroad." In the case at bar sufficient evidence was offered by the plaintiff to make out a prima facie case. The railway company then tendered proof going to establish the fact that the engine which set out the fire was equipped with the latest and best appliances to prevent the escape of fire therefrom, was in good repair, and was being skillfully handled by competent employes. Here was a case of evidence against evidence. It is hardly fair to say that it was presumption against evidence, or evidence against presumption. The statute makes the setting out of the fire prima facie evidence of negligence. We think it is competent for the Legislature to give this much of evidentiary weight to the fact of the causing of the fire. Ordinarily, fires do not occur in the skillful management of well-constructed engines. If it is a question of evidence against evidence or of a conflict of evidence, upon what theory would the court be authorized to take the decision out of the hands of a jury, and pronounce, as a matter of law, that the railway company's witnesses were in all respects to be believed, and that their conclusions as to the condition of the engine and the skill of the employes were beyond the pale of contradiction? We are not unaware of the fact that several courts have pronounced the rule that, where the evidence of the

defendant is clear and convincing, the presumption of negligence arising because of the occurrence of the fire has been overcome, and the court should, as a matter of law, so declare. Among these cases are the following: *Spaulding v. C. & N. W. Ry. Co.*, 33 Wis. 582; *Menominee River Co. v. M. & N. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Ky. Cent. R. Co. v. Talbot*, 78 Ky. 621; *So. R. Co. v. Pace*, 114 Ga. 712, 40 S. E. 723. The same principle is held in Dakota under a similar statute relating to the killing of stock. *Huber v. O. M. & S. P. R. Co. (Dak.)* 43 N. W. 819; *Hodgins v. Minn., etc., R. Co. (N. D.)* 56 N. W. 139. But few, if any, of the cases adopting this view have been decided under statutes like our own. Realizing the severity of a rule which would cast upon a plaintiff the burden of showing actual negligence in the construction or management of an engine, many courts, even before the passage of any statutes relative to the matter, had declared a rule, growing out of convenience, that the occurrence of the fire raised the presumption of negligence. We greatly question whether this court-made rule has the gravity or authority of the statute; at least the courts, having gone thus far, hesitated in going farther, but paused, and said that this presumption (and they called it but a presumption) would be overcome by clear and convincing evidence on the part of the railroad company that it had been guilty of no negligence; and added that whether it had been so overcome was a question of law for the court. Other cases apprehending the anomalous position in which this places the court are found laboring hard to place the decision of this question of fact with the jury by seizing upon the slightest and most intangible facts to relieve them of the duty of determining when such proof is clear and conclusive. See *Hoffman v. C., M. & St. P. Ry.*, 43 Minn. 334, 45 N. W. 608; *Burud v. G. N. Ry. Co.*, 62 Minn. 243, 64 N. W. 562; *Solum v. G. N. Ry. Co.*, 63 Minn. 233, 65 N. W. 443.

After a very careful examination of the entire question, we are fully persuaded that there is no adequate legal reason why these questions of fact should receive any different treatment from others; why the weight of the evidence and the credibility of the witnesses should not be left to the determination of the jury in these matters as well as in ordinary cases. The theory of our practice is that questions of fact growing out of conflicting evidence shall be left to the determination of the jury. Here it is a question of fact, not one of law, whether the evidence of the negligence of the company, which legally follows a showing of the setting out of the fire, is overcome by the evidence of proper construction and competent management. The weight of authority and the present tendency of the courts sustains this view. In the case of the Great Northern Railway v. Coats, 115 Fed. 452, 53 C. C. A.

382, the exact question here presented is found, namely, that, as the railroad company had offered proof, in substance, that the engine was properly managed, and that the company was guilty of no negligence in that respect, the court should have eliminated the question and withdrawn it from the jury. The presumption of negligence having thereby been overthrown, the court said: "This presumption could only be overcome by testimony, and, unless we apply to this class of cases a rule different from that which is applied to other cases, it is the province of the jury to determine the weight that should be accorded to the testimony which was introduced for that purpose, and also to determine the credibility of the witnesses who testified on that subject. It was well said by the Supreme Court of Minnesota in *Karsen v. Railroad Company*, 29 Minn. 12-15, 11 N. W. 122, when construing a statute of that state which makes the scattering of fire by a locomotive engine prima facie evidence of negligence: 'Neither is a jury necessarily bound to accept as conclusive the statements of a witness that an engine was in good order, or carefully and skillfully operated, although there is no direct evidence contradicting the statement. They have a right to consider all the facts and circumstances in evidence bearing upon the condition or mode of operating the engine and upon the accuracy of witnesses.' \* \* \* We cannot well understand upon what theory the statement of persons, who were in charge of a locomotive when it occasioned a disastrous fire, that it was properly and prudently managed, must be accepted by a court as conclusive, and as overwhelming, as a matter of law, the presumption of negligence raised by other testimony. It would seem, rather, that the triors of the fact ought, in such a case, to consider how far the interest of such witnesses—their natural desire to absolve themselves from all blame—may have colored their evidence, and how far their statements are consistent with other facts and circumstances which have been proven. If a court undertakes to weigh such evidence, and say that the witnesses are credible, and also to decide as to the effect of the proof, it plainly assumes the functions of the jury, or at least a function which is discharged by the jury in other cases." In *Hemmi v. C. G. W. Ry. Co.*, 102 Iowa, 25, 70 N. W. 746, this language is used: "If it be conceded there was no fault in the engine or its management, it cannot be said, as a matter of law, that the fire was not the result of negligence. But, if this were not the rule, the point relied upon by appellant is of no avail, for the reason that we have expressly held that in such cases there is a conflict in the evidence—the prima facie case of negligence made by the plaintiff standing on one side of the issue, and the direct evidence of the defendant as to its care and diligence upon the other—and that

it is the duty of the court to submit such conflict to the jury." To the same effect, see the following cases: *McCullen v. C. & N. W. Ry. Co.*, 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 645; *Karsen v. M. & St. P. R. Co.* (Minn.) 11 N. W. 122; *Greenfield v. C. & N. R. Co.*, 83 Iowa, 270, 49 N. W. 95; *Norris v. B. & O. S. W. R. Co.*, 109 Fed. 591, 48 C. C. A. 561; *Alabama G. S. R. Co. v. Taylor* (Ala.) 29 South. 675; *Farrington v. Rutland R. Co.*, 72 Vt. 24, 47 Atl. 171; *First Nat. Bank of Hoopston v. L. E. & W. R. R. Co.*, 174 Ill. 36, 50 N. E. 1023; *C. & A. R. R. Co. v. Esten*, 178 Ill. 192, 52 N. E. 954; *Hemmi v. C. G. W. Ry. Co.*, 102 Iowa, 25, 70 N. W. 746; *Grt. N. Ry. Co. v. Coats*, 115 Fed. 452, 53 C. C. A. 382; *Greenfield v. C. & N. W. Ry. Co.*, 83 Iowa, 270, 49 N. W. 95. Upon reason and authority we hold that the entire question is one of fact to be submitted to and determined by the jury upon proper instructions.

The plaintiff further insists that the case should be reversed because some of the special findings were against the uncontradicted evidence; notably the following: "(5) Was engine No. 123 run and operated in a proper manner past the plaintiff's premises on the day of the fire? A. No. (6) If you answer question No. 5 'No,' then please state how and in what manner the engine was not properly operated. A. By firing engine too heavy. (7) Was John M. Allen, the fireman on said engine on the day of the fire, a competent and skillful fireman? A. No. (8) If you answer question No. 7 'No,' please state how and in what manner he was incompetent. A. By firing too heavily on a light grade with a small train of cars." "(10) Were the appliances used on said engine for the prevention of escape of fire therefrom in good condition on the night of June 27, 1901, and on the following morning when said engine left the shops to be used on the following day of June 28, 1901? A. No. (11) If you answer question No. 10 'No,' then please state what defects existed in said appliances and in what manner they were defective. A. Defective screens. (12) Were the appliances used for the purpose of preventing the escape of fire from said engine No. 123 found to be in good condition when it was examined in the shops at Argentine on the night of June 28, 1901? A. No. (13) If you answer question No. 12 'No,' then please state where and in what manner they were defective. A. Screens defective in smokestack." The evidence of the witnesses for the company, if believed, required the answers to all of these questions to be different; so perhaps the question here presented is but the one already passed upon. However, we may go further, and call attention to some of the evidence of the plaintiff below tending to contradict in terms the testimony of the witnesses for the company. Engine No. 123 was an old one; had long been in the service of the company. The day it set the fire in question was the first



time it had ever been on this run, and it did not make it but once thereafter, to wit, on the day following. One witness, who was close to the point where the engine set the fire as it passed, testified that it was blowing out cinders from its smokestack as it went. There was a slight upgrade at this point. The train, however, was very light—two freight cars and a passenger coach. The fireman testified that he was firing heavily. The fire caught at a distance something near 200 feet from the track, and the cinders that caused the fire were carried to this distance across a road and over a hedge fence. Might not the jury, from this evidence, reasonably conclude that the screens were not in perfect condition, as testified to by the company's witness? Might they not also reasonably conclude that the fireman was not a competent and skillful man, inasmuch as no excuse was given for heavy firing with a light train on a slight grade? Add to this the further facts requiring a greater degree of care and skill, that the day was very hot, the wind very high, the vegetation very dry, we cannot say, in view of all of these things, that these findings were wholly unsupported by the evidence.

A further claim is made that at most only nominal damages could be awarded under the evidence. The plaintiff showed that some 150 apple trees had been destroyed, and that they were of the value of from \$5 to \$10 each. The defendant's witnesses testified that the farm on which the orchard was growing was as valuable after the fire as it was before. It is competent to prove damages such as were here claimed by showing the value of the trees destroyed (*Ry. Co. v. Lyan*, 57 Kan. 635, 47 Pac. 526; *K. C., Ft. S. & M. R. R. v. Perry*, 65 Kan. 792, 70 Pac. 876), or by showing the depreciation of the value of the real estate; so that the effect of the contradictory evidence was simply to refer the matter as a question of fact to the jury.

Upon the whole case we find no error, and affirm the judgment of the court below. All the Justices concurring.

(68 Kan. 244)

**KANSAS CITY, FT. S. & M. R. CO. v. B. F. BLAKER & CO.**

(Supreme Court of Kansas. Jan. 9, 1904.)

**FIRE SET BY RAILROAD—RECOVERY OF INSURANCE—EVIDENCE.**

1. Where an insurance company pays to the insured a loss occasioned by the wrong of a third party, and the value of the property destroyed exceeds the amount paid by the insurance company, the insured may bring an action in his own name against the wrongdoer, and may recover the full amount of the loss.

2. A dealer in grain and lumber leased a portion of the right of way of a railroad company on which to build an elevator and warehouses, and it was stipulated that the railroad company should not be liable for the burning of property erected or stored on the rented premises. The lessee had other property connected with that on leased premises, which was destroyed by fire

negligently set out by the railroad company on the rented premises, and which continued from there and burned property not on the right of way. *Held*, that the fact that the railroad company was exempt from liability for the burning of the property on the right of way, and which first caught fire, will not relieve it from liability for the negligent burning of the connected property.

3. The placing of structures on the right of way of a railroad company, and which are permitted to remain there with the consent of the company until they are negligently set on fire by a passing locomotive, which fire extends to and burns other and adjoining property, does not constitute contributory negligence on the part of the owner, nor deprive him of the remedy given by law for the negligent burning of property not on the right of way.

4. The fact that fire which destroyed property originated in sparks from a passing locomotive may be shown by circumstantial evidence, following the rule of *Railroad Co. v. Perry*, 70 Pac. 876, 65 Kan. 792.

5. A person who has been employed as a locomotive engineer for a long time, and who is qualified by experience and observation to understand the operation and effect of spark arresters in locomotives, may give testimony as to whether, a locomotive equipped with a spark arrester in first-class condition would prevent the escape of sparks or fire from a locomotive sufficient to ignite and burn property on or near the right of way.

(Syllabus by the Court.)

Error from District Court, Miami County; John T. Burris, Judge.

Action by B. F. Blaker & Co. against the Kansas City, Ft. Scott & Memphis Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Pratt, Dana & Black and L. F. Parker, for plaintiff in error. L. C. Boyle, for defendant in error.

JOHNSTON, C. J. B. F. Blaker & Co. recovered a judgment against the Kansas City, Ft. Scott & Memphis Railroad Company for the destruction of their lumber yard at Fontana by fire, alleged to have been negligently started by an old and defective engine which the railroad company was operating. The fire started on the roof of an elevator owned by B. F. Blaker & Co., which was situate on the right of way of the railroad company, and had been placed there under a lease which had been several times renewed. The lease under which possession was held when the fire occurred, among other things, provided that "said second parties agree to use the above-described property for elevator and warehouse only, said premises and all buildings thereon to be used conjunctively for the purpose of receiving, storing and holding freight and property received or transported over the lines of party of the first part," etc. There was a further provision in the lease that the railroad company "shall not be held liable for any loss or damage by fire communicated either by sparks from locomotives or otherwise to any property erected or stored upon said rented premises." Aside from the elevator, the fire destroyed lumber sheds and other structures

wholly or partly on the right of way, but on account of the provision in the lease above mentioned no recovery was sought or given for the destruction of property situated on the right of way. The lumber yard, including structures and material, was insured in The Lumbermen's Exchange, a mutual insurance company, to the extent of \$3,000. After the fire that company paid B. F. Blaker & Co. as indemnity \$2,980. An agreement was made between the insurance company and B. F. Blaker & Co. that the latter should bring a suit in its own name, and prosecute it to judgment, and of the amount recovered the insurance company should get three-fourths and B. F. Blaker & Co. the remaining one-fourth. In the pleadings and at the trial the railroad company insisted that The Lumbermen's Exchange was the real party in interest, but it was not made a party, and the action was prosecuted to judgment by B. F. Blaker & Co. alone, who were awarded by the jury \$3,000 as damages, and there was a further award of \$400 as attorney's fees.

It is contended here that the evidence did not establish a right of action in B. F. Blaker & Co., and that the court erred in not sustaining the railroad company's demurrer to the evidence. The fact that the insurance company was not a party plaintiff is the principal ground of this contention. The claim is that, as the insurance company had paid the greater part of the loss, it was a proper party, and in fact the only real party in interest in the result of the action. This question has already received the consideration of the court, and sanction has been given to the rule that, where the value of the property destroyed exceeds the insurance money paid, the action must be brought in the name of the owner, and not in the name of the insurance company. *Railroad Co. v. Insurance Co.*, 59 Kan. 432, 53 Pac. 459. The rule proceeds on the theory that the insured sustains towards the insurer the relation of trustee, and is well supported by the authorities. *Insurance Society v. Standard Oil Co.*, 59 Fed. 984, 8 C. C. A. 433; *Insurance Co. v. Railroad Co.*, 3 Dill. 1, Fed. Cas. No. 96; *Assurance Co. v. Sainsbury*, 3 Doug. 245; *Insurance Co. v. Boshier*, 39 Me. 253, 63 Am. Dec. 618; *Hart v. Railroad Corp.*, 13 Metc. 99, 46 Am. Dec. 719; *Insurance Co. v. New York R. Co.*, 25 Conn. 265, 65 Am. Dec. 571; *Railway Co. v. Insurance Co.*, 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; *Marine Insurance Co. v. Railway Co. (C. C.)* 41 Fed. 643. The rule stated is applicable here, as the value of the property destroyed exceeded the amount paid by the insurance company. In addition to the rule of law which holds the insured in such cases chargeable as trustee, there was a specific agreement between the insured and the insurance company that he should act and account in the capacity of a trustee to the insurance company, and the recovery would neces-

sarily conclude both parties, and effectively bar any other or further recovery against the railroad company for the loss.

It is next contended that no liability exists because the fire was communicated from the elevator to other structures not rightly on the right of way, and thus carried along to property not on the right of way. There was, as we have seen, a provision in the lease exempting the company from loss by fire of property situated on the rented premises. This exemption was not a license, however, to negligently set out fires which might burn the elevator and pass over the right of way, destroying other property. B. F. Blaker & Co. assumed the risk of destruction by fire of property on the right of way which was rented, and nothing more. There was no release from liability for the negligent destruction of other property, although it may have been connected with that situated on the right of way. It is not necessary to a recovery that the fire should have been directly communicated to the property destroyed, nor will the fact that the fire passed over intervening land in order to reach that destroyed prevent a recovery. It was a continuous fire, negligently set out by the railroad company, as the testimony of the plaintiff below tends to show, and, under the authorities, appears to have been the proximate cause of the loss for which the action was brought. *Railroad Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Railroad Co. v. Bales*, 16 Kan. 252. See, also, *Rutherford v. Railroad Co.*, 147 Mo. 447, 48 S. W. 921. The other buildings near to or connected with the elevator cannot be regarded as an intervening and independent cause of the injury. There is a claim that, as there was a provision in the lease that the lessee should use the premises for elevator and warehouses only, the maintaining thereon of other structures, like lumber sheds, was unwarranted, and to some extent contributed to the injury. The lumber sheds and some other structures wholly or partly on the right of way may not be warehouses in the strict sense of that term, but the parties to the lease had given practical interpretation to the term, and had treated these structures as proper appurtenances. Most, if not all, of them were on the right of way when the lease was executed, and materials shipped over the railroad had been previously stored in them. Aside from that, their existence and location was recognized in the lease itself, where it was "agreed by parties of the first part that they will at all times leave open and unobstructed for the passage of wagons and vehicles a strip of ground sixteen feet wide between their elevator and lumber sheds, parallel with the main track of said railroad." The lumber sheds referred to were manifestly located on the right of way, and the parties contemplated that they should remain there, and be used for the purpose of storing lumber and other materia-

shipped over the railroad. If there had been no such express recognition of the lease, but the structures had been placed or maintained on the right of way with the consent of the company, and from them the fire was communicated to the other property, it would not constitute contributory negligence on the part of the lessees, nor deprive them of the remedy given by law for losses to property not on the right of way, the proximate cause of which was the negligence of the railway company. *Sherman v. Railroad Co.*, 36 Me. 422, 30 Atl. 69; *Railroad Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; 13 A. & E. Ency. of L. (2d Ed.) 487.

It is contended that the evidence of negligence of the railroad company in setting out the fire was insufficient, and that some of that received was incompetent. It was mainly circumstantial, but we deem it to be sufficient to support the verdict. A heavy freight train passed the buildings destroyed shortly before the fire was discovered. It was running rapidly, working steam, and leaving a trail of smoke behind it. Within a few minutes after it passed persons in the neighborhood saw a patch of fire on the roof of the elevator. No fire was kept in the elevator at the time, as it had been locked up for two weeks before the fire occurred. The wind was blowing from the railroad track toward the elevator. As far as the testimony goes, no one saw sparks proceeding from the engine and lighting on the building, but there was nothing in the testimony to show that the fire could have arisen from any other source, and the facts recited, in the absence of proof of any other cause, tend to show that the fire was caused by the sparks from the engine, and whether the fire so originated was a proper question for the jury. The effect of circumstantial evidence of this character was before the court in the recent case of *Railroad Co. v. Perry*, 65 Kan. 792, 70 Pac. 876. After a full consideration and a review of the authorities it was there held that: "The fact that soon after the passing of an engine a fire starts near a railway track in an inclosed field covered at the time with a growth of highly inflammable vegetation, and travels before a high wind in a direction away from the track, is sufficient to warrant a jury in finding that the fire was caused by the operation of the railroad, without its appearing that the engine emitted sparks or live cinders, or was put to special exertion, and without further proof excluding other possible origins." A witness, who had been a locomotive engineer for 16 years, was introduced to prove the character and operation of spark arresters. After describing them, he stated, in answer to an inquiry, that an engine equipped with a spark arrester in first-class condition would prevent the escape from the engine of sparks or fire that would ignite property on the right of way. There was no objection to this testimony on the ground that the witness was not qualified to testify on

the subject, but it is that the testimony was upon an ultimate fact which it was the duty of the jury to determine. The witness was qualified, and the testimony related to a matter which is the subject of expert testimony, and one which inexperienced persons are not likely to understand. The operation of a spark arrester and its effect in arresting sparks and cinders passing through it, as well as the length of time that they would continue to burn, could be intelligently told by witnesses who had had special advantages and opportunities for observing the operations of engines and the effect of sparks issuing from engines equipped with the different kinds of spark arresters. The opinion, based as it was on experience and observation, was not an ultimate issue in the case, but was an important consideration in the determination of an ultimate issue, and was properly admitted.

The case appears to have been fairly submitted to the jury, and, although some of the rulings on the instructions are criticised, we find nothing in them which warrants special comment. What has already been said answers most of the objections which were made to the rulings of the court in charging the jury, and we see nothing in them or in other rulings which would warrant us in disturbing the verdict of the jury.

The judgment of the district court will therefore be affirmed. All the Justices concurring.

(68 Kan. 207)

McALPINE et al. v. CHICAGO GREAT WESTERN RY. CO. et al.

(Supreme Court of Kansas. Jan. 9, 1904.)

DEDICATION—EXTENT—ABANDONMENT—REVERSION.

1. A strip of land lying along the margin of a navigable stream was included in the plat of a city and dedicated to the public by the use of the word "Levee" written thereon. Several streets opened upon this tract, and many lots had no other means of ingress and egress, except over and along it. *Held*, that its dedication included its use as a street, as well as a landing place for boats.

2. Such strip of land is not abandoned by the public, so as to cause a reverter to the original dedicators or their representatives, because railroads have been permitted to lay their tracks and build depots upon it; nor because its use has been permitted for other unauthorized purposes; nor because river commerce has ceased, and boats do not land upon it; nor because approach to the river margin has become difficult.

3. Land dedicated to a public use does not revert to the dedicators because of misuse or nonuse, unless its use for the dedicated purpose has become impossible, or so highly improbable as to be practically impossible.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by N. McAlpine and others against the Chicago Great Western Railway Com-

¶ 3. See *Dedication*, vol. 15, Cent. Dig. §§ 103, 104, 105, 107.

pany and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Sutton & Sutton, for plaintiffs in error. Miller, Buchan & Morris, Arthur F. Smith, M. J. Reitz, J. W. Dana, Frank Hagerman, N. H. Loomis, R. W. Blair, and H. A. Scandrett, for defendants in error.

CUNNINGHAM, J. This action was one in ejectment for the recovery of a three-fourths interest in a tract of land lying between the platted portion of what is now Kansas City, Kan., on the west, and the Missouri river, on the east. The plaintiffs are the heirs of the proprietors of the original plat of Wyandotte, now Kansas City, Kan. This tract in dispute is of irregular form, and, as originally delimited upon the plat, was from 700 to 900 feet wide, and perhaps a mile long. Upon the plat it was designated and dedicated as "Levee." By reliction and alluvion, accretions have been added to the river margin, until now the tract is more than twice the size in width it was at the time of the dedication. The defendants are the city of Kansas City; several railroad companies who have received permission from the city to build upon this tract of land their tracks, depots, etc., and who are now using the same for such purposes; some private parties, who have erected and are now maintaining manufacturing plants of various kinds; and numerous persons who have squatted and built upon the same more or less temporary habitations, and who are now residing there, as it would appear, without permission from any one, and as trespassers.

The evidence for the plaintiffs, in brief, shows that the Wyandotte City Town Company was a partnership; that the plat of the city was filed for record in 1859; that there were indicated thereon, by name, various streets and alleys as dedicated to public use, besides the tract in controversy which was named "Levee"; that several of these streets, running at right angles with the river, opened at their eastern ends upon this levee; that quite a large number of lots have no other approach to them, save that afforded by this levee tract; that at the time of this platting the Missouri river was navigated quite extensively by both freight and passenger boats, and continued to be so navigated up to the year 1866, during which time the current of the river swept well up to the eastern line of the levee, and afforded ample natural landing place for such boats and the commerce brought by them; that after that time navigation fell off by reason of the fact that railroads were built to and from the town, affording easier and swifter communication, and also that the river became less navigable, and the landing less feasible, by reason of the fact that the current was diverted to the eastern or Missouri shore, the western shore receiving the accretions above noted, and

leaving a wide, marshy, and comparatively untraversable alluvion between the river and the levee, as originally platted. It appeared, however, that occasionally pleasure and other craft had landed there at differing stages of water, up to five or six years ago, and that, with some improvements in the way of wharfs and roadways, easy and adequate communication could now be had to the point where navigable water might be reached.

At the conclusion of plaintiffs' evidence, the court sustained a demurrer thereto, and they are now here asking a reversal of this action. Their claim is stated most fairly and frankly in their brief, and perhaps no better basis of the discussion here involved can be found than a repetition of the statement. It is: "This suit proceeds upon the theory that this tract of land was dedicated to the public for a levee; that a levee is a landing place for boats and for commerce carried on by river; that this levee was never improved for such purpose by the city or other person or corporation; that no boats have landed at it for twelve years, and, in all human probability, will never again use it for a landing; that it has been permanently abandoned by the city authorities and the public as a levee, because (1) the decreased flow of water in the Missouri river makes the navigation of that river impossible; (2) the permanent change in the channel of the Missouri river from the Kansas to the Missouri bank would make impossible an approach by steamboats to the levee, if any should by chance appear upon the Missouri river; (3) the complete substitution of railroad carriage of freight and passengers for river transportation." Upon this premise the plaintiffs deduce the conclusion that abandonment of the use for which this tract of land was dedicated by the original proprietors has been shown, and that therefore the title thereto, and with it the right of possession, has reverted to the plaintiffs, as the representatives of such proprietors. We are therefore called upon to examine the soundness of their premise, and the correctness of the conclusions deduced.

What, then, we first inquire, was the purpose, as indicated by the word "levee," for which this tract was dedicated? Are we confined to the rather narrow definition which the plaintiffs would have us give to this word, and hold that it simply meant a landing place for boats and commerce carried on by river? Necessarily must be added to this the right to pass over, across, and along this tract for the hauling of such goods and passengers as should be there delivered by reason of such commerce. This implies its use as a highway or street, at least to some extent. Would that use be limited to vehicles used for the loading and unloading of river traffic, or does it not, as well, include the right of the general public to use the same as a street for all purposes? It is true, perhaps, that in the popular sense the more

restricted meaning obtains, probably because of the fact that such tracts are most largely used in connection with water commerce, rather than because of an analytical examination of the question. It is equally true that it would greatly surprise the general public of cities where boats tie up at well-improved levees that no one other than those who came and went with goods in promoting "commerce carried on by river" were permitted to traverse the same. It is clear that we may not here give to this word the restricted meaning which plaintiffs' definition contemplates, for, besides the suggestions already made, such a restriction would make each of the streets whose eastern terminus is upon this tract a mere cul-de-sac. Neither would the proprietors of lots abutting the levee have any method of ingress or egress thereto. Primarily the word "levee" has no such restricted meaning. The lexicographers tell us that it is derived from the same root as the word "lever," and means a rise of ground—specifically, "an embankment to prevent inundation, or the steep bank of a river"; and, used as a transitive verb, it is "to keep within a channel by means of levees." The law dictionaries but re-echo this definition, and say: "Levees are embankments to prevent the overflow of rivers." Discussing these various definitions, see *City of St. Paul v. Chicago, etc., Ry. Co.*, 63 Minn. 351, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Coffin v. Portland (C. C.)* 27 Fed. 412-416; *New Orleans v. Morris*, 3 Woods, 115, Fed. Cas. No. 10,183; *Dillon's Municipal Corporations* (4th Ed.) § 649; *Napa v. Howland*, 87 Cal. 88, 25 Pac. 247.

It may well be argued, in the light of recent disastrous experience, that portions of the land in dispute may be needed and used in pursuance of the primary meaning of the term, and that the city, to guard itself from floods, will need to raise embankments thereon. We therefore certainly question the soundness of the plaintiffs' major premise—that a levee is only a landing place for boats. While a levee is a place for the landing of boats and commerce, it is much more than that; and, were we to grant the abandonment of the disputed tract for that purpose, we would not thereby grant that it was abandoned for all other purposes so as to revert.

Giving to the word "levee" the narrow construction contended for by plaintiffs, we pass to inquire if the conclusion that there has been an abandonment and consequent reverter is warranted by their facts. By their brief the rule as stated, and, we think, correctly, is: "Land dedicated to a particular purpose will revert to the dedicator when there has been a full and lawful abandonment of the use for which the dedication has been made, or when the dedication has spent its force by the use becoming impossible."

That is, abandonment, to cause a reverter, is something more than a mere cessation of use. The fact that the use has become inconvenient or undesirable, to the extent that it has ceased entirely, will not constitute an abandonment on the part of the public, so as to cause a reverter; and this even though such nonuser has extended through a long series of years. In *Wilgus v. The Commissioners of Miami County*, 54 Kan. 605, 38 Pac. 787, a plot of land dedicated as "Seminary Square" was held not to have been abandoned through a nonuse of 25 years. A like rule is announced in *Commissioners of Wyandotte County v. The Presbyterian Church*, 30 Kan. 620, 1 Pac. 109, concerning a lot dedicated by the same plat that contains the land here in controversy, where nonuse had continued for an equal or greater period of time. In *Forbes v. The Board of Education of Ft. Scott*, 7 Kan. App. 452, 53 Pac. 533, a block dedicated to the public use as "University Square" was held not to be vacated after 26 years of nonuser. In *City of Ashland v. Chicago & Northwestern Railway Company*, 105 Wis. 398, 80 N. W. 1101, it is held: "Mere nonuse of a street for any period of time will not operate as an abandonment of the rights conferred by a proper dedication, and, until the time arrives when the street is needed for actual use, all persons in possession hold subject to such rights." In *Coffin v. Portland (C. C.)* 27 Fed. 412, 416, 417, 420, it is held: "And when, as in this case, the dedication is unconditionally made to a public use, as a levee or landing place, no formal acceptance of the same is necessary, nor does the existence or continuance of the easement depend on the extent of the use or improvement of the premises, or that they are used or improved at all; and it is even doubtful if the same can be lost by the adverse occupation of the premises by private parties for any length of time. 2 Dill. Mun. Corp. (3d Ed.) § 675. \* \* \* Where the fact of dedication of a street or landing is in dispute, nonuser is evidence, more or less cogent, according to circumstances, against a dedication. But where, as in this case, the dedication is admitted, the evidence of nonuser is immaterial. The right to the use, once admitted, is not affected by it. *Barclay v. Howell*, 6 Pet. 505 [8 L. Ed. 477]. Property dedicated to public use does not revert to the donor, unless, it may be, where the execution of the use becomes impossible, as, if such property is appropriated to an unauthorized use, a court of equity will compel a specific execution of the trust, by restraining the parties engaged in the unlawful use, or by causing the removal of obstructions or hindrances to the lawful one. *Barclay v. Howell*, 6 Pet. 507 [8 L. Ed. 477]. See, also, 2 Dill. Mun. Corp. (3d Ed.) § 653." In *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145, the rule is stated: "Whenever a dedication is complete, the

property thereby becomes public property, and the owner loses all control over it, or right to its use. \* \* \* The property dedicated has become public property, impressed with the use for which it was dedicated; and neither can the public divert it from that use, nor can it be lost by adverse possession. Nor is the effect of such dedication impaired by any delay in the use of the land for which it was set apart. Such failure to make use of the land does not authorize the owner to resume possession. The public can thereafter appropriate the land to the use for which it was dedicated whenever convenience or necessity may suggest." In *Parker v. St. Paul*, 47 Minn. 317, 50 N. W. 247, the rule is put: "Moreover, streets, levees, and the like are often laid out on land acquired for or dedicated to such purposes with reference to future as well as present requirements, and therefore it is not legitimate to assume that the property has been abandoned merely because it has not yet been used by the public. It may also be safely laid down as sound, both upon reason and upon consideration of public policy, that until the time arrives when a street, levee, or the like, is required for actual public use, and when the public authorities may be properly called upon to open or prepare it for such use, no mere nonuser for any length of time, however great, will operate as an abandonment." This court, in *Giffen v. City of Olathe*, 44 Kan. 350, 24 Pac. 474, quotes approvingly from the case of *Town of Lakeview v. Le Bahn*, 120 Ill. 92, 9 N. E. 269, as follows: "Until the time arrives when any street or part of a street is required for actual public use, and when the public authorities may be properly called upon to open it for use, no mere nonuser for any length of time will operate as an abandonment of it, and all persons in possession of it will be presumed to hold subject to the paramount right of the public." The court further cites as supporting the same view a number of cases. Very many more cases could be cited announcing the same doctrine. Indeed, we hardly think, from the plaintiffs' argument, that they claim that mere nonuser will ever constitute an abandonment, but that there must be coupled with such nonuser the further fact that the use has ceased because it has become impossible. This we believe to be the rule of the authorities. In *Coffin v. Portland*, 27 Fed. 420, the rule is stated thus: "Property dedicated to public use does not revert to the donor, unless, it may be, where the execution of the use becomes impossible." In *The City of Osage City v. Larkin*, 40 Kan. 206, 19 Pac. 658, 2 L. R. A. 56, 10 Am. St. Rep. 186, it is held that "an alley retains its character as an alley although the lots on both sides thereof are owned by one person, and is so intersected by a railroad as to make it practically impassable." An extreme case is found in *Logansport v. Shirk*, 88 Ind. 563,

where it is held: "The construction of a canal through a street by the city suspends, but does not destroy, the easement for a street, and such an easement revives on the abatement of the canal." With many cases cited in support thereof. Judge Dillon, in his work on *Municipal Corporations* (4th Ed.) § 653, states the rule as follows: "Property unconditionally dedicated to public use or to a particular use does not revert to the original owner, except where the execution of the use becomes impossible. If the dedicated property be appropriated to an unauthorized use, equity will cause the trust to be observed or the obstruction removed." There is nothing to be found in the evidence which goes to show that the use of the tract in question, even were it limited to a boat landing, has become impossible. Indeed, the evidence shows to the contrary. As a matter of law, we know that the Missouri river is a navigable stream. Vast sums of money are expended by the general government for its improvement, and even though at the present but little, if any, commerce is being carried on over its waters, or during the immediate past has been, who shall say that the time may not come, possibly soon, when transportation conditions may so change that navigation may again be profitably resumed? That such a possibility exists may at least serve to exercise a restraining influence upon railroad rates. Certainly it cannot be said either that navigation upon the river has been permanently abandoned, or that by the improvements of wharfage and ways upon the levee it may not again be usable as a landing. That use is now being made of the levee by railroads, manufactories, and squatters counts for little. Such use, if unauthorized or unwarranted, could be prevented by proper action for that purpose. Certain it is that neither city nor county could give away the rights of the public in a tract of land dedicated to public use by authorizing its use for an unwarranted purpose.

We conclude that neither misuse nor nonuse alone will be sufficient to constitute an abandonment of land dedicated to a public use, so as to work as a reverter to the dedicators; that nonuse, to accomplish it, must have been the result of causes rendering use impossible, or at least so highly improbable as to closely approach the impossible; that in this case no such condition was shown by plaintiffs' evidence, even if we take the narrow view that the dedication was only for the purpose of affording a landing place for boats and for commerce carried on by river. We are farther of the opinion that this narrow view may not be sustained—that the dedication was for other purposes as well—and it may well be doubted that a reverter would necessarily follow the complete drying up of the Missouri river.

The judgment of the trial court is affirmed. All the Justices concurring.

(68 Kan. 258)

**HIER v. MILLER.**

(Supreme Court of Kansas. Jan. 9, 1904.)

**BANKS—AUTHORITY OF CASHIER—UNAUTHORIZED CREDITS—RIGHTS OF BANK—NOTICE.**

1. The cashier of a bank organized under the laws of this state has no implied authority to pay his individual debts by entering the amount of them as a credit upon the passbook of his creditor, who keeps an account with the bank, and permitting the creditor to exhaust such account by checks which are paid, the bank having received nothing of value in the transaction.

2. If the cashier of a bank, without actual authority so to do, should undertake to pay his individual debts in the manner stated, the bank may recover of his creditor the amount of money it may pay out upon checks drawn upon the faith of the unauthorized passbook entries.

3. The fact that the cashier is personally interested in a transaction of the character described is sufficient to put his creditor upon inquiry as to the actual extent of the cashier's power.

(Syllabus by the Court.)

Error from District Court, Doniphan County; Wm. I. Stuart, Judge.

Action by Jacob Miller against Martha A. Hier. Judgment for plaintiff. Defendant brings error. Affirmed.

Johnson, Rusk & Stringfellow and Ryan & Reeder, for plaintiff in error. A. L. Perry and S. M. Brewster, for defendant in error.

BURCH, J. Briefly summarized, the essential facts of this controversy are as follows: The cashier of a bank organized under the laws of this state was allowed the sole charge and conduct of its affairs by its board of directors. He was indebted individually to a depositor of the bank, and upon different occasions pretended to make payments upon such indebtedness by giving the depositor credit upon her passbook. Such credits were not shown upon any other memoranda of the bank's business, and were not entered upon its books. The last transaction of this character occurred upon November 30, 1900. A final settlement was then had between the depositor and the cashier, resulting in the surrender to him of his last unpaid note, and an entry upon her passbook as before. She then demanded her balance in the bank. The cashier balanced her passbook, she drew a check for the amount shown by the passbook to be due her, and he gave her therefor a cashier's draft upon a bank in St. Joseph, Mo., which was afterwards duly paid and returned. No officer of the bank had actual knowledge of the true character of these transactions except the cashier. The depositor herself acted in good faith. On January 16, 1901, the death of the cashier occurred. The bank was then found to be insolvent, was immediately taken in charge by the bank commissioner, and in due time a receiver for it was appointed. Because the books of the bank did not disclose the personal transactions of the cashier with the depositor, her account appeared to be overdrawn when the receiver assumed con-

trol. The amount of the overdraft following the affair of November 30, 1900, was somewhat reduced by deposits subsequently made by third parties to the depositor's credit, and the receiver sued for the balance appearing to be due when he took charge. From the facts found the district court concluded that the cashier had no authority to pay his individual debts to the depositor by giving her credit in the bank and permitting her to draw checks upon it without its having received anything of value therefor; that the entries of credit upon the depositor's passbook were acts beyond the scope of the cashier's power; and that, because nothing appeared upon the books of the bank to give notice of the facts, the bank was not bound. Judgment was rendered for the receiver, and the depositor asks for a review of these conclusions of law.

The defendant received no money in payment of her debtor's notes, and made no deposit in the bank of anything derived from them. Her debtor made no deposit for her, and procured no transfer of funds to her account as an equivalent. Therefore the books of the bank spoke true, and any obligation of the bank to pay the defendant's checks arose from the entries upon her passbook made by the bank's cashier. Those entries were made in payment of the cashier's private debt, and, if of any effect at all, amounted to an appropriation of the money of the bank to the discharge of his personal obligations. The cashier had a right to dispose of the funds of the bank for purposes contemplated by its charter. For this his office is a warrant of authority. But he could not absorb the funds of the bank in the satisfaction of his private debts without an express and especial authorization. The office of cashier does not import such power. Whether or not such authority actually did exist the defendant was bound to inquire. It has been well understood from of old that no man can serve two masters. He will hold either to one or to the other. For a like reason the cashier could not serve both himself and the bank in a single transaction, and because he was attempting such a perilous thing the defendant was put upon guard as to the extent of his power. "It is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time." Bank of N. Y. N. B. Ass'n v. A. D. & T. Co., 143 N. Y. 559, 564, 38 N. E. 713, 714. "It is not pretended that Collins had any express authority to apply the funds of the bank to the payment of his own note. He had no implied authority to do so. There are no presumptions in his favor of such a delegation of power. He who assumes to rely upon the authority of an agent to bind his principal to the discharge of the agent's own obligation must prove actual authority if contest arises. No principle of law of agency is better settled than that no person can act as the

agent of another in making a contract for himself." *Chrystie v. Foster*, 61 Fed. 551, 553, 9 C. C. A. 606. The case of *Williams v. Dorrier*, 135 Pa. 445, 19 Atl. 1024, is directly in point. The syllabus reads: "The cashier of an unincorporated bank, himself a partner, being indebted individually on a note he had made to a depositor, wrote to the latter that he had placed to his credit \$1,000 as a payment on the note. A credit for this amount was placed to the depositor's account upon the books of the bank. Afterward the cashier wrote to the depositor that he had again placed \$1,000 to his credit as a second payment, but no credit for this amount was placed to the account. The depositor checked out, from time to time, both amounts, when the receiver of the bank sued to recover the same from the depositor. (1) In such case the bank was estopped from setting up want of authority in the cashier, so far as related to the credit for the first \$1,000, but was not estopped by the act of the cashier as to the second \$1,000, though the cashier had placed them both upon the depositor's passbook; and the bank could recover the latter as an overdraft." The entry of credits in the defendant's passbook in payment of the cashier's private debt is quite analogous in principle to the payment of a bank officer's personal obligations by drafts drawn by him in favor of his creditor upon the funds of the bank. In such a case it is the duty of the recipient of the instruments to inquire of those who alone could confer it if the officer possessed the requisite power to execute them. "Brokers who receive drafts drawn in their favor by the president of a bank upon its funds in settlement of his transactions upon the board of trade are bound to communicate that fact to the bank directors, and inquire as to his authority to execute the paper." *Lamson v. Beard*, 94 Fed. 30, 36 C. C. A. 56, 45 L. R. A. 822. In the case just cited Judge Woods discusses the direction and scope of such an inquiry in the following manner: "The inquiry, therefore, which these plaintiffs in error should have made, was whether Cassatt had authority to draw drafts of the bank upon funds of the bank in possession of its correspondents for use in his individual transactions. Such an inquiry involved no difficulty beyond communicating to the directors of the bank other than Cassatt the fact that such a draft or drafts had been tendered in discharge of liabilities incurred in dealings upon the Board of Trade in Chicago, and asking whether the execution of the paper had been authorized. There can be little doubt what would have been the result of such an inquiry, accompanied with a frank and full statement of the facts as they were known to the payees of any of the drafts in suit at the time of execution. It would not have needed a discovery of Cassatt's fraudulent bookkeeping to enable the directors to say whether the execution of such paper had been theretofore authorized, or then had their

approval. As contended, it was clearly no duty of the plaintiffs in error to undertake an examination of the books, which, once they commenced inquiry into the management of the bank, they would have learned had been wholly in the keeping of Cassatt and of clerks who could not be expected to testify against him. Inquiry of Cassatt, too, it is to be presumed, would have been useless, and therefore, if made, would not have met the requirement of the law. The one thing necessary to be known was whether Cassatt had authority to make the proposed use of the bank's paper. The authority could have come only from the directors by direct resolution or by acquiescence or implied assent, and the plain, unmistakable course was to push the inquiry, wherever begun, to the source of authority."

The rule of law involved, that an agent may not represent himself and his principal in the same transaction, has been applied in many cases. "Undoubtedly the general rule is that one who receives from an officer of a corporation the notes or securities of such corporation in payment of or as security for a personal debt of such officer does so at his own peril. Prima facie the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation." *Wilson v. M. E. R. Co.*, 120 N. Y. 145, 150, 24 N. E. 384, 385, 17 Am. St. Rep. 625. "Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking. Thus he is generally understood to have authority to indorse the commercial paper of his bank, and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has procured a bona fide rediscount of the paper of the bank, his acts will be binding, because of his implied power to transact such business; but certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers, and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power." *West St. L. Sav. Bk. v. Shawnee, etc., Bank*, 95 U. S. 557, 559, 24 L. Ed. 490. "In the absence of special authority from the directors of a bank, the president cannot authorize the cashier to pay the checks of a person who holds a claim against the president, but has no deposit in the bank. The amount of the checks cashed can be recovered by the bank from the drawer of the checks in an action for money paid out." *Dowd v. Stephenson* (N. C.) 10 S. E. 1101. "One man ought not to be permitted to dispose of the property or



to bind the rights of another unless the latter has authorized the act. In the case of a partner paying his own separate debt out of the partnership funds, it is manifest that it is a violation of his duty and of the right of his partners, unless they have assented to it. The act is an illegal conversion of the funds, and the separate creditor can have no better title to the funds than the partner himself had. Does it make any difference that the separate creditor had no knowledge at the time that there was a misappropriation of the partnership funds? We think not. If he had such knowledge, undoubtedly he would be guilty of gross fraud, not only in morals, but in law. That was expressly decided in *Sheriff v. Wilks*, 1 East, R. 48, and, indeed, seems too plain upon principle to admit of any serious doubt. But we do not think that such knowledge is an essential ingredient in such a case. The true question is whether the title to the property has passed from the partnership to the separate creditor. If it has not, then the partnership may reassert their claim to it in the hands of such creditor." *Rogers v. Batchelor*, 12 Pet. 221, 229, 9 L. Ed. 1063, 1067. "A general authority to the president of a bank to certify checks drawn upon it does not extend to checks drawn by himself. The face of the check showing the president's attempt to use his official character for his private benefit, every one to whom it comes is put upon inquiry; and when the certificate is false no one can recover against the bank as a bona fide holder." *Claffin v. Farmers' & Citizens' Bank*, 25 N. Y. 293.

In the case of *Campbell v. Manufacturers' National Bank*, 67 N. J. Law, 301, 51 Atl. 497, 91 Am. St. Rep. 438, the receiver of a bank brought an action to recover money obtained by the defendant upon a draft drawn upon the bank funds by its cashier in payment of his individual debt. In sustaining a recovery the court said: "There is no reason, which is founded on principle, that can be given for not applying the same rule of agency to a cashier as to other persons occupying fiduciary relations. No person can act as an agent in a transaction in which he has an interest, or to which he is a party, on the side opposite to his principal. This must be so where the person dealing with the agent has knowledge of the facts. A person cannot deal with a cashier of a bank as an individual in securing a draft, and claim, after the draft is delivered, it has become the transaction of the bank. To make the acts of the cashier valid, the transaction in which the draft is delivered must be a bank transaction, made by the cashier, within his express or implied authority, in the conduct of the business of the bank. So long as a person deals with the cashier in a matter wherein, as between himself and the cashier, he is dealing with, or has a right to believe he is dealing with, the bank, the transaction is obligatory upon the bank. The

cashier is presumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank itself, or which are usually or customarily done, or held out to be done, by such an officer. But the test of the transaction is whether it is with the bank and its business, or with the cashier personally and in his business. *Claffin v. Farmers' Bank*, 25 N. Y. 293; *Moore v. Citizens' National Bank*, 111 U. S. 156 [4 Sup. Ct. 345, 28 L. Ed. 385]. As to the former, all presumptions are in favor of its regularity and binding force. In the latter no such presumption arises. In fact, upon proof that it was known to the claimant to be an individual transaction, and not one for the bank, the burthen is cast upon the claimant to establish by proof that the act of the cashier thus done for his own individual benefit was authorized or ratified. These are fundamental principles applicable to principal and agent in every transaction arising out of that relation."

In *Williams v. Barnett*, 10 Kan. 455, it is said: "True, each member of a partnership has the *jus disponendi* in reference to all the partnership property; but that right is subordinate to the obligation to make all dispositions for the benefit of the partnership. He may not pledge the partnership credit, or use the partnership assets, for the satisfaction of his individual indebtedness, without the consent of his partners. That is a use foreign to the purposes of a partnership. Neither can he in any way dispose of the property so as to deprive the partnership of the benefit of it." By way of paraphrase it may be observed that the cashier of a bank may not pledge the credit of the corporation, or use the corporate assets, for the satisfaction of his individual indebtedness, without the consent of the board of directors. That is a use foreign to the charter purposes of the corporation. And because such conduct falls outside the scope of a cashier's lawful authority any one dealing with him privately must do so at his peril. The case of *Goshen Nat. Bk. v. State*, 141 N. Y. 379, 36 N. E. 316, cited by counsel for defendant, is not opposed to these views, for in that case the cashier "had the right to draw a draft on the corresponding bank of the claimant for himself upon the same terms that he had to draw a draft for a stranger." See *Campbell v. Manufacturers' National Bank*, *supra*, and *Bank of N. Y. N. B. Ass'n v. A. D. & T. Co.*, *supra*.

It is said that the act of the cashier in entering up deposits on the defendant's pass-book was an assurance from him that, if he was using the bank's funds, he was acting within his authority. The reply is that, because he was paying his own debt his assurance was merely that of himself as an individual for his own ends, and not that of the bank through him, as its agent, for its benefit.

It is said that when a bank places an offi-

cer at the window, where he transacts its business with the public, it in effect tells the world that he is trustworthy and reliable, and that he will act within the scope of his authority. It does nothing of the kind. Such a declaration would protect a recipient in the enjoyment of a Christmas gift of the entire body of corporate assets. By placing an officer at the window to do its business a bank publishes to the world that he is there to do its business, and not his business; that he has no power or authority to do any act outside the legitimate prosecution of the corporate enterprise; and that it will not be bound by any perversion of the corporate funds to his personal use. "The cashier is the executive of the financial department of the bank, and whatever is to be done, either to receive or pass away the funds of the bank for banking purposes, is done by him or under his direction. He therefore directs and represents the bank in the reception and emission of money for banking objects. *United States v. Bank*, 21 How. 356 [16 L. Ed. 130]; *Merchants' Bank v. State Bank*, 10 Wall. 604 [19 L. Ed. 1008]; *Com. Bank v. Norton*, 1 Hill [N. Y.] 501. But neither the president nor the cashier can impose by his own action, on the bank, any liability not already imposed by law or usage." *Asher v. Sutton*, 31 Kan. 286, 289, 1 Pac. 535, 537.

In an effort to avoid the effect of these conclusions and to establish ratification or estoppel on the part of the bank, the defendant strives to magnify the importance of many minor details of her relations with the bank and its cashier, in which the voluminous findings of fact abound. It may be doubted if the act of the cashier was capable of ratification by the board of directors, because it was not within the power of the board to grant him such authority in the first instance. "May the officers of a corporation make a contract binding on the company by which its property is diverted from the use and benefit of the corporation and applied to the payment of the individual debt of its president? It is a fundamental principle that the officers and directors of a corporation are trustees for its stockholders. *Sargent v. K. M. R. Co.*, 48 Kan. 672, 29 Pac. 1063. This fiduciary relation forbids the doing of any act by them by which the corporate assets are applied to any use except such as may serve the purpose of the corporation. It is as much beyond the power of the officers or directors of a corporation to pledge its property to secure the personal debt of its president as it is to use it in pledge for the payment of the obligation of a total stranger." *Cattle Co. v. Loan Co.*, 65 Kan. 359, 361, 69 Pac. 332. "A corporate officer who performs the duties of his position is not, in the absence of agreement with the corporation, entitled to any compensation therefor. Nor can the directors, after the services have been performed, pay for such services, unless per contract theretofore made. The reason is

that the board cannot give away the money of the stockholders. They can be liberal or charitable with their own private funds, but, as agents, cannot be liberal with money of their principals. A subsequent vote of the board to pay a director for his services, when there was no previous agreement, is not binding." "If the directors have no power to bind the corporation by a direct vote granting pay for past services in any capacity to one of their number who agreed to serve without compensation, a fortiori, the corporation is not concluded by a presumed ratification through a supposed knowledge and acquiescence on the part of such directors. What cannot be done directly, through lack of power, is never accomplished indirectly by silence, acquiescence, and ratification." *First Nat. Bank v. Drake*, 29 Kan. 311, 317, 320, 44 Am. Rep. 646.

But conceding the transaction to be one which the board of directors could have authorized, a careful consideration of the findings of fact discloses no substantial ground for denying the right of the receiver to recover the money of the bank which the defendant obtained. To state fully the reasons for this conclusion would require a discussion of the facts far beyond the proper limits of a written opinion. It may be said in passing, however, that the defendant stands upon precarious ground in invoking the rule of equitable estoppel against the representative of the bank. When the cashier made an entry in the defendant's passbook of the receipt of money by the bank, she knew the recital was false, for she had delivered to the bank nothing of value at all. She knew that something more must be done before she could rightfully demand the payment of her checks. She knew very well that the money was yet to be supplied, and that, unless funds actually were furnished, there was nothing which she could have any right to withdraw. No obligation rested upon the bank, or upon any of its officials as such, to deposit or to transfer funds to the credit of her account. She was required to do that herself, or to see that it was done. If she depended upon her debtor to act for her, it was incumbent upon her to see that he did whatever was required. It did not devolve upon the bank to see that her debtor discharged any duty to her, and when he failed to supply her account with necessary funds the bank was not bound to make good his default. She had no right to ask the bank to return to her money which she never deposited, and which it never in fact received from any source; and when it paid her checks without any money belonging to her in its possession to meet them it was entitled to be reimbursed.

Other propositions presented by counsel need not be discussed at length. None of them are sufficiently grave to require a reversal of the judgment of the district court. It is therefore affirmed. All the Justices concurring.

(29 Mont. 485)

**HOGAN v. KELLY et al.**

(Supreme Court of Montana. Feb. 1, 1904.)

**PAROL EVIDENCE—BILL OF SALE—CONTRADICTION — AGENT'S DECLARATIONS — SCOPE OF EMPLOYMENT—IRRELEVANT EVIDENCE.**

1. Code Civ. Proc. § 3132, provides that there can be no evidence of the terms of a written agreement other than the contents, except where a mistake or imperfection is put in issue, or where its validity is in dispute; but this shall not exclude evidence of the circumstances under which the agreement was made as defined in section 3136, or to explain an extrinsic ambiguity or establish illegality or fraud. Section 3136 provides that for the proper construction of an instrument the circumstances under which it was made, etc., may be shown. Civ. Code, § 4430, provides that a written contract may be revised for fraud or mistake. A bill of sale, under which plaintiff claimed certain buildings, described the property as "one store building and dwelling house attached (new); one warehouse (new); one barn (new); and all fixtures and attachments thereunto belonging," etc. The defendants denied plaintiff's ownership or right of possession, denied their wrongful detention or that the buildings could be removed from the land, and alleged that they themselves were the owners and in possession of the property. *Held*, that parol evidence that the parties did not intend to include the buildings in the bill of sale was inadmissible.

2. On an issue as to the title to property under a bill of sale, written declarations of the vendee's agent representing her in the purchase, made several months after the bill was executed, but before the property was resold, to the effect that the vendee did not claim the property, and that it was not included in the bill, are hearsay and inadmissible, the uncontradicted evidence showing that the agent had no authority to sell or dispose of the property in any way.

3. The written declaration of the agent of plaintiff's vendor to defendants, wholly disconnected with the matter in controversy, and of an acrimonious character, tending to prejudice the jury against plaintiff, is erroneously admitted in evidence.

**Commissioners' Opinion.** Appeal from District Court, Deer Lodge County; Welling Napton, Judge.

Action by Dave Hogan against T. L. Kelly and another. From a judgment for defendants and a denial of a new trial, plaintiff appeals. Reversed.

J. H. Duffy and Bernard Noon, for appellant. Geo. B. Winston, for respondents.

**CALLAWAY, C.** Defendants had judgment below. Plaintiff moved for a new trial, which was denied. From the judgment and order denying his motion for a new trial, he has appealed.

It is stated in the amended complaint, in substance, that plaintiff is the owner and entitled to the possession of certain frame buildings of the value of \$800, situated on land belonging to the Northern Pacific Railway Company, in Deer Lodge county, and in which land neither plaintiff nor defendants have any interest; that the buildings are not affixed or permanently attached to the land, and can be removed without injury; that the defendants unlawfully and wrongfully withhold and detain the possession of the said buildings from the plaintiff; that

prior to the commencement of the action the plaintiff demanded of the defendants the possession of the same, but the defendants refused, and still refuse, to deliver them to plaintiff.

In their answer defendants deny that plaintiff is the owner or entitled to the possession of the buildings, and deny that the defendants, or either of them, unlawfully and wrongfully withhold or detain the possession of said property or any part thereof; deny that the buildings can be removed from said land without injury. And defendants, for further and separate answer to the complaint of plaintiff, allege "that they are now and were at all times mentioned in plaintiff's complaint and for a long time prior thereto the owners of and in possession of the property and every part thereof mentioned in plaintiff's complaint."

The case was tried to a jury. Plaintiff introduced evidence showing that the defendants and one James McGovern, who were partners doing business under the firm name of M. E. Kelly & Co., on April 26, 1900, executed a bill of sale to one Lulu F. Largey. The consideration named in the bill of sale is \$15,000 and the cancellation of all indebtedness due and owing to Lulu F. Largey from the vendors. The property conveyed is described as follows: "One store building and dwelling house attached (new); one warehouse (new); one barn (new); and all fixtures and attachments thereunto belonging. All of said buildings being situated at Gold Creek station, Deer Lodge county, Montana. Also all goods, wares and merchandise now in and around said buildings (except the household furniture in said dwelling house attached to said store building), belonging to the said first parties, consisting of a stock of general merchandise, including all counters, scales, cash register, stove, safe, all other goods and property used in and around said store and useful in connection with said business. This bill of sale is intended to cover all goods, wares, and merchandise of every kind, character and description belonging to said above named first parties, belonging to and connected with the general store and mercantile business of the firm of M. E. Kelly & Co." On December 7, 1900, Lulu F. Largey conveyed said buildings to the plaintiff, who demanded possession of them from the defendants, which was refused.

The defendants sought to defeat plaintiff's action by showing that the contracting parties did not intend to include the buildings in the bill of sale. The evidence discloses that one Bernard Noon was Mrs. Largey's business agent, and acted for her in the transaction which culminated in the bill of sale being executed to her. The court permitted defendant T. L. Kelly to recount conversations and understandings had between himself and Noon prior to the signing of the bill of sale, and thereafter concerning what prop-

erty was intended to be included therein. It will be observed that the defendants did not plead any mistake or imperfection in the writing; neither was the validity of the bill of sale in dispute; nor was there any attempt to explain an extrinsic ambiguity, nor any attempt to establish illegality or fraud. There was no question concerning the construction of the instrument. Under the pleadings in this case, such proof was inadmissible. Sections 3132, 3136, Code Civ. Proc., and section 4430, Civ. Code; *Gaffney Mer. Co. v. Hopkins*, 21 Mont. 13, 52 Pac. 561; *Sanford v. Gates, Townsend & Co.*, 21 Mont. 277, 53 Pac. 749; *York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; *Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279; *Armington v. Stelle*, 27 Mont. 13, 69 Pac. 115; *Riddell v. Peck-Williamson H. & V. Co.*, 27 Mont. 44, 69 Pac. 241.

Over plaintiff's objection defendants were permitted to introduce in evidence two letters and a so-called certificate written by Noon to T. L. Kelly several months after the bill of sale was executed and delivered, and before the property was sold to plaintiff. The letters and certificate were to the effect that Noon did not claim the buildings for Mrs. Largey; that she was not the owner of them, and did not claim any interest, right, or title in them; that the buildings were not included in the bill of sale, but were expressly reserved therefrom. The bill of sale was thus directly contradicted. In explanation of these letters and the certificate Noon testified that he had put the bill of sale away for safe-keeping and had forgotten its contents; was misled by Kelly as to what was included in it. Both Mrs. Largey and Noon testified that the latter had no authority to sell or dispose of the buildings in any way, and this testimony was uncontradicted.

To bind the principal, the declarations of an agent must be made within the scope of his authority, at the time of the transaction, and be a part of the *res gestæ*. If made after the transaction is completed, they are in the nature of hearsay, and are mere narrations of a past transaction. *Moore v. Bettis*, 11 Humph. 67, 53 Am. Dec. 771, and note; *Garfield v. Knight's F. & T. M. W. Co.*, 14 Cal. 36; *Clunie v. Sacramento Lumber Co.*, 67 Cal. 313, 7 Pac. 708; *Beasley v. S. J. Fruit-Packing Co.*, 92 Cal. 388, 28 Pac. 485; *Birch v. Hale*, 99 Cal. 299, 33 Pac. 1088; *Luby v. Hudson River Railroad Co.*, 17 N. Y. 131; *Herbert v. King*, 1 Mont. 475; *Mechem on Agency*, § 714. It is apparent that the letters and certificate were nothing more than mere declarations made by the agent several months after the transaction to which they related occurred, and their reception in evidence was error.

Over plaintiff's objection the court also permitted the defendants to introduce in evidence an acrimonious letter written by Noon to T. L. Kelly on December 3, 1900. Under the rules above announced, it was inadmis-

sible for any purpose as being the mere declaration of an agent; but, in addition to that, it was objectionable because it did not even remotely refer to any matter in controversy, so far as can be ascertained from its terms. Besides being wholly irrelevant and incompetent for any purpose, it probably tended to prejudice the jury to plaintiff's injury under the testimony already in evidence.

What we have said renders a discussion of the instructions unnecessary.

No question has been raised by counsel as to whether the buildings in suit are real or personal property.

For the foregoing reasons, we are of the opinion that the judgment and order should be reversed, and the case remanded for a new trial.

OLAYBERG, C. C., and POORMAN, C., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the case is remanded for a new trial.

(29 Mont. 466)

#### PETELIN v. KENNEDY.

(Supreme Court of Montana. Feb. 1, 1904.)

#### CRIMINAL LAW—JUDGMENT—FINE AND IMPRISONMENT.

1. A judgment of a justice in a criminal case, reciting that defendant was sentenced to pay a fine of \$100, and that, failing to pay it, he was remanded to be confined in jail at the ratio of one day for every \$2, will be held to have been rendered under Pen. Code, § 2707, providing that a judgment that defendant pay a fine may also direct that he be imprisoned till the fine be satisfied in the proportion of one day's imprisonment for every \$2 of the fine, in which case the imprisonment *ipso facto* discharges the judgment; and not under sections 2226 and 2227, providing that, when judgment of fine and costs is entered against defendant, and it is ordered that he be committed till the same are paid, if he thereafter proves to the court that he is unable to pay them, the court may order his release on his having been confined a day for every \$2 of such fine and costs, but when he is committed for failure to pay any fine and costs, and fails to prove his inability to pay them, the court must order his discharge when he has served one day for every \$2 of the fine and costs, but this shall not discharge the judgment for fine and costs, which may thereafter be collected on execution.

Appeal from District Court, Deer Lodge County; Welling Napton, Judge.

Action by Joseph Petelin against Frank Kennedy. From a judgment of the district court affirming a judgment of a justice for plaintiff, defendant appeals. Affirmed.

J. H. Duffy and W. H. Trippet, for appellant. C. M. Sawyer, for respondent.

HOLLOWAY, J. On December 21, 1900, a complaint was filed in the office of Frank Kennedy (appellant here), at that time a justice of the peace for Anaconda township, Deer Lodge county, Mont., charging Joseph

Petelin (respondent here) with the crime of assault in the third degree. The defendant in that action appeared and entered a plea of guilty, and thereupon the justice of the peace court made and entered this judgment: "The defendant having pleaded guilty, the court adjudged him guilty of assault in the third degree as charged in the complaint, and sentenced the defendant to pay a fine of one hundred (100) dollars, and the defendant, failing to pay the same, was remanded to the custody of the sheriff of Deer Lodge county, Montana, to be confined in the county jail of Deer Lodge county, Montana, at the ratio of one day for every two dollars." On December 28, 1900, an execution was issued, and money to the amount of \$44.75, belonging to the defendant, Petelin, but then in the possession of a third party, was seized. The justice of the peace attempted to apply the same towards the satisfaction of such judgment, and then made an order directed to the sheriff requiring that officer to discharge the prisoner on January 10, 1901. But, notwithstanding such order, the sheriff continued to confine the defendant, Petelin, in the county jail for the full period of 50 days. Immediately upon his release the defendant made a demand upon the justice of the peace for the return of the \$44.75 which had been collected and was then in the possession of that officer. This demand was refused, and thereupon this action was commenced by Petelin against Kennedy to recover such sum, together with certain items of expense for time spent and money expended in pursuit of the same. The cause was tried in the justice of the peace court, and from the judgment entered therein an appeal was taken to the district court. The cause was there tried upon an agreed statement of facts, the facts being substantially as herein set forth. The district court entered judgment for the plaintiff for the recovery of the sum of \$44.75 and costs, and from that judgment this appeal is prosecuted.

It is contended by appellant that sections 2226 and 2227 of the Penal Code are applicable to the practice in justice of the peace courts as well as district courts, and that under section 2227 the imprisonment of Petelin for the full term of 50 days did not operate to satisfy or discharge the judgment rendered against him in whole or in part, and that the payment of such judgment could be properly enforced by execution. The application to be made of these sections is to be determined from the character of the judgment entered in any particular case. Sections 2226 and 2227 are as follows:

"Sec. 2226. When judgment of fine and costs is entered against a defendant, and it is ordered that he be committed until the same are paid, if at any time thereafter the defendant prove to the court, or judge thereof, by his own affidavit or that of any other person, that he is unable to pay such fine and costs, or any part thereof, the court or

judge thereof, may order the sheriff to release him upon his having been confined in jail one day for every two dollars of such fine and costs, or any portion thereof remaining unpaid. \* \* \*

"Sec. 2227. Whenever any defendant is committed to jail for the failure to pay any fine and costs adjudged against him, and has failed to prove to the satisfaction of the court or judge thereof, that he is unable to pay the same, or any part thereof, the court must order that he be discharged from custody when he has served one day for every two dollars of such fine and costs; but this does not discharge the judgment for fine and costs, which may at any time thereafter, within the time limited by law, be collected upon execution issued thereon."

Section 2707 of the same Code reads as follows:

"Sec. 2707. A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every two dollars of the fine."

Under the provisions of this last section the court may render a judgment that the defendant in a criminal proceeding pay a fine, and may further direct that he be imprisoned until such judgment be satisfied, specifying in the judgment the term or extent of the imprisonment, which shall not exceed one day for every \$2 of such fine; and, in the event such a judgment is entered, the imprisonment of the defendant during the term specified operates ipso facto to satisfy and discharge the judgment. The entry of this form of judgment presupposes that the court has determined that the defendant is unable to pay the fine in money, and immediately upon its entry the justice of the peace makes out and delivers to the sheriff a certified copy of such judgment, which is the commitment under which the prisoner is held. If no appeal be taken by the defendant, the case is closed, so far as the justice of the peace court is concerned, and thereafter that tribunal is without authority to issue an execution based upon such judgment.

Sections 2226 and 2227, supra, are made applicable to the practice in justice of the peace courts, to some extent at least, by section 2711 of the same Code, which provides: "The defendant committed under the provisions of this chapter may be discharged in the same manner as if he had been committed by the district court." Sections 2226 and 2227 contemplate a judgment imposing a fine and costs, and providing that the defendant shall be imprisoned until such fine and costs be paid. In this instance the judgment does not specify the term of such imprisonment, but provision is made whereby the defendant may secure his release from such imprisonment when he shall have served one day for every \$2 of the fine and costs. While it might be proper for the justice of the peace court to render the judgment con-

templated by these sections, the question for our determination is, did it do so in this instance? If it did not, then it is unnecessary for us to determine what effect, if any, imprisonment under such a judgment would have towards satisfying or discharging the judgment. While the record of the justice of the peace court is informal, it is sufficient to disclose the purpose of the court in rendering the judgment, and satisfies us that it proceeded under section 2707, supra, and the judgment is sufficient to bring the case within the meaning of that section. Therefore the imprisonment of the defendant for the full period of 50 days operated to satisfy and discharge that judgment in full. In this view of the case, the defendant had no lawful right or authority to retain the money belonging to Petelin which had been collected by execution, and his refusal to deliver the same upon demand, and his attempt to apply it on the judgment which had been rendered against Petelin, constituted a conversion of the fund. Upon the facts as shown by the record, the plaintiff in this action was entitled to recover.

The judgment is affirmed. Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

(29 Mont. 470)

WILSON et al. v. FREEMAN.

(Supreme Court of Montana. Feb. 1, 1904.)

MINING CLAIMS—LOCATION—DECLARATORY STATEMENTS—DESCRIPTION OF CLAIM—MARKINGS—AMENDMENT—WHAT LAW GOVERNS—IMPROVEMENTS—REPRESENTATION WORK—OBJECTIONS—RIGHT TO URGE.

1. Pol. Code, § 3611, provides that the equivalent of a discovery shaft in a mining location shall be "a cut, a cross-cut or a tunnel which cuts a lode at the depth of ten feet below the surface, or an open cut of at least ten feet in length along the lode from the point where the lode may be in any manner discovered," and section 3612 requires the declaratory statement to set forth the dimensions and location of the discovery shaft, or its equivalent sunk on lode or placer claims. *Held*, that where a recorded declaratory statement merely recited that the claim was a relocation of the M. lode claim, on which the discovery was a shaft 10 feet in depth and 4½ feet in size, but failed to state that such were the dimensions at the date of the relocation, and it contained no reference to a discovery shaft or its equivalent, except the recitals, "from the center of discovery shaft, which is an open cut ten feet deep," and "beginning at an open cut which is the point of discovery," it was insufficient.

2. Pol. Code, § 3615, declares that the relocation of an abandoned lode or placer claim must be made by sinking a new discovery shaft and fixing new boundaries in the same manner as if an original location had been made, or the relocater may sink the original discovery shaft 10 feet deeper, in which case the declaratory statement shall give the depth and dimension of the original discovery shaft at the date of the relocation. *Held* that, where the claim was based on a relocation of an abandoned claim, a declaratory statement, failing to show the dimensions and locations of the shaft on the abandoned claim at the date of such location, and that it was sunk 10 feet deeper, was invalid.

3. In a suit to establish an adverse claim filed against an application for a patent to a mining claim, the United States is a quasi party, and if, upon a trial, neither plaintiff nor defendant is entitled to a patent to the ground in controversy, the court must so find.

4. The validity of a mining location, in an action to determine an adverse claim before patent issued, must be determined by the law in force at the time the location was made.

5. Under Laws 1901, p. 56, authorizing the filing of an amendatory declaratory statement of the location of a mining claim where the original was defective or erroneous, where a locator misdescribed his claim as running easterly and westerly, he was entitled to file an amended declaratory statement that the claim ran in the northerly and southerly direction, to correspond to the staking of the claim on the ground.

6. In an action in support of an adverse claim in an application for a patent to a mining claim, an objection that the claimant had not placed on the claim sought to be patented \$500 worth of work or improvements could not be considered, such question being within the exclusive jurisdiction of the land office.

7. Where an adverse claimant to a mining location had no right or title thereto, he could not object that the claimant was not entitled to a patent for failure to do the annual representation work thereon.

Commissioners' Opinion. Appeal from District Court, Park County; Frank Henry, Judge.

Action by A. B. Wilson and others against George O. Freeman in support of an adverse claim to a mining location. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

W. J. Beecher and Geo. F. Shelton, for appellants. H. G. & S. H. McIntire, for respondent.

CLAYBERG, C. C. This is an action brought in support of an adverse claim filed against an application for patent to a mining claim. The contentions of the respective parties, as we gather them from the record, are briefly as follows: Respondent asserts that his predecessors had located the W. W. Dixon lode claim on January 1, 1891, which, according to the declaratory statement duly recorded, ran 1,400 feet easterly and 100 feet westerly from the discovery shaft. Appellants base their rights upon a location of the Snowstorm lode claim, made September 5, 1898, which, according to the declaratory statement, extends along the vein 1,150 feet in a northerly direction and 300 feet in a southerly direction from discovery. Appellants' declaratory statement of the Snowstorm location is as follows:

"Quartz Location. Notice is hereby given that the undersigned citizens of the United States, did, on the 5th day of Sept., 1898, discover a quartz lode or vein, bearing gold, silver, iron and other valuable metals, with at least one well-defined wall, to be known as the Snowstorm quartz lode mining claim, and did on said day locate and claim, by virtue of chapter six, of title XXXII, of the Revised Statutes of the United States, and the laws of the state of Montana, 1150 feet in a

northerly direction and 350 feet in a southerly direction from the center of the discovery shaft, which is an open cut ten feet deep (at which cut this notice of location is posted), and 300 feet on each side from the middle or center of said lode or vein at the surface, comprising in all 1500 feet in length along said vein or lode, and 600 feet in width. This lode is situated in the Sheep-eater unorganized mining district, in the county of Park and state of Montana (the adjoining claims are the New York mining claim on the north and the Sunshine lode mining claim on the west), and is a relocation of the Monarch lode claim, on which the discovery was a shaft which was ten feet in depth,  $4\frac{1}{2}$  feet in size, and — feet in —, has been extended in — by the undersigned — feet —. The exterior boundaries of this location are distinctly marked by posts or monuments at each corner of the claim, so that the boundaries can be readily traced, viz.: Beginning at open cut which is the point of discovery, thence running in a northerly direction 1150 feet to the northeast corner stake, marked No. 1; thence, 600 feet west to the northwest corner stake, marked No. 2; thence, 1500 feet in a southerly direction to the southwest corner stake, marked No. 3; thence, 600 feet in an easterly direction to southeast corner stake, marked No. 4; thence, 1500 feet in a northerly direction to stake No. 1 at N. E. corner. A. B. Wilson, Thomas Lenaghan, Paul Rigler, John Viditz, Locator—and Claimant—."

This declaratory statement, when offered in evidence, was objected to by respondent, on the ground that "It does not meet the requirements of the statute." Its validity must therefore be determined; because, if it be invalid, appellants' location fails, and they could not maintain this character of action, and were not entitled to a judgment. Section 3611 of the Political Code, among other things, provides that: "The locator or locators must define the boundaries of his or their claim by marking a tree or rock in place, or by setting a post or stone at each corner or angle of the claim. When a post is used, it must be at least four inches square by four feet six inches in length, set one foot in the ground, with a mound of earth or stone four feet in diameter by two feet in height around the post. When a stone is used, not a rock in place, it must be at least six inches square and eighteen inches in length, set two-thirds of its length in the ground, which trees, stakes or monuments must be so marked as to designate the corners." Section 3612 provides what the declaratory statement which is recorded shall contain, and among the other things required are: "(6) The dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims. (7) The location and description of each corner, with the markings thereon." An examination of the recorded declaratory statement discloses that

the boundary stakes were simply marked "No. 1," "No. 2," "No. 3," and "No. 4." It must be remembered that under section 3611 the stakes "must be so marked as to designate the corners," and under section 3612 the recorded declaratory statement must contain "a description of each corner, with the markings thereon." We doubt whether this declaratory statement shows that the stakes were "so marked as to designate the corners," or that it contains "a description of each corner with the markings thereon," within the purview of the following decisions: *Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 153; *Walker v. Pennington*, 27 Mont. 369, 71 Pac. 156; *Hahn v. James* (Mont.) 73 Pac. 965; but, inasmuch as it is clearly insufficient for other reasons, we do not express any definite opinion thereon.

Section 3612, as above seen, requires the declaratory statement to set forth the dimensions and location of the discovery shaft, or its equivalent sunk upon lode or placer claims. The equivalent of a discovery shaft is defined by the statute in the following language: "A cut, a cross-cut or a tunnel which cuts a lode at the depth of ten feet below the surface, or an open cut of at least ten feet in length along the lode from the point where the lode may be in any manner discovered, is equivalent to a discovery shaft." Section 3611, Pol. Code. The recorded declaratory statement does not satisfy the requirements of these provisions. The only reference to a discovery shaft, for the purpose of giving its dimensions, is as follows: The *Snowstorm* "is a relocation of the Monarch lode claim, on which the discovery was a shaft which was ten feet in depth and four and one-half feet in size," not that these were its dimensions "at the date of such relocation." No reference is made to a discovery shaft or its equivalent upon which the location is based, except the recitals, "from the center of discovery shaft which is an open cut ten feet deep," and "beginning at an open cut which is the point of discovery," neither of which is sufficient to give, as a fact, the dimensions and location of the discovery shaft or its equivalent.

Again, section 3615 provides: "The relocation of an abandoned lode or placer claim must be made by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were an original location made under this chapter; or the re-locator may sink the original discovery shaft ten feet deeper, in which case the declaratory statement must give the depth and dimension of the original discovery shaft at the date of such re-location." Now, under this section, if the *Snowstorm* was a relocation of the Monarch, the locators were required, either to sink a new discovery shaft or its equivalent, the same as if it were an original location, in which case they would be bound to set forth in their declaratory statement the dimensions and location of such discovery

shaft or its equivalent, or sink the original discovery shaft 10 feet deeper, in which case the declaratory statement would be required to give, first, the depth and dimensions of the original discovery shaft "at the date of re-location," and, second, the dimensions and location of the discovery shaft or its equivalent upon which the location was based (which in such instance must be the original discovery shaft sunk 10 feet deeper). There is nothing in the declaratory statement above quoted showing the dimensions and location of the discovery shaft, or its equivalent, if a new shaft was sunk as a basis of location; or showing the depth and dimensions of the discovery shaft upon the abandoned claim "at the date of such location," and that it was sunk 10 feet deeper, if the location was based upon such facts. Therefore we are satisfied that the declaratory statement introduced in evidence by the plaintiffs and appellants was absolutely void, and gave the plaintiffs and appellants no right to maintain the suit in controversy, or have judgment entered in their favor upon such suit.

Of course, in suits of this character the United States is a quasi party, and if the court is satisfied, upon a trial of the case, that neither plaintiff nor defendant is entitled to a patent of the ground in controversy, it must so find and decide. *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990. It therefore becomes necessary to investigate the validity of respondent's alleged title. As was stated before, respondent claims under a location made on the 1st day of January, 1891. This location, having been made prior to the Code of 1895, must be tested by the law in force at the time it was made. We have no doubt that it was *prima facie* a valid location under the laws of Montana and the United States existing at the time it was made. Respondent claims that there was a mistake in the recorded certificate of location as to the direction of the vein located and of the claim, and a discrepancy between such certificate and the staking of the claim on the ground; that while in the notice the claim was described as running easterly and westerly, in truth and in fact, by the staking of the claim on the ground, it ran in a northerly and southerly direction. Therefore, for the purpose of correcting this mistake, an amended declaratory statement was recorded in 1899. This amended statement recites fully the facts in regard to the making of the original location, and states that it was "for the purpose of more fully and perfectly describing the said claim, and with no intention or design to waive any rights accrued or accruing under and by virtue of the said notice of location so filed as aforesaid." It is therefore not a new location or a relocation, but simply an amendment of the declaratory statement of the old location, made solely for the purpose of correcting a mistake therein in the description of the claim as to its staking.

The Legislature in 1901 (Laws 1901, p. 56) enacted a law allowing the filing of an additional or amendatory declaratory statement in cases where the original was defective or erroneous. Section 2 of this act provides as follows: "Any amended or additional declaratory statement which may have heretofore been filed by a locator, or his successors or assigns, shall have the same force and effect and be subject to the same terms and conditions as though the same had been filed under the provisions of section 1 of this act."

In our opinion, under this law, the original location and the amended declaratory statement, construed together, constituted a valid location of the W. W. Dixon in a northerly and southerly direction, and that the respondent, as against plaintiffs and the United States, was entitled to a patent for the W. W. Dixon, upon making the proper proof before the court and land office. Respondent did not change the location on the ground by the amended declaratory statement, but simply conformed the description as stated in the original declaratory statement, as recorded, with the actual staking on the ground as made at the time the original location was made. Respondent had a perfect right to do this, and, inasmuch as plaintiffs' location has been held to be absolutely void, they were not interested in any of the ground in controversy, and therefore have no right to object to the action of respondent in that regard.

Appellants also contend that respondent has not placed upon said lode claim, so sought to be patented, \$500 work or improvements. This was a matter which could not be in controversy in the trial of a suit of this character. The court has nothing to do with the question as to whether the work was done or not. It is a question exclusively for the land office, and the respondent might have, if he had not already done so, completed such work and improvements at any time before actually making his final entry in the land office.

Appellants further allege that the W. W. Dixon lode was forfeited because of the failure of respondent to do the necessary annual work upon the claim for the years 1897 and 1898. The purpose of annual representation is to enable the locator to hold his claim as against all persons. It is not required for any purpose which affects the general government. 2 Lind. on Mines (2d Ed.) § 624, and cases. The government cannot forfeit the claim if the annual representation has not been placed upon it. In order to make the want of annual representation effective, the ground must be entered and located by another person. We have seen that the pretended entry and location by the appellants was absolutely void and of no effect, and therefore they cannot raise the question as to the sufficiency of representation work. Besides, the proof in the record discloses that representation work was done



for both these years on claims which are a part of a group of contiguous claims owned by the respondent, of which the W. W. Dixon was one, and that the work done upon the other claims "had a tendency to develop the W. W. Dixon claim."

Counsel for respondent raised and argued the proposition that the plaintiffs' location was void because of its great excess, being 806 feet wide at one end and over 1,800 feet in length, one side line being  $1,858\frac{1}{10}$  feet long, and the other  $1,951\frac{3}{10}$  feet long (as disclosed by the complaint on file in the action). The point is a very important one, and its consideration is not necessary to a decision of the case, inasmuch as appellants' location is void for other reasons.

We are therefore of the opinion that the judgment of the court below was correct, and should be affirmed.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(29 Mont. 490)

#### STATE v. MJELDE.

(Supreme Court of Montana. Feb. 1, 1904.)

INDICTMENT—DUPLICITY—MODE OF RAISING QUESTION—LARCENY—PROPERTY OF DIFFERENT OWNERS—SINGLE ACT OF TAKING.

1. Pen. Code, § 1922, provides that the defendant may demur to an information when it appears upon the face thereof, among other things, that the court has no jurisdiction of the offense charged therein, or that more than one offense is charged. Section 1930 provides that, when the objections mentioned in section 1922 appear on the face of the information, they can only be taken advantage of by demurrer, except that the objection to the jurisdiction of the court over the subject of the information may be taken under a plea of not guilty or in arrest of judgment. Section 2200 provides that a motion in arrest of judgment may be founded on any of the defects mentioned in section 1922, unless the objection has been waived by a failure to demur. *Held*, that an objection to an information for grand larceny that it joins several distinct offenses, each of which alone would constitute petit larceny, was addressed to the jurisdiction of the court, rather than to the form of the information, and therefore might be raised by an objection to the introduction of any evidence and a motion to compel an election.

2. Pen. Code, § 880 et seq., provides that every person who, with intent to deprive or defraud the true owner of his property, or to appropriate the same to the use of the taker, etc., takes property from another's possession, or, having it in his possession, appropriates it to his own use, etc., is guilty of larceny; and that when the property exceeds \$50 in value the offense is grand larceny, and otherwise petit larceny. Three persons placed at the same time individual sums, less than \$50, on the table of an agent, who by one act collected them, placed them in his pocket, and afterwards appropriated them to his own use. *Held* to constitute a single offense of grand larceny, so that an information charging that he, as the agent of such three persons, had money in his possession in the aggregate of the sums belonging to each, the specific ownership being alleged, and appropriated it to his own use, was not bad for duplicity.

Commissioners' Opinion. Appeal from District Court, Sweet Grass County; Frank Henry, Judge.

B. M. Mjelde was informed against for grand larceny, and from a directed verdict of acquittal the state appeals. Reversed.

Jas. Donovan, Atty. Gen., for the State.  
Sydney Fox, for respondent.

POORMAN, C. This is an appeal by the state from an order directing the jury to find for the defendant. The defendant was informed against and tried for grand larceny. The information charges the offense as follows: "That at the county of Sweet Grass, in the state of Montana, on or about the 18th day of February, A. D. 1903, and before the filing of this information, the said B. M. Mjelde was the agent of Olaus Mydland, Syvert Mydland, and Lars Grosfield, and then and there had in his possession, custody, and control, as such agent of the said Olaus Mydland, Syvert Mydland, and Lars Grosfield, money to a large amount, to wit, to the amount of one hundred and two dollars, and of the value of one hundred and two dollars, a more particular description thereof being to informant unknown, forty dollars of the above-described money being the property of and belonging to said Olaus Mydland, and forty dollars of the above-described money being the property of and belonging to said Syvert Mydland, and twenty-two dollars of the above-described money being the property and belonging to Lars Grosfield, the aggregate of said sums of money, to wit, the said amount of one hundred and two dollars, being then and there received by the said defendant, B. M. Mjelde, as such agent aforesaid, at one and the same time, from the said Olaus Mydland, Syvert Mydland, and Lars Grosfield, and then and there he, the said B. M. Mjelde, as such agent aforesaid, did willfully, unlawfully, and feloniously appropriate to his own use and steal said money to the amount of one hundred and two dollars, with the intent then and there to deprive and defraud," etc. At the trial the defendant objected to the introduction of any evidence, "for the reason that said information states three separate and distinct offenses." The court overruled this objection at the time, reserving final ruling thereon until the conclusion of the state's case. The defendant then moved the court to compel the state to elect which one of the three distinct offenses stated in the information it would proceed upon. This motion was also overruled.

The evidence introduced by the state was to the effect that Olaus Mydland, Syvert Mydland, and Lars Grosfield went into the office of the defendant, and each paid to him the separate sum of money named in the information, which was to be sent by the defendant to the land office as filing fees on three distinct pieces of land; that such payment was made by all of the said parties

placing their money on the table in the office of defendant at the same time, and that when the whole sum was laid on the table the defendant took the same at one time, "put a string on it, and put it in a paper," and "put it in his pocket"; that defendant did not remit the same, but appropriated it to his own use. It was shown that no one of the parties who made the payment had any interest whatsoever either in the money paid by either of the other parties or in the land for which the money was paid. At the close of the state's evidence the court directed a verdict for the defendant, and the jury thereupon returned a verdict of not guilty.

No appearance is made in this court by or on behalf of the respondent. The state insists that defendant was properly charged with grand larceny; that objections for duplicity, where the same appear on the face of the information, must be raised by demurrer; and that, if the information does not allege facts sufficient to constitute grand larceny, the district court had no jurisdiction, and should have dismissed the case without trial. Sections 1922, 1930, and 2200 of the Penal Code, *State v. Mahoney*, 24 Mont. 281, 61 Pac. 647, and *State v. Lee* (Or.) 56 Pac. 415, are cited by the state as supporting the contention that a demurrer should have been filed. The objection made, however, is addressed to the jurisdiction of the court, rather than to the form of the information, and the law cited does not apply. The objection made is sufficient to raise the question as to whether the offense of grand larceny is stated in the information. Section 880 et seq. of the Penal Code contains the definition of larceny, which is, in substance, that every person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, takes property from the possession of another, or, having in his possession property of another, appropriates the same to his own use, or that of any other person other than the one entitled to it, is guilty of larceny. When the property taken is of a value exceeding \$50, or when it is taken from the person of another, it is termed grand larceny; otherwise petit larceny. Under this section what at common law constituted the offenses of larceny and embezzlement are merged in the one offense of larceny, and thereby the distinction formerly recognized between cases where the taking was unlawful and those where the possession had been lawfully obtained is abolished. Property must have an owner before it is the subject of larceny, but this statute does not define the character of that ownership—whether it is general or special, joint or several, absolute or qualified, arises from title or from possession. The particular ownership of the property stolen does not fall within the definition, and is not of the essence of the crime. Neither the legal nor moral quality of the act is

affected by the fact that the property stolen, instead of being owned by one, or by two or more jointly, is the several property of different owners. The gist of the offense is the felonious taking or appropriation. The grade of the offense is determined by the value of the property taken. The time and place of the taking and the ownership of the thing taken must be alleged in the information, not to give character to the act of taking or appropriation, but merely by way of description. The fraud is against the owner; but the crime, of which the fraud is one ingredient, is against the state, and not against the owner, owners, or ownership. The prosecution is conducted in the name and by the authority of the state. The owner of the property stolen is not a party thereto.

The great weight of authority sustains the principle that, where several articles of property belonging either to one or several owners are taken at the same time and place, the act is a single transaction, and constitutes but one larceny. Although the information may charge the taking of a particular article or all the articles stolen, a trial for stealing a part is a bar to any subsequent action for the stealing of the remainder. This very question was once presented to this court in *State v. English*, 14 Mont. 399, 36 Pac. 815, but was not directly decided. The defendant in that case was convicted of stealing a cow belonging to Lars Waldeland. Prior to that time he had been arrested and tried for stealing a steer belonging to Charles Carthrae. The facts appeared to be that defendant and one other first cut out the steer from Carthrae's herd, drove it some distance, and left it, and in about half an hour afterward they went to the herd of Waldeland, about half a mile distant, and took the cow. The court held that the taking of these two animals was at different times and places, under different circumstances, and from different owners, and that under the circumstances each was in itself an absolute, complete, and independent offense. In *Holles v. United States*, 3 McArthur, 370, 36 Am. Rep. 106, the court, in discussing this very principle, quotes with approval 2 Russ. on Cr. 177: "But it seems that if the property of several persons, lying together in one bundle, or chest, upon the same table, or even in the same house, be stolen together at one time, the value of the whole may be put together, for such stealing is one entire felony." The court also quotes 1 Hale's P. C. 531: "But it seems to me that if, at the same time, he steal goods of D. to the value of sixpence, goods of B. to the value of sixpence, and goods of C. to the value of sixpence, being perchance in one bundle, or upon a table, or in one shop, this is grand larceny, because it is one entire felony, done at the same time, though the persons had several properties; and therefore in one indictment they make grand larceny." In *Lorton v. State*, 7 Mo. 55, 37 Am. Dec. 179, the

court says: "The stealing of several articles of property at the same time and place constitutes but one offense, and the circumstance of several ownerships of the property cannot increase or mitigate the nature of this offense." This decision is approved in *State v. Morphin*, 37 Mo. 373. See, also, *State v. Wagner*, 118 Mo. 626, 24 S. W. 219. In *State v. Larson*, 85 Iowa, 659, 52 N. W. 539, it is said that "an indictment charging the larceny on a certain day of 32 bushels of flaxseed in sacks, the property of one L., and 48 bushels of flaxseed, the property of one P.," is not objectionable upon the ground of duplicity. In *State v. Mickel et al.* (Utah) 65 Pac. 484, the defendant was indicted in one count for stealing 20 mares and 3 horses, the property of several owners, stating the names of the several owners, and specifying the number of animals belonging to each. The court held that the indictment was not bad for duplicity. To the same effect are the following: *United States v. Scott* (C. C.) 74 Fed. 213; *State v. Douglas* (Nev.) 65 Pac. 802; *State v. Colgate* (Kan.) 3 Pac. 346, 47 Am. Rep. 507; *Furnace v. State* (Ind. Sup.) 54 N. E. 441; *People v. Johnson*, 81 Mich. 573, 45 N. W. 1119; *Haywood v. Territory* (Wash.) 2 Pac. 189; *State v. Hennessey*, 23 Ohio St. 339, 13 Am. Rep. 253; *State v. Nelson*, 29 Me. 329; *Fulmer v. Commonwealth*, 97 Pa. 503; *State v. Newton*, 42 Vt. 537; *Alexander v. Commonwealth*, 90 Va. 809, 20 S. E. 782; *State v. Merrill*, 44 N. H. 624; *State v. Cooper* (N. J.) 25 Am. Dec. 490; *Roberts v. State* (Ga.) 53 Am. Dec. 528; *Nicols v. Commonwealth*, 78 Ky. 180; *Bushman v. Commonwealth*, 138 Mass. 507; *Gravatt v. State*, 25 Ohio St. 162; *Lowe v. State*, 57 Ga. 171; *State v. Warren*, 77 Md. 121, 26 Atl. 500, 39 Am. St. Rep. 401; *Waters v. People*, 104 Ill. 544; *Kelly v. State*, 7 Baxt. 323; *Wilson v. State* (Tex.) 23 Am. Rep. 602; *Rapalje on Larceny*, par. 117. In *State v. Reinhart* (Or.) 38 Pac. 822, it is said that, where confidential relations exist, the aggregate amount taken by the defendant, though at different times and in different amounts, may be considered as one act, and as constituting one offense. Whether, under the provisions of the Penal Code, the acquittal of the defendant on the former trial is a bar to a second trial, is a question not now before the court; but the procedure heretofore observed by this court where the contentions of the state on appeal from a similar order were sustained has been to remand the case for a new trial. *State v. Heron*, 12 Mont. 230, 29 Pac. 819, 33 Am. St. Rep. 576, opinion on rehearing page 300, 12 Mont., 30 Pac. 140. See, also, section 2324, Pen. Code.

We recommend that the order appealed from be reversed, and the case remanded for a new trial.

**CLAYBERG, C. C., and CALLAWAY, C.,**  
concur.

**PER CURIAM.** For the reasons stated in the foregoing opinion, the order is reversed, and the case remanded for a new trial.

(29 Mont. 428)

**MACGINNISS v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO. et al.**

(Supreme Court of Montana. Feb. 1, 1904.)

**CORPORATIONS—ULTRA VIRES ACTS—RIGHTS OF MINORITY STOCKHOLDERS—INJUNCTION SUITS—CHARTER VIOLATIONS—CONSOLIDATION OF CORPORATIONS—TRUSTS—CONSTITUTIONAL AND STATUTORY PROHIBITION—HOLDING CORPORATIONS—RIGHT TO VOTE STOCK—CORPORATE VIOLATION OF LAW—ACTIONS BY PRIVATE CITIZENS—APPEAL—SUFFICIENCY OF NOTICE—PERSONS AGGRIEVED.**

1. An order entered on the minutes, granting an injunction, is an appealable order.

2. A notice of appeal from two orders, couched in separate paragraphs, by which, reading the first in connection with each of the others, a separate and distinct notice of each appeal is given, was sufficient, as respondents understood therefrom that appellants intended to prosecute two appeals.

3. The fact that two separate notices of appeal from different orders were included in one paper, though an appeal does not lie from one of the orders, does not affect appellants' right to prosecute the appeal from the other appealable one.

4. No appeal lies from an order signed by a judge, but intended as process to carry into effect an order granting an injunction.

5. A defendant, over whom the district court acquired no jurisdiction by service of process, is not aggrieved by an order of such court granting an injunction against him.

6. A party who takes no appeal can obtain no relief in the Supreme Court on the appeal of other parties, except so far as the relief granted appellants may incidentally affect his rights.

7. A private citizen cannot, as such, and through the medium of a civil action, try the issue as to whether a foreign corporation is doing business within the state in violation of law, or whether a combination formed by such corporation, through its officers, and the stockholders of domestic corporations, is a monopoly in violation of the Penal Code, rendering such domestic corporations liable to punishment and forfeiture of their franchises and property, but such questions, as independent grounds of relief, must be determined by and on behalf of the state, through the Attorney General.

8. A court of equity cannot, at the instance of a minority stockholder, decree a forfeiture of the stock of any other stockholder in the same corporation to the corporation, on the ground that the title of such stockholder has been acquired and is held in violation of the corporation's charter.

9. So far as the participation of a corporation and its officers in an unlawful combination to create a monopoly subjects its property and franchises to forfeiture, and thus imperils the property rights of a minority stockholder, he may, through the medium of equity, compel it and them to abandon such unlawful connection, and return to a performance of their charter obligations, to wit, the accomplishment by lawful means of the purposes for which the corporation was formed.

10. Const. art. 15, treats restrictively of the rights and powers of corporations in general, absolutely prohibiting the combination and consolidation of certain ones, such as competing railroads (section 6) or telegraph and telephone companies (section 14), and in reference to other combinations provides, in section 20, that no corporation shall combine or form a trust, or make a contract with any person, cor-

poration, etc., "for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people." Pen. Code, § 321, follows literally the language quoted, making some additions of the same general nature, and prescribes a penalty for its violation. *Held* that, to bring a combination within the provisions of Const. art. 15, § 20, and to subject it and its promoters to the penalty provided by Pen. Code, § 321, there must be shown a specific intent, or necessary tendency, to accomplish the prohibited result of regulation of price or production.

11. In cases involving the above provisions, the nature of the arrangement or combination is a question of fact, to be determined by the court from the evidence before it, or from the vice inherent in the contract of combination itself.

12. Evidence *held* not to show an intent or necessary tendency of combining corporations to fix the price or regulate the production of copper, such as is prohibited by Const. art. 15, § 20, and Pen. Code, § 321.

13. It is not every unlawful act of a corporation that may be questioned by a minority stockholder in an action against it, but to enable him to complain he must be injuriously affected, either directly or indirectly.

14. One corporation cannot hold or vote stock in another unless expressly authorized so to do by the terms of its charter or by statute.

15. Since the Constitution (article 15) does not prohibit the consolidation of corporations, except of certain kinds and for certain purposes, and Civ. Code, § 527, expressly authorizes the consolidation of domestic mining corporations, and Sess. Laws 1899, p. 113, authorizes such corporations to sell or exchange their property and assets to other corporations, domestic or foreign, for the whole or any part of their stock, whether mining corporations or not, it is not against the public policy of this state to permit, and mining corporations are permitted, to hold and vote stock in other corporations of like character.

16. The holding of stock in a corporation by one person or another does not affect the rights of any other stockholder so long as the purposes of the corporation are carried out under its charter for the benefit and profit of all the stockholders alike, according to the best judgment of those who have the active management of its business, and so long as the transaction by which the stock was obtained does not violate any constitutional or statutory provision.

17. Since Code Civ. Proc. § 570, provides that actions shall be prosecuted by the real party in interest, it is competent for a corporation, the actions of which are questioned by a minority stockholder, to show that he is not in fact the real owner of the stock standing in his name.

18. One possessing a right may enforce it irrespective of his motive in so doing, and his motive is not a subject of inquiry except as ground for impeachment.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by John MacGinniss against the Boston & Montana Consolidated Copper & Silver Mining Company and another, impleaded with A. S. Bigelow and others. From orders granting temporary injunctions, defendants separately appeal. Reversed.

This action was brought by the plaintiff, as a minority stockholder in the Boston & Montana Consolidated Copper & Silver Mining Company—hereinafter referred to as the

Montana Company—on behalf of himself and all other minority stockholders occupying the same position as himself. He alleges that he is the owner and holder of 100 of the 150,000 shares of the capital stock of the company, which was organized under the laws of Montana prior to the year 1898. No other stockholder has joined with him in the action. The complaint is very long, containing some repetitions and a large amount of immaterial matter. It charges, in substance: That the defendant Amalgamated Copper Company—hereinafter referred to as the Amalgamated Company—is a corporation organized under the laws of New Jersey, and having its principal place of business in that state; that the purpose of its organization was to secure a monopoly of the production and sale of copper; that it has become the owner of a majority of the shares of the Montana Company and other corporations in Montana and elsewhere, some of which are mining corporations owning properties in the city of Butte, adjacent to the properties of the Montana Company; that the stock in all of these Montana corporations was acquired by the Amalgamated Company under an agreement with the officers and a majority of the stockholders of the Montana Company and the other corporations, with the purpose, entertained by the Amalgamated Company, of controlling all of the affairs and conducting all of the business of said corporations, through its officers and agents or boards of directors elected by it; that, as a part of the agreement aforesaid, the officers and directors of the Montana Company stipulated to turn over the control and management of the business and property of the Montana Company to the Amalgamated Company, and to obey in all things, and submit to, the direction of the officers of the Amalgamated Company; that the officers and directors of the other corporations having adjacent properties in Butte were parties to this agreement also; that, in pursuance of the same, the officers of the Amalgamated Company have assumed the possession of the properties of said companies, and the control and direction of their officers and business affairs; that, if this condition of affairs is permitted to continue, the Montana Company will suffer loss in this: that, the mining properties of the various companies being adjacent to each other, controversies will arise among them over their respective rights beneath the surface, and that, by reason of the controlling position of the Amalgamated Company, these controversies will be settled by it to the detriment of the Montana Company, and thus of the rights of the plaintiff; that the Amalgamated Company, though engaged in conducting the business of mining and smelting copper through these companies as aforesaid in the state of Montana, has not complied with the laws of the state permitting foreign corporations to do business therein, and is thus engaged in conducting a business in Montana

\* 14. See Corporations, vol. 12, Cent. Dig. §§ 760, 1532.

in violation of the law; that the plaintiff and the other minority stockholders did not and have not assented to the arrangement by which the Amalgamated Company acquired its control of the Montana Company and its properties; that the Amalgamated Company has no right to own or control any property in Montana; that its action in the premises is in violation of section 20 of article 15 of the state Constitution, and section 321 of the Penal Code; that the other defendants, except Scallon, are the directors and officers of the Montana Company, and because of their participation in and furtherance of the purposes of the Amalgamated Company, aided by said Scallon and other agents of that company in Montana, are not fit and proper persons to have charge and control of the property of the Montana Company, acting, as they do and will, at the direction of the Amalgamated Company; that the purpose of the organization of that company was also to evade the laws of Montana, and to override and disregard the rights of the minority stockholders; and that because of the participation by the officers and a majority of the stockholders of the Montana Company in the combination aforesaid, and in the violation of the law in pursuance thereof, the property and franchises of said company are subject to forfeiture to the state of Montana, and thereby the minority stockholders will be deprived of the value of their stock.

The relief demanded is: That the Amalgamated Company be decreed to have no right to the stock held by it; that said stock be adjudged to belong to the Montana Company; that the Amalgamated Company and its agents be enjoined from voting the stock or taking any part in the management of the affairs of the Montana Company, or receiving any money or property or dividends from it; that the other defendants who are acting for the Amalgamated Company be enjoined from so doing; that the officers of the Montana Company be enjoined from transferring or permitting the transfer of any stock upon its books now held by the Amalgamated Company, and from allowing any such stock to be voted at any meeting of the company; that the defendant directors of the Montana Company be enjoined from acting as such; that the agreement by which the Amalgamated Company obtained the stock held by it be declared null and void, and that all the defendants be required to account for their conduct with reference to it, and to deliver to the Montana Company all the property and money received from it; that the Amalgamated Company be declared a trust and monopoly, and be enjoined forever from doing business in the state of Montana, either directly or through its agents or any person or corporation whatsoever; that a receiver be appointed to take charge of the property and business of the Montana Company during the pendency of the action; and that, until final hearing, an injunction issue to re-

strain any wrongful act on the part of the defendants, and to protect the rights of the minority stockholders in the meantime.

The complaint was filed on July 23, 1901. At that time an order was made requiring the defendants to appear and show cause on September 2d, following, why an injunction pendente lite should not issue. In the meantime the Montana Company and the defendant directors were restrained from paying dividends to the Amalgamated Company, and from permitting it to interfere in the affairs of the Montana Company by voting its stock. The order also restrained the directors from transferring stock on the books of the company. For various reasons a hearing was not had under the order until September 1, 1903. None of the defendants were served with process, except the Montana Company, C. S. Batterman, and William Scallon. The defendant William Scallon interposed a general demurrer to the complaint. The defendants Montana Company and C. S. Batterman interposed a motion to strike from the complaint many matters alleged to be immaterial. The cause is now pending in the district court upon the legal questions raised by the demurrer and the motion to strike out; one of the rules of that court disallowing the entry of default for want of an answer until the motion to strike out has been disposed of. At the close of the hearing under the order to show cause, and on October 22, 1903, the court entered an order in the minutes directing an injunction to issue, restraining the defendant Montana Company from permitting the stock to be voted by the Amalgamated Company, from allowing it to be transferred in the books of the company, and from paying dividends thereon. The other defendants were also enjoined from acting as representatives of the Amalgamated Company. The judge also signed and filed with the clerk a written order in the form of an injunction, which, by its own terms, became effective as an injunction upon the filing by the plaintiff of a bond or undertaking in the sum of \$10,000. The defendants Montana Company and William Scallon took separate appeals to this court from each of these orders.

A. J. Shores, Forbis & Evans, W. W. Dixon, C. F. Kelley, and D. Gay Stivers, for appellants. Jno. J. McHatton, for respondent.

BRANTLY, C. J. (after stating the facts). At the hearing in this court counsel for plaintiff interposed motions to dismiss both appeals on various grounds, among others, that the order of October 23d is not appealable, and that the notice is ambiguous and uncertain, in that it does not appear therefrom to which order it refers. There is no merit in the motion so far as it is directed at the appeal from the order of the court entered in the minutes granting the injunction. The notice is couched in separate paragraphs. By reading the first paragraph with each of the

other two, there is a separate and distinct notice of each appeal, the notice being almost in the exact form of the one considered in *In re Barker's Estate*, 26 Mont. 279, 67 Pac. 941. It is a sufficient notice, for it is entirely clear that the respondent understood therefrom that the appellants intended to prosecute two appeals. The fact that two separate notices were included in the same paper, though an appeal does not lie from one of the orders, does not affect the right of the appellant to prosecute an appeal from the one which is appealable. As to the appeal from that order, the motion is denied. The evident purpose of the district judge in signing the order, and filing it with the record on October 23d, was that this order should be the injunction, which in form and substance it is, except that it is signed by the district judge. It was intended to perform the office of process, to carry into effect the order of the previous day. No appeal lies from an injunction, and the motion as to this appeal is sustained.

Counsel in their briefs have presented and argued many questions which are not pertinent in any manner to this investigation. Much of the appellants' brief is devoted to an argument to show that the district court had no jurisdiction of the Amalgamated Company, because it had never been served with process nor had appeared in the action. It is not necessary to consider the question thus presented, because, if the district court had no jurisdiction of the Amalgamated Company by service of process, that company is not aggrieved by the order. If it had jurisdiction, and the Amalgamated Company is aggrieved by the order, it took no appeal, and can obtain no relief from this court, except so far as the relief granted to the appealing defendants may incidentally affect its rights.

Much argument in the appellants' brief is also devoted to the questions whether or not the Amalgamated Company is engaged in doing business in this state in violation of the law, and whether it is a monopoly and subject to the prohibition contained in section 20 of article 15 of the Constitution, and the penalties provided by section 321 of the Penal Code. The plaintiff sues as a private citizen. He is not, as such, authorized to present, through the medium of a civil action, and try the issue, whether the defendant Amalgamated Company is doing business in this state in violation of a law. A determination of this issue as an independent ground of relief must be had, if at all, by the state, and in its own behalf, through the Attorney General. It is no concern of the plaintiff if the state neglects or waives its right to call the defendant to account. In general, the same may also be said as to the issue whether the combination formed by the defendant Amalgamated Company, through its officers and the stockholders of the Montana Company and the other corporations, is a monopoly

and in violation of the Penal Code of the state, rendering the defendant Montana Company liable to punishment and a forfeiture of its franchises and property. *Cook on Corporations*, § 632; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563; *State v. Erie, etc.*, *Transportation Co.*, 17 Minn. 372 (Gil. 348); *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606, 33 N. W. 749. Nor do we know of any provision of law authorizing a court of equity, at the instance of a minority stockholder, to decree a forfeiture of the stock of any stockholder in the same corporation to the corporation, on the ground that the title of such stockholder has been acquired and is held in violation of the charter of the corporation. Nevertheless, so far as the participation of the Montana corporation and its officers in an unlawful combination to create a monopoly subjects its property and franchises to forfeiture, and thus imperils the property rights of the minority stockholder, he has a cause of complaint against it and them, and may, through the medium of a court of equity, compel it and them to abandon such unlawful connection and return to a performance of their obligations under the charter contract of the company, to wit, to accomplish, through its board of directors, the purposes for which it was formed, and by lawful means. The officers of a corporation are trustees; by their acts in engaging in an unlawful enterprise, and making the corporation a party to it, they are guilty of a breach of trust, and both they and the corporation can be held to account by a court of equity, at the suit of a minority stockholder who has not participated in the violation of the law. *Cook on Corporations*, §§ 646, 647; *Forrester & MacGinniss v. B. & M. O. C. & S. M. Co.*, 21 Mont. 544, 55 Pac. 229, 353. The propriety of the action of the district court in granting the preliminary injunction, therefore, depends upon a solution of two fundamental questions, to wit: Did the transaction by which the Amalgamated Company acquired a majority of the shares in the Montana Company have for its purpose, or result in, the formation of a trust within the meaning of the sections of the Constitution and the Penal Code referred to; and, if not, is it in violation of the rights of the plaintiff for the Amalgamated Company to own and vote shares of stock in the Montana Company, so long as its power is not used to the detriment of plaintiff? An affirmative answer to either of these questions will require an affirmance of the order.

The Amalgamated Company was organized under the laws of the state of New Jersey on April 27, 1899, the charter designating its principal office in Jersey City. The incorporators were persons intimately associated with the authorities of the Montana Company. Its powers and objects are very extensive. It has the power, among other things: "(1) To carry on the business of

mining, milling, concentrating, converting, smelting, treating, preparing for market, manufacturing, buying, selling, exchanging, and otherwise producing and dealing in gold, silver, copper, metals and minerals, and in the products and by-products thereof of every kind and description, and by whatsoever process the same can be or may be hereafter produced; and generally and without limit as to amount, to buy, sell, exchange, lease, acquire and deal in lands, mines and minerals, rights and claims and in the above specified products, and to conduct all business appurtenant thereto. \* \* \* (8) To purchase, subscribe for or otherwise acquire, and to hold the shares, stocks or other obligations of any company organized under the laws of this state, or of any other state, or of any territory or colony of the United States, or of any foreign country, and to sell or exchange the same, or upon a distribution of the assets or division of profits, to distribute any such shares, stocks or obligations or the proceeds thereof amongst the stockholders of this company." Its capital stock was originally \$75,000,000. At the time the hearing under the order to show cause was had, it had acquired all the stock in the Washoe Company, the Big Blackfoot Milling Company, and a majority of the shares in the following companies: The Anaconda Copper Company, the Parrot Silver & Copper Mining Company, and the Hennessy Mercantile Company—all Montana corporations. These stocks had been acquired prior to June, 1901. To these may be added the Montana Company and the Butte & Boston Company. In brief, the negotiations by which the shares of these latter companies were acquired are the following: On or about April 15, 1901, the directors of the Montana Company received a proposition from Kidder, Peabody & Co., bankers, of Boston, Mass., that they would undertake to negotiate an exchange of shares held by the stockholders of that company, to the amount of at least 100,000 shares, for shares of the Amalgamated Company, upon some equitable basis. Pending negotiations, the shares of the Montana Company were to be deposited in the bank and negotiable receipts issued therefor. If the exchange should be effected, each depositor was to receive a negotiable receipt for the number of shares of the Amalgamated Company he would be entitled to. If not satisfied with the result of the negotiations, each depositor was to have the option either to take \$375 per share in money for his certificates, or to withdraw them altogether. It was further stated that Kidder, Peabody & Co. would reserve the right to return all stock deposited, unless within seven days after April 25th they were prepared to submit a satisfactory offer for the exchange. Deposits were to be made on or before April 25th. This proposition was at once communicated by the directors of the Montana Company to the individual

stockholders of that company, with the statement that all the officers, directors, and large stockholders had agreed to make the deposit under the prescribed conditions. The negotiations thus begun were delayed from time to time. Like negotiations were begun at the same time with the directors and stockholders of the Butte & Boston Company, it being the wish of the Amalgamated Company not to acquire an interest in either company unless it could obtain a majority of the stock in each of them. Finally an agreement was reached for a satisfactory basis of exchange. On June 6, 1901, the Amalgamated Company, at a meeting of its board of directors called for that purpose in Jersey City, N. J., increased its capital stock to \$155,000,000 in order to effect the exchange. This exchange was accomplished in the latter part of June. The increase of the capital stock of the Amalgamated Company had been authorized at stockholders' meeting of the company held in the city of New York on May 22d. The basis of the exchange finally agreed upon was 1 share in the Montana Company for  $5\frac{1}{4}$  shares in the Amalgamated Company, and 1 share in the Butte & Boston Company for  $1\frac{1}{4}$  shares. The estimated value of the properties belonging to the two Montana corporations was fixed by engineers employed to examine them at \$75,000,000 to \$80,000,000, while the market value of their combined stocks was estimated at \$90,000,000. The result was that the Amalgamated Company acquired 147,915 shares of a total of 150,000 in the Montana Company, and 197,222 shares of a total of 200,000 in the Butte & Boston Company, thus giving the former complete control of the latter.

To go back for a moment in the order of events. Early in January, 1899, an agreement had been entered into between a number of the stockholders of the Montana Company and a committee consisting of Albert S. Bigelow, Edward C. Perkins, and Sidney Chase, the first two being directors of the Montana Company, under the terms of which the stockholders were to and did deposit with the State Street Trust Company, a Massachusetts corporation, for safe-keeping, their shares of stock in order to concentrate their power and effect an organization for the purpose of protecting the properties of the company from ruinous and groundless litigation which had, as was stated in the agreement, arisen in the courts of Montana. The Massachusetts corporation was a party to the agreement, but only for the purpose of acting as trustee. The members of the committee were, by the terms of the agreement, constituted sole agents and attorneys for the depositing stockholders. They were empowered by a majority to act for the stockholders in any manner deemed necessary to carry out the purposes of the trust. They could bring, prosecute, and defend suits, or compromise or continue them, or take any step in connec-



tion with them deemed advisable by counsel. They could vote all shares of the stock held in trust at all stockholders' meetings, either as a committee or through one of the members authorized to do so. They could assent to a dissolution of the corporation and the disposition of its property. The agreement could be terminated at any time at the discretion of the committee. This committee is referred to by some of the witnesses as the "protective committee."

The foregoing partial synopsis of the agreement sufficiently indicates its nature and purposes, and the extensive powers it conferred upon the committee. It does not distinctly appear from the evidence that the committee had anything to do with the organization of the Amalgamated Company, but the intimate connection shown to exist between it and the Amalgamated Company is made manifest by the statement of the secretary and treasurer of the Amalgamated Company, contained in his deposition used at the hearing, that, though the acquired stock is owned by the Amalgamated Company, it is in fact held by the committee, while the company holds the certificates of deposit issued by the committee. What other agreement there was, if any, does not appear. Nor does it appear, except indirectly, that one of the purposes of the organization of the Amalgamated Company was to acquire the stock of the Montana Company. From the facts stated, however, it would seem that the committee was merely an instrumentality devised to secure some sort of organization or combination of the interests of the Montana corporations, including the Montana Company, which finally culminated in the organization of the Amalgamated Company, for most of the persons engaged in the promotion of the scheme were officers and stockholders of the Montana corporations. But be this as it may, all the corporations of which the Amalgamated Company has secured control, except the milling and mercantile companies, are engaged in the business of mining copper and other ores and marketing the product. It is not unreasonable to presume that it is a holding corporation, one design of it being to secure harmony among the servient companies.

We thus have a combination of corporations, the dominant one of which is subject only to the laws of New Jersey, while the servient bodies were all organized and are subject to the laws of the state of Montana. Does this combination fall within the prohibition of the Constitution and of the Penal Code, *supra*? The Constitution declares: "No incorporation, stock company, person or association of persons in the state of Montana, shall directly, or indirectly, combine or form what is known as a trust, or make any contract with any person, or persons, corporations or stock company, foreign or domestic, through their stockholders, trustees, or in any manner whatever, for the purpose of fixing the price, or regulating the production of

any article of commerce, or of the product of the soil, for consumption by the people. The Legislative Assembly shall pass laws for the enforcement thereof by adequate penalties to the extent, if necessary for that purpose, of the forfeiture of their property and franchises, and in case of foreign corporations prohibiting them from carrying on business in the state." Section 20, art. 15. The Penal Code re-enacts the substantive part of this section, and provides penalties for its violation and for other offenses. It is as follows:

"Every person, corporation, stock company or association of persons in this state who, directly or indirectly, combine or form what is known as a trust, or make any contract with any person or persons, corporations or stock companies, foreign or domestic, through their stockholders, directors, officers, or in any manner whatever, for the purpose of fixing the price or regulating the production of any article of commerce, or of the product of the soil for consumption by the people, or to create or carry out any restriction in trade, to limit productions, or increase or reduce the price of merchandise or commodities, or to fix a standard or figure whereby the price of any article of merchandise, commerce or produce, intended for sale, use or consumption, will be in any way controlled, or to create a monopoly in the manufacture, sale or transportation of any such article, or to enter into an obligation by which they shall bind others or themselves not to manufacture, sell, or transport any such article below a common standard or figure, or by which they agree to keep such article or transportation at a fixed or graduated figure, or by which they settle the price of such article, so as to preclude unrestricted competition, is punishable by imprisonment in the state prison not exceeding five years, or by fine not exceeding ten thousand dollars, or both. Every corporation violating the provisions of this section, forfeits to the state all its property and franchises, and in case of a foreign corporation it is prohibited from carrying on business in the state." Section 321. Article 15, *supra*, deals generally with the rights and powers of corporations and associations of persons exercising any of the powers and privileges not possessed by individuals or partnerships, and their duties and purposes. It is prohibitory and restrictive in its general scope and purpose, the design of the convention in adopting its provisions being to prevent combinations to restrict or repress competition in all industrial pursuits, and to protect the people in general, and the employes of a certain class, against both the Legislature and combinations of capital, from unjust impositions. Certain combinations and consolidations are prohibited altogether, as having a necessary tendency to restrict competition, such as consolidation, by purchase or otherwise, by one railroad or other transportation company, with another having a competing line (section 6), or the control of a telephone or telegraph



company by another competing company (section 14). Apart from these prohibited combinations, the right of consolidation by corporations or associations engaged in these particular pursuits is not prohibited. Nor are such combinations, either of corporations or individuals, engaged in other pursuits prohibited, except as provided in section 20. Section 15 declares that any combination or consolidation by a domestic corporation with one organized under the laws of another state or country shall not result in depriving the courts of this state of jurisdiction over the property of such corporation in this state. Apart from these wholesome restrictions and prohibitions, the right of the people to accumulate property and to hold and enjoy it, either by individual effort or by means of associations of natural or artificial persons, is not restricted. Section 20 prohibits any combination or contract which has a particular purpose, to wit, "fixing the price or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people." The terms "combine" and "form a trust" were evidently intended to be read in connection with the expression "for the purpose," etc., clearly implying that, in order to subject offenders to the severe penalties which the Legislature might impose, there must be shown a specific intent to do the prohibited act, or that the association or combination necessarily tends to accomplish the same result. That this is the meaning is clear from the enumeration of persons who may not do the prohibited acts. Corporations, stock companies, natural persons, or partnerships are all included. If the criminal intent is not a necessary ingredient of the evil denounced, then all sorts of combinations are to be deemed prohibited, even ordinary copartnerships, as coming within the letter of the prohibition. For the terms "combine" and "form a trust" are of equal dignity. If the former is to be regarded as modified and explained by the clause "for the purpose," etc., by the same rule must the latter also.

The term "trust," if assigned the meaning given to it by the text-writers (Cook on Corporations, § 503a; Spelling on Trusts, § 121), includes any form of combination between corporations, or corporations and natural persons, for the purpose of regulating production and repressing competition by means of the power thus centralized. It was first used in a narrower sense, we believe, of an organization formed by a combination of several corporations under one direction, by the device of a transfer by the stockholders in each corporation of a majority of the stock to a central committee, who issued to the stockholders in return certificates showing, in effect, that, though they had parted with their stock, they were still entitled to share in the profits, the purpose being to control competition in production and transportation, and thus the price to the consumer. If it be

construed as equivalent to the term "combination" or "consolidation," the meaning of the section is perfectly clear. If used in the sense of the definition given it by the text-writers, it is none the less clear, though it involves a repetition of the same idea, since the definition includes the idea of criminal purpose, and makes it a necessary ingredient of the offense denounced. The section of the statute quoted involves the same idea and demands the same construction, though it is more specific in its provisions, and extends to and includes combinations in restraint of competition in transportation. It denounces every form of combination or contract which has for its purpose, directly or indirectly, the restraint of production or trade in any way or manner, or the control of the price of any article of consumption by the people. It was not the purpose of the convention, or of the Legislature, to limit either the term used in the Constitution, or in the statute, by any narrow definition, but to leave it to the courts to look beneath the surface, and, from the methods employed in the conduct of the business, to determine whether the association or combination in question, no matter what its particular form should chance to be, or what might be its constituent elements, is taking advantage of the public in an unlawful way. *Harding v. Am. Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189. In each case, therefore, under these provisions, the nature of the arrangement or combination is a question of fact to be determined by the court from the evidence before it, or from the vice which inheres in the contract itself.

The facts in the record before us, tending to show the purposes and methods of the Amalgamated Company and associate corporations, do not justify the conclusion that the combination involves a criminal intent to evade or transgress the provisions of law which have been considered. Witnesses, who took part in the organization of the Amalgamated Company and the acquisition of the stock in question, and who are officers of the Amalgamated Company as well as of some of the Montana corporations, stated that the exchange of stock was for the purpose of investment only; that, apart from a solicitude concerning the success and prosperity of the Montana Company and the other servient corporations, they have taken no interest in their affairs, nor attempted in any way to control their business, and that each of them has been allowed to pursue independently the purpose for which it was organized, and to market its own product. Whatever doubt there may be as to the candor and truth of these professions, it does not appear that the combined companies entered into any agreement to control, or have controlled, or attempted to control in any way, the transportation or the price of copper or any by-product of the business, or to regulate the amount of production. Nor does it appear

that they have attempted to affect in any way the wages of their employes. The total product of copper in the United States during the year 1901, for example, was approximately 500,000,000 pounds; Montana properties produced about 210,000,000 pounds of this output. The output of the associated companies was approximately 150,000,000 pounds, the remainder of the total being the product of other mining companies not associated with them. While the associated companies are thus shown to have produced about three-fourths of the whole product of this state, and nearly one-third of the product of the United States, the price persistently decreased from 16½ cents per pound early in 1901 to 10 cents in the latter part of that year, and has fluctuated since that time, never rising higher than 15 cents. The dividends of all companies engaged in the industry have persistently declined in value owing to the decline in the price of the product, though the amount produced has remained substantially the same. Yet there is nothing to indicate that any of the associated companies have anything to do with these conditions. Indeed, the evidence tends to show that they have been the result of natural causes, dependent upon the condition of the market, over which they have had no control. Nor is there any evidence that the Amalgamated Company has in any way attempted to use its power to discriminate in favor of or against any servient company to the advantage of itself or the detriment of any minority stockholders, or to affect competition with other companies. While the dominant company might, either by means of its superior position or other connections, perpetrate any of these wrongs, it does not appear to have done so, nor to have manifested any disposition to do so. Hence the evidence does not convict the Montana Company of such unlawful purpose, in connection with the Amalgamated Company, that it is liable for this reason to have its property and franchises forfeited at the suit of the state.

It is not every act of a corporation, though unlawful, that will give the minority stockholder therein a right of action against it. So far as he is not injuriously affected, directly or indirectly, he has no ground to complain, and, until it makes such connections or pursues such a course as to make it amenable to the law, he cannot be heard to question its action. It is held by many courts that the mere possession of power by a combination of corporations or associations, or persons, to injuriously repress competition, to regulate production, and fix prices, is against public policy, and all such are by them declared illegal as against public policy. This is true of the Illinois Supreme Court, as will be found by an examination of *Harding v. Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189. It is said in that case: "The material consideration in the case of such combinations is, as a general thing, not

that prices are raised, but that it rests in the power and discretion of the trust corporation taking all the plants of several corporations to raise prices at any time, if it sees fit to do so." This case is typical of the class which hold to this doctrine. But an examination of them will reveal the fact that, in each particular case before the court for consideration, it appeared either from the fact proved or admitted, or from the terms of the contract itself, that the defendants entertained and were pursuing the unlawful purpose. The manifest purpose of the Constitution and the legislative utterances must be deemed controlling in this jurisdiction.

What we have said relates only to the evidence adduced at the hearing under the order to show cause. If upon the final hearing, after the issues are made up, it should be made to appear that the associated companies are proceeding in violation of the law, the district court would be justified in issuing a perpetual injunction to restrain the Montana Company and its directors from further participating in the unlawful connection. This case does not fall within the principle of *Forrester & MacGinniss v. B. & M. C. Co. & S. M. Co.*, 21 Mont. 544, 55 Pac. 229, 353, as respondent contends.

The contention is made by the appellants that one corporation may own and vote stock in another corporation, provided its charter authorizes it to do so; that the Amalgamated Company has this power under its charter; that the laws of the state under which it was created authorizes such a grant; and that it has a right to own and vote stock in any Montana corporation, even though it was acquired for the purpose of controlling it; and that the injunction was not properly issued. The respondent admits that the Amalgamated Company is lawfully authorized by its charter to own and vote stock in any corporation, no matter where organized, but that it cannot exercise this power in Montana unless it is permitted to do so by express provision of law authorizing corporations of Montana to do the same thing. There is no such provision of law, counsel say, and therefore the exercise of this power contravenes the provision contained in section 11 of article 15 of the Constitution, which denies foreign corporations the enjoyment, within this state, of "any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

We have, then, the Amalgamated Company, a corporation duly authorized by its charter, under the laws of New Jersey, to hold and vote stock in other corporations, no matter where created. Do the laws of this state authorize mining companies, organized in this state, to own and vote stock in other mining corporations? If they do, it is not the duty of the board of directors to interfere with the exercise of that right by the Amalgamated Company, and the respondent may not

compel them to do so, unless they are guilty of or permit abuses of their trust. The general rule is that one corporation cannot hold or vote stock in another unless expressly authorized so to do by the terms of its charter or by a statute. This was formerly the rule in England (*Green's Brice's Ultra Vires*, 91); but it has been much relaxed by the later decisions, which recognize many exceptions (*Id.* 92, 93). The general rule prevails in the state and federal courts in this country. Iowa and Maryland are, possibly, the only exceptions. *Latimer v. Citizens' Bank* (Iowa) 71 N. W. 225; *White v. Marquardt* (Iowa) 74 N. W. 930; *Booth v. Robinson*, 55 Md. 419. The case of *California Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198, is an example of the application of the rule. See, also, *Parsons v. Tacoma Smelting & Refining Co.* (Wash.) 65 Pac. 765; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319, and cases cited; *Thompson on Corporations*, § 1102; *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; *Marble Co. v. Harvey* (Tenn.) 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71. This is but a corollary of the principle that, on grounds of public policy, a corporation can do no other act or make any contract that is not expressly or impliedly authorized by its charter, read in the light of the general provisions of law on the subject. The converse of the rule is also generally recognized, to wit, that a corporation is the creature of law, and may do any act or enter into any contract expressly or impliedly authorized by its charter or the law of its creation. The Montana Company was organized on June 21, 1887, under section 446, Div. 5, Comp. St. 1887,—for the purpose of mining, milling, smelting, concentrating, buying, and selling ores, and doing a general mining business in connection with such other business as might be useful or profitable, in the state of Montana. Its charter does not, nor did the statute at that time, expressly or impliedly permit it to own or hold stock in other corporations. Its powers were the same as those of like mining companies. Under the application of the general rule, probably no corporation of its character and purpose could hold stock in another. Neither, probably, could an industrial corporation, such as it is, have been organized under the statute *supra* with the power in question; for the enumeration therein of the purposes for which such corporations could be organized concludes with the general provision, "or of carrying on any other branch of business to aid in the industrial or productive interests of the country and the development thereof." The purposes specifically enumerated in this section would not authorize the creation of a corporation with the power to hold stock in another corporation. If the maxim *noscitur a sociis* be held to indicate the rule of construction applicable to the general clause, it

is doubtful whether a corporation with such power was included. The territorial court impliedly held that this maxim is not applicable. *Carver Mercantile Co. v. Hulme*, 7 Mont. 566, 19 Pac. 213. But however this may be, and though this section was carried into the Code of 1895 (Civ. Code, § 411), the conclusion reached upon the question before us is determined by other provisions of the statute indicating the policy of the law towards mining corporations. Section 527 of this Code authorizes mining corporations organized under the laws of the territory and state of Montana, owning properties in the same vicinity, "to consolidate their capital stock, debts, property, assets and franchises in such manner and upon such terms as may be agreed upon by their boards of directors," when authorized by a two-thirds vote of the stockholders. If such corporations may consolidate in any manner and upon any terms without restriction, they may proceed by conveying all their property to a corporation organized for that purpose, or by the purchase by one of the companies of stock of the others in whole or in part.

Again, the Legislature of 1899 (Sess. Laws 1899, p. 113) enacted a law popularly known as "House Bill 132," entitled "An act to enlarge the powers of mining corporations to dispose of, sell, lease, mortgage, exchange, or otherwise convey, all or any part of the property," etc. This act in terms authorizes such corporations to sell or exchange any part of their property or assets to another corporation, domestic or foreign, for the whole or any part of the capital stock of another corporation, whether a mining corporation or not. This provision empowers such corporations to hold stock in others, at least of like character, and, necessarily, to vote it; for the unrestricted ownership of property by a person, whether natural or artificial, carries with it the right to its full use and enjoyment for all purposes for which it may be used or enjoyed. It is therefore not against the public policy of the state for one corporation to hold and vote stock in another of like character. The provisions of the statutes *supra* are to be construed as amendments to the general laws authorizing the formation of corporations and defining their powers, within the purview of section 11 of article 15 of the Constitution, *supra*. The public policy of the state varies from time to time. It is not to be measured by the private convictions or notions of the persons who happen to be exercising judicial functions, but by reference to the enactments of the lawmaking power, and, in the absence of them, to the decisions of the courts. When, however, the Legislature has spoken upon a particular subject and within the limits of its constitutional powers, its utterance is the public policy of the state. *U. S. v. Trans-Missouri Ass'n*, 168 U. S. 230, 17 Sup. Ct. 540, 41 L. Ed. 1007.

The Constitution (article 15, § 15) does not prohibit consolidations. Its prohibition extends only to any device by which an attempt is made to deprive the state courts of jurisdiction. Section 527 of the Civil Code expressly authorizes consolidations of domestic corporations. House Bill 132, supra, impliedly authorizes them between domestic and foreign corporations, or, at least, goes to the extent of empowering one domestic corporation to hold stock in another of a similar character. But counsel for respondent say that these statutory provisions do not apply to the Montana Company, because as to it, at least, having been enacted after its organization, they impair the obligation of the corporation contract, and thus infringe upon the rights of the plaintiff. It may be conceded that, so far as they attempt to increase the powers of that corporation without consent of all of its stockholders, they may be violative of the constitutional prohibition. But this objection does not arise as to corporations formed since their enactment. The holding of stock in a corporation by one person or another does not affect the rights of any other stockholder so long as the purposes of the corporate body are carried out under its charter for the benefit and profit of all the stockholders alike, according to the best judgment of those who have the active management of its business, and so long as the transaction by which the stock was obtained does not violate any provision of the statute or of the Constitution. *Trust Co. v. Georgia*, 109 Ga. 736, 85 S. E. 323, 48 L. R. A. 520. Whenever, in the conduct of the business, the purposes of the charter of the Montana Company are ignored and the rights of the minority stockholders are disregarded, the courts of this state have ample power by way of injunction, or a receivership if necessary, to compel it to observe its contract obligations with the state and stockholders, notwithstanding its connection with the Amalgamated Company. It does not appear from any evidence in the case that the Amalgamated Company, by any act of control over the Montana Company, has affected in any way the rights of the plaintiff as a stockholder. On this branch of the case, therefore, the plaintiff has no cause of complaint.

Inquiry was made of one of the witnesses at the hearing as to the ownership of the shares of stock which are the foundation of this action. The inquiry was made in an attempt to show that the shares, though standing in the name of the plaintiff, are in fact owned by the Montana Ore Purchasing Company, a rival corporation, and that the action cannot, therefore, be maintained by the plaintiff. When the issue is made, as in this case, as to the ownership of the subject of the controversy, it is competent for the defense, if they can, to show that the plaintiff is not in fact the owner of it, for the statute (Code Civ. Proc. § 570) declares

that the action shall be prosecuted by the real party in interest. The inquiry should have been permitted. Generally speaking, the motives actuating the plaintiff do not, as contended by appellants, affect the merits of the action. One possessing a right may enforce it notwithstanding his motive may be evil. *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Bordeaux v. Greene*, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600. The motive may not, therefore, be the subject of inquiry, except when it may be ground for impeachment.

The order of the district court is reversed, and the cause is remanded for further proceedings. Reversed and remanded.

MILBURN and HOLLOWAY, JJ., concur.

(9 Idaho, 418)

MELLEN v. McMANNIS.

(Supreme Court of Idaho. Jan. 11, 1904.)

DECLARATION OF HOMESTEAD—HEAD OF FAMILY—ABANDONMENT—SALE.

1. Under the provisions of section 3071, Rev. St. 1887, a declaration of homestead must contain a statement showing that the person making it is the head of a family. It is a sufficient compliance therewith if such declaration contains a statement of the probative facts from which the ultimate fact may be judicially inferred that the person making such declaration is the head of a family.

2. If a homestead declaration contains a statement of the facts in substantial compliance with the provisions of said section 3071, Rev. St. 1887, it is sufficient.

3. The property selected as a homestead can only be abandoned by a declaration of abandonment, or by a grant or conveyance thereof properly executed and acknowledged by the husband and wife, if the claimant is married, as provided by section 3041, Rev. St. 1887.

(Syllabus by the Court.)

Appeal from District Court, Elmore County; Lyttleton Price, Judge.

Action by Thomas Mellen against H. H. McMannis to compel conveyance of real estate. Judgment for plaintiff, and defendant appeals. Reversed.

W. C. Howle, for appellant. N. M. Ruick, for respondent.

SULLIVAN, C. J. This is an action to compel the defendant to convey to the plaintiff, who is respondent here, certain premises situated in the village of Mountainhome, the title to which premises formerly was in one A. B. Clark. It appears that said Clark and his family, consisting of a wife and two children, had formerly resided on said premises, occupying them as their home; that while residing thereon said Clark filed a homestead declaration, claiming said premises as a homestead under the laws of this state; that more than a year prior to the commencement of this action said Clark had removed from said premises, with his family, to the state of Washington, and had resided there ever since. The plaintiff alleges that, through written correspondent with said Clark, an

agreement was entered into for the purchase of said premises, whereby plaintiff became entitled to a conveyance of the same; that, said Clark disregarding such agreement to convey, he and his said wife thereafter conveyed said premises to the appellant, McMannis. And it is alleged that the appellant took said conveyance with full notice of said agreement by Clark to convey said premises to the respondent. Those allegations were put in issue by the answer, and for a separate defense it was alleged that the premises in question constituted the homestead of Clark, and for that reason he could not make a valid contract for the conveyance thereof without the written consent of his wife. The issues thus made were tried by a jury, and a verdict was rendered for the plaintiff, on which verdict a judgment was duly entered. A motion for a new trial was denied by the court. This appeal is from the order denying a new trial.

The court is called upon to decide two questions: (1) Was there a valid agreement between Clark and Mellen, whereby the former was to convey to the latter the premises in question? (2) Did the premises at the date of said agreement constitute a homestead? In our view of the case, a proper answer to the second question will dispose of both questions, for, if said premises constituted a valid homestead, the alleged agreement between Clark and Mellen could not be enforced, for the reason that Mrs. Clark did not join in that agreement. Counsel for respondent contends that the declaration of homestead relied on by appellant is fatally defective, in that it fails to state that the declarant is the head of a family. Said homestead declaration is as follows: "Know all men by these presents: That I do hereby certify and declare that I am married and that I do now at the time of making this declaration, actually reside with my family on the land and premises hereinafter described, that my family consists of a wife and two children. That the land and premises on which I reside are bounded and described as follows, to wit: Lying and being the town of Mountainhome, in Elmore County, State of Idaho, and particularly described as follows: Lots five (5), six (6), seven (7) and eight (8) of block ten (10) of the town of Mountainhome, Elmore County, State of Idaho, according to the plat of said town now on file in the office of the recorder of said county. That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling house thereon and its appurtenances, and I do hereby select and claim the same as homestead. That the actual cash value of said property I estimate to be fifteen hundred dollars. In witness whereof, I have hereunto set my hand and seal this 20th day of August, 1897. A. B. Clark [Seal.]" Attached to said declaration is a proper certificate of acknowledgment.

Section 3071, Rev. St. 1887, provides what the declaration of homestead must contain, and is as follows: "The declaration of homestead must contain: (1) A statement showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit; (2) a statement that the person making it is residing on the premises, and claims them as a homestead; (3) a description of the premises; (4) an estimate of their actual cash value." The first subdivision of said section provides that such declaration must contain a statement showing that the person making it is the head of a family.

Does the declaration contain a statement showing that said Clark was the head of a family at the date he made the declaration? He states therein that he is married; that he actually resides on the premises described in the declaration, with his family; and that his family consists of a wife and two children. Whilst he does not state the ultimate fact, to wit, "that he is the head of a family," we think the probative facts stated warrant the conclusion or the judicial inference that he is the head of a family, and negative any other inference. We are of the opinion that, if a homestead declaration contains a statement of sufficient facts to warrant the conclusion that the person making it is the head of a family, it is sufficient, and is a substantial compliance with the provisions of subdivision 1 of said section in that regard. Through motives of public policy and humanity to the debtor and his family, exemption and homestead laws have been enacted; and, even aside from the provisions of section 4, Rev. St., which provides that all statutes must be liberally construed, we can hardly conceive the necessity or propriety of strictly construing a statute having mercy and benevolence for its object.

It is contended by counsel for respondent that under the provisions of section 3059, Rev. St. 1887, the wife is included in the phrase "head of a family," and for that reason the husband is not necessarily the head of the family, and that the statements in said declaration of homestead are not sufficient to show that said Clark was the head of his family. Counsel cites *Jones v. Waddy*, 66 Cal. 457, 6 Pac. 92, as showing the change in section 1263 of the Civil Code of that state prior to its amendment in 1874. That section, before amendment, provided that the declaration of homestead must contain "a statement of the facts that show the person making it to be the head of a family." After the amendment of 1874, the above-quoted provision read as follows: "A statement showing that the person making it is the head of a family." In commenting on that amendment the court says in the opinion of *Jones v. Waddy*, supra, that "from the

phraseology of the amendment, it is manifest that the Legislature intended to dispense with 'a statement of the facts' in a declaration from which the ultimate fact might be judicially inferred, and to require a simple statement or recital of the ultimate fact." The court there holds that a statement in the declaration of homestead that the declarant is the head of a family is sufficient. But it does not hold, in terms or by inference, that the declaration there under consideration would have been held void if it had contained a statement of facts from which it could be judicially inferred that the declarant was the head of a family, instead of a statement of the ultimate fact that the declarant was the head of a family. We are clearly of the opinion that, if the declaration of homestead contains a statement of probative facts sufficient to show that the declarant was qualified to make the declaration, the declaration is sufficient on the point under consideration to satisfy the requirements of said provision of section 3071, Rev. St. 1887.

The question of the abandonment of said homestead is suggested. Section 3041, Rev. St. 1887, provides how a homestead may be abandoned. That section provides that a homestead can only be abandoned by a declaration of abandonment, or a grant or conveyance thereof, executed by the husband and wife if the claimant is married, and by the claimant if unmarried. It will thus be seen that one spouse cannot sell and dispose of the homestead by grant or conveyance unless it is duly signed and acknowledged by both, and, as that was not done in the alleged sale by Clark to respondent, it was not a sale that a court of equity can enforce.

For the foregoing reasons, the judgment is reversed, and the cause remanded, with instructions to enter judgment in favor of the appellant. Costs of this appeal are awarded to the appellant.

AILSHIE, J., concurs. STOCKSLAGER, J., did not sit at the hearing, and took no part in the decision of this case.

(141 Cal. 534)

COHEN v. COHEN. (S. F. 2,872.)\*

(Supreme Court of California. Jan. 8, 1904.)  
CONTRACTS—CONSTRUCTION—PROVISION FOR  
SUPPORT—APPEAL—RENDITION  
OF JUDGMENT.

1. A contract between a father and son provided that, in consideration of the transfer by the father to the son of certain property, the latter would pay to the former the sum of \$25 a month during his life, and after his death to the son's two sisters "during the period they remain single or unmarried, and said payment is to cease as soon as both are married," but said payment was only to be made in case the sisters (naming them separately) "are unmarried after the death" of the father. Held, that the payment was to be continued after the death of the father, in the event that either of the sisters was then unmarried, for the bene-

fit of the unmarried one, and was to cease only when both had married.

2. On appeal from a judgment on the judgment roll, a finding that nothing was due to defendant on her cross-complaint precludes the Supreme Court from directing judgment to be entered in her favor thereon.

Department 1. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by G. S. Cohen against Rose Cohen. From a judgment for plaintiff, defendant appeals. Reversed.

Henry H. Davis (P. F. Dunne, of counsel), for appellant. O. tum Suden, for respondent.

ANGELLOTTI, J. This action was brought for the purpose of determining an adverse claim made by defendant against plaintiff, based upon a written contract executed by plaintiff to his father, William Cohen. Judgment was given in favor of plaintiff, decreeing that plaintiff is not bound, under said contract, to pay to defendant any sum of money whatever, and enjoining defendant from making any claims against plaintiff under said contract. Defendant appeals from said judgment, on the judgment roll.

The findings of the court, upon which the judgment is based, show the following facts: The contract involved was entered into between plaintiff and his father on May 22, 1883; the consideration for the promise of plaintiff therein contained being the transfer to him by his father of a lot of personal property, stock, and the good will of a business carried on by the father. In consideration of such transfer, plaintiff agreed to pay to his father the sum of \$25 on the 1st day of each and every month thereafter, during the period of the natural life of the father, and further "to pay said sum, of twenty-five dollars, as aforesaid, to his sisters Rose and Esther Cohen, or to their order during the period they remain single or unmarried, and said payment is to cease as soon as both are married, but the payment as aforesaid is only to be made to said Rose and Esther Cohen in case the said Rose and Esther Cohen are unmarried after the death or decease of said party of the second part." The father was the party of the second part. The defendant is the Rose Cohen mentioned in said agreement. Plaintiff made the payments stipulated to his father until the 21st day of September, 1899, when said father died, leaving, him surviving, the defendant and also the said Esther Cohen. Prior to the death of her father, said Esther Cohen became, and ever since has been, a married woman. The defendant, Rose Cohen, has never been a married woman. Esther Cohen makes no claim under said contract.

Certain allegations of the complaint as to a subsequent agreement for the cancellation and destruction of the agreement, and as to a marriage of defendant, are found to be untrue; and the judgment of the court in fa-

\*Rehearing denied February 3, 1904.

vor of plaintiff is entirely based upon the theory that, under the terms of the contract, the marriage of one of the sisters prior to the death of the father terminated all liability of plaintiff thereunder, so far as the sisters are concerned. The material facts are fully found by the court, and the only question presented by this appeal is as to the proper construction of the written agreement in this respect.

While the agreement is not as clearly and concisely expressed in this behalf as it might have been, we are of the opinion that it sufficiently shows that it was the mutual intention of the parties thereto that the monthly payment of \$25 was to be continued after the death of the father, in the event that either of his two daughters was then unmarried, for the benefit of such unmarried daughter, and was to cease only when both had married. Taking the whole contract together in such a manner as to give effect to every part, such appears to be the only reasonable construction. The construction contended for by respondent is unreasonable, in this: that while, under such construction, no payment is to be made to the unmarried sister if the other sister married prior to the death of the father, on the other hand, if neither sister married prior to such death, the payments to the sisters must commence at such death, and continue, despite the subsequent marriage of one, until both are married, for there can be no doubt, under the wording of the contract, unless the provision as to the time of cessation of payments be entirely disregarded, that, once having commenced, they shall cease only when "both are married." It is impossible to conceive of any object for such a distinction. It is likewise difficult to understand why the parties should agree that the unmarried sister should be deprived of the benefit of a payment intended for her support while she remained unmarried, simply because her sister, for whose support while unmarried it was also intended, became a married woman. The provisions for the payment to the sisters were undoubtedly inserted with a well-understood object. The father was contracting for the benefit of his daughters, providing partially for their support after his death, so long as they did not, through marriage, acquire other means of support. This is clearly shown by the contract. The taking away of this support from one because of the marriage of the other is plainly inconsistent with this object. It further clearly appears, we think, that neither sister was to be a beneficiary under said contract after her marriage. The contract between the parties was simply this, viz.: The son, in consideration of the transfer to him of his father's property, assumed the obligation to support, to a specified extent, his father while he lived, and after his father's death, his unmarried sisters, if any there then were, until they became married, when, according to the understanding of fa-

ther and son, they would not need further aid. The amount stipulated was to be paid by the son, after his father's death, if the sisters survived, unless in the meantime both sisters had married, and no portion thereof was at any time to be paid to any married sister. So long as an unmarried sister remained, just so long must the payment to her continue. This construction gives effect to every part of the contract, and effectuates what the contract clearly indicates was the mutual intention of the parties executing it. The last clause quoted above from the contract, to the effect that the payment is only to be made to the sisters "in case they \* \* \* are unmarried after the death" of the father, and upon which respondent so strongly relies, is substantially the same in all material respects as the first clause quoted, where he agreed to pay the money "to his sisters \* \* \* during the period they remain \* \* \* unmarried," which is followed by the provision that "said payment is to cease as soon as both are married." This provision indicates most clearly that the parties did not intend that the marriage of one should cut off the other. The pronouns and conjunctions are the same in the last as in the first clause, and must be presumed to have been used to express the same meaning in both places. The time of cessation of the payments is clearly and definitely stated, in terms that cannot be misunderstood, viz., "as soon as both are married," and the final clause was apparently inserted to make certain the proposition that no payment was to be made after the death of the father, in the event that both are married before such death. Plaintiff was not entitled to any relief by this action.

Defendant, by cross-complaint, sought judgment for certain installments alleged to be due her under the contract; but the finding of the court in regard thereto, being to the effect that there is not unpaid any sum of money thereon, precludes this court from directing that judgment be entered on said cross-complaint in favor of defendant.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment to the effect that plaintiff take nothing by this action, and that defendant recover her costs.

We concur: SHAW, J.; VAN DYKE, J

(141 Cal. 529)

PEOPLE v. CREEKS. (Cr. 993.)

(Supreme Court of California. Jan. 7, 1904.)

HOMICIDE—IMPEACHING EVIDENCE—  
ADMISSIBILITY.

1. In a prosecution for murder, defendant's guilt was sought to be proved by circumstantial evidence, the most important of which related to tracks leading from the place of the killing, and apparently made by shoes similar to a pair found in defendant's room. The only direct evidence that he wore them at the time in question was brought out by the examination

of his mother on behalf of the state. After she had stated that she could not tell what shoes he had on, she was asked on the redirect examination if she did not at the preliminary trial say that he had those shoes on. Without objection, she answered that she did, but that it was a mistake. She was subsequently recalled by the state, and, after being allowed to read her testimony given at the coroner's inquest, she was compelled to testify, over objection, that at the inquest she testified that he wore such shoes during the whole of the day of the homicide. *Held*, that as witness had merely failed to testify as expected by the state, but had not testified against it, the evidence thus elicited was incompetent.

Van Dyke, J., dissenting.

In Banc. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Frank Creeks was convicted of murder, and he appeals. Reversed.

J. S. Clack and D. M. Edwards, for appellant. U. S. Webb, Atty. Gen., and E. B. Power, Dep. Atty. Gen., for the People.

**PER CURIAM.** The defendant was convicted of the crime of murder in the first degree for the killing of one James N. Cornell, and adjudged to suffer death. He appeals from the judgment, and from an order denying his motion for a new trial.

The deceased was found dead on his own land, under circumstances showing that he had been shot from behind with a shotgun, and that whatever valuables he had on his person had been taken by the murderer. The evidence relied upon to connect the defendant with the killing was wholly circumstantial. There was evidence tending to explain away many of the circumstances, and to create a doubt of the guilt of the defendant, but there were circumstances tending strongly to show guilt, and it cannot be held that the evidence was insufficient to sustain the verdict. Most important evidence, however, against the defendant, was that relative to shoe tracks leading to and from the place of the killing, which were apparently made by shoes similar to a pair found in defendant's room. It was all-important for the prosecution to show, if it could, that defendant wore those particular shoes on the afternoon of the killing. There is no direct evidence in the record showing that he did so wear them, except that afforded by the prior statements of defendant's mother that he did have on those shoes at the time he left her home shortly before the killing. The mother was called as a witness by the prosecution, and having, in response to the questions of the district attorney, testified generally as to the movements of the defendant on the day of the homicide, said: "I could not tell you what shoes he had on when he went hunting. I cannot swear positively what shoes he had on." In so testifying, she apparently did not come up to the expectations of the district attorney, who, on redirect examination, asked her if she did not, at the preliminary examination, testify that he had those shoes on his feet when he left home

that afternoon. Without objection, she answered that she did say so at that time, and also said, "But it was a mistake, for I didn't notice them on his feet after dinner." She was subsequently recalled by the prosecution, and compelled, over objection, to testify that at the coroner's inquest she testified that he wore those shoes during the whole of the day of the homicide. She was further asked if her memory was not much fresher on that point at that time than on the trial, and answered that it was, but that she was sick at the time. The prosecution was further allowed to show by another witness who was at the coroner's inquest that the shoes concerning which the mother then testified were the shoes which corresponded with the tracks near the place of the homicide. This testimony was the only direct evidence in the case tending to show that the defendant at the time of the homicide wore shoes that could have made those tracks. It is unnecessary to point out the prejudicial effect of the evidence as to these declarations, especially when we stop to consider that they came from the lips of one who would naturally seek to conceal everything that might be injurious to defendant's cause.

The evidence thus elicited over the objection was incompetent for any purpose. It was clearly not offered for the purpose of refreshing the memory of the witness, as was the case with an unimportant question in *People v. Durrant*, 116 Cal. 179, 213, 48 Pac. 75. Here the memory of the witness had been fully refreshed by the question as to her testimony in regard to the same matter given at the preliminary examination, when she had acknowledged the testimony, and attempted to excuse it by stating that she was then mistaken. Her memory had been further refreshed on the trial by being allowed silently to read the transcript of her testimony given at the coroner's inquest, before being questioned as to the same. The testimony was sought to be elicited solely for the purpose of getting before the jury statements made by the mother on a prior occasion, tending to make out the case of the people. Where a witness called by a party has simply failed to testify to all that party expected or desired, but has not given testimony against him, it is not permissible for the party calling him to prove that such witness had previously made statements which, if sworn to at the trial, would tend to make out his case. As was said by Mr. Justice McKinstry in *People v. Jacobs*, 49 Cal. 384: "To admit the proof of such statements would enable the party to get the naked declaration of the witness before the jury as independent evidence." That such testimony is not authorized by the provisions of sections 2049, 2052, Code Civ. Proc., was squarely held in *People v. De Witt*, 68 Cal. 584, 588, 10 Pac. 212. The decisions of this court uniformly hold such testimony objectionable.



See *People v. Jacobs*, 49 Cal. 384; *People v. De Witt*, 68 Cal. 584, 588, 10 Pac. 212; *People v. Wallace*, 89 Cal. 158, 164, 26 Pac. 650; *People v. Mitchell*, 94 Cal. 550, 566, 29 Pac. 1106; *In re Kennedy*, 104 Cal. 429, 431, 38 Pac. 93; *People v. Conkling*, 111 Cal. 624, 44 Pac. 314; *People v. Crespi*, 115 Cal. 55, 46 Pac. 863. Upon this subject, this court has never gone further than to hold that where a witness called by a party has given damaging testimony against him—as, for instance, if the mother had here affirmatively testified that defendant did not wear the shoes when he left her home—the party calling him may show that the witness previously made statements inconsistent with his present testimony, and this ruling is apparently upon the theory that the party was surprised by the adverse testimony given by his own witness. Here, as was said in *People v. Mitchell*, supra, “the impeaching statements were evidently desired as evidence. If such testimony were admissible, it would be easy to manufacture evidence of that kind. If a witness merely fails to testify as expected, that does not authorize the party calling him to prove that the witness had elsewhere made the desired statements.” See, also, *People v. Conkling*, supra.

The prejudicial effect of this testimony was not obviated by the fact that the witness had, without objection, acknowledged the giving of such testimony before the committing magistrate. She had attempted to explain such discrepancy by stating that “it was a mistake, for she didn’t notice them on his feet after dinner.” It was not likely that she would make the same “mistake” in such a matter on two occasions; and the fact that she had also at the inquest, immediately after the homicide, made this most damaging declaration against her son, must have operated with telling effect upon the jury. Because of the erroneous admission of this evidence, the judgment must be reversed. We are not disposed to regard seriously technical errors, which could not have substantially affected the rights of a defendant, but, where it is clear that an error must have injuriously affected his cause, the judgment cannot be allowed to stand.

An examination of the record in this case indicates that there may be a serious question as to the correctness of some of the rulings of the trial court in excluding evidence offered by the defendant relative to the shoe tracks. Upon this most important matter, it is needless to suggest that the defendant is entitled to have admitted all legal evidence offered by him tending to contradict that offered by the prosecution.

The transcript in this case contains 822 pages and 2,460 folios—many times more than the necessities of the case required. Something over 100 rulings of the court are assigned as error, but most of these assignments are so trivial as not to be worthy of notice by any court. In the majority of

cases designated as error, appellant’s counsel do not deign to specify in what particular the error consists, but simply state that the court erred in this, that it did so, etc. The practice indulged in herein has unnecessarily increased the labors of this court, which is already overwhelmed with business. Because of the importance of the case, we have, however, thoroughly examined the transcript; and it is entirely due to such examination that the error necessitating a reversal has been brought to light, notwithstanding the obscurity caused by the unnecessarily voluminous record, and the assignment of so many trivial errors without cause.

The judgment and order are reversed, and the cause remanded for a new trial.

VAN DYKE, J. I dissent. The evidence in this case shows that a cold-blooded and most atrocious murder was committed, and that robbery was the motive, and all the circumstances point to the defendant as the guilty party. The error referred to in the opinion of the court, and on which the case is reversed, in my opinion, did not affect the substantial rights of the defendant, and it is the law: “After hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.” Pen. Code, § 1258. And therefore I am of the opinion that the judgment of the court below should be affirmed

(141 Cal. 523)

#### In re CHRISTAL. (Cr. 1,038.)

(Supreme Court of California. Jan. 6, 1904.)  
HABEAS CORPUS—CUSTODY OF MINOR SON—RESPONDENT’S RIGHT TO DISCHARGE.

1. Where on the hearing on the return to an application for a writ of habeas corpus to compel respondents to produce the body of the petitioner’s son, 15 years old, it conclusively appears that he left his father of his own volition, and was not detained by respondents, to whose residence he came after leaving his father, and that he had left them for Honolulu on the invitation of his sister, and that respondents, merely from motives of humanity, furnished him with sufficient funds for his comfort on the trip, the respondents must be discharged and the writ dismissed.

In Banc. Application by J. F. Christal for writ of habeas corpus against R. F. and Teresa Johnson. Respondents discharged, and the writ dismissed.

William T. Kearney, for petitioner. C. F. Lacey (W. W. Foote, of counsel), for respondents.

SHAW, J. This is an application by J. F. Christal, father of Leo J. Christal, for a writ of habeas corpus, to compel the respondents, R. F. Johnson and his wife, Teresa Johnson, the aunt of Leo J. Christal, to produce the body of said Leo J. Christal. The petition was filed on the 28th day of May, 1903. Respondents make return that

said Leo J. Christal, on about the 7th day of May, 1903, of his own volition, went to Honolulu, and there remains, living with his sister, Anita Christal, and that he is not within their custody or control. Upon the hearing the respondent, R. F. Johnson, was cross-examined with reference to the facts stated in the return. Thereupon it appeared that the boy, being 15 years of age, in February last resided in Santa Cruz with his father; that at the time he voluntarily left his home, owing to some quarrel with his father, and went to the residence of the respondents, in Monterey county, and there remained with them until May 6th, not at their solicitation or procurement, but of his own free will; that he declared that he would never return to his father, but would rather throw himself into the bay or become a tramp; that his sister, who is now in Honolulu, wrote to him to come to her to reside, whereupon he declared his intention of going; that, upon his so declaring his intention, and making preparations to go, he having no money wherewith to pay his passage, the respondent R. F. Johnson, who had in his control money belonging to the boy, arranged to have his passage paid, and to that extent assisted in his departure, but that he did not advise or counsel or encourage him to go. Respondent strenuously denies that this was done in anticipation of the issuance of any writ, or that he had any wish or desire to prevent the boy from returning to the custody of his father, and there is no evidence to the contrary sufficient to satisfy the court that his statements are not true.

Counsel for the petitioner cite authorities to the effect that where a child has been given by the parent into the custody of a third person, or where it has been taken into custody by a third person against the wish of the parent, or through some design to take it from the parent's custody, and afterwards, upon a demand by the parent for its production, it appears that the parties so having the custody or control of the child, in anticipation of the issuance of a writ of habeas corpus, with the purpose of depriving the parent of its custody, have caused it to be taken beyond the jurisdiction of the court, the fact that it is at the time of the hearing beyond the control of the respondent is no answer to the writ. The court, under such circumstances, if it has any reasonable ground to believe that the respondent can produce the child, will imprison him until the child is produced, or until it is demonstrated that its production by the respondent is impossible. These authorities have no application to this case. Here the child is 15 years of age, and in size is a man. So far as the evidence shows, he has not been detained from the father by the respondents, and he was not sent to Honolulu in anticipation of any writ, nor for the purpose of depriving the father of his custody. He went of his own volition,

and all that the respondents did was, from motives of humanity, to furnish him sufficient funds for his comfort on the trip. It appears that this was not done for any ulterior or sinister motive or purpose, and, further, that the child is not now under the control of the respondents.

We are therefore of the opinion that the respondents must be discharged and the writ dismissed.

We concur: VAN DYKE, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.; ANGELLOTTI, J.

(141 Cal. 519)

BAILEY et ux. v. KREUTZMANN. (S. F. 2,424.)

(Supreme Court of California. Jan. 5, 1904.)

PHYSICIANS AND SURGEONS—MALPRACTICE—NEGLIGENCE AND LACK OF SKILL—QUESTIONS FOR JURY—EVIDENCE—NEW TRIAL—TRIAL COURT—DISCRETION—APPEAL—PRESUMPTION.

1. It is within the discretion of the trial court, on proper application thereto, in case of excusable neglect, to relieve a party desiring to make a motion for a new trial from his failure to serve the statement in time.

2. Where the trial court, on the ground of excusable neglect, relieves a party desiring to make a motion for new trial from his failure to serve the statement in time, the Supreme Court will not presume that the new trial was refused on the ground of any delay in the service of the proposed statement.

3. Recitals by witnesses of the contents of medical works, or the substance of their contents, are hearsay.

4. In an action against a physician by a husband and wife to recover damages for unskillful treatment of the wife as a patient, it appeared that defendant pronounced her ailment to be a cystic tumor of the ovary, and operated on her for that ailment. After an abdominal incision, he discovered that the ovaries were in reasonably good condition, and, finding the uterus enlarged, concluded that the patient was probably pregnant. The wound healed, and subsequent events proved that she was not pregnant. Thereafter physicians called as witnesses reached the conclusion that the patient's trouble was in fact a fibroid tumor of the uterus. *Held*, that whether the defendant was lacking in the skill usually possessed by a physician was a question for the jury.

In Banc. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by A. H. Bailey, Jr., and wife against Henry Kreutzmann. From an order denying a motion for a new trial, plaintiffs appeal. Reversed.

J. J. Burt, for appellants. Loewy & Gutsch, for respondent.

PER CURIAM. The defendant is a physician and surgeon, and as such he examined the plaintiff Hannah M. Bailey, and pronounced her ailment to be a cystic tumor of the ovary, and ordered her to a hospital, where he proceeded to operate upon her for

¶ 4. See *Physicians and Surgeons*, vol. 39, Cent. Dig. § 44.

the said ailment. After an abdominal incision and careful inspection of the parts, he discovered that the ovaries were in reasonably good condition, and, finding the uterus enlarged, concluded that the patient was probably pregnant, and sewed up the incision. The wound healed, and subsequent events proved that she was not pregnant at the time of the attempted operation. Thereafter the physicians and surgeons called as witnesses reached the conclusion, from the history of the case and all the circumstances surrounding it, that the patient's trouble was neither pregnancy nor an ovarian tumor, but was in fact a fibroid tumor of the uterus, or something else nearly allied thereto. The patient and her husband brought this suit to recover \$40,000 for the said alleged unskillful and negligent acts of defendant. The verdict and judgment being in defendant's favor, plaintiffs moved for a new trial, and bring this appeal from the order denying the motion.

1. Respondent makes the preliminary objection that the proposed statement on motion for new trial was not served in time, and therefore the court was warranted in denying the motion, because there was no proper record to base it on. But it appears that appellants made a motion in due form to be relieved from their failure to serve the statement in time upon the ground of excusable neglect. This motion was granted, and thereafter the statement was duly settled and certified by the court. It was clearly within the discretion of the court to do this. *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935. In view of the trial court's order relieving appellants from their failure to serve the statement in time, we will not presume that the new trial was refused on the ground of any delay in the service of the proposed statement.

2. Many objections are urged by appellant, but we will discuss only those errors which seem to require a reversal of the order appealed from.

On the trial, medical witnesses called by defendant as experts to prove that his treatment of Mrs. Bailey was neither negligent, nor lacking in medical or surgical skill, were allowed, in response to questions by defendant's counsel, and against the objections of plaintiffs that the same was incompetent and hearsay, to recite instances from medical reports and authors illustrating the difficulties which attend a diagnosis under the circumstances developed in the case of Mrs. Bailey. For instance, Dr. De Vecchi was permitted to say: "I refer to some reports in the *Annals of Medicine*, which prove the difficulty of making a diagnosis. \* \* \* Professor Reverding, of Geneva, who is considered one of the most eminent surgeons of Geneva, once examined a woman. He could not make a diagnosis, but he suspected pregnancy, which diagnosis he doubted after the absolute assertion of the woman

that it was impossible that she should be pregnant. He sent the woman to a hospital in Geneva, where the physician, after a careful examination and questioning of the woman, decided to wait for a while, under suspicion of pregnancy, and after a month or two an abdominal opening was made, and they found a pregnant uterus of six months." Another physician testified: "I think you will find it in a book. Spencer Wells, when asked what class of tumor he was dealing with in an operation he was about to perform, said: 'I have stopped guessing. I will tell you when I open the abdomen.' That was after he had performed one thousand operations. He was the greatest author on abdominal tumors." There were many more of these illustrations and recitals from standard authors, living and dead, but the above quotations are sufficient to illustrate the point. It has been held, without conflict and in an extended line of cases in this state, that medical works are hearsay and inadmissible in evidence, except, perhaps, on cross-examination, when a specific work may be referred to, it seems, to discredit a witness who has based his testimony upon it. *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70; *Gallagher v. Market Street Ry. Co.*, 67 Cal. 13, 6 Pac. 869, 51 Am. Rep. 680, note; *Lilly v. Parkinson*, 91 Cal. 655, 27 Pac. 1091. In *People v. Golden-son*, 76 Cal., at page 348, 19 Pac. 170, it is said: "Dr. Woolsey, one of the experts called by the defense, was asked to name the circumstances of the cases he had read where violence accompanied hysterical mania, and the court sustained an objection to the question. If allowed, the examination would have been in effect the introduction of medical works in evidence, and therefore it was properly rejected." It must be taken as the settled rule in this state that medical books are not admissible as evidence, except in the instance already specified. If the books themselves are hearsay and inadmissible, certainly any recital of their contents or the substance thereof is none the less hearsay, and should be excluded for that reason. It is apparent that the plaintiff's case may have been materially prejudiced by the erroneous admission of this evidence.

3. At the request of respondent, the court instructed the jury as follows: "The defendant in this action is not charged by the plaintiffs with any lack of general skill or competency as a physician and surgeon. This amounts to an admission, and you are bound to hold, accordingly, that the defendant was possessed of that ordinary medical and surgical knowledge and skill which the law requires him to possess; there being no degree other than that of ordinary knowledge and skill recognized by law as a standard or applicable as a measure of knowledge and skill in such cases." This instruction was erroneous, and should not have been given. The plaintiff charged the defendant with

negligence and want of skill in treating her, and should have been left to argue to the jury that the facts presented showed that the defendant was lacking in the skill usually possessed by a physician and surgeon.

The order appealed from is reversed.

(141 Cal. 508)

**WILLEY v. CROCKER-WOOLWORTH NAT.  
BANK OF SAN FRANCISCO.**  
(S. F. 2,741.)

(Supreme Court of California. Jan. 4, 1904.)

**PARTNERSHIP — SECRET PARTNERS — REPRESENTATIONS OF OSTENSIBLE PARTNERS — ESTOPPEL TO DENY — RIGHTS OF THIRD PERSONS — RELIANCE ON REPRESENTATIONS — FINDINGS — EVIDENCE — SUFFICIENCY — ASSIGNEES — RIGHTS DERIVED FROM ASSIGNOR.**

1. In an action by the assignee of a secret partner to recover a bank deposit belonging to the firm, evidence held insufficient to support a finding that defendant did not know the ostensible partner to be alone in business under the firm name, and that such partner did not after a certain date hold himself out to be the firm's sole member, or sole owner of the business, and that he was so considered in the business world.

2. There being no law preventing the use of a trade-name by an individual, the use by him of the term "& Co." after his name does not import the existence of a partnership, or that any other person than the individual named is interested in the business.

3. Where a bank had the right to set off an individual's note against an account kept by him under his trade-name, such right passed to the bank's assignee of the note and account, nothing having arisen prior to the transfer to require inquiry on the part of the bank as to a secret partnership between such individual and another, and nothing arising to call for inquiry on the part of the assignee.

4. An assignee of a note and account has a right to rely on the statements made by the maker of the note and creditor of the account to the assignor as to his individual ownership of the account, when informed by the assignor of such statements at the time of the transfer.

5. That an individual negotiated a loan with a bank, and executed the note therefor in a firm name, does not show that the bank dealt with the maker of the note as a partnership, when it was informed and believed that the individual and firm were the same.

6. In an action by the assignee of a secret partner to recover a bank deposit belonging to the firm, evidence examined, and held insufficient to support a finding that defendant did not give the ostensible partner credit, nor accept his note, in reliance on his sole ownership of a deposit standing in the firm name.

7. Where a corporation entered into a partnership with an individual which the latter was enjoined to keep secret from the business world, holding himself out as the sole owner of the business, it thereby constituted such individual its agent, was bound by his representations, and estopped to question their truth as against a bank which extended credit to the individual in bona fide reliance on such individual's sole ownership of an account with it standing in the firm name.

8. An objection that an estoppel was not pleaded was waived, and could not be urged on appeal, where no question by demurrer, or objection to evidence in support of that defense, was raised in the court below.

In Banc. Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by Charles G. Willey against the Crocker-Woolworth National Bank. From a judgment for plaintiff, affirmed in department (72 Pac. 832), defendant appeals. Reversed.

Henry E. Monroe and Monroe & Cornwall (Lloyd & Wood, of counsel), for appellant. Crandall & Bull (H. M. Barstow, of counsel), for respondent.

LORIGAN, J. This is an appeal from a judgment on a bill of exceptions. Appellant attacks the sufficiency of the evidence to sustain the findings upon which judgment for respondent was entered.

The facts are substantially as follows: One A. B. Perry, some time in the latter part of 1896 (the record does not disclose the exact date), went to the banking house of the Tallant Banking Company, in San Francisco, for the purpose of opening a deposit account with said bank in the name of A. B. Perry & Co. He stated to the cashier of the bank at the time that he was the sole owner of the business of A. B. Perry & Co., and had no partner; that he was going to open up his business in that style, and under the name of A. B. Perry & Co., and run the business that way for the appearance of it; that he preferred to do it in that manner, as he thought it gave him a little strength; that he expected to take a partner in, and when he did so he would not have to make any change. That on January 1, 1897, the said A. B. Perry and W. P. Fuller & Co., a corporation, entered into articles of copartnership under the firm name and style of A. B. Perry & Co. That such articles provided, among other things, that said W. P. Fuller & Co., or its employés, should not be required to give their time or services to the conduct of such business, but that A. B. Perry should give his entire time and attention to it. The articles further provided for the keeping of books of account, and in that regard specially stipulated that "said books shall be kept in the name of A. B. Perry & Co., and the name of W. P. Fuller & Co. shall not appear therein, but shall remain and be kept secret and undisclosed by the parties hereto. The account of W. P. Fuller & Co. in this copartnership shall be kept in the name of 'Private Partner,' and all credits and debits belonging to said W. P. Fuller & Co., as partner, shall be kept in said name." That, after the formation of such partnership, the deposit account stood in the name of said A. B. Perry & Co., with said Tallant Banking Company, and in August, 1897, the said A. B. Perry individually borrowed from the said Tallant Banking Company the sum of \$1,600, for which he gave his personal note, payable 90 days after date. In November, 1898, said Tallant Banking Company transferred to defendant certain of its assets, including the said note, and thereupon defendant assumed certain liabilities of the Tallant Banking Company, including the liability for the

deposit to the credit of A. B. Perry & Co. The said deposit account was thereafter kept by defendant with said A. B. Perry & Co., but said A. B. Perry had no individual deposit with defendant at any time. When the transfer of the account and note was made from the Tallant Banking Company to the defendant bank, the cashier of the former informed the officers of the latter of the statements A. B. Perry had made, when he first appeared at the bank, as to his sole ownership of the business, that he had no partner, and stated the reasons he gave why he wished to conduct the business under the firm name of A. B. Perry & Co. That neither the Tallant Banking Company nor the defendant bank ever had any actual notice that A. B. Perry & Co. represented a partnership, or that A. B. Perry had a partner, or that any one other than said A. B. Perry was interested in the business conducted under such name. That on February 14, 1899, there was on deposit to the credit of A. B. Perry & Co. with the defendant the sum of \$1,720.64, and on that day defendant charged said account with the sum of \$1,604.94, being the amount due on said note of A. B. Perry. This was done without any request from said A. B. Perry or A. B. Perry & Co., and solely on account of the fatal illness of said A. B. Perry, reported to the defendant. Said A. B. Perry having subsequently died, W. P. Fuller & Co., claiming to be the surviving partner of A. B. Perry & Co., demanded the delivery to it by defendant of the entire \$1,720.64, and, being refused, assigned its claim to plaintiff for collection. The lower court found "that the defendant did not know A. B. Perry to be alone in business under such firm name; that after January 1, 1897, he did not hold himself out as the sole member of said A. B. Perry & Co., nor as the sole owner of the business conducted under that name, nor was he after that date so known or considered in the business world"; and found also that "the defendant did not give said A. B. Perry credit, or accept his promissory note because of, or in reliance upon, the fact that A. B. Perry was alone the owner of the deposit account standing in the name of A. B. Perry & Co."

It is insisted by the appellant that these findings are not supported by the evidence, and we have come to the same conclusion. They are not only not so supported, but the evidence directly shows the contrary. While the exact date when A. B. Perry opened his account with the Tallant Banking Company is not shown, it is fairly inferable from the evidence that he had opened it somewhat prior to the agreement of partnership between himself and W. P. Fuller & Co.; that he was then the sole owner of the business, and so declared himself to the cashier of the bank, giving his reason for adopting the name and style of A. B. Perry & Co. There is not a particle of evidence to show that from that date A. B. Perry ever acquainted

the Tallant Bank, or the defendant bank, that his relation to the business of A. B. Perry & Co. had changed, that he had a partner, or had entered into partnership, or that W. P. Fuller & Co. was in any manner interested in the business. Neither did W. P. Fuller & Co. at any time, until after Perry's death, notify either of them of its interest in the business as a partner. Nor is there any evidence showing that even an intimation was conveyed to either banking house that Perry was not at all times the sole owner of the business. In fact, it would have been a violation of the articles of agreement for A. B. Perry or W. P. Fuller & Co. to have informed anybody that such a partnership existed. The agreement between them expressly provided that their partnership should be kept a secret. The presumption is that men keep their agreements, and in the case at bar it appears to be the fact that both of them kept theirs, and that A. B. Perry, having in the beginning stated that he was the sole owner of the business, without a partner, sedulously thereafter avoided informing either the Tallant Bank or the defendant bank to the contrary. Aside from depositing and checking against his account, he had but few dealings with the officers of either bank, but those he did have tended to confirm their belief in his original declaration that he was the sole owner. To illustrate, in 1898, contemplating a trip East, he called at the Tallant Bank, and stated that while East he might make some purchases and want to overdraw his account; to meet such overdrafts he desired to leave blank notes with the bank, giving as a reason therefor that, while his bookkeeper could sign checks, there was no one who could sign notes for him. The bank declined to receive such notes, and other arrangements were made. When the transfer of the account from the Tallant Bank to the defendant bank was made, the identification signature furnished to the bank by Perry, upon which alone it should honor checks, was that of A. B. Perry & Co., signed by A. B. Perry. Both these transactions were confirmatory of his original declaration of individual ownership; that he alone could draw checks was equivalent to saying that he alone still owned the business; that there was no one who was authorized to sign notes for him, even to meet the exigencies of the business while he was away, warranted the natural inference that he was solely interested in it, and excluded the idea of his having a partner. Not only does the whole trend of the evidence tend to show that, as far as the Tallant Bank or the defendant bank is concerned, they knew A. B. Perry as the sole owner of the business represented by the style and name of A. B. Perry & Co., but the plaintiff made no effort to show that any information to the contrary was brought to the attention of either.

The trial court seems to have attached some importance to the fact that the defend-

ant bank, after the transfer to it by the Tallant Banking Company of the account of A. B. Perry & Co., "received its deposits, and honored its checks, without prosecuting any inquiry as to the membership of such copartnership." But there was nothing calling for such inquiry. No conclusive presumption arose from the use of the term "& Co.," in connection with A. B. Perry, which imported the existence of a copartnership. It is a matter of common observation that persons do business frequently under what is known as "trade-name," adopted for the purpose of giving them an apparent standing in the business community. This is the idea Perry had in view. He selected it, doubtless, as a trade-name, and because, as he stated to the Tallant Bank, he "thought it gave him a little strength." It does not necessarily follow, as a presumption from the use of such a business designation, that more than one person is interested in the business, or that any other than the one whose name is given is so interested. The business world looks chiefly to the individual actually mentioned in the business appellation, until it discovers or is informed that others are interested in the business with him. There is no law of this state which prevents the use of a trade-name by an individual, and, in the absence of any such prohibition, an individual may conduct business under any designation he sees fit. As is stated in *Brennan v. Pardridge*, 67 Mich. 453, 35 N. W. 87: "In a state where there is no statute prohibiting the use of a name or an abbreviation to do business under other than that of the individual, there is no necessary presumption that when '& Co.' is made use of after the dealer's name he has a partner or partners, or that such title includes more than one person." Aside from this, the Tallant Banking Company did make inquiry at the time when inquiry should properly have been made, when the account was proposed by Perry to be opened, and had been informed by him that he was the sole owner. Nothing arose subsequently to awake suspicion upon the part of the Tallant Banking Company as to the accuracy of this statement, and, as far as the defendant is concerned, it must be borne in mind that all the rights which had accrued in behalf of the Tallant Bank against Perry or A. B. Perry & Co., represented by Perry as sole owner, passed to the defendant by its assumption of such account and the transfer of the note to it. It cannot be questioned that, if the Tallant Bank had the right to offset this note against the A. B. Perry & Co.'s account, such right passed to the defendant bank under the transaction between them. Nothing certainly arose prior to the transfer by the Tallant Bank to require any additional inquiry on its part. Neither, if that fact could affect its rights at all, did anything arise to call for inquiry by the defendant bank. It had a right to rest on the statements which Perry had made to the

Tallant Bank as to his ownership of the business, and of which it was informed when the transfer of the account and note were being negotiated. Besides, this inquiry is only required when such inquiry would have disclosed the facts. If inquiry had been made of the business community, it could have imparted no information other than that A. B. Perry was the owner of the business, because, under the partnership agreement, the actual management of it was left to him alone, and it was provided by the same instrument that the fact that Fuller & Co. was a partner should be kept concealed by both of them, and the presumption is that they kept their agreement. Nor would subsequent inquiry of Perry have been attended with any better results. He was bound by the contract, equally with Fuller & Co., to conceal the existence of the latter as a member of the firm, and, if inquiry had been made, doubtless would have done so. In fact, his whole course of conduct shows that he lived up to the agreement in this particular. Under these circumstances it is apparent that any inquiry made would be fruitless, without considering whether it lies in the mouth of Fuller & Co. to now complain of a failure to make inquiry concerning a fact which it had so cautiously provided should be kept secret and undisclosed.

Some importance is attached to the fact that, after business relations were established between A. B. Perry & Co. and the defendant bank, a loan was negotiated for \$3,000 by A. B. Perry with the latter, and a note given executed by him in the firm name of A. B. Perry & Co. This note was paid. It is argued from the execution of this note in the firm name that the bank must have dealt with A. B. Perry & Co. as a partnership. We do not think this circumstance entitled to the importance which is claimed for it. As the bank understood and believed A. B. Perry and A. B. Perry & Co. to be the same, it would be a circumstance of no moment with it whether the note was signed by A. B. Perry or A. B. Perry & Co. Under either signature it would represent, in their belief, simply A. B. Perry the individual, and, taking it in the manner in which it was executed, may have been entirely for the convenience of Perry. As far as the bank was concerned, it knew no difference between the individual and the firm.

As to the finding "that the defendant did not give A. B. Perry credit, nor accept his promissory note because of, or in reliance upon, the fact that he was alone the owner of the deposit account standing in the name of A. B. Perry & Co.," we are satisfied, also, that the evidence is entirely to the contrary. In determining whether the evidence supports this finding, it is not alone sufficient to examine the relations existing between A. B. Perry and the defendant, but there must be also taken into consideration the transactions previously had between the Tallant

Bank and A. B. Perry, because, as we have said, whatever rights had accrued in favor of the Tallant Bank, at the time of its negotiations with the defendant resulting in the transfer of the note and the assumption of the liability on the deposit account, passed to the defendant. The note was then due, and if, under the law upon the facts then existing, the Tallant Bank had the right to set off the note against the account, it passed to the defendant. That the Tallant Bank credited Perry and accepted his note in reliance upon the fact that he alone, as he stated, was the owner of the deposit account, we think has been clearly shown. When the transfer of the deposit account and note were being negotiated, it was stated to defendant by Mr. McKee, cashier of the Tallant Bank, "that along with this note would come, among the other deposits, accounts to be transferred, an account of A. B. Perry & Co. \* \* \* That the note and account were one and the same thing, and we had a number of borrowers who borrowed money and kept money to their credit. \* \* \* I stated in general terms the nature of the business. I told them that Mr. Perry was doing business under the firm name of A. B. Perry & Co., because he told me that he preferred to do it that way; he thought it gave him a little strength; that he was the sole owner of the business. That knowledge I got from Mr. Perry himself." And the cashier of defendant bank, Mr. Kline, testified: "In the acceptance of these notes and security that were turned over to us by Tallant Banking Company, I acted upon the statement and representations made to me by Mr. McKee." This evidence, to our mind, about which there is no contradiction, fully establishes, not only that the Tallant Bank originally took said note on the faith of A. B. Perry's declaration that he alone owned the business of A. B. Perry & Co., and as a consequence the account standing in the name, but that the defendant took it, and intended to take it, with all the legal rights which existed in favor of such Tallant Bank. It is hardly necessary to say that when, under such circumstances, a person says he acted upon the statement and representation of another in a business transaction, that he is understood to mean that he relied upon them.

We have discussed these findings, and the evidence bearing on them, because the defendant, as a defense to the claim of plaintiff, insisted that it had a right to set off said note against the amount due on said account, for the reason that it believed, and was justified in believing, that A. B. Perry was the sole owner of the business represented by A. B. Perry & Co.; that it did not know that any other person than A. B. Perry was a member or interested in said business; and that the corporation of W. P. Fuller & Co. was estopped from claiming any interest in said deposit fund adverse to the right of de-

fendant to set off said note against it. The findings of the court which we have called attention to negative this claim. The evidence in the case, which we hold is directly contrary to the findings, supports it. No one will claim that, if in fact A. B. Perry was the sole owner of such business, the right of set-off as exercised was not available to the defendant. It is equally available when, from the facts of a case, it appears that the surviving partner is a dormant, or secret, partner, who permits or authorizes his co-partner to hold himself out as a sole member of the partnership, and on the faith of that appearance to obtain credit. This is the relation—a dormant and secret partner—which W. P. Fuller & Co. bore to the firm of A. B. Perry & Co., and the rule is elementary that, where a dormant partner permits the business world to believe that the ostensible partner is alone the owner of the business, he is estopped from claiming to the contrary against those who have in good faith acted upon such appearance, and cannot be heard to insist that a creditor under such circumstances has not the right to set off his debt against such ostensible partner. On this point it is only necessary to refer to the textbooks. Collyer on Partnership, p. 1099, and note; 1 Lindley on Partnership, p. 686; Bates on Partnership, § 1093; Barbour on Set-Off, pp. 56, 62, 103; Waterman on Set-Off, § 238. Though the cases are to the same effect: Lord v. Baldwin, 6 Pick. 352; Van Valen v. Russell, 13 Barb. 592; Allen v. Brown, 39 Iowa, 330; and Brown's Appeal, 17 Pa. 484. The case at bar comes squarely within the rule. Under the terms of their partnership agreement, such partnership was not only to be secret, but it was to be kept secret. Perry, as the active manager of the firm, was to mingle with the business world ostensibly as the sole owner of the business. It was intended that he alone should be known in it, and he was empowered from his very position, under the terms of the partnership, to deceive the public as to the true state of affairs, and authorized to make any representation which would induce those with whom he dealt to believe him the sole owner of the business. Fuller & Co. knew the inner conduct of their own firm; that business relations would naturally be established in various quarters, and that they were actually established with the Tallant Bank and with the defendant; that inquiries would be made as to who A. B. Perry & Co. represented. It was intended that this should not be disclosed, and Perry was enjoined not to do so. This necessitated actual deception if inquiry would be made, or such a course of conduct as would tend to suggest individual ownership and prevent inquiry. By its own act Fuller & Co. placed Perry where such deception could be practiced. In so doing, it constituted him its agent, became bound by his representations, and is now estopped to question the truth of them against one who acted upon

them in good faith. Fuller & Co. voluntarily assumed this secret relationship and made the deception possible, and it is only just that it should suffer by reason of it, rather than an innocent creditor who through its conduct was deceived as to the true condition of affairs.

It is insisted by the respondent that estoppel was not pleaded. As we construe the answer, there was at least an attempt to do so. Some facts tending to establish an estoppel are pleaded. No demurrer to the answer was filed, or objection made to the introduction of evidence under it. The case was tried upon the theory that the plea was sufficiently made. Under these circumstances the objection was waived, and cannot now for the first time be urged here. *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386; *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157.

Appellant makes the additional point that W. P. Fuller & Co., being a corporation, could not legally enter into a copartnership with an individual, and for that reason no partnership ever existed between A. B. Perry and W. P. Fuller & Co. The disposition we make of the case upon a review of the findings under the evidence makes it unnecessary to discuss this point.

The judgment is reversed, and the cause remanded for a new trial.

We concur: HENSHAW, J.; McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; BEATTY, C. J.

(141 Cal. 525)

HOFSAS et al. v. CUMMINGS et al. (Sac. 1,102.)\*

(Supreme Court of California. Jan. 6, 1904.)  
TRUSTS—VALIDITY—BLENDING OF VALID AND INVALID PROVISIONS.

1. A deed of trust to trustor's son C. to do certain things with the income during trustor's life, at her death half the real estate to become the property of C., he to pay to trustor's son L. for five years after trustor's death the income of the other half of the real estate, and at the end of that time to make a deed of that half to L., the title not to vest in L. otherwise, with the further provision that, if L. should die before the end of five years without disposing by will of such half, as he was authorized to do, it should vest in C.—being invalid as to the trust to convey to L., is invalid as to the trust over, dependent thereon, and also as to the other trust to W., by reason of the blending of the valid and invalid parts.

In Banc. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Rebecca Hofsas and others against William Cummings and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

White & Miller, for appellants. Devlin & Devlin, for respondents.

HENSHAW, J. This is an action to quiet title. Plaintiffs claim as grandchildren and

heirs at law of Rebecca Cummings, deceased. The defendants are sons of Rebecca Cummings, and deraign title through a deed of trust executed by their mother. The action was commenced after the death of Rebecca Cummings, and was founded upon the view of the plaintiffs that the deed of trust was void. The trial court so held, and refused its admission in evidence. From the judgment which followed in favor of plaintiffs the defendants appeal.

The deed of trust was a conveyance to the son, William Cummings, upon certain trusts, which need not here be specified, since they concern the disposition to be made of the property and its income during the life of the trustor, and were executed and terminated upon her death. The third and fourth clauses of the instrument are as follows:

"(3) At the date of my death, one-half of said real property, or if at that time said real property has been sold under the authority herein conferred, by said party of the second part, then one-half of the proceeds of such real property shall become the property of said party of the second part, and said one-half of said property, or the said one-half of the proceeds thereof shall be thence released from the trust herein created.

"(4) The remainder of said real property, or the proceeds of the same shall remain subject to the trust herein created, and the whole of the income thereof shall be paid to my said son Lewis B. Cummings, by said party of the second part as soon and as often as the same shall be received by him; at the expiration of five years after my death said party of the second part shall make a deed of said remaining portion of said real property to my said son Lewis B. Cummings. If it is at that time composed of the hereinbefore described real property, or real property of any kind, and if the said hereinbefore described real property has at that time been sold under the authority hereof, then said party of the second part shall transfer to said Lewis B. Cummings the proceeds of the same in whatever form it may be and deliver the possession thereof to him, provided, however, that the title to said property shall not vest in said Lewis B. Cummings until such delivery is made to him in person.

"From the date of my death until said property vests in him as provided for herein said Lewis B. Cummings shall have the right to dispose of said property, and every part thereof, by will, and if at his death (providing he shall die within said period of time) he shall have failed to have disposed of said property by will, then the whole remaining portion of said property shall vest in the said party of the second part and be freed from the trust herein created, and if at that time the said party of the second part be dead, the title to said last described property shall vest in his children which are then surviving, and said word 'children' shall not be

\*Rehearing denied February 3, 1904.



construed to include grandchildren, and the trustee then acting in the place of the said party of the second part shall convey the same to said children absolutely, and said property shall be freed from the trust herein created."

The trial court took the view that the trust to Lewis B. Cummings could not be distinguished from the trust to convey condemned and declared void in the Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, and in this construction we think the court was correct. It is declared as to Lewis B. that the trustees shall "make a deed" to him, and that the title to the property shall not vest in him except as thus provided. There appears to have been thus designedly created a trust to convey, a trust whereby the title to the property should vest and could only vest in Lewis B. upon the execution of the deed, and in fact, as we read appellants' brief, they declare that an examination of the situation of the parties to the instrument and the surrounding circumstances would show that, because of existing differences between Lewis B. Cummings and his wife, his mother "tried to place him in a position where his interest could not be sold under execution, or where the purchaser under such a sale could not demand of the trustee a conveyance as the successor of his title." But, apart from these extraneous considerations, the instrument itself, as we have said, clearly manifests its intention, and ex industria creates a prohibited trust to Lewis B. Cummings.

The trusts over in the event that Lewis B. should die failing to exercise the power of testamentary disposition are not obnoxious to the same objection. It is provided by them that, upon the contingency arising, the "property shall vest," and "the title shall vest in the other son, or in his surviving children," following which there is a provision that the trustee "shall convey the same to the children absolutely," and the trust shall terminate. The distinction between the trusts over and the trust to Lewis B. is broad and well defined. As to Lewis B., the property and its title cannot vest in him excepting by the conveyance. In the trust over the title vests absolutely under the terms of the instrument, and the added provision that a conveyance shall be made amounts to nothing more than an assurance of title. In the trusts over, therefore, there are apt words granting and conveying title by the act of the trustor under the instrument itself, while in the case of Lewis B. the only title which he is to receive is from the trustee, and none whatever from the act of the trustor. But while the trusts over, in the event of Lewis B. Cummings' death, are not obnoxious to our law governing express trusts, yet they are absolutely dependent upon the void trust to Lewis B., and must fall with it. Nor can it be said that the provisions of the other trust to William can be given effect

without doing injustice to the intention of the trustor. The whole instrument, therefore, comes under the well-settled rule that, where valid and invalid provisions are so blended that it is impossible to separate them and give effect to the one without doing violence to the intention of the trustor, the whole trust must fail. *Carpenter v. Cook*, 132 Cal. 621, 64 Pac. 997, 84 Am. St. Rep. 118; *Estate of Fair*, 136 Cal. 79, 68 Pac. 306.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: MCFARLAND, J.; VAN DYKE, J.; LORIGAN, J.

We dissent upon the ground that the case is distinguishable from the case of *Estate of Fair*, 136 Cal. 79, 68 Pac. 306: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.

(141 Cal. 503)

**BIGELOW v. CITY OF LOS ANGELES**  
(NEWMARK et al., Interveners).

L. A. 1,124.

(Supreme Court of California. Jan. 2, 1904.)

**MUNICIPAL CORPORATIONS—USE OF STREET—INJUNCTION — PROOF — SUFFICIENCY — DAMAGES—COMPLAINT—NECESSARY ALLEGATION —NEW TRIAL.**

1. A judgment condemning land for a street became final with plaintiff's consent. Thereafter plaintiff sued to enjoin the city from using the street until it had passed an ordinance vacating an alley, alleged to be part of the consideration of the permission to take plaintiff's land for the street. After the commencement of the suit, and for about eight years before the trial, the street had been open and graded, and during all those years it had remained an open public street, and plaintiff had made no effort to enforce any injunction against it, but had paid assessments on her property for the improvement of the street. Held not to entitle plaintiff to the injunction prayed for.

2. That a claim for damages has been presented to the city council of Los Angeles in accordance with its charter is a necessary allegation in a suit therefor against the city.

3. In a suit for an injunction, to which plaintiff is not entitled, under the proof, where no issue of damages was raised by the pleadings, a new trial, to enable plaintiff to recover damages, is properly refused.

**Commissioners' Decision.** In Banc. Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by L. M. Bigelow against the city of Los Angeles, in which M. J. Newmark and others intervened. From an order denying a new trial, plaintiff appeals. Affirmed.

McNutt & Hannon and A. W. Hutton, for appellant. W. B. Mathews and J. S. Chapman, for respondent. M. J. Newmark, in pro. per.

GRAY, C. Plaintiff owns a lot of land in the city of Los Angeles, said lot being about 155 feet north and south and 105 feet east and west, and bounded on the north by the

¶ 1. See *Injunction*, vol. 27, Cent. Dig. § 200.

plaza, on the east by Negro alley, and on the west by an alley 10 feet wide, running along the westerly line of Engine House No. 38. In 1887 the defendant city commenced an action against the plaintiff herein, Mrs. Bigelow, to condemn a right of way over and covering the greater portion of this property for the extension of Los Angeles street north of the plaza. While said action was pending, and before any proceedings had been taken to ascertain the damage to be paid for condemning the said land, the plaintiff city and defendant Mrs. Bigelow entered into a written stipulation disposing of the question of damages, as follows: "It is hereby stipulated and agreed by and between the city of Los Angeles and the said L. M. Bigelow, respective parties to said action: '(1) That the purchase price to be paid for the strip of land sought to be condemned and to be taken for public use as a public street of the said city, is the sum of \$12,000. (2) That the said sum of \$12,000 shall be deposited by said city in the court, or any portion of such sum not so deposited shall be secured by good and sufficient bond, executed by — and —, and that the same shall be paid over, or the said bond be conditioned that the money be paid over to the said L. M. Bigelow, upon the passage of said two several orders or ordinances hereinafter mentioned. (3) That immediately upon an order or ordinance being passed by the council of said city, declaring said proposed Los Angeles street opened as a public street of said city, the said city shall pass an order or ordinance abandoning and vacating Negro alley as a street or thoroughfare, and disclaim all right, title or interest, in fee or otherwise, in, over, along or upon any portion of the strip of land lying to the east of the said proposed easterly line of the said Los Angeles street."

This stipulation was dated December 16, 1887, was filed in the condemnation proceedings, and thereupon a decree of the court was entered declaring Los Angeles street open. Thereafter, on motion of Mrs. Bigelow, the court stayed further proceedings until the city should be able to secure, according to the terms of the stipulation, "the whole amount of \$12,000, without any deduction or offsets by assessments or otherwise." The matter remained in that condition, as is alleged by plaintiff herein, to her great damage in consequence of the delay, until the 6th of September, 1888, when the city finally paid over to Mrs. Bigelow \$12,000 as the purchase price of said land taken. Thereupon, Mrs. Bigelow, through her attorneys, entered into another stipulation, as follows: "We hereby consent that the order heretofore entered may be set aside, and that said decree may be declared final in the premises, and further that plaintiff may take possession of the land sought to be condemned, and use the same as a public street of said city forever. It being understood that im-

mediately upon the entering of the decree herein the council of said city shall pass an ordinance declaring Los Angeles street open, and vacating Negro alley as provided in the stipulation heretofore filed in this case."

This stipulation was in turn filed, and thereupon the city passed an ordinance declaring Los Angeles street open, and also some time thereafter passed what purported to be an ordinance vacating and closing Negro alley. Thereafter Mrs. Bigelow, claiming that the last-named ordinance was a nullity, commenced this suit to restrain the city from further entering upon her land and premises, until, through its council, it should pass an ordinance vacating and abandoning Negro alley as a public street. In her complaint she alleged the facts substantially as above set forth, and also alleged that the city had failed and refused to pass an ordinance vacating Negro alley. She further alleged that it was among the main considerations moving the plaintiff to the stipulations that Negro alley should be vacated and abandoned by the defendant, and that this was so for the reason that she would have left without the abandoning of the alley only a narrow wedge-shaped strip of land between Los Angeles street and the alley, only a few feet wide at the south end, and running to a point at the north some 30 feet before reaching the plaza, and that without the abandonment of the alley, and the consequent right to use the west half of the alley in connection with this narrow strip, the same would be practically useless for any purpose, and the plaintiff would suffer damage in the sum of \$10,000 over and above the amount already paid her.

Plaintiff prayed for an injunction against the city restraining it from entering upon or in any way using the said land and premises of plaintiff in said Los Angeles street until the said city should pass an ordinance vacating Negro alley and for such other and further decree as may seem meet and proper. There is no allegation in the complaint that plaintiff presented any claim for those damages to the city council. Thereafter the defendant answered the complaint, and certain property owners along Negro alley intervened, and their complaints were in turn answered, and upon the issue thus made the case went to trial before the court without a jury, and the findings and judgment were against the plaintiff, dismissing her action.

The plaintiff appeals from an order denying her motion for a new trial. There is no appeal from the judgment.

The equitable relief in the nature of an injunction prayed for by plaintiff could not be properly granted by the trial court on the showing made before it. It was shown by the stipulations entered into at the trial of the case that the judgment condemning the land for Los Angeles street had become final

with the consent of the plaintiff, and that after the commencement of this suit, and some seven or eight years before the trial of it, Los Angeles street had been opened and graded, and during all those years it had remained an open public street, used and occupied as such, and plaintiff had made no effort to enforce any injunction against it, but, on the contrary, paid assessments on her property for the improvement of this street in seeming acquiescence in the use thereof as a public street. The findings are in accordance with these stipulations. It is not strongly contended by appellant that she is entitled to have the equitable relief prayed for, and, in view of these stipulations and findings, it cannot be plausibly so contended.

Plaintiff's main contention, as here urged, is that she is entitled to damages on account of the city not fulfilling its contract to close Negro alley, and that the court should have granted her a new trial that she might obtain those damages. The trouble with this contention is that an examination of the record shows that this was not an action for damages. No damages were demanded in the complaint, and there was no allegation in it to the effect that plaintiff had suffered any damage. The allegation as to \$10,000 damages was conditioned upon the refusal of the injunction, and was intended only to satisfy the requirement that the complaint in suit for an injunction must show that substantial damages will result if the injunction is not granted. Furthermore, there was nothing in the stipulations or other evidence, nor was there anything in the pleading, to show that any claim or demand for any damages had been presented to the council of the city of Los Angeles. In order that the suit might be treated as one for damages, it was absolutely necessary that a claim therefor should have been so presented to the council. City Charter of Los Angeles, St. 1889, p. 510, § 222; Alden v. County of Alameda, 43 Cal. 270; Rhoda v. Alameda County, 52 Cal. 350; Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712; McCann v. Sierra County, 7 Cal. 121. There was no case for damages presented by the pleadings, and no issue of that kind tried. Can it be said that the court should have granted a new trial as to an issue that had never been tried and was not before the court? We think not. We are not holding that the complaint failed to state a cause of action, but only that the pleadings presented no issue as to a cause of action for damages, and that there can be no new trial of an issue which is not presented by the pleadings in the case. Not being in a position to obtain damages on account of failure to show presentation of claim therefor, and not being entitled to equitable relief, a new trial was properly denied her.

Some of the findings of the court are perhaps unsupported by the evidence, but these findings become immaterial, in view of the stipulations and other findings showing that

plaintiff is not entitled to have the equitable relief to which they relate.

We advise that the order denying a new trial be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

For the reasons given in the foregoing opinion, the order denying a new trial is affirmed: ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

(141 Cal. 475)

**MADISON v. NORTHWESTERN MUT.  
LIFE INS. CO. (S. F. 3,606.)**

(Supreme Court of California. Dec. 29, 1903.)

**INSURANCE POLICY—CONSTRUCTION—FORFEITURE—NONPAYMENT OF INTEREST OR PREMIUM NOTES.**

1. A ten-payment life insurance policy provided that in consideration of an annual premium in advance, consisting of an annual premium note, the interest on which was required to be paid annually in cash at the date of the maturity of the annual premium, and of an annual cash premium to be paid at or before noon on or before July 16th in every year during the first 10 years of the policy, the company assured the life of the policy holder and agreed to pay the sum assured, "the balance of the year's premium, and all notes given for premiums, if any, being first deducted," etc. It further provided that, if default should be made in the payment of any premium, it would pay, as before agreed, as many tenths parts of the original sum assured as there should have been complete annual premiums paid at the time of such default, but, in order to secure such proportion, all premium notes were to be taken up, or the interest thereon paid annually in cash on the date of the maturity of the premium until the notes were canceled by returns of the surplus, or the whole policy would be forfeited. In addition it was declared that the policy was issued and accepted on the following express conditions: "3rd. If the said premiums or the interest upon any note given for premiums shall not be paid on or before the days above mentioned for the payment thereof, \* \* \* then, and in every such case the company shall not be liable for the payment of the whole sum assured, but only for such part thereof as is expressly stipulated above, and the remainder shall cease and determine. 4th. In every case where this policy shall cease or become null and void, all payments thereon shall be forfeited to the company." Held, that the third subdivision was not inconsistent with and contradictory of the prior provisions, thus involving the rejection under that subdivision of that which would lead to a forfeiture under the prior provisions, and hence, where the insured had paid four annual premiums pursuant to the terms of the policy, and then, instead of discontinuing his payments and claiming insurance for four-tenths of its face in accordance therewith, elected to continue his payments and the insurance for the full amount until the end of the 10 years, his failure thereafter to take up his premium notes or pay the annual interest thereon avoided the policy, and he forfeited all his payments.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Sarah Madison against the Northwestern Mutual Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Van Ness & Redman, for appellant. Geo. A. Rankin, for respondent.

CHIPMAN, C. This is an action upon a policy of life insurance, and was submitted upon an agreed statement of facts. Defendant had judgment, and plaintiff appeals.

The policy was issued upon the life of P. T. Madison, payable to his wife, plaintiff herein. The face of the policy is \$2,000, and was on what is termed "the ten-payment life plan, with premiums payable annually, \$87.42, and provided for payment of the premiums partly in cash and partly by note. The cash portion was \$53.24 and the note portion was \$34.18." The principal of the notes was not required to be paid before the death of the insured, but the interest thereon was to be paid annually. The dividends on the policy were to be applied to the payment of the notes. On July 16, 1867, the date of the policy, Madison paid the company cash \$53.24 and executed to the company his note for \$34.18 in full payment of the first annual premium. On July 16th of each succeeding year to and including the year 1872 he "duly and seasonably paid to the defendant herein, and defendant received and accepted, the premiums required by the terms of the policy to be paid, viz., the said sum of \$53.24 in cash and his note for the sum of \$34.18." On July 16, 1873, and each year to and including 1876, he paid no cash premiums, but, in addition to a premium note for \$34.18, executed by him in each of said years, he executed to defendant, in lieu of the cash part of the premiums, notes as follows: 1873, for \$53.24; 1874, for \$71.06; 1875, for \$78.88, and 1876, for \$53.24, which were received by defendant in addition to said premium notes for \$34.18 each, executed during each said years in settlement of the premiums for said years, "subject to the terms of said policy." The note given in 1874 for \$71.06 "included not only \$53.24, the cash part of the annual premium, but also one year's accrued interest, then unpaid, on all these outstanding premium notes, given by the insured on account of said policy." So, also, the note given in 1875 for \$78.88, included like items. The dividends payable out of the surplus referred to in the policy in the sum of \$144.61 were credited to said policy prior to 1877, and were sufficient to take up and cancel four of said premium notes of \$34.18, for the years 1867, 1868, 1869, and 1870, with a balance of \$7.89 to be applied and which was applied on the fifth note, bearing date July 16, 1871. No other or further dividends were earned upon said policy, and said four notes referred to were returned to Madison canceled, and said credit of \$7.89 given on said note of July 16, 1871. The interest on said first four notes last above enumerated was fully paid prior to their cancellation, and the interest on all the other notes given by Madison was duly paid by him in cash to July 16, 1876, except the interest, which, as aforesaid, formed part of said notes of 1874

and 1875 for \$71.06 and \$78.88, respectively. "From July, 1876, no interest on either or any of the outstanding premium notes was or has been paid either in cash or otherwise"; and "no premiums, either in the form of cash or note, or part cash and part note, have been paid since July 16, 1876, upon or on account of said policy, and none or either of the premium notes \* \* \* have or has been in any form taken up, paid, or canceled, and \* \* \* are now held unpaid and uncanceled by defendant." The total premium notes given amounted to \$598.22. Dividends earned and applied reduced this amount to \$453.61 on July 16, 1876, the present amount of unpaid principal of outstanding notes. "The accrued interest paid at the beginning of each year on the total amount of premium notes at the end of the preceding year is as follows: 1868, in cash, \$2.39; 1869, cash, \$4.79; 1870, cash, \$7.18; 1871, cash, \$9.57; 1872, cash, \$10.09; 1873, cash, \$11.44. In 1874 the interest, \$17.82, was included in the note for \$71.06, and in 1875 the interest, \$25.64 was included in the note for \$78.88. In 1876 accrued interest, \$34, was paid in cash. On these facts plaintiff claims four-tenths, or \$800, of the policy. Each of the premium notes contained the following: "With interest at the rate of seven per cent. per annum, which interest shall be paid annually, or the policy be forfeited." A similar provision is also in the notes given in lieu of the cash premiums. All the notes are signed by P. T. Madison alone, except the premium note of July 16, 1872, which is signed also by plaintiff, Sarah Madison. Madison died November 9, 1900, having made no further payments.

The questions raised by the appeal involve the true construction and meaning of the policy, and call for a statement of certain of its provisions, to wit: The company, by the policy, "in consideration \* \* \* of the annual premium in advance consisting of an annual premium note of thirty-four dollars and eighteen cents (the interest on which must be paid annually in cash at the date of the maturity of the annual premium) and of the annual cash premium of fifty-three dollars and twenty-four cents to be paid at or before noon on or before the sixteenth day of July in every year during the first ten years of the continuance of this policy, doth assure the life of \* \* \* for the term of his natural life." The company agrees to pay the said sum assured, "the balance of the year's premium, and all notes given for premiums, if any, being first deducted," etc. "At each distribution of the surplus, after three years from the date hereof a due proportion of such surplus on each year's business, during the continuance of this policy, will be returned to the said assured. And the said company further promises and agrees, that, if default shall be made in the payment of any premium, it will pay as above agreed, as many tenth parts of the original sum assured as there shall have been complete annual premi-

ums paid at the time of such default. But in order to secure such proportion of the policy all premium notes must be taken up, or the interest thereon be paid annually in cash, on the date of the maturity of the premium until the notes are canceled by returns of the surplus, or the whole policy will be forfeited. This policy is issued and accepted by the parties in interest on the following express conditions: \* \* \* 3rd. If the said premiums or the interest upon any note given for premiums shall not be paid on or before the days above mentioned for the payment thereof, \* \* \* then, and in every such case the company shall not be liable for the payment of the whole sum assured, but only for such part thereof as is expressly stipulated above, and the remainder shall cease and determine. 4th. In every case where this policy shall cease or become null and void, all payments thereon shall be forfeited to the company."

It is quite clear that the contract calls for the prompt payment of the cash portion of the annual premium notes as a condition upon which the company will hold itself liable to pay the whole amount of the policy, after first deducting the balance of the year's premium and all notes given for premiums, if any. Its agreement next to pay as many tenths parts of the original sum assured as there shall have been complete annual premiums paid, should there be any default in the payment of any premium, is on the express condition that "all premium notes must be taken up, or the interest thereon be paid annually in cash on the date of the maturity of the premium, until the notes are canceled by return of surplus, or the whole policy will be forfeited." A clear and unmistakable forfeiture appears from the statement of facts, and we do not understand that, if this was all of the contract, appellant would dispute the inevitable result. But it is contended that the provisions of the policy embraced in the third subdivision, above quoted, are inconsistent with and contradictory of the provisions just referred to, and therefore that which leads to a forfeiture must be rejected.

A precisely similar policy of defendant company, where the facts were also similar, was before the Supreme Court of Wisconsin in *Ewald v. N. W. Mut. Life Ins. Co.*, 60 Wis. 431, 19 N. W. 513. The questions now here were very fully considered, and many cases bearing thereon in other courts cited and commented upon. The conclusion was reached, as stated in the syllabi: "A forfeiture stipulated in a contract will be enforced if the rights of the parties cannot otherwise be preserved. The holder of a policy of life insurance will be presumed to understand its various provisions for forfeiture by which he may suffer loss through his own fault, and cannot complain of hardship from a forfeiture when he suffers voluntary default. In an action, commenced after the expiration of the term of the policy, to recover four-tenths of the original sum

assured, held, that by reason of the plaintiff's failure to pay annually in cash the interest upon the four premium notes given by him, the whole policy became forfeited." In the case of *Russum v. St. Louis Mut. Life Ins. Co.*, 1 Mo. App. 228, the policy was subject to two provisos: First, that, if default was made in the payment of any annual premium thereafter becoming payable, such default should not work a forfeiture of the policy, but the sum assured should be proportionately reduced. Thus if only the first annual premium should be paid, then, in case of death, only one-tenth of the sum assured should be claimable; if two premiums only were paid, then two-tenths; and so on. The second proviso was a qualification of the first. It provided that, "if the insured shall fail to pay annually in advance the interest on any unpaid notes or loans which may be owing on account of the above-mentioned annual premiums, \* \* \* then and in every such case the said company shall not be liable for the payment of the sum insured, or any part thereof, and this policy shall cease and determine." It was there urged, as here, that the two provisions are inconsistent, and the one leading to forfeiture must be disregarded. It was held, after a careful examination of the provisions, that they are not inconsistent or contradictory; that they may stand together, and that it is the duty of the court to give effect to both of them; that the failure to pay the interest avoided the policy. In *Moses v. The Brooklyn Life Ins. Co.*, 50 Ga. 196, the policy was on the 10-year plan, with participation in the profits. The premium was payable part in cash and part by note, and one of the conditions of the policy was that, should the assured fail to pay the premiums, or any note or notes which may be given in part payment of any premium, the policy was to be void. It also stipulated that after two annual payments, should the party wish to discontinue, the company will issue a paid-up policy for as many tenths of the amount originally assured (which was \$15,000) as there have been annual premiums paid in cash. The prayer of the bill was to have it decreed that the defendant issue a paid-up policy for \$3,000, and deliver the notes given to the company canceled, and receive the present policy canceled. The assured had made two payments, two premiums, part in cash and part by note. The court said: "The payment by complainant to the company of the two first annual premiums was a condition precedent to be performed on her part by the terms of the contract before she was entitled to have issued to her by the company a paid-up policy of \$3,000. To enable the company to pay dividends from the profits, it is indispensably necessary that the assured should pay to the company the annual premiums stipulated to be paid, so as to create a fund from which profits may be derived." It was held that the assured was

not entitled to a paid-up policy until the note given for the premium had first been paid. In the Wisconsin case, *supra*, the policy was one of endowment, issued in 1867, and the assured paid the cash premiums for that and the three succeeding years, and also paid the interest on the premium notes given for those years, but nothing thereafter. The action was brought after the expiration of the policy. After quoting the third subdivision of the policy, stated above, the court proceeds at page 438 et seq. 60 Wis., page 514, 19 N. W., to give its reasons at considerable length for the construction of the policy. We are satisfied with the result there reached, notwithstanding the very searching analysis of the opinion by appellant's counsel.

We do not think the assured could, by the terms of the policy, have been misled into the belief that he could have full insurance for 10 years, and then cease further payments, leaving his notes unpaid, and yet have the right to a paid-up policy of four-tenths, because the first four notes had been taken up by dividends in the meantime. If at the end of the fourth year he had paid the cash premiums and the premium notes and interest, and had then ceased or made default, he would have earned four-tenths of the policy. But nothing in the policy warranted his continuing to pay his cash premiums and to give his premium notes for six or seven years, thus obtaining full insurance for that time, and then default, and yet have the right to claim four-tenths of the policy. In fact, his default, and his only default, was after he had obtained this full insurance for this period, and his default was at a time when there were outstanding notes still unpaid, principal and interest, which were themselves the consideration for the insurance. When he made default he could, by paying all the outstanding notes, have had "as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default," for thus reads the policy. But he could not, after having received the benefit of 10 years' full insurance, make default, refuse to pay his outstanding obligations given for this insurance, and claim four-tenths of the policy, as though he had defaulted at the end of four years. His election to continue and reap the benefits of full insurance carried with it the reciprocal duty to discharge his obligations incurred to that end; and the rights of the assured and his obligations must be measured as of the date when he defaulted, and not of some prior date, by assuming what in fact did not occur—that he defaulted at this prior date. Appellant's contention would result in his having a paid-up policy for \$300 (four-tenths of \$2,000); also a full insurance of \$2,000 for 10 years; also a return of all his notes canceled which he gave to secure this insurance. Such a construction would destroy any company doing business under such a system, and finds no

warrant in the terms of the policy. In point of fact, there was no default for the 10-year period, for the assured had paid in cash or notes. To keep the policy alive thereafter, obviously his duty was to pay the annual interest charge on his notes or take up the notes. He still had a considerable life expectancy, and, rather than continue payment of interest charges, he elected to quit, and we cannot find any warrant for ignoring these outstanding obligations and adjusting the loss as though they did not exist.

It is advised that the judgment be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

On Rehearing.

(Jan. 28, 1904.)

In banc.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. The language of this policy was chosen by the defendant, and seems to have been chosen, not for the purpose of expressing a clear intention, but rather with a view of giving it the appearance of intending one thing while really providing for something inconsistent. In one clause (clause 3) it provides that in a certain contingency there shall be a partial forfeiture of the policy, and this provision is set out with considerable fullness and rotundity of expression. In another clause, by a half dozen words at the end of a sentence, an absolute forfeiture is provided upon the same contingency. I do not think that the defendant is entitled to claim for itself the most favorable construction of a contract which it has purposely made ambiguous, and especially where the result is manifestly unjust.

In this particular case, perhaps, no serious injustice is done, for the notes given by the insured in payment of the premiums, which by the terms of the policy were payable only in cash, and were forfeitable in case of default, would, with interest, amount to as much as the unforfeited portion of the policy, and they, in my opinion, constitute a counterclaim in favor of the defendant. But the principle of the opinion, applied to other claims upon similar policies, might work the grossest injustice, as, for instance, in the case put by counsel: "The insured may have paid ten premiums in cash and notes. He may have paid interest on these notes for many years, until all of them, except the last, have been canceled by dividends. He may then default in the payment of the annual interest on the last uncanceled note, reduced by dividends to a nominal amount.

On the construction which the court gives the policy, the insured loses everything, although, if he had not paid any part of the tenth premium, he would have been entitled to nine-tenths of the policy in paid-up insurance! Because he received term insurance for the tenth year for the face of his policy (which he could have purchased for less than half the cash part of the tenth premium), he is put in a worse position than if he had failed to pay any part of the tenth premium! Because he received something which he more than paid for, he must lose that which he fully paid for!"

A construction of this policy which would inevitably lead to such a result in the case supposed, and in other like cases, certainly has little to recommend it, and, in my opinion, may be avoided upon two grounds: First, that the doubtful or conflicting clauses of an agreement should be construed against the party responsible for the ambiguity; second, because a provision involving a total forfeiture should yield to a provision involving only a partial forfeiture.

(68 Kan. 193)

#### NEELY v. THOMPSON.

(Supreme Court of Kansas. Jan. 9, 1904.)

#### ACCORD AND SATISFACTION—WHAT CONSTITUTES—EVIDENCE.

1. Where a sum of money is tendered in satisfaction of a claim, the amount of which is in dispute, and the tender is accompanied with such acts and declarations as amount to a condition that, if the money is accepted, it is accepted in satisfaction, and such that the person to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such condition, an acceptance of the money offered constitutes an accord and satisfaction. This is true although the debtor admits that the amount tendered is unconditionally and immediately due the creditor, and although the creditor protests at the time that the amount paid is not all that is due, or that he does not accept it in full satisfaction of the claim.

2. The amount of a claim being in dispute the debtor mailed the creditor a statement of the account and a check, together with a letter in which he said that the check was in full satisfaction of the balance due on the account, adding, "Look it [the statement] over, and if there is any item you do not understand, if you will come to Leavenworth we will go through the original statements and I will explain it to you." *Held*, that the creditor was bound to understand that, if he accepted the check, he took it subject to the condition that it should be in full settlement of his demand.

Mason, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by T. W. Thompson against S. F. Neely. Judgment for plaintiff. Defendant brings error. Reversed.

H. J. Bone and Hite & Nichols, for plaintiff in error. Joseph Reed, for defendant in error.

MASON, J. T. W. Thompson sued S. F. Neely for a balance claimed to be due him for services performed as deputy United States marshal during the latter's term of office as marshal. At the trial it developed that plaintiff had been paid 50 per cent. of the fees earned by him as such deputy, and that defendant claimed that under their agreement this was all he was to receive, but that plaintiff claimed that the agreement was that he was to have 65 per cent. The difference between these percentages made the amount in controversy, \$240.65. Plaintiff testified that he did not know of defendant's contention until after the action was brought, but that he at various times asked defendant for a settlement; that on December 29, 1898, defendant sent him a letter inclosing a statement of the account and defendant's check on a Leavenworth bank for \$7.90, the balance due as shown by such statement; that plaintiff cashed the check and kept the proceeds, but wrote to plaintiff saying that he needed the money and would use the check, but that he wanted defendant to meet him in Leavenworth and make settlement, as the check was not a settlement, and defendant still owed him between \$250 and \$300. Defendant testified that the check sent to and collected by plaintiff contained the words, "Balance in full for fees and expenses of deputy marshal." The letter referred to read as follows:

"Leavenworth, Kansas, Dec. 29, 1898.

"T. W. Thompson, Esq., Topeka, Kansas—Dear Sir: I have received from the Auditor of State and other Departments final reports on suspensions and disallowances in accounts of Deputies U. S. Marshal. I have credited you with all re-allowances and send herewith a full statement of your account. Look it over and if there is any item you do not understand, if you will come to Leavenworth we will go through the original statements and I will explain it to you. Please find enclosed my check for \$7.90, payable to your order by the Manufacturers Nat. Bank of Leavenworth, which is in full satisfaction of balance due on account of fees and expenses as deputy U. S. Marshal.

"Very Respectfully, S. F. Neely."

The trial court instructed the jury that: "If you believe from the evidence in this case that there was a dispute between these parties as to the amount that was due from the defendant to plaintiff, and the defendant made his calculation as to the amount he understood was due, and wrote the plaintiff a letter, inclosing a check for the amount he claimed was due, and stated either in the check or in the letter that that was in full for his account, and the plaintiff received that check and letter, and appropriated the check without objection on his part, then I instruct you that that would be a settlement of their difference." The jury found for the plaintiff, and a judgment was rendered accordingly, which the defendant now asks to

\* 1. See Accord and Satisfaction, vol. 1, Cent. Dig. §§ 76, 76, 78.

have reversed. The contention of plaintiff in error, in effect, is that the words "without objection on his part" should have been omitted from the instruction quoted; that the cashing of the check under the circumstances stated in the instruction (or at all events under the circumstances shown by defendant's evidence) estopped plaintiff to deny that a full settlement had been had notwithstanding any protest he may have made at the time. In 1 Cyc. 332, it is said of an unliquidated or disputed claim: "To constitute an accord and satisfaction, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions. The mere fact that the creditor receives less than the amount of his claim, with knowledge that the debtor claims to be indebted to him only to the extent of the payment made, does not necessarily establish an accord and satisfaction. Where, however, a sum of money is tendered in satisfaction of the claim, and the tender is accompanied with such acts and declarations as amount to a condition that, if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such condition, an acceptance of the money offered constitutes an accord and satisfaction. This is true although the creditor protests at the time that the amount paid is not all that is due, or that he does not accept it in full satisfaction of his claim. Where the tender or offer is thus made, the party to whom it is made has no alternative but to refuse it or accept it upon such condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary." These statements are supported by abundant authority, as shown by the accompanying citations. They have been referred to with approval by this court in *Harrison v. Henderson*, 67 Kan. —, 72 Pac. 875. They are now accepted as a correct exposition of the law. In *American Bridge Co. v. Murphy*, 13 Kan. 35, it is said: "Where a debtor pays a portion of his debt, which portion he admits to be due at the time he pays it, but claims that it is all that is due, and that it is the whole of the debt, and the creditor receives the same and signs a receipt in full therefor, but at the same time claims that it is only a portion of the debt, and that the other portion still remains due, the creditor is not estopped by his receipt from afterwards suing the debtor and recovering the balance of the debt not yet paid." This declaration of legal principles is not in conflict with that just made, since it does not purport to cover a case where the tender

is made with the condition that it must be accepted in full if at all. Even if such element was in fact present in that case, it is not important, since the discussion was not based upon that consideration. The decision turned upon the question whether the written receipt purporting to be in full could be disputed. This is shown not only by the language of the opinion, but by the authorities cited in its support.

It remains only to decide whether plaintiff in this action was bound to understand from the letter written him by defendant that, if he took the payment, he took it subject to the condition that it should be in full settlement of his whole claim. In a footnote to the passage quoted above (1 Cyc. 333, note 72) it is said: "According to the weight of authority, where a claim is in dispute, and the debtor sends or gives the creditor a check for a less sum, which he declares to be in full payment of all demands, the retention thereof by the creditor constitutes an accord and satisfaction." Even disregarding the evidence of defendant as to a receipt in full having been embodied in the check, we hold that the language of the letter alone was sufficient to advise the recipient that the writer intended that the check should be accepted, if at all, in full satisfaction of the account. The expression of a willingness to explain any of the items that may not be understood is not equivalent to an admission that there may be a doubt of the correctness of the statement rendered, or that the amount shown as a balance is open to further inquiry. It is rather a distinct affirmation of the contrary.

It results that the judgment must be reversed, and the cause remanded for a new trial.

JOHNSTON, C. J., and SMITH, CUNNINGHAM, GREENE, BURCH, and ATKINSON, JJ., concurring.

MASON, J. (dissenting). I recognize that the result reached by the court as above indicated is in accordance with the weight of authority. I do not believe, however, that the payment by a contract debtor of an amount which he admits to be immediately and unconditionally due should be held a sufficient consideration for an accord and satisfaction, or any other contract; or that a debtor should be permitted to build a right upon the doing of an act which, by his own admission, he is under a positive duty to perform; or that a creditor should be prejudiced by accepting and retaining a payment to which his debtor admits that he is entitled. It is almost universally held that the acceptance by a creditor of a part of a sum admitted to be due him under a positive agreement that it shall satisfy the entire demand does not preclude his recovering the remainder. The reason is that there is no consideration for the agreement to waive the



unpaid part of the claim. Where a debt is admitted to be due, but the amount is in dispute and the debtor pays and the creditor receives so much of it as is not disputed, under an agreement that such payment shall be a satisfaction of the entire demand, there is likewise no consideration for the release by the creditor of the disputed part of his claim. The debtor in such case waives no right, concedes nothing, and does no act that he is not absolutely bound to perform. Of course, if he pays the slightest sum in excess of what he admits to be due, the transaction amounts to a compromise, and there is a good consideration for the waiver by the creditor of a part of his claim. The authorities supporting the conclusion of the court proceed upon the unwarranted assumption that there can be a compromise where one party to a controversy yields everything, the other nothing. A compromise implies mutual concession. *Gregg v. Weathersfield*, 55 Vt. 385; *Bright v. Coffman*, 15 Ind. 371, 77 Am. Dec. 96.

(68 Kan. 223)

**PINNEY v. FIRST NAT. BANK OF CONCORDIA.**

(Supreme Court of Kansas. Jan. 9, 1904.)

**APPEAL—TRANSCRIPT—CERTIFICATE—CONTRACT—VIOLATION OF STATUTE—PATENT RIGHTS—SALE—NOTE.**

1. A certificate that a transcript of the record is full, true, and correct is not impeached and overthrown by a statement in the record from which a mere inference may be drawn that something has been omitted from it, nor unless the record, on its face, affirmatively and satisfactorily shows that it is incomplete and incorrect.

2. Where a statute expressly provides that a violation thereof shall be a misdemeanor, a contract made in direct violation of the same is illegal, and there can be no recovery thereon, although such statute does not in express terms prohibit the contract, nor pronounce it void.

3. A sale of the exclusive right to manufacture, use, and sell for use a patented invention in a specified territory for a period of two years carries with it an interest in the patent right itself, and constitutes a sale of a patent right, within the meaning of the "act relating to the registration and sale of patent rights, and prescribing a penalty for the violation of the same."

4. The taking of a promissory note, the consideration of which is the sale of a patent right, or what is claimed by the vendor to be a patent right, without inserting therein the words, "Given for a patent right," is, under our statute, a misdemeanor, punishable by fine or imprisonment; and no recovery can be had thereon by one who violates the statute, nor by a transferee of the note who has knowledge that the law was violated.

(Syllabus by the Court.)

Error from District Court, Cloud County; Hugh Alexander, Judge.

Action by the First National Bank of Concordia against Henry Pinney. Judgment for plaintiff. Defendant brings error. Reversed.

C. N. Peck and F. W. Sturges, for plaintiff in error. Park B. Pulsifer and Dwight M. Smith, for defendant in error.

JOHNSTON, C. J. The First National Bank of Concordia brought an action against Henry Pinney to recover on two promissory notes, each for the sum of \$144, payable to the order of W. S. James, and indorsed by him to the bank. In his answer Pinney set up three grounds of defense. The first was a general denial, and the second alleged: "That he executed the notes; that is, signed and delivered the same to the payee, W. S. James. He says, however, that the consideration thereof was the sale and transfer to him of a certain patent right, to wit, the right to manufacture, use, and sell for use in certain territory in this state, for the term of two years, to wit, in Shawnee county, exclusively, and in other counties, to wit, Jewell, Mitchell, Ottawa, Cloud, Clay, Republic, and Washington, jointly with others, a certain window lock or fastener, known as the 'James Window Lock,' for which the said W. S. James had obtained letters patent No. 629,446, issued July 25, 1899, and that said sale and transfer took place in this county and state, to wit, Cloud county, Kansas. That although the said James had filed with the clerk of the district court of this county a copy of said letters patent, and also filed with said clerk an affidavit stating that said letters were genuine and had not been revoked, and that he had full authority to sell or barter the same, which affidavit also set forth his occupation and residence, and the residence of his so-called principal, the said James Lock Company (the said James and the said James Lock Company being one and the same, however), yet the said James did not, nor did any one, insert in said notes, or either of them, the words, 'Given for a patent right,' and the said notes were taken by the said James in violation of the law of this state, without consideration, and are illegal and void wheresoever and in whomsoever hands they may be. And said defendant says that plaintiff did not purchase said notes in good faith for a valuable consideration, in the usual course of trade, but purchased them well knowing at the time that they were given for a patent right, and all of the facts and circumstances under which they were given." The third defense averred that there was an absence of novelty in the patent, and hence a lack of validity. The trial court, on motion of the bank, required Pinney to amend his answer, and state whether the contract transferring the patent right was oral or in writing, and, if in writing, to set out a copy of the same. In pursuance of this order, the defendant filed a statement alleging that the sale was an oral transaction, but that a writing was executed for the purpose of making it appear that the sale was of something else than a patent right. He averred, however, that it was a mere subterfuge to avoid the penalty of the statutes of the state; that the writing did not serve its purpose, as it did appear from the writing itself that the transaction was the

sale and transfer of a patent right. He alleged that the writing had been accidentally destroyed by fire, and that it was impossible for him to produce it, or a copy of the same. A demurrer to the answer on the ground that it did not state a defense was sustained. Subsequently the court set aside its order, and then sustained the demurrer, except as to the third count of the answer; and as to that defense the demurrer was overruled, and time was given to reply. Later the defendant asked and obtained leave to withdraw the third count of the answer, and the court then sustained a demurrer, holding that the remaining counts did not state a defense; and, the defendant electing to stand on the ruling of the court, judgment was given in favor of plaintiff.

Pinney comes here with a transcript of the record, alleging error, and the bank challenges the record, and insists that the transcript is incomplete, and therefore not open to our consideration. The certificate of the clerk attached to the transcript is in approved form, and states that it is a full, true, and correct transcript. It is said, however, that the record itself shows that it is incomplete, in not including the demurrer to the answer which was filed after the withdrawal of the third count. Only one demurrer appears in the record, and that seems to have been filed on March 29, 1902, and was sustained on April 1st of that year. On September 25, 1902, the court appears to have considered a demurrer to the answer after the third count had been eliminated, but, if a second demurrer was filed, it has been omitted from the record. Some language in the record indicates that the sufficiency of the answer was tested by a second demurrer, and, if it were satisfactorily shown on the face of the record that such a pleading was filed and not included in the record, it would impeach the certificate, and we could not review the case. However, there is an entry in the record which seems to confirm the certificate, and tends to show that but one demurrer was actually filed. After reciting the withdrawal of the third count on September 25, 1902, the journal entry proceeds to state that defendant "elects to stand on the order of this court of April 1, 1902, sustaining the demurrer to his answer," and the court thereupon rendered judgment on the notes. This would indicate that a second demurrer was not in fact filed, but that counsel and court adopted the first demurrer in testing the sufficiency of the answer after it had been amended by striking out the third count. We must therefore assume that the transcript is complete, and examine the case on its merits.

Does the omission from the notes of the words, "Given for a patent right," render them illegal, and prevent a recovery thereon? The statute provides that "any person who may take any obligation in writing for which any patent right, or right claimed by him or her to be a patent right, shall form a

whole or any part of the consideration, shall, before it is signed by the maker or makers, insert in the body of said written obligation, above the signature of said maker or makers, in legible writing or print, the words, 'Given for a patent right.'" Gen. St. 1901, § 4357. Noncompliance with this and other provisions of the act is made a misdemeanor, the penalty of which is a fine not exceeding \$1,000, or imprisonment in the county jail not more than six months. In *Mason v. McLeod*, 57 Kan. 105, 45 Pac. 76, 41 L. R. A. 548, 57 Am. St. Rep. 327, the validity of this act was sustained, and it was held that contracts made by a vendor of patent rights in violation of the act are void as between the parties.

It is contended in behalf of the bank that the answer discloses that there was no transfer of any patent right, within the meaning of the statute; that the contract pleaded is the transfer of a license, and not of a patent right; and that the statute does not cover a mere license from a patentee. Again, it is said that under the United States law (3 U. S. Comp. St. 1901, p. 3384; Rev. St. U. S. § 4893) the assignment of a patent or any interest therein must be in writing, and, if that which was undertaken to be transferred was a patent right, it was ineffectual, because the contract of transfer was not in writing.

The pleader does not make himself very clear as to the nature of the transaction. In one part of the amended answer he speaks of it as an oral transfer, and in a later part he says that a writing was executed between them, which was intended to cover up the nature of the transaction, but that it appeared by the writing itself, and upon its face, that the transaction was the sale and transfer of a patent right. In view of this averment, it cannot well be said that the contract was not in writing. Although questioned by the bank, the answer fairly shows that the interest which the patentee undertook to transfer was a patent right, or an interest therein. According to the answer, the interest transferred was the right to manufacture, use, and sell for use a certain patented invention in a prescribed territory for a fixed time. As to part of the territory the right was given to be exercised jointly with others, but an exclusive right was given to Shawnee county, Kan.; and to that extent, at least, the purchaser was given an interest in the patent, good not only against strangers, but against the patentee himself. Such a transfer, if established by proof, must be held to constitute a sale of a patent right, within the meaning of our statute relating to the registration and sale of patent rights. *New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40.

That the transfer was not in writing, if it be a fact, may not be very important, so far as this transaction is concerned. The federal act on the subject, which provides that every patent or interest in a patent shall be assignable in law by a writing, and be

recorded, relates mainly to the matter of notice to purchasers, and is intended for the protection of those subsequently acquiring an interest in the invention. A writing is provided in order that it may be a matter of record, and the record so made only goes to the matter of notice to those who subsequently may become interested in the monopoly or invention. While an assignment in writing and the recording of the same are necessary to the transfer of the legal title, binding upon all, it is held that a verbal assignment is good between the parties, and passes an equitable title, and that the failure to record an assignment is not material as between the parties and those having actual knowledge of the transfer. *Burke v. Partridge*, 58 N. H. 349; *Blakeney v. Goode*, 30 Ohio St. 351; *Spears v. Willis*, 151 N. Y. 443, 45 N. E. 849; 2 *Robinson on Patents*, § 784; and 22 A. & E. Ency. of L. (2d Ed.) 418. In this case it is specifically alleged that the bank was not a bona fide purchaser of the paper, but had actual knowledge that the notes were given for a patent right, and also of all the facts and circumstances under which they were given. Here, however, the kind of title conveyed is not the real point in controversy; nor is it very material at this time whether the transfer was a grant, an assignment, or a license. The answer alleges that it was a patent right which was transferred, but, even if it does not amount in law to a patent right, the requirements of the statute must be complied with, whether that which is sold is a patent right, or is only claimed by the vendor to be a patent right. A note or obligation taken for what is claimed to be a patent right, although it may not constitute one, must have the words, "Given for a patent right," inserted therein, the same as if a valid patent right formed the whole or a part of the consideration. Gen. St. 1901, § 4357.

It is finally contended that noncompliance with the statute in omitting from the notes the words, "Given for a patent right," did not render them void, for the reason that the consideration for the notes is not bad in itself, and, further, that the statute does not so declare. It is true, the statute does not in express terms provide that the omission to state in the note or obligation that a transfer of a patent right forms its consideration shall render it void. It does, however, specifically provide that noncompliance with the statute in this respect shall constitute a misdemeanor, and upon conviction the person violating the law may be fined as much as a thousand dollars, or be imprisoned in the county jail as long as six months. In determining whether a contract made in violation of a law is legal or illegal, the test is the intention of the Legislature. As was said in *Mason v. McLeod*, supra, the imposition of a punishment for the violation of a statute implies a prohibition, and contracts made by a vendor of patent rights in violation of the

act are void as between the parties and those having actual knowledge of the violation. In 15 A. & E. Ency. of L. (2d Ed.) 939, it is laid down as an accepted rule that, "where the statute expressly provides that a violation thereof shall be a misdemeanor, it would seem clear that it was the intention of the Legislature to render illegal contracts violating such statute." It is the settled doctrine of the common law that contracts intended to prohibit the doing of things forbidden by law, and made in violation of a penal statute, are void; and this is so although the statute may not expressly so declare, but only inflicts punishment upon the persons doing the act in violation of its provisions. *Chitty on Contracts*, 694-7; *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145. The Supreme Court of Indiana, in interpreting a law respecting the sale of patent rights, has also held that "on a contract, the making of which is punishable by statute by the imposition of a penalty, there can be no recovery, although such statute does not in express terms prohibit the contract, nor pronounce it void." *Sandage v. Studabaker Bros.*, 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165. See, also, *Woods v. Armstrong* (Ala.) 25 Am. Rep. 671, and authorities collected in note; *Winchester Electric Light Company v. Veale* (Ind. Sup.) 41 N. E. 334; and *New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40.

The taking of the notes as alleged was a crime in itself, and it would hardly do to allow the party committing the offense to maintain an action on the obligations so criminally taken. No rights can be acquired by persons who so violate a penal statute, nor by those who know that the act on which they ground their claim was done in violation of law.

We think the demurrer to the answer should have been overruled, and therefore the judgment of the district court will be reversed, and the cause remanded, with directions to overrule the demurrer and proceed with the cause. All the Justices concurring.

(68 Kan. 310)

#### McSHERRY v. BLANCHFIELD.

(Supreme Court of Kansas. Jan. 9, 1904.)

#### CUSTOM AND USAGE — BINDING EFFECT — WAREHOUSE-STORAGE CHARGES.

1. In order that it may be binding, a custom or usage must be known to the party sought to be charged, or must be so notorious that knowledge of it will be presumed.

2. Usage or custom cannot make a contract when parties themselves have made none.

3. The proper office of usage or custom is to explain technical terms in contracts, to which peculiar meanings attach; to make certain that which is indefinite, ambiguous, or obscure; to supply necessary matters upon which the contract itself is silent; and generally to elucidate the intention of the parties when the meaning

¶ 1. See *Customs and Usages*, vol. 15, Cent. Dig. §§ 23, 24.

of the contract cannot be clearly ascertained from the language employed.

4. In order to recover charges for the storage of grain, a warehouseman must keep at the place of deposit, subject to delivery on demand of the depositor, either the grain left for storage, or an equal quantity of other grain of the same kind and quality; and this requirement is not satisfied by keeping a sufficient quantity of grain of the proper description in another warehouse, at a different place from that in contemplation of the parties when the bailment was made.

(Syllabus by the Court.)

Error from District Court, Reno County; M. P. Simpson, Judge.

Action by W. D. Blanchfield against Ella McSherry, as executrix. Judgment for plaintiff. Defendant brings error. Affirmed.

Prigg & Williams, for plaintiff in error. Geo. A. Vandever and F. L. Martin, for defendant in error.

BURCH, J. The plaintiff sued the defendant for the value of wheat which he had stored in the defendant's elevator, and which the defendant sold. He alleged an express contract covering the terms of the transaction. The defendant admitted the storage of the wheat and its sale, and claimed the relations of the parties were fixed by an express agreement, but the contract he proposed differed in certain material respects from that the plaintiff contended for. At the trial the defendant offered evidence of a custom among elevator-men of the locality relating to the disputed items of the contract. The court rejected the evidence, and its ruling upon that subject is assigned as error. The defendant claims the custom was identical with his version of the contract, that evidence of it would have corroborated his testimony as to what the agreement was, and that it would have furnished a basis for the adjustment of the differences between the parties in case the jury found that their minds had not met. The claim of error is predicated upon the refusal of the court to permit certain questions to be answered. Favorable answers to all the questions propounded would not have shown that the plaintiff knew of the claimed custom, or that it was so notorious as to furnish a presumption of knowledge. No offer to make this showing is disclosed. Without that, the testimony was insufficient, and the ruling of the district court was correct. *Lawson, Usage & Customs*, §§ 18, 19. But beyond this, usage or custom cannot make a contract when the parties themselves have made none. *National Bank v. Burkhardt*, 100 U. S. 686, 692, 25 L. Ed. 766. *Thompson v. Riggs*, 5 Wall. 663, 679, 18 L. Ed. 704; *Tilley v. County of Cook*, 103 U. S. 155, 26 L. Ed. 374. And the defendant did not claim that technical or trade terms had been used, to which a peculiar meaning, requiring explanation, attached (*Seymour v. Armstrong*, 62 Kan. 723, 64 Pac. 612; *Cosper v. Nesbit*, 45 Kan. 457, 25 Pac. 866), or that the contract was ambiguous or indefinite or silent

upon any matter (*Smythe v. Parsons*, 37 Kan. 79, 14 Pac. 441), or that the intention of the parties could not be ascertained from the language they employed (*McCulsky v. Klosterman*, 20 Or. 108, 25 Pac. 366, 10 L. R. A. 785). This is the only proper function of usage or custom. *Barnard v. Kellogg*, 10 Wall. 383, 390, 19 L. Ed. 987. Therefore the evidence sought to be introduced was irrelevant and immaterial.

At the trial the defendant admitted he did not keep on hand at the place of storage in Abbeyville, in Reno county, a quantity of wheat like in kind and quality to that of the plaintiff's sufficient to meet the plaintiff's demands, and, for the purpose of enabling him to collect storage charges, offered to show that he had wheat in a Topeka elevator with which to satisfy his contract with the plaintiff. This offer the court rejected, and its ruling is assigned as error. The contract of the parties had reference solely to the place of storage selected by the owner of the wheat. The character of the warehouse structure, its location, the method of handling grain in use there, and many other circumstances, may control the depositor's choice of a place. The right of the owner of stored grain to protect himself from fire and his protection against the creditors of the warehouseman all relate to that place alone. The warehouseman may refuse a demand to deliver at any other place, and the owner may refuse to receive at any other place. Hence, without a new contract, the obligation of the warehouseman to keep on hand the depositor's wheat, or other wheat of like kind and quality sufficient to satisfy the depositor's demands, can only be discharged at that place. It is for this alone that storage charges are paid, and, if this duty be not performed, such charges cannot be recovered. Therefore the evidence offered was properly rejected.

Pending the litigation the parties made an effort to compose their difficulties, and did agree upon a basis of settlement, which they embodied in two written instruments. In a supplemental answer the defendant pleaded a balance due him, ascertained and agreed to, under the instruments referred to, while the plaintiff, in a supplemental reply, repudiated the settlement altogether. Upon these pleadings and the evidence, several theories of the case were tenable. The court instructed the jury upon all phases of the controversy, and many of these instructions are assailed as erroneous. It is not necessary to discuss at length the questions raised. Both the evidence and the instructions have been carefully examined, and the instructions appear to be unimpeachable. The chief argument of the defendant against them seems to overlook the fact that the witness he called to prove the computation made upon the written basis of settlement, and to prove the balance ascertained by such computation, testified that the plaintiff re-

pudiated the result of the calculation altogether. The plaintiff could only be bound by a true balance. In order, therefore, for the jury to find for the defendant upon his theory of the case, it was necessary for it to determine whether or not, in making his calculation, the defendant's witness had actually employed lawful methods in dealing with proper items, and had therefore reached a correct conclusion. The jury could not do this without the aid of instructions, and those given were correct.

None of the assignments of error are well grounded, and the judgment of the district court is affirmed. All the Justices concurring.

(68 Kan. 190)

### McGLINCHY v. BOWLES.

(Supreme Court of Kansas. Jan. 9, 1904.)

#### LIMITATIONS—PENDENCY OF ANOTHER ACTION—DISMISSAL.

1. A corporation having suspended business for more than a year, and a judgment having been rendered against it, the running of the statute of limitations against a proceeding to enforce the judgment by execution against a stockholder is not affected by the pendency of an action brought prior to an execution on the judgment against all the stockholders, seeking to charge them with the payment of the judgment.

(Syllabus by the Court.)

Error from District Court, Anderson County; C. A., Smart, Judge.

Action by Thomas Bowles against John McGlinchy. Judgment for plaintiff. Defendant brings error. Reversed.

N. L. Bowman, for plaintiff in error. J. G. Johnson, for defendant in error.

MASON, J. Thomas Bowles recovered a judgment against John McGlinchy upon his liability as a stockholder of the Bank of Garnett in the form of an order allowing execution against him on a judgment against the bank. Defendant in this proceeding seeks to reverse the judgment upon two grounds: (1) That he was not in fact such a stockholder, and (2) that the action was barred by the statute of limitations. It will be necessary to consider only the second contention. The case was tried on an agreed statement of facts. The bank ceased to do business October 19, 1895. Bowles recovered judgment against the bank June 17, 1897. No execution was issued on this judgment until March 30, 1900, when one was issued, which was returned unsatisfied April 4, 1900. June 26, 1897, an action was brought by Bowles against McGlinchy and other stockholders seeking to charge them with the payment of the judgment. In this action the plaintiff recovered a judgment, which was reversed by this court. Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331. In accordance with this decision, an order dismiss-

ing the case was made by the district court March 15, 1900. February 25, 1901, the present action was begun by plaintiff's filing a motion for execution against McGlinchy upon the judgment against the corporation. From this statement it is evident that, the bank having ceased to do business more than four years before this proceeding against McGlinchy was instituted, it was barred by the statute of limitations, unless it was saved by being brought within one year after the order was made dismissing the other case. *Bank v. King*, 60 Kan. 738, 57 Pac. 952; *Cottrell v. Manlove*, 58 Kan. 405, 49 Pac. 519. Section 23 of the Code (Gen. St. 1901, § 4451) reads: "If any action be commenced within due time and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure." Where an action is prematurely begun upon a cause of action otherwise complete, a new action may be brought within a year after the disposal of the first one. *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22. But a petition which does not state a cause of action at all does not delay the running of the statute of limitations. *Railway Co. v. Bagley*, 65 Kan. 188, 69 Pac. 189. If the petition in the action begun June 26, 1897, stated a cause of action at all, or could, by any permissible amendment, have been made to state a cause of action, it must have been in virtue of paragraphs 1200 and 1204 of the General Statutes of 1889, which authorized a direct action against the stockholders of a corporation whenever it had ceased business for over a year. It could not have been based upon paragraph 1192, which authorized a proceeding against a stockholder when an execution on a judgment against the corporation had been returned unsatisfied, because at the time it was begun no execution had been issued, nor was any issued until more than four years after the corporation quit business. If it stated a cause of action based upon the fact that the corporation had suspended business for more than a year, it could not have been converted into one depending upon the return of an execution unsatisfied. The two remedies are not only different, but have been held to be so inconsistent that the adoption of one precludes the subsequent resort to the other. *Remington Paper Co. v. Hudson*, 64 Kan. 43, 67 Pac. 636. A cause of action cannot be saved by the section relied upon by plaintiff unless the second action is substantially the same as the first. *Hlatt v. Auld*, 11 Kan. 176.

For these reasons the judgment is reversed, and the cause remanded, with directions to render judgment for defendant. All the Justices concurring.

(68 Kan. 328)

**LORIMER v. FAIRCHILD et al.**

(Supreme Court of Kansas. Jan. 9, 1904.)

**NOTE — EXTENSION — CONSIDERATION — SECOND APPEAL — LAW OF THE CASE — NEW TRIAL — JURISDICTION OF SUPREME COURT.**

1. The promise of a debtor to keep an overdue loan of money secured by mortgage upon his land, and pay a reduced rate of interest upon the note given for the loan, for a definite period of time, is a sufficient consideration for an extension, by the creditor, of the time for the payment of the note for such period.

2. Ordinarily the decision of one of the Courts of Appeal of this state, in a case which it has determined and remanded to the district court, will be deemed to be the settled law of the case in a subsequent proceeding in error in this court, and the questions involved will not be made the subject of another examination. If, however, the cause was remanded for a new trial, and not merely for some special proceeding supplemental to the mandate, and the record in this court presents the same questions which were presented to the Court of Appeals, this court has the power to make such re-examination, and it will do so, in a case involving a question of great public importance, when the former decision was erroneous and tended to confuse the law, because in conflict with a decision of the Court of Appeals of the other department of the state and with a previous expression of opinion by this court, especially when no injustice will result from a reversal of the judgment rendered. (Syllabus by the Court.)

Error from District Court, Reno County; M. P. Simpson, Judge.

Action by J. Campbell Lorimer against W. G. Fairchild and others. Judgment for defendants, and plaintiff brings error. Reversed.

Geo. A. Vandever and F. L. Martin, for plaintiff in error. Fairchild & Lewis, for defendants in error.

**BURCH, J.** The facts of this controversy were found by the trial court to be as follows: "(1) That on the 23d day of July, 1886, the defendant William Stout executed a six hundred (\$600) dollar note payable to William F. Leonard, a copy of which is attached to plaintiff's petition, marked 'Exhibit A.' (2) And that at the same time, and for the purpose of securing said note, said Stout executed a mortgage upon the southwest quarter of section twenty (20), in township twenty-six (26), south of range nine (9) west in Reno county, Kan., a copy of which mortgage is attached to plaintiff's petition, marked 'Exhibit B.' (3) That thereafter, and for valuable consideration, and before maturity, said note and mortgage were duly assigned and transferred to the plaintiff, J. Campbell Lorimer, trustee, a copy of which assignment is attached to plaintiff's petition, marked 'Exhibit C.' (4) That said mortgage was duly filed in the office of the register of deeds of Reno county, Kan., on the 27th day of August, 1886, and recorded in Book 34, at page 277. (5) That on or about the 25th day of October, 1886, the defendant William Stout sold and conveyed the land in question, by warranty deed, to the defendants Frank M. McKee and Charles Bloom, and that

in said deed said defendants McKee and Bloom assumed and agreed to pay said six hundred (\$600) dollar mortgage as a part of the consideration price for said land. (6) That thereafter, and on, to wit, the 17th day of October, 1891, and after the said six hundred (\$600) dollar note and mortgage had by their terms become due and payable, the defendants Frank M. McKee and Charles Bloom entered into a certain extension agreement with the plaintiff, J. Campbell Lorimer, trustee, extending the time of payment of said note for a period of five years from maturity thereof. A copy of said extension agreement is attached to plaintiff's petition, marked 'Exhibit D.' (7) That attached to said extension agreement were 10 interest coupons of even date therewith, payable semiannually thereafter, each representing six months' interest on said sum of six hundred (\$600) dollars, at the rate of 6 per cent. per annum, each being for the sum of eighteen (\$18) dollars; and at the same time the said defendants Frank M. McKee and Charles Bloom executed a certain other agreement with the plaintiff, J. Campbell Lorimer, trustee, which was a part and parcel of the same transaction as the extension agreement above referred to, said other agreement being dated October 17, 1891, and a copy of which is attached to plaintiff's petition, marked 'Exhibit E.' (8) That after the execution of said extension agreement and the interest coupons on the 17th day of October, 1891, the defendants Frank M. McKee and Charles Bloom conveyed the land in question to the defendant, N. G. Hollister, as cashier, and that said Hollister was then cashier, of the defendant the National Bank of Commerce of Hutchinson, Kan., and took said deed in fact as a mortgage to secure an indebtedness of said Frank M. McKee and Charles Bloom to said bank in the sum of eleven hundred (\$1,100) dollars, and that afterwards, and during the pendency of this suit, said N. G. Hollister, for a valuable consideration, conveyed said land to the defendant J. E. Conklin. (9) That at no time after the execution of the extension agreements dated October 17, 1891, did the defendants Frank M. McKee, Charles Bloom, N. G. Hollister, cashier, the National Bank of Commerce, and J. E. Conklin, or either or any of them, pay any of the interest coupons attached to said extension agreement of October 17, 1891; but that the defendant W. G. Fairchild, anticipating becoming the owner of the land in question, remitted the money and took up four of the interest coupons, being Nos. 6, 7, 8, and 9, intending to have the same assigned to him, and that coupons Nos. 6 and 7 were so assigned, but that by inadvertence coupons 8 and 9 were stamped 'Paid.' (10) That the amount due the plaintiff on said note and the one unpaid coupon No. 10 amounts, with interest at this time, to \$819.50, and that no part thereof has ever been paid to the plaintiff by the defendants, or any of them, or any one of them. (11) That the defendant Frank M. McKee has been duly and regularly discharged

in bankruptcy by the United States District Court at Wichita, Kan., so that no judgment can be taken against him."

Exhibits A, D, and E referred to in these findings are as follows:

"Exhibit A. Mortgage Note. \$600.00. St. Louis, Mo., July 23, 1886. On the first day of July 1891 value received for money loaned, I promise to pay to the order of William F. Leonard, Six Hundred Dollars, with interest on the same at the rate of 12 per cent. per annum, after due, until paid. And I hereby agree that if default is made in the payment of any of the coupons hereto attached, or any part thereof, and the same shall remain due and unpaid for the period of ten days, in such case this note, with the interest accrued thereon, shall at the option of the legal holder hereof become due and payable, and may be demanded and collected immediately, anything herein contained to the contrary notwithstanding according to the tenor of a certain mortgage bearing even date herewith, given by William W. Stout, single, to William F. Leonard. Payable at the office of Wilson & Toms, St. Louis, Mo. William W. Stout. Endorsed: Pay to the order of J. Campbell Lorimer without recourse. William F. Leonard."

"Exhibit D. Extension Agreement and Coupons. St. Louis, Mo., October 17, 1891. Whereas, J. Campbell Lorimer, Trustee, has agreed to extend the time for payment of a loan of \$600.00, secured by a mortgage made and executed by William W. Stout, dated July 23, 1886, and by the terms thereof due July 1, 1891, for a term of five years: Now, in consideration of such extension, we hereby agree to keep said loan for a term of five years from July 1, 1891, and further agree to pay interest on the principal of said debt, according to the tenor and effect of certain Extension Coupon notes, signed by me, of even date herewith, and in case of any default in payment of interest, or in case of non-payment of taxes assessed on the mortgaged premises, or of a breach of any of the covenants in said mortgage contained, it shall be optional with said mortgagee to declare the principal sum of said debt immediately due and payable, and the same may be collected according to the terms and conditions of the said mortgage and principal note, time being the essence of this contract for extension. We hereby certify that we are the present owners of the land mortgaged to secure payment of the above mentioned loan, and we hereby agree to pay said loan as part of the purchase price. Frank M. McKee. O. Bloom."

"Exhibit E. Extension Agreement. St. Louis, Mo., October 17th, 1891. Whereas, J. Campbell Lorimer, Trustee, has agreed to extend the time for the payment of a loan for \$600, secured by a mortgage on the following described real estate: The Southwest Quarter of Section Twenty (20), in Township Twenty-six (26), South in Range Nine (9), W. of the Sixth (6th) Principal Meridian, containing 160 acres, more or less, made and exe-

cuted by William W. Stout, dated July 23, 1886, recorded in the Recorder's office of Reno County, Kansas, in book No. 34, page 276 and by the terms thereof due July 1st, 1891, for the term of five years: Now in consideration of such extension we hereby agree to keep said loan for the term of five years from July 1st, 1891, and further agree to pay interest on the principal of said debt at the rate of six per cent. per annum, payable semi-annually, according to the tenor and effect of certain extension coupon notes, signed by them of even date herewith, and in case of any default in payment of interest, or in case of non-payment of taxes assessed on the mortgaged premises, or of a breach of any of the covenants in said mortgage contained, it shall be optional with said mortgagee to declare the principal of said debt immediately due and payable, and the same may be collected according to the terms and conditions of the said mortgage and principal note, time being the essence of this contract for extension. Frank M. McKee. C. Bloom."

The trial court's conclusion of law from these facts is in the following language: "As a conclusion of law, based upon the above and foregoing facts, the court holds that it is bound by the opinion of the Kansas Court of Appeals, Southern Department, Central Division, rendered in this case when in that court on proceedings in error, and that under the opinion filed by said court in this case the plaintiff is not entitled to recover; that there was no consideration for the extension agreement executed October 17, 1891, and that therefore this action was barred, at the time this suit was commenced, by the statute of limitations."

The opinion referred to is that of Conklin v. Lorimer, 10 Kan. App. 550, 63 Pac. 23, the syllabus of which is as follows: "L., the mortgagee, entered into an agreement with M. and B., grantees of the mortgagor, to extend the time of payment of a past-due note and mortgage for five years. It does not appear that M. and B. agreed to pay a greater rate of interest than was provided for by the terms of the original agreement, or that any advance payment of interest was made, or any act done which would constitute a sufficient consideration, or that M. and B., or either of them, paid any interest on the debt after the making of the extension agreement. More than six years after the note and mortgage became due by their terms, this action was brought. Held, that the extension agreement, being without consideration, was ineffectual to prevent the running of the statute of limitations, and that the cause was barred." A careful analysis of the transaction will show the fallacy of this syllabus to lie in the words, "or any act done which would constitute a sufficient consideration," construing the word "act" to include in its legal signification the making of a promise. By virtue of the extension agreement the holder of the note gave up his right to enforce immediate payment,

gave up his right to collect 12 per cent. interest upon the note while it remained unpaid, and bound himself to take a less rate of interest, and to make no demand for the payment of the principal at all for the fixed period of five years. The landowners gave up their right to pay the principal at once, to stop interest, and to free their land from the lien of the mortgage, and bound themselves to keep the money, and to pay interest upon it at a given rate, for the fixed period of five years. The holder of the note acquired the valuable right of keeping his money at interest, at a satisfactory rate, for a fixed period, and the landowners acquired the valuable right of the undisturbed use of a sum of money for a fixed period at a satisfactory rate of interest. A new right, interest, profit, and benefit accrued to each party, and a new forbearance, detriment, loss, and responsibility was suffered and undertaken by each party. Every element of the most subtly discriminative definition of valuable consideration appears, and there can be no doubt that the parties were legally bound.

In the opinion in *Conklin v. Lorimer*, it is said: "There is no evidence to show that they assumed any new obligation, made advance payments of interest, or did any other acts that would constitute a sufficient consideration for the agreement to extend the time of payment. McKee and Bloom were bound already to pay the note, with a rate of interest at least as high as 6 per cent., and this promise to do what they were already bound for was invalid as a new promise. *Schuler v. Myton*, 48 Kan. 282, 29 Pac. 163." It is apparent, however, that McKee and Bloom were not obliged to keep the money, and pay interest upon it, for any specified length of time. In promising to do so for the period of five years, they undertook to do something they were not previously bound to do. The freedom, the legal right to pay and avoid interest, was renounced, and the burden, the legal duty to keep the money and pay the extension interest coupons for five years, was assumed. That was a new obligation which McKee and Bloom took upon themselves as an inducement for the extension, and the principle announced in *Schuler v. Myton*, was not infringed.

The case of *Eaton v. Whitmore*, 3 Kan. App. (Northern Dept.) 760, 45 Pac. 450, is quite in point. In the opinion Judge Garver says: "It is familiar law that a promise to extend the time of payment of a note, to be binding, must be based upon a sufficient consideration, and that such consideration must be something other than the mere doing or promising to do by the opposite party that to which he was obligated by the original contract. *Dudley v. Reynolds*, 1 Kan. 285; *Jenness v. Cutler*, 12 Kan. 500; *Prather v. Gammon*, 25 Kan. 379; *Ingels v. Sutliff*, 36 Kan. 444 [13 Pac. 828]. Although, in this case, the consideration for the claimed agreement for an extension may have been merely

the promise of Whitmore to pay interest at a less rate than that which, by the terms of the note, he had already promised to pay, yet we are of the opinion, if it was a promise to pay such interest for a definite future time, it furnished a valid and sufficient consideration to support an agreement to extend the time of payment for such period. It is true the amount agreed to be paid is no more, and in this particular case was less, than could be demanded under the original contract, provided payment was delayed for a like period of time as a mere matter of indulgence; but by the new agreement there was ingrafted on the original contract a new and additional feature—that the maker of the note waived his right to stop interest by paying the debt at any time after maturity, and bound himself to pay interest for a further and definite time. He thereby assumed an obligation which was not before imposed upon him, and the holder of the note acquired an additional substantial right—that of refusing payment and exacting interest for the full period of the extension."

In 1846 the Supreme Court of Ohio carefully distinguished the essential features of transactions of this character, as follows: "If the lender of money secured by a note, after the same becomes due, contracts with the borrower that the time of paying the same shall be extended for one year, or for any other period, upon consideration that the borrower shall pay the legal or less rate of interest, why is not that a binding contract? The lender, by this contract, secures to himself the interest on his money for the year, and the borrower precludes himself from getting rid of the payment of the interest by discharging the principal. It is a valuable right to have money placed at interest, and it is a valuable right to have the privilege at any time of getting rid of the payment of interest by discharging the principal. By this contract the right to interest is secured for a given period, and the right to pay off the principal, and get rid of paying the interest, is also relinquished for such period. Here, then, are all the elements of a binding contract. But it is said there is no consideration for the extension of time, because the law gives 6 per cent. after the note is due. But the law does not secure the payment of this interest for any given period, or prevent the discharge of the principal at any moment. There is precisely the same consideration for the extension of the time as there was for the original loan." *Robert McComb v. William F. Kittridge*, 14 Ohio, 348.

The reasons for this rule have been stated in various ways:

"This brief reference to the history of the law, showing its origin and growth, is made for the purpose of exhibiting it as it existed when our ancestors brought it with them to this continent, that it may distinctly appear that nothing of its ancient condition gives any support whatever to the doctrine of the



anomalous cases mentioned, which, as we must think, without a very full consideration of the subject, substantially rule that an agreement to pay interest for the forbearance of money for a definite time is not a sufficient consideration for a promise to forbear, when the original debt bears the same rate of interest. It is true that, if the time had been voluntarily given, the note would have drawn the same rate of interest promised to be paid. But if this be an argument, it assumes that the principal debtor and surety would in any event have failed to pay until the lapse of the period of indulgence given by the agreement. It assumes that men will never discharge an interest-bearing obligation to avoid the payment of interest, and that it is not to the debtor's advantage to pay the debt for the purpose of stopping the interest, and, moreover, that it is not beneficial to the creditor to obtain a contract which will continue his investment for a definite period for the sake of the lawful interest. But when it is borne in mind that in every commercial country men and moneyed corporations are constantly seeking to loan money for definite periods for the profit derived from interest, and that they grow rich by the operation, and that debtors frequently seek the opportunity to pay their interest-bearing debts before maturity in order to save interest, it will not be very apparent that where the creditor bars the right of payment to him at the maturity of the obligation by a new contract, and continues the investment at interest for an additional definite period, payable at the expiration of that period, he will derive no benefit from the performance of the new contract. The benefit of such a contract to the creditor is that he continues the loan for a specified time, when without the contract the debtor might lawfully pay at once, and thus stop interest. So that it might as well be contended that an original contract of loan for a given time at lawful interest shall not bind the lender to wait for his money until the lapse of the time stipulated. The consideration for the performance is in one case precisely as valuable as in the other." *Pierce v. Goldsberry*, 31 Ind. 52, 54.

"The agreement of the principal to pay interest for a specified time, after the note became due, furnished a sufficient consideration for the promise to delay. Both agreements were valid and binding upon the parties respectively, and enabled each to accomplish what he appears to have considered a desirable purpose—a further investment for a definite period for the creditor, and an extension of credit for the same time for the debtor. The legal effect of the agreements was to disable the former from enforcing collection, and the latter from making payment of the note, until the expiration of the year stipulated; and to alter the contract, and change the responsibility of the sureties, without their consent." *Chute v. Pattee*, 37 Me. 102, 105.

"If the holder of a note which has become due agrees with the principal maker of said note that he may retain the sum due for a definite period of time, upon his promise to pay usurious interest, and such maker agrees to keep said sum for such definite time and to pay said interest, this agreement will discharge a surety on said note not consenting to such contract for forbearance. Although the usury cannot be collected, the legal rate can be; and the absolute right to get interest for a given time is a valuable consideration to uphold a promise to forbear, and to tie the hands of the creditor, so that he cannot sue until the expiration of the time agreed on as aforesaid. *Chute v. Pattee*, 37 Me. 102; *McComb v. Kitttridge*, 14 Ohio, 348; 2 Am. Lead. Cas. (5th Ed.) 469." *Brown v. Proffit*, 53 Miss. 649.

"If the new agreement was that the debtor should pay, at the end of the period agreed upon for the extension, precisely the same sum which was due at the time the agreement was entered into, the case might be different. But a promise to do what one is not bound to do, or to forbear what one is not bound to forbear, is a good consideration for a contract. In case of a debt which bears interest either by convention or by operation of law, when an extension for a definite period is agreed upon by the parties thereto, the contract is that the creditor will forbear suit during the time of the extension, and that the debtor foregoes his right to pay the debt before the end of that time. The latter secures the benefit of the forbearance; the former secures an interest-bearing investment for a definite period of time. One gives up his right to sue, for a period, in consideration of a promise to pay interest during the whole of the time; the other relinquishes his right to pay during the same period, in consideration of the promise of forbearance. To the question, why this is not a contract, we think no satisfactory answer can be given. It seems to us it would be a binding contract, even if the agreement was that the debt should be extended at a reduced rate of interest." *Benson v. Phipps*, 87 Tex. 578, 580, 29 S. W. 1061, 47 Am. St. Rep. 128.

"The agreement to keep the money another year, and pay the interest thereon, was a sufficient consideration for the promise of the payee to extend the time of payment. It may have been, and doubtless was, of great benefit to *Dodgson* to secure a loan another year at 10 per cent. interest. Had the money been paid in, a customer might not be found ready to borrow at so large a rate of interest, and hence the money might lie idle in the owner's hands a whole year." *Dodgson et al. v. Henderson*, 113 Ill. 360, 364.

"The consideration flowing to the holder was the implied promise of the maker to pay interest during the full period of the extension at the rate expressed in the instrument, and the promise of the holder to forbear suit for a definite period constituted a good con-

sideration for the agreement upon the part of the maker to pay interest for such full period. Here are all the elements of a valid contract, and upon principle we are unable to see why such an agreement should not be sustained by the courts. The reasoning so often advanced by courts holding a contrary doctrine, that the maker under such circumstances assumes no additional obligation, that the note by its terms binds him to pay interest until the note is paid, does not, in our opinion, meet the case. It overlooks the fact that by the new agreement the maker is bound to pay interest for the full term, whereas, aside from such new agreement, it would be his privilege to make payment at any time." *Nelson v. Flagg*, 18 Wash. 39, 41, 50 Pac. 571.

"The holder of the note in this case, by the contract of extension, secured to himself, as he supposed, the payment of interest on the principal of the note for three months longer, and the debtor precluded himself from getting rid of the payment of interest from that period by discharging the principal. The promise of each was a part of the consideration. It is a valuable right to have money drawing interest, and it is a valuable right to have the privilege at any time of getting rid of payment of interest by discharging the principal." *Diescher v. Fulham*, 11 Colo. App. 62, 68, 52 Pac. 685, 687.

These authorities cite others in which the same conclusion is reached.

This court has not, heretofore, decided the precise question now under consideration in an authoritative way. In *Royal v. Lindsay*, 15 Kan. 591, 594, Mr. Justice Brewer said: "That a promise to pay interest for a definite period of time is a sufficient consideration for an agreement to extend for a like period the day of payment, is affirmed by these authorities: *Wheat v. Kendall*, 6 N. H. 504; *Bailey v. Adams*, 10 N. H. 162; *Chute v. Pattee*, 37 Me. 102; *McComb v. Kittridge*, 14 Ohio, 348; 2 Am. Lead. Cas. (5th Ed.) 469. It is denied in *Reynolds v. Ward*, 5 Wend. 502; *Kellogg v. Olmsted*, 25 N. Y. 189; *Parmelee v. Thompson*, 45 N. Y. 58 [8 Am. Rep. 33]; *Gibson v. Irby*, 17 Tex. 173; 2 Pars. Notes & Bills, 528. It is perhaps not necessary that this question shall in this case be definitely decided, though we may say that the suggestions made in favor of the proposition by the court in the case from 14 Ohio seem to us of great force." The suggestions referred to have lost nothing of their force by lapse of time, and the doctrine they elucidate has the support of the most closely reasoned cases.

Therefore the judgment of the Court of Appeals of the Southern Department, and the judgment of the district court in obedience to that of the Court of Appeals, were erroneous.

It is insisted, however, that the decision of the Court of Appeals has become the law of this case, and is therefore binding upon the parties, even though it be erroneous.

In *Headley v. Challiss*, 15 Kan. 602, the syllabus reads: "Where a case is brought a second time on error to this court, the first decision will be deemed the settled law of the case, and will not be made a subject of re-examination. This rule extends not merely to all questions actually presented by counsel, but to all questions existing in the record and necessarily involved in the decision." The opinion contains the following statement of the rule and citation of authorities supposed to sustain it: "This case has been once before to this court. *Challiss v. Headley*, 9 Kan. 684. Upon abundant authority and well-settled principles, the decision at that time has become the established law of the case. *Phelan v. City of San Francisco*, 20 Cal. 40; *Polack v. McGrath*, 38 Cal. 666; *Yates v. Smith*, 40 Cal. 662; *McKinley v. Tuttle*, 42 Cal. 570; *Washington B. Co. v. Stewart*, 3 How. 413 [11 L. Ed. 658]; *Booth v. Com.*, 7 Metc. [Mass.] 286; *Hosack's Ex'rs v. Rogers*, 25 Wend. 313; *Mason v. Mason*, 5 Bush, 187. Whatever, therefore, was at that time decided, is not now a matter for re-examination. Nor is this limited to the mere questions noticed in the opinion, nor, indeed, to the actual matters presented by the respective counsel and considered by the court. It extends to all matters actually existing in the record and necessarily involved in the decision. Thus, in the case from 3 How. [11 L. Ed.], cited above, a question was raised as to the jurisdiction of the court; but as the case had once before been taken to the court, and a decision rendered upon the merits, the question of the jurisdiction was held to be also settled, although, as a matter of fact, it had not been considered; and this, because jurisdiction is involved and assumed in an inquiry into and a decision upon the merits. See, also, the cases above cited from 7 Metc. [Mass.], 25 Wend., 5 Bush, and 38 Cal."

In *Central Branch U. P. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163, the syllabus reads: "Where a case is brought a second time on error to this court, the first decision will be deemed the settled law of the case, and will not be made the subject of re-examination. While this rule may not be a cast-iron rule, incapable of relaxation under any circumstances, yet it must be adhered to where the question is one of great doubt, has been thoroughly considered, and is one whose decision involves no serious injury to general rights." In the opinion it is said: "Nearly all the questions in the case were considered and determined when it was here before. The decision of those questions has become the established law of the case. *Headley v. Challiss*, 15 Kan. 602. Nevertheless, counsel for plaintiff in error seriously challenge the decision then made, and earnestly contend that this court erred, and should re-examine the questions; and they refer to the opinion in *Long v. Wolf*, 25 Kan. 522, in which we stated that we had gone

to the extreme verge in this case in upholding defective notices of redemption, and that the case deserved to be limited rather than extended. We do not understand that the rule that a decision once made becomes the established law of the case is a cast-iron rule, and incapable of relaxation in any event. Cases may arise in which it will be very clear that the first decision was erroneous, that not only in the case at bar will wrong result from adhering to the decision, but also other interests through the state will be imperiled; hence we do not doubt the power of the court to reconsider and reverse a prior decision in the same case. Still, in all ordinary cases, the rule is as above stated. After a decision has once been announced by this court, the further steps in continuation of the controversy are based upon and regulated by that decision, and, unless it is plain that a serious error has been committed, such decision should be adhered to. Now, it is not clear to us that the prior decision was wrong. On the contrary, the question still seems one of great doubt. Much can be said on either side, but, after all the arguments pro and con have been considered, we can only say that we hesitated at the time the prior decision was made; we hesitate still, and that very doubt compels us to adhere to that decision."

In *Crockett v. Gray*, 31 Kan. 346, 2 Pac. 809, the syllabus is practically the same as that of *Headley v. Challiss*. The opinion contains the following discussion of the rule: "Viewed as an original question, we think there is force in this claim, but the defendants are too late in presenting it. It was a question necessarily involved in the case as it came to us before. If, whether the homestead included one acre, or the entire tract, the contract was void, then the judgment of the district court was right, and no reversal should have been ordered. Counsel failed to present it then, and it is too late now. A case cannot be tried by piecemeal. Every defense that exists must be presented, and, when a case is reversed, the defeated party will not be heard to say that there were other reasons for affirmance which he might have presented. A decision once made becomes the law of the case, and this rule embraces not merely all questions presented, but also all questions necessarily involved in the decision. *Headley v. Challiss*, 15 Kan. 602; *Rld. Co. v. Shoup*, 28 Kan. 394 [42 Am. Rep. 163]. Counsel, not questioning the general rule, claim that it is not an inflexible one, but must yield when justice and equity imperatively require it. But even with this limitation, we think the rule must control in the present case, for there is no equity in releasing a party from a fair and reasonable contract into which he freely entered."

In *Norton v. Huntoon*, 43 Kan. 275, 22 Pac. 565, the syllabus is as follows: "Where a cause has once been reviewed in the Su-

preme Court on error, the judgment of the lower court modified, and the cause remanded, held, that in the subsequent proceedings in said cause the former decision of this court will not be reviewed, but it is final and conclusive." The commissioner who wrote the opinion does not discuss the subject.

In *Wheelock v. Myers*, 64 Kan. 47, 52, 87 Pac. 632, 633, referring to the position taken by one of the counsel in the case, the court said: "He invokes the doctrine that the first decision of a court is the law of the case on all questions presented by the record, and on all questions necessarily involved in the decision. We agree with him on this last proposition. It was so decided in *Headley v. Challiss*, 15 Kan. 602."

These quotations embody the principal utterances of this court upon the subject prior to *Railroad Co. v. Merrill*, hereafter referred to. The foundations of the rule, and the reasons for its limitations, have not been elaborated. In the case of *City of Hastings v. Foxworthy*, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321, this has been done. The cases cited in *Headley v. Challiss*, and many others, have there been given a most searching examination, and the law upon the subject is shown to be involved in considerable confusion. The conclusion reached is stated as follows: "An appellate court, on a second appeal of a case, will not ordinarily re-examine questions of law presented by the first appeal; but where the case was on the first appeal remanded generally for a new trial, and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal, and may re-examine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect." This is substantially the doctrine of *Central Branch U. P. R. Co. v. Shoup*, and the practice of this court has been to reverse its former decision in the same case and follow "the law of the land," rather than "the law of the case," whenever an imperative legal necessity demanded. *Warner v. Broquet*, 54 Kan. 649, 39 Pac. 228, and *Railroad Company v. Merrill*, 65 Kan. 436, 70 Pac. 358, 59 L. R. A. 711, 93 Am. St. Rep. 287, are instances. In the latter case Mr. Justice Smith said: "Counsel for defendant in error have invoked the rule stare decisis, and insist that the former decision must govern on the second appeal. This would come to us with more force if we were not now considering the same case with the same parties before the court. If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally. We are fully satisfied that the rule of the former case is shattered by the pressing weight of opposing authority, and that reason is against it."

In the present case the decision claimed to be binding was rendered by an intermediate court. The cause was remanded for a new trial, and not merely for some special proceeding supplemental to the mandate. The same parties now appear in this court, with a record presenting the same questions as before. The former decision was clearly erroneous. It was in direct conflict with a decision of a court of equal authority having jurisdiction over another portion of the state, and was in opposition to an expression of opinion given by this court in 1875. The question is of great public importance, touching as it does the very essence of a comprehensive class of everyday contracts of the people of this state. It ought to be finally determined by this court, and no injustice can result in this particular case from a reversal of the judgment rendered. In the ancient Celtic law-book, the *Senchus Mor*, it is said there are three periods at which the world is of little worth—the time of a plague, of a general war, and of the breaking of express agreements. The fair and reasonable agreement of the parties in this case, extending the time within which a loan of money made in good faith might be repaid, ought not to be broken.

The judgment of the district court is reversed, with direction to enter judgment upon the findings of fact for the plaintiff, according to the views herein expressed. All the Justices concurring.

(34 Wash. 131)

#### BELL v. BUTLER.

(Supreme Court of Washington. Jan. 27, 1904.)

##### JURY—MISCONDUCT—STRIKING AVERAGE.

1. Jurors being agreed that a verdict should be returned for plaintiff, but not agreed as to the amount, it was not misconduct for them to strike an average of the sums they thought proper, and return a verdict for the sum so determined.

Appeal from Superior Court, Spokane County; William E. Richardson, Judge.

Action by J. R. Bell, an infant, by his guardian ad litem, against Burt Butler. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John C. Kleber and Albert G. Starkey, for appellant. Harris Baldwin, for respondent.

**PER CURIAM.** The respondent, an infant, brought this action to recover damages for personal injuries alleged to have been received by reason of the bite of a dog belonging to appellant. A verdict was returned in his favor. Thereafter a motion for a new trial was made and overruled, and a judgment entered, from which this appeal is taken. The motion for a new trial was based on the ground of misconduct of the jury, in that they arrived at their verdict by lot or chance.

From the record it appears that the jury unanimously agreed that the verdict should

be for the plaintiff, but were at variance as to the amount. After considerable discussion, it was suggested that an average be struck of the various amounts contended for by the different jurors. This was done by setting down the amount each juror considered proper, and dividing the sum of these amounts by 12, which gave a quotient of \$252.17. After further consideration, this amount was returned as the verdict. This court has heretofore held that such a proceeding, in itself, was not misconduct. In *Stanley v. Stanley*, 73 Pac. 596, under a similar state of facts, we said that "• • • it is not a valid objection to a verdict that it was the result of this or some other method of computation, if it finally receives the sanction of the necessary number of jurors required to return a verdict." See, also, *Watson v. Reed*, 15 Wash. 440, 46 Pac. 647, 55 Am. St. Rep. 899. We think the case before us falls squarely within the rule announced in these cases.

The judgment is therefore affirmed.

(34 Wash. 132)

#### LEGG et al. v. LEGG et al.

(Supreme Court of Washington. Feb. 4, 1904.)

##### DESCENT AND DISTRIBUTION—BETTERMENTS ON LAND—CREDIT TO WIDOW—PARTITION—COSTS—ATTORNEY'S FEES.

1. Under Ballinger's Ann. Codes & St. § 5604, authorizing taxation of costs in partition suits, including fees of referee and other disbursements, attorney's fees, not being specified, cannot be taxed.

2. Where the public records showed that the widow was the owner of land left by her deceased husband, and she held possession thereof to the exclusion of his other heirs, who were in fact entitled to a share of the land, a sum recovered by her on account of condemnation of a part of the land should be shared with those heirs who were not parties to the condemnation proceedings, but not with one who was made a party and defaulted.

3. Where a husband and wife occupied his land for several years, and up to the time of his death, she is entitled to a credit for the betterments they have placed on the land during coverture, before it is divided between her and the other heirs.

Appeal from Superior Court, Skagit County; Jeremiah Neterer, Judge.

Action by William D. Legg and others against Malena Legg and others. From the judgment, the plaintiffs appeal. Modified.

Million & Houser, for appellants. Fairchild & Bruce, for respondents.

**PER CURIAM.** This was an action for the partition of real estate, commenced in the superior court of Skagit county by appellants William D. Legg, Hattie Legg, Cassie Legg, Mary Legg, Lydia Staples, Arthur F. Heywood, Edgar A. Heywood, and William M. Lynden against respondents Malena Legg, Milo J. Legg, John Steen, and James White. Joseph B. Legg, on the 8th day of

¶ 1. See Partition, vol. 38, Cent. Dig. § 447.

March, 1873, made final proof under the pre-emption laws of the United States on the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 22, township 36 N., range 3 E., in Skagit county, Wash. Patent issued for this land to said Legg on February 25, 1874. On the 22d day of September, 1874, in Whatcom county, this state, Joseph B. Legg and respondent Malena Legg intermarried, and from that date continuously till on or about June 1, 1899, occupied this property as their home. After their marriage, on June 20, 1884, Joseph B. Legg acquired title by patent to lot 3, section 21, in township 36 N., range 3 E. W. M., pursuant to the homestead laws of the United States. On or about June 1, 1899, Joseph B. Legg died intestate, while occupying the real estate above described with respondent Malena Legg as a home. There was no issue of this marriage. The intestate, Joseph B. Legg, did not leave surviving him any children, nor did he leave a father or mother. He left as his heirs at law his widow, Malena Legg; Lydia Staples, a sister; Cassie, Mary, and Hattie Legg, children of Chas. H. Legg, a deceased brother of the intestate; William M. Lynden, whose name was formerly William M. Legg, an only child of Edwin Legg, a deceased brother of the intestate, whose name was changed by a decree of the probate court in Massachusetts from William M. Legg to William M. Lynden; Arthur F. and Edgar A. Heywood, only children of Eliza F. Legg-Heywood, a deceased sister of intestate; and William B. and Milo J. Legg, only children of William Legg, a deceased brother of intestate. The trial court found that since June 1, 1899, the date of the decease of Joseph B. Legg, respondent Malena Legg has been in the sole and exclusive occupation of the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 22, above described; that the reasonable rental value thereof is \$225 per annum; that at the time of the marriage of Joseph B. Legg with respondent Malena Legg this land was of no other or greater value than \$500; that since their marriage said husband and wife resided upon, improved, and enhanced the value of said land by their joint efforts to the extent of \$900; that the present value thereof is \$2,000; that the rental value of such property during the time it was occupied by intestate and Malena Legg in excess of taxes paid was \$100 per annum; that Malena Legg at the time of the death of her husband had no property of any kind or character except her community interests in the property above named; that she was not indebted to the community in any sum whatever; that since the decease of Joseph B. Legg, Malena Legg has paid the expenses of the last sickness and funeral of her deceased husband and costs of administration of the estate, amounting to \$150, the sum of \$111 general taxes, and \$43 in labor for road property tax assessed against said N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 22; that in 1901, the Seattle & Montana Railroad Company

instituted proceedings to condemn a right of way through the real estate first above described, making Malena Legg, William D. Legg, James White, and John Steen defendants therein; that all of said parties except Malena Legg defaulted in such proceedings, who received from said railroad company as compensation for her land by virtue of said proceedings the sum of \$940; that in such condemnation proceedings Malena Legg necessarily incurred expenses amounting to \$138; that in such proceedings appellants Hattie Legg, Cassie Legg, Mary Legg, Lydia Staples, Arthur F. Heywood, and William M. Lynden were not made parties therein; that after the decease of Joseph B. Legg Malena was duly appointed by the superior court of Skagit county as administratrix of said decedent, Joseph B. Legg; that she thereafter duly qualified in that behalf, and has since been discharged; that at the time of the decease of Joseph B. Legg he left sufficient personal property belonging to the community to have paid the expenses of his last sickness and funeral and the costs of administration. The trial court further found: "That, so far as the public records show, at the time said condemnation proceedings were pending said Malena Legg was the owner of said property. That an order was made in said proceedings directing said \$940 to be paid to said Malena Legg. Said order was made without notice to any of the plaintiffs (appellants)." The court also found that \$100 is a reasonable fee to be allowed appellants' attorneys in case the same is a proper allowance as a part of the costs herein; that said property is so situated that a partition thereof cannot be made without great prejudice to the owners. On these findings of fact the trial court made its conclusions of law that respondent Malena Legg is the sole owner of said lot 3 in section 21, as the survivor of the community (Joseph B. and Malena Legg); that the appellants and respondent Milo J. Legg are the owners of an undivided one-half of the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 22, township 36 N., range 3 E., and Malena Legg is the owner of the remaining undivided one-half thereof; that this tract of land was the separate property of deceased, Joseph B. Legg, in his lifetime, which is the only land and property affected by these proceedings; that respondents Steen and White have no interest in the merits of this action; that no attorney fees on either side are chargeable against the common estate; that appellants and respondent Milo J. Legg have no interest nor right to participate in the money paid by the railroad company to Malena Legg; that she is entitled to a charge and prior lien upon this land on account of improvements in the sum of \$900, with interest added, aggregating \$1,165, with accruing interest thereon at 7 per cent. per annum, and an additional charge of \$77, one-half of the total amount paid for taxes and betterments placed on the land, and is to be char-

ged with \$337.50, one-half of the rental value of said lands for three years. On October 28, 1902, the superior court rendered a decree ordering this tract to be sold. Out of the proceeds of such sale Malena Legg was first to receive \$904.05, with interest at 7 per cent. from date of decree. One-half of the residue of such proceeds was to be paid to Malena Legg, and the other half thereof to be paid to appellants and Milo J. Legg. Malena Legg was charged with one half of the costs, and appellants and Milo J. Legg with the other half. The court refused to tax any attorney fees as a part of the costs on either side. Plaintiffs allege exceptions, and appeal to this court.

Appellants contend that the trial court erred (1) in not allowing them an attorney fee of \$100 as a part of the costs; (2) in refusing to allow them their share of the money received by respondents for the right of way from the railroad company; and (3) in allowing Malena Legg's charges against this tract of land on account of improvements and taxes.

1. Ballinger's Ann. Codes & St. § 5604, provides, that: "The costs of partition, including fees of referee and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the decree. In that case these shall be a lien on the several shares, and the decree may be enforced by execution against the parties separately. When, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them." The question presented by appellants' counsel is whether the above provision authorizes the taxation of attorney's fees as a part of the costs in partition suits. Some of the authorities cited by appellants from other states hold that under the general term "costs" attorney's fees may be taxed in partition cases, while the vast majority of courts treat this subject-matter as regulated wholly by statutory provisions, refusing to tax such fees unless specially named therein. The recovery of costs by that name was unknown to the common law till regulated by statute in the courts of law. The allowance of costs in any case depended entirely on the terms of the statute. Enc. Plead. & Prac. vol. 5, p. 110. This court, in *Trumble v. Trumble*, 28 Wash. 133, 66 Pac. 124, decided in accordance with this rule, in enforcing a judgment lien for alimony in a divorce suit against certain property, that, when there was no provision for an attorney's fee by the terms of the original decree, it was error to allow more than the statutory compensation as provided in Ballinger's Ann. Codes & St. § 5165. We think the rule enunciated in that case on this subject is correct, and, when applied to the case at bar, would not authorize us in allowing the attorney's fee

which appellants now contend should be charged against the common estate of the parties to this controversy; more especially in view of the statute which provides that compensation of attorneys shall be left to the agreement of the parties. Section 5165, supra.

2. On the second contention we are of the opinion that Malena Legg should account, under the findings of the trial court, to the appellants (excepting William D. Legg), as heirs at law of decedent Joseph B. Legg, above named, who were not parties to the condemnation proceedings instituted by the Seattle & Montana Railroad Company, for their interests, respectively, as such heirs in the money received by her from the railroad company after deducting the expenses necessarily incurred in connection with such condemnation proceedings. The public records showed that at the time of the condemnation proceedings Malena Legg was the owner of the land taken as a right of way, and she received the money as the value of the real estate condemned, and not simply payment for her interest therein. This seems to be the correct interpretation of the findings of the trial court in that behalf. If this be true, it is but fair and equitable that Malena Legg should be treated as a trustee for these heirs with reference to their respective interests in that fund. Whether these appellants are concluded by the judgment of the superior court in the condemnation proceedings instituted by the railroad company is not a material question in the controversy as presented by this record. These appellants have the undoubted right to treat the proceedings as valid, and call upon Malena Legg for an accounting as their trustee. Appellant William D. Legg is not entitled to share in this fund, as he was a party to the condemnation proceedings, and defaulted therein.

3. Appellants' counsel concede in their argument that respondent Malena Legg is entitled to a credit of one-half of the \$154 paid for taxes, which inured to the benefit of the other heirs of deceased, Joseph B. Legg, so no discussion of that question is necessary. We are of the opinion, however, that the trial court committed no error in allowing Malena Legg the sum of \$900 and interest as a lien and charge against the land, to be deducted from the proceeds of the sale, for betterments placed on the land during the existence of the community. The decedent and Malena Legg had by their joint efforts and labors added that sum to the valuation of this property. The appellants were not co-tenants with Malena Legg of the land at the time when these improvements were placed thereon by the community. They had no estate or interest in this property at that time. Their interests as heirs did not attach to the estate of Joseph B. Legg before the time of his death. In equity and fairness to Malena Legg, as the survivor of the community, she should be reimbursed for betterments placed on the land by the

community as against parties who contributed nothing towards improving the same or enhancing the value thereof. In *Furrh v. Winston*, 66 Tex. 525, 1 S. W. 529, the court uses the following language: "It is well settled that the separate estate of one member of the community must reimburse the community for any proper improvements made in good faith upon the separate estate with community funds;" citing *Rice v. Rice*, 21 Tex. 66; *Bond v. Hill*, 37 Tex. 626. See, further, *Clift v. Clift*, 72 Tex. 144, 10 S. W. 338. Applying this rule of law to the facts in the case at bar, Malena Legg, as survivor of the community, is entitled to reimbursement from the separate estate of Joseph B. Legg, decedent, as decided by the trial court.

The judgment of the superior court should be modified as indicated in this opinion, and the case is therefore remanded, with directions to the trial court to enter the proper decree. Neither appellants nor respondents shall recover costs on this appeal.

(43 Or. 595)

**In re SMITH'S WILL.\***

**SMITH et al. v. ARNOLD.**

(Supreme Court of Oregon. Feb. 1, 1904.)

**ADMINISTRATOR—CLAIM OF CREDITOR—RESIDENCE—LIMITATIONS—NONINTERVENTION WILL—LACHES—EVIDENCE—APPEAL.**

1. An administrator has an appealable interest in an order of a county court dismissing his petition for license to sell property of the estate to pay a claim which he has allowed.

2. Evidence held to show that a creditor of an estate was a resident of this state when his claim on a note became due, so that whether his right to recover is barred is determined by the laws of this state, under B. & C. Comp. § 26, providing that, when a cause of action has arisen in another state between nonresidents of this state, it is barred in this state when it is barred in the sister state.

3. On objection by the heirs and devisees of a testator to a petition by the administrator for license to sell real estate to pay the claim of a creditor, they alleging that when the claim became due in 1894 the creditor was a resident of Washington, so that the statute of limitations of that state applies, which was denied, proof that he was a resident of that state in 1891 does not shift the burden of proof to the administrator.

4. Under B. & C. Comp. § 25, providing that on any payment on a contract after due the limitation shall run from such payment, a payment by one joint maker of a note before limitations have run will continue the liability as to all.

5. Under Ballinger's Ann. Codes & St. Wash. § 6196, providing that, after the probate of a nonintervention will and filing of an inventory showing the estate solvent, it may be managed without the intervention of the court, section 6228, providing that if a claim be not presented within one year after the notice to creditors it shall be barred, does not apply to such a will.

6. A delay of nearly 10 years in procuring letters of administration and filing a petition for license to sell real estate to pay a claim against a testator's estate, the ownership or condition of the realty not having changed, and

the time for the running of the statute as to realty not having elapsed, is not such laches as to bar the right to make the sale.

7. Where it is admitted by objections to an administrator's petition for license to sell realty to pay a claim against the testator's estate that the only property of the estate in the state is the realty, the objectors cannot on appeal complain that it was not proven that the personal property had been exhausted.

**Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.**

Objections of Albert U. Smith and another, minors, by G. C. Moser, guardian ad litem, to the sale of realty by F. K. Arnold, administrator of the estate of Charles O. Smith, deceased. From a judgment in favor of the administrator, the objectors appeal. Affirmed.

Charles O. Smith died in Lewis county, Wash., September 15, 1891, leaving a nonintervention will and property situated in that state and Oregon. The will was admitted to probate in Washington November 13, 1891, and W. G. Gaunce and the widow, Annie J. Smith, since married to Davis, were appointed executors. No notice to the creditors was ever published, but, notwithstanding, an order of the court was made in the year 1898 discharging them. On March 15, 1891, Charles O. and Annie J. Smith executed and delivered to George F. Gibson their note for \$2,500 for money loaned, payable three years after date. On March 12, 1896, Mrs. Davis, nee Smith, made a payment of \$456 on the note in the following manner: Gaunce, her coexecutor, being indebted to her in that sum, Gibson agreed with them to take his notes for the amount, and give credit therefor on the Smith note, which was accordingly done. On May 6, 1901, F. K. Arnold, the respondent herein, was appointed by the county court of Multnomah county administrator with will annexed of the estate of Charles O. Smith in Oregon. The claim of Gibson arising upon the note in question was subsequently presented to Arnold as such administrator, and by him allowed, and on July 11th following he petitioned the court for a license to sell the real property situate in such county to pay said claim and the costs and expenses of administration. The petition sets forth the necessary jurisdictional facts showing the presentation and allowance of the claim against the estate, that no personal property has come into the hands of the administrator, and that the only property belonging to the estate in Oregon is the real property, a particular description of which is given. A citation being issued to the heirs and devisees, Albert U. and Ethel Smith, both minors, appeared by their guardian ad litem, G. C. Moser, and answered, denying that the estate was indebted to Gibson, and setting up the statute of limitations of Washington as a bar to the claim. The county court found in favor of the devisees, and from the decree dismissing the petition the administrator alone appealed to the cir-

\*4. See Limitation of Actions, vol. 23, Cent. Dig. § 624.

\*Rehearing denied March 1, 1904.

cuit court. A motion was there interposed to dismiss the appeal, assigning, among other reasons, that the administrator has not an appealable interest in the proceeding. This was denied, and, the circuit court having rendered a decree reversing the county court and allowing the petition granting a license to sell the real property, the devisees have appealed to this court.

G. C. Moser and Miller Murdoch, for appellants. S. B. Huston, for respondent.

WOLVERTON, J. (after stating the facts). The first question presented upon the record is whether the administrator had a right of appeal from the order of the county court denying his petition for a license to sell real property for the payment of the claim in question and the costs and expenses of administration. It is insisted with much force that the administrator was not aggrieved by the order or decree, and therefore had not such an interest in the controversy as would authorize him to prosecute the appeal, and that, if any right of appeal existed, it was in favor of Gibson, the creditor, and not the administrator. We said in the case of *Hume v. Turner*, 42 Or. 202, 208, 70 Pac. 611, 614: "It is a statutory rule that a litigant can only appeal from an order affecting a substantial right (Hill's Ann. Laws Or. 1892, § 535), which accords with the fundamental principle, everywhere recognized, that he has no appeal unless aggrieved by the judgment or decree of the trial court." We consider the rule to be well founded, and fully substantiated by the authorities there cited; so that we have here only to determine whether the administrator had such an interest in the order that some substantial right of his, either in his personal or representative capacity, was impaired thereby. It must be premised that Gibson's claim was duly presented to the administrator, and by him allowed as a just and legal demand against the estate. As there was no personal property out of which to provide for its payment, the law made it his duty to sell the real property. In pursuance of that duty, he petitioned for a license authorizing him to sell. The devisees are contesting his right to such license, alleging as one of the grounds therefor that Gibson's claim is not a valid demand against the estate because the statute of limitations has run against it, which, being the case, it is argued the administrator is without foundation upon which to base his application for the license. It is then urged that this is the only question to be litigated, and, whether it is decided one way or the other, it could not affect the administrator injuriously; therefore that he has no appealable interest. The argument overlooks the basic principle that, the claim having been allowed, it was at least prima facie valid, and thenceforth in all auxiliary proceedings to provide for its payment the administrator represents the

creditor. The law casts upon him the burden of establishing every fact necessary to maintain his application to sell, and if he fails as to one in the court of original jurisdiction it is of no more consequence to limit his right to appeal than if he fails in another. His prima facie case is made, so far as it is necessary that the application be based upon valid claims against the estate, when he has produced the claims duly allowed. If it is attacked in the procedure, and adjudicated to be invalid, it can be no more effective to cut off his authority to proceed further with the matter than if any other controverted fact had been decided against him; as, for instance, the insufficiency of the personal property to pay the demand. The fact in dispute as to the validity of the claim, although jurisdictional, is incidental only to the application for a license to sell, and the interest of the administrator in his representative capacity cannot be precluded by the judgment of the court of original cognizance against him upon that issue. It is said by Mr. Chief Justice Brickell in *Spence, Adm'r, v. Parker et al.*, 57 Ala. 196, 197: "It is the right of the personal representative, essential to his protection, and a duty he owes to creditors, to apply for and obtain an order for the sale of lands for the payment of debts when the necessity exists. The denial of a proper application, supported by proper evidence, is the denial of a clear legal right, as much so as the rendition of judgment of dismissal in a court of law against a plaintiff having a just cause of action, properly presented and proved." For this reason a motion to dismiss an appeal presented by the personal representative was denied. The principle finds further support in *Jamison v. Adler-Goldman Com. Co.*, 59 Ark. 548, 28 S. W. 35; in *re Welch's Estate* (Cal.) 39 Pac. 805; in *The Matter of the Estate of McCune*, 76 Mo. 200. So we conclude that the administrator had an appealable interest in the order denying him license to sell the real property. The order was without question final as to the administrator, as it determined his right to subject the real property to the payment of the demand in question, and precluded him from proceeding further in the premises. It follows that the motion in the circuit court to dismiss the appeal from the county court was properly denied.

We come now to consider whether Gibson's claim was barred by the statute of limitations. This depends primarily upon whether Gibson was a resident of the state of Washington at the time the cause of action accrued upon the note in controversy, namely, March 15, 1894. This question is mainly one of fact, to be determined from the evidence adduced at the trial. By the statute of Washington an action upon a contract of the nature here involved can only be commenced within six years after the cause of action shall have accrued. *Balinger's Ann. Codes & St.* § 4796, and section 4798, subd. 2. Under our statute (B.



& C. Comp. § 26), when a cause of action has arisen in another state between non-residents of this state, and by the laws of that state an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state. This statute has received construction at the hands of this court in the case of *Crawford v. Roberts*, 8 Or. 324, and its meaning is well understood. Did the cause of action accrue between nonresidents of this state? It is admitted that Gibson was residing at Centralia, Wash., at the time the note was executed, and beyond this the evidence consists of the testimony of four witnesses, namely, Mrs. Davis, Gibson, the claimant, and Andrew and George Lewis. The latter two are brothers of Mrs. Davis, and all are cousins of Gibson. Gibson testifies, in effect, that he was residing at Centralia, Wash., at the time he made the loan to the Smiths, but that he came to this state shortly afterward, and has since made his home with Daniel Lewis, his uncle, at Russellville, Multnomah county, the most of the time; was sometimes in Washington and a while in the East; that he was living here during the year after Smith died, September 15, 1891; that after her husband died (a year or more) he stayed a while with Mrs. Davis in Washington, and fixed a fence for her—just long enough to get her yard fixed up; that he was living at her house at the time she was married to Davis, and that from the time Smith died he had been there once in a while; that after the marriage he did not stay long, but came over to Oregon; that he was at his aunt's, Mrs. Isham's, in Washington, off and on, but not very long at a time; that he never made his home there; that he worked for Isham's son through harvest one summer before the elder Isham died. When asked where he made his home in 1891, 1892, and 1893, he could not say, but guessed it was here in 1894 and 1895. Later he was interrogated and answered as follows: "Was it not less than a year ago when Mr. Lewis, the old gentleman who is dead now, made a provision for you, for a home out here at his place? A. He said I could stay at his place—make my home there. Q. You have been making your home there ever since? A. Yes, and before. Q. How long before? A. Most all of the time while I was over here. Q. How many years back of that? A. Ever since I sold my place in Washington I made my home mostly here. Q. You said a little while ago you did not know where you were in 1891. A. I said when I was over here." He further testifies that he voted in Oregon seven or eight years ago; that it was at a state and county election, but did not know what one it was. On redirect he testifies that he sold his land in Washington just a while before he loaned the money; that he had been in Oregon before Smith died; that he went back and sold the place, and loaned

the money to them, and came back over here, and that since that time he never called that his home over there; that he stopped with Mrs. Davis sometimes and Mrs. Isham sometimes. George Lewis testifies that he was living with his father until 1895, since which time he has been living in the same yard; that Gibson began making his home with his father at Russellville before his brother-in-law, Smith, died in 1891, and that he has always made his home there since, except that he was away in Washington from time to time, and in later years has been in Illinois; that the witness was in Washington in the year 1892; that Gibson was there a little while in the summer of that year; that he stayed the rest of the year over there, first at one place and then at another, but did not stay very long at a time; that he stayed around with his aunt and uncle and his brother, visiting from place to place; that he has had his clothes at his father's ever since 1891; that he claims his father's place as his home, and has so claimed it ever since 1891; and that he never spent as much as a year in Washington at any time after coming over here, but that he would stay over there two or three months, sometimes six, and then he would spend the rest of his time here, prior to the time he went to Illinois. Mrs. Davis testifies that in March, 1891, when the note was given, Gibson was living at her place in Centralia, Wash., just like one of her family; that he continued to reside there after that; that he was residing there in 1893 and 1894; that he came to Oregon in about 1896, and subsequently went to Illinois; that he is making his home now at her mother's place at Russellville, in this state; that before the death of her father, which occurred some time during the early summer of 1900, he told her mother to keep him there, to let him make his home there; that in 1890 he was making his home in Washington, and has continued to reside there ever since up until last year. She further testifies that Gibson spent the year after her husband's death at her house, and after he left there he made his home with his aunt on Porter creek, in Chehalis county, Wash. On cross-examination she says that Gibson was at her house in 1891, 1892, 1893, and 1894, and came over here in 1896, and, in rebuttal, that he was there quite a long while, did a good deal of work for her; that she remarried December 14, 1892, and that he was still with her, and remained there a while afterward; and that he went from there and made his home with her aunt, Mrs. Isham, staying there all winter, working for her. Andrew Lewis, who lived about a quarter of a mile from his father's, testifies that he never knew of Gibson making his residence in Oregon during the years 1891, 1892, and 1893, and that it was a surprise to him when asked about the matter; that Gibson never made his home at his father's any more than

going there and staying and working for him and for his brothers around there whenever he could get a job; that he never heard of his making his permanent home there; that he used to stop at his brother's some, and was going back and forth from Oregon to Washington, which he did a dozen times inside of the time; that he was in Russellville, Ore., in 1893; that he went to Washington the latter part of 1893, and came back late in 1894 or early in 1895, stayed around a while, and went back over there in 1896, and late in 1897 he went to Illinois, and stayed there until some time in May or June, 1900, when he came back here. When asked if Gibson had any permanent home in Oregon the early part of 1890 and until 1895, he answered not that he knew of; if he did, he never knew of it; that he was working for his brother in the nursery; did work for witness also; that he worked a few days grafting for witness in 1892 or 1893, and that he was in Washington the latter part of 1893 and 1894, because his aunt's husband died in 1894; that Gibson sold his land in Washington in 1890 or 1891, or somewhere along there; that his home was anywhere he saw fit to stop; that he stopped wherever he took a notion to, and that for the last 10 years he has not made his home at Russellville, but has been back and forth all the time; that he could not say whether it has been more his home than any other place. These witnesses are all more or less indefinite in their testimony with reference to Gibson's place of residence since 1891. It is certain, however, that he was often back and forth between the two states of Oregon and Washington. Mrs. Davis is sure that he made his home in Washington until 1896, at which time she admits that he came to Oregon, and is now making his home here, having been to Illinois in the meanwhile. She says that he made his home with her from the time of the execution of the note until after her marriage with Davis, which was December 14, 1892, when he left there, and made his home at his aunt's in Chehalis county. From this time she is not specific as to his whereabouts and place of residence. She fixes one winter that he stayed at her aunt's, but otherwise she does not presume to state definitely. Gibson, like her, is indefinite, and not altogether consistent. He says, in effect, that he came to make his home here after making the loan, and before the death of Smith, but seems to admit that he was living at Mrs. Smith's when she was married to Davis. He claims, however, that he left there shortly afterward, and came to Oregon, and that he was back again in Washington at his aunt's only, and stayed there during the harvest of one summer; otherwise that he visited with her and Mrs. Davis occasionally, and that he made his home here in Oregon. As to the relative weight of the testimony of these two witnesses, who are the most vitally concerned

in this litigation, there is no appreciable difference, and one will offset the other without giving a preponderance on either side. The testimony of Andrew Lewis is of but little weight. He does not assume to know much about the matter, and what he has to say is of such a confused and uncertain character as to make it very unreliable from which to determine the fact of Gibson's residence since the year 1891. George Lewis' testimony, upon the other hand, is much more exact and determinate, and in reality the most reliable to be found in the case. Living with his father, as he was, until 1895, and afterward in the same yard, he had a perfect opportunity for knowing whether Gibson made his home there or not, and consequently whether he resided within this state. He says distinctly that Gibson began making his home with his father at Russellville before Smith died in 1891, and has since always made his home there, except that he was away in Washington from time to time, and in later years had been in the state of Illinois. It is quite generally concurred in by all the witnesses that Gibson was in Washington in 1892, and was at Mrs. Davis' a while; but he must have left there the latter part of the year or early in 1893, soon after she was married to Davis, and it is certain that he has not made his home with her since. He was at his aunt's, Mrs. Isham's, subsequently, and worked for her son through the harvest of one summer while her husband was living—he having died in 1893 or 1894; but it is not established that he ever made his home there, except temporarily while he was at work. He visited there off and on, but never, so far as the record indicates, to take up his residence there. We conclude, therefore, that he took up his residence here in Oregon at least as soon as the early part of 1893, and has so continued to reside here, with the exception of his absence in Illinois, and resides here now.

It is argued that, as it is admitted on the part of the administrator that Gibson was a resident of Washington in 1891, it must be presumed that he continued to reside there, and that, therefore, the burden of proof that he changed his residence to Oregon was upon the administrator. The question as to the residence of Gibson arises in this way: The devisees assert in their answer that the cause of action arose between nonresidents of the state, and in this, having alleged it, they have the burden of proof. The administrator merely denies the fact, without attempting to set up where the residence of Gibson was at the time the action accrued. He admits, however, that in 1891 Gibson was a resident of the state of Washington. But we do not understand that this admission has the effect to shift the burden of proof to the administrator to show that the cause of action did not arise between nonresidents of the state. The question is whether, upon all the testimony

produced, taking into consideration the presumption that a residence once established will continue until otherwise shown, the devisees have made the better case. When it was admitted that Gibson's residence was in Washington in 1891, the admission made for the devisees a prima facie case, and, while it then devolved upon the administrator to overcome this, yet in the end they must show the better case as between them and the administrator upon the question of the cause of action having arisen between nonresidents of this state. *Chaperson v. Portland Electric Co.*, 41 Or. 39, 47, 67 Pac. 928. While the presumption alluded to must be taken into account in determining Gibson's place of residence when the note fell due and his cause of action accrued in 1894 and since that time, yet we think, upon a careful survey of the whole testimony and the credibility to be accorded the witnesses as we go along, that the presumption has not only been overcome, but that the administrator has made the better case; that is, that the preponderance of the evidence in the record is with him. The cause of action not having arisen between nonresidents of the state, the statute of limitations of the state of Washington was not pleadable as a bar to the note.

In so far as it may relate to the interposition of our own statute of limitations as a bar, an action upon the note was saved by the payment of the \$456 made by Mrs. Davis thereon March 12, 1896. In this state a payment by one joint maker of a promissory note before the statute of limitations has fully run will continue the liability or right of action thereon as to all, its effect being to continue the original promise. *B. & C. Comp. § 25; Partlow v. Singer*, 2 Or. 307; *Sutherland v. Roberts*, 4 Or. 378; *Creighton v. Vincent*, 10 Or. 56; *Dundee Investment Co. v. Horner*, 30 Or. 558, 48 Pac. 175. In this view of the fact or question as to Gibson's residence when the cause of action accrued, and the effect of the payment made by Mrs. Davis, section 4810, *Ballinger's Ann. Codes & St. Wash.*, providing that if any person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced against the representatives after the expiration of that time and within one year after the issuing of letters testamentary or of administration, can serve no purpose, and is without application.

Another defense is interposed, based upon a statute of Washington relating to the time of the presentation of the claim against the estate of a deceased person, which provides that, if a claim is not presented within one year after the first publication of the notice to creditors, it shall be barred. *Ballinger's Ann. Codes & St. § 6228*. But it is not shown that any notice was published requiring the creditors of the estate of Charles O. Smith to present their claims to the executors. If

it had been, however, it could not help the case, as the will was of the kind known in the state of Washington as a "nonintervention will," and, where the estate is settled outside of the probate court, any notice given would not operate to bar a claim not presented within a year. See *Id. § 6196; Moore v. Kirkman*, 19 Wash. 605, 54 Pac. 24.

It is next insisted, although not pleaded as a defense, that Gibson and the administrator have been guilty of such laches in not sooner applying for the appointment of an administrator in Oregon and for license to sell the real property as to preclude them from now insisting upon subjecting such property to the payment of Gibson's demand. It is doubtful if the question is in the case as the record stands, but we will state our views concerning it briefly, without an elaborate discussion of the authorities. It is said by Mr. Moore in his article on *Settlement of Decedents' Estates* (19 Enc. Pl. & Pr. 819, 870) that "the right to sell is lost by delay in procuring letters of administration whenever it would be forfeited by a like delay in making application after letters granted." No hard and fast rule has ever been promulgated, so far as we are aware, defining what lapse of time in such a case will amount to laches, and every case must necessarily be governed by its own particular facts and circumstances. One of two principles is usually applied, namely, where, on account of an unreasonable delay in applying for letters of administration or a license to sell the realty sought to be subjected to a creditor's demand, it is so changed as to ownership or physical conditions as to render it inequitable to the owner to grant the relief; or where, by analogy to the statute of limitations prescribed in the jurisdiction, barring the presentation of the claim or the right to recover the realty, the time having sufficiently run as to bar the relief in that form—the right to the relief by petition for administration and license to sell as here sought will likewise be barred. 19 Enc. Pl. & Pr. 871, 872; *Hatch v. Kelly*, 63 N. H. 29; *Roth v. Holland*, 56 Ark. 633, 20 S. W. 521, 35 Am. St. Rep. 126. Neither of these principles would seem to have application here. As to the former, it does not appear that there has been such a change in the ownership or conditions of the realty concerned as to render its subjection to the payment of the demand in question inequitable in respect to the devisees. As to the latter, no definite time is fixed by our statute for the presentation of claims to an administrator for allowance beyond which the demand will be deemed to be barred, and, in so far as the statute of limitations as it pertains to realty is concerned, it had not yet run when either the application for administration or for license to sell was made, the decedent having died September 15, 1891. So that neither the claimant nor the administrator has been guilty of such laches as will bar the right of the latter to sell the realty.

One other question was submitted, which was whether the administrator had sufficiently shown that the personal property had been exhausted. It is alleged by the administrator that no personal property of any kind has come into his hands, and that the only property belonging to the estate in the state of Oregon is the real property in question. This is admitted by the objections of the devisees to the petition of the administrator, and, having so admitted this necessary jurisdictional fact for a license to sell, they cannot now be heard to say that it is not proven.

The decree of the circuit court will be affirmed, and it is so ordered.

(44 Or. 259)

**FORD v. GILBERT et al.**

(Supreme Court of Oregon. Feb. 1, 1904.)

**ATTORNEYS — EMPLOYMENT BY INSOLVENT DEBTOR—FEES—CLAIM AGAINST FUND IN HANDS OF RECEIVER.**

1. Where an attorney is employed by and represents an insolvent debtor to resist the claim of creditors, he has no lien on the fund in court in the hands of receivers of such insolvent for his compensation, nor is he entitled to be paid therefrom.

2. An insolvent debtor, after the appointment of a receiver of his property, has no authority to subject the fund in the hands of the receiver to any legal liability.

Appeal from Circuit Court, Marion County; R. P. Boise, Judge.

Action by Tillmon Ford, executor of the will of William Cospers, deceased, against A. T. Gilbert and others. From a judgment allowing a claim for attorney's fees, J. N. Brown and another appeal. Affirmed.

John A. Carson, for appellants. W. M. Kaiser, for respondents.

**PER CURIAM.** On April 22, 1901, the defendant Gilbert, who was conducting a general banking business at Salem, in the name of Gilbert Bros., was served with process in a suit brought against him and the plaintiff herein, as executor of the estate of William Cospers, deceased, by a Mrs. Johnson, one of the Cospers heirs, in the United States court, for an accounting and the appointment of a receiver. In her complaint Mrs. Johnson charged, in substance, that for many years prior to Cospers' death Gilbert had been his confidential agent and trustee, and during that time had received about \$350,000, which he had failed to account for; that Ford was the executor of the Cospers estate, but was in fact the attorney and confidential adviser of Gilbert, and had wrongfully and unlawfully conspired and associated with him to defraud the estate, and to that end had failed to file a true inventory thereof, and had refused and neglected to institute proceedings to compel him to account for the money in his hands belonging to Cospers. Owing to the commencement of this suit, Gilbert was compelled to close his bank,

which he did on the 22d, and never thereafter reopened it for business. On the same day or the following morning Gilbert employed the petitioners to appear for and represent him in the suit and any other litigation which might arise out of the closing of the bank. No special agreement was made as to the time of their employment or the amount of their compensation, but at their request Gilbert delivered to them certain notes belonging to the bank amounting to \$884 as collateral security for the payment of their fees and claims against the bank held by clients and others. On April 25th the United States court appointed a temporary receiver of the assets of Gilbert, who immediately took charge thereof, and retained the same until he turned them over to the present receiver, appointed by the state court. Pending the determination of the suit in the United States court the plaintiff, as executor of the Cospers estate, conceiving that it had no jurisdiction in the matter, brought a suit in the state court against Gilbert for an accounting, on substantially the same grounds alleged in the complaint of Mrs. Johnson, and Claud Gatch was appointed receiver therein. The federal court held, on separate demurrers filed by Ford and Gilbert, that it did not have jurisdiction of the subject-matter, dismissed the suit (109 Fed. 501), and directed its receiver to turn all the property in his possession over to Gatch, which was done accordingly. Thereafter some of the creditors of Gilbert instituted proceedings in the federal court to have him adjudged an involuntary bankrupt, and the petitioners were retained and employed by him as his attorneys therein. They were also retained to file an answer for him in the present suit. The cause never came to trial, but so far as the claim of the heirs of the Cospers estate is concerned was settled by stipulation. The petitioners filed a claim in the present suit for \$2,500 as attorneys' fees in the Johnson suit, \$3,000 as attorneys' fees in the bankruptcy proceeding, and \$1,000 as attorneys' fees in the present suit, and asked for an order directing the receiver to pay the same out of the assets in his hands in preference to the general creditors of Gilbert. The court disallowed the claim as a charge upon the assets in the hands of its receiver, but permitted the petitioners to retain and appropriate to their own use the collateral received by them at the time of their retainer by Gilbert.

The services rendered by the petitioners were personal to Gilbert. They did not recover a fund for the common benefit of the creditors, or add to the assets now being administered by the court. The Johnson suit was dismissed for want of jurisdiction, leaving the merits wholly undetermined. The bankruptcy proceeding was merely a contest as to the forum in which the insolvent's estate should be administered, and the present suit, so far as the claim of the Cospers heirs is concerned, was voluntarily discon-

tinued by them. When a fund is brought into court through the service of an attorney, or where his services have added to or preserved or increased the amount being administered, the court of primary jurisdiction may properly allow a reasonable compensation for his services to be paid from the fund; but an attorney, who is employed by and represents an insolvent debtor to resist the claims of creditors, has no lien on the fund in court for his compensation, nor is he entitled to be paid therefrom. *Beach, Receivers, § 764; In re Tallassee Mfg. Co., 64 Ala. 567.* An insolvent debtor, after the appointment of a receiver of his property, has no authority to subject the fund in the hands of the receiver to any legal liability. *Barnes v. Newcomb, 89 N. Y. 109.* The petitioners have a claim against Gilbert for their services as his attorney, but it cannot legally be paid from the assets in the hands of the receiver, and now being administered by the court below.

The judgment is affirmed.

(43 Or. 477)

#### McFARLANE v. McFARLANE.

(Supreme Court of Oregon. Feb. 1, 1904.)

##### COSTS ON APPEAL—FILING STATEMENT.

1. Where costs and disbursements to which a party is entitled can be ascertained when a decree is reversed, a statement thereof, filed after the first day of the term next succeeding the expiration of five days after the reversal, will be stricken from the files; Act Feb. 24, 1903 (*Laws 1903, p. 209*), prohibiting the recovery of costs unless the prevailing party to a decree file a statement thereof not later than the first day of such next term.

Action by Elizabeth McFarlane against A. McFarlane. Decree for plaintiff was reversed (73 Pac. 203), and she now moves to strike from the files a statement of costs. Motion allowed.

W. M. Kaiser and Carey F. Martin, for the motion. P. H. D'Arcy, opposed.

MOORE, C. J. This is a motion to tax costs and disbursements. A supplemental decree herein having been reversed July 27, 1903, the defendant, on December 9th of that year, filed a statement of his costs and disbursements, serving a copy thereof on plaintiff's counsel, who moved to strike it from the files, on the ground that it was not placed thereon within the time prescribed. The clerk having allowed the several items as claimed, plaintiff's counsel contend that an error was thereby committed. The statute prescribing the manner of taxing costs and disbursements was amended by an act approved February 24, 1903, prohibiting the recovery thereof unless the prevailing party to a judgment, decree, or special proceeding, within five days from the rendition thereof, serves on the adverse party entitled to notice an itemized statement of the sums to which he claims to be entitled. Such state-

ment may be filed, however, at any time after the period prescribed, but not later than the first day of the next regular term of the court occurring after the expiration of the first five days, in which case the statement must be served on the adverse party, though he has not appeared. If objections thereto are filed within five days from the expiration of the time allowed to file the cost bill, such statement and objections shall constitute the only pleadings required, and the issue so joined shall be tried as soon as convenient by the court or judge, and from the judgment rendered thereon an appeal may be taken. *Laws 1903, p. 209.* Though this statute was evidently designed to regulate the mode to be pursued in taxing costs and disbursements in the circuit courts, the rule prescribed ought to be adopted as far as applicable in this court. *Rader v. Barr, 37 Or. 453, 61 Pac. 1027, 1127.*

It will be remembered that the cost bill was filed December 9, 1903; but as an excuse for the delay it is maintained by defendant's counsel that a petition for a rehearing was pending until October 5th of that year, and until that was overruled no final decree had been rendered, and for this reason the statement was filed within the time prescribed. In *Hammer v. Downing, 39 Or. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30*, it was held that when an opinion is handed down the judgment affected thereby is to all intents and purposes final, notwithstanding the rules of this court allow the defeated party 20 days in which to file a petition for a rehearing, and the conclusion so reached controls the case at bar.

It is also insisted by defendant's counsel that stipulations had been entered into between the parties hereto which affected the costs in the case of *McFarlane v. Cornelius (Or.) 74 Pac. 468*, and that, objections to a cost bill in that case not having been disposed of until December 7, 1903, it was impossible prior thereto to determine the amount of costs to which their client was entitled, and hence the statement of the items now claimed was filed in proper time. In that case, which was an action arising out of the original decree in this suit, the only controversy involved in the objections to the cost bill related to the expense incurred in printing an abstract and briefs; the stipulations having provided that the outline of the case, and the summary of the law points and argument in support thereof, as printed, might be used in both cases, as far as applicable. The expense of publishing the abstract and brief in the case at bar and the other items included in the statement herein were not necessarily involved in the cost bill in the case of *McFarlane v. Cornelius*, which related to the costs and disbursements to which that plaintiff was entitled, the defendant therein contending that by reason of the stipulations entered into she was entitled to only one-half the sum claimed. In the case at bar the costs and disburse-

ments to which the defendant was entitled could have been ascertained when the supplemental decree was reversed, but no statement thereof having been filed until after the first day of the next succeeding term of court occurring after the expiration of the five days from July 27, 1903, the prohibition contained in the statute compels us to disallow the items now claimed.

The motion to strike the statement from the files is therefore allowed.

(43 Or. 636)

**McCALL et ux. v. MARION COUNTY.**

(Supreme Court of Oregon. Feb. 8, 1904.)

**TAKING PROPERTY FOR COUNTY ROAD—JUDGMENT FOR DAMAGES.**

1. No personal judgment should be entered against a county for the amount of the award on an appeal from an assessment of damages in the matter of the location of a county road; but the judgment should be simply that the amount is a just compensation to be paid for the property sought to be condemned.

On petition for rehearing. Denied.

For former report, see 73 Pac. 1030.

BEAN, J. Question is made as to the form of the judgment which should be entered against a county on an appeal from an assessment of damages in the matter of the location of a county road. Attention is called to some expressions in the opinion, from which it is inferred that the court intended that a judgment in personam should be entered. The taking of private property, without the consent of the owner, for a county road, is by virtue of the power of eminent domain. The proceedings for that purpose are by analogy the same so far as it affects the form of the judgment as an action by any other corporation authorized to exercise the power. Its purpose is simply to ascertain and fix judicially the amount which the county should pay as a just compensation in order for it to be entitled to take the property for a county road, and no personal judgment should be entered against it for the amount of the award. The judgment against the county or other corporation in all condemnation proceedings is simply to adjudicate that the amount found due and assessed is a just compensation to be paid by the corporation for the property sought to be condemned, and should be so entered. *Oregonian R. Co. v. Hill*, 9 Or. 377; *Oregon R. Co. v. Bridwell*, 11 Or. 282, 3 Pac. 634; *Florence, etc., R. Co. v. Lilley*, 3 Kan. App. 588, 43 Pac. 857; *City of Bloomington v. Miller*, 84 Ill. 621.

The petition is denied.

(44 Or. 263)

**KERNS v. LEE.**

(Supreme Court of Oregon. Feb. 1, 1904.)

**TRIAL TO COURT—FINDINGS AND CONCLUSIONS—FAILURE TO RECORD—GROUND FOR REVERSAL.**

1. That the findings of fact and conclusions of law in a trial to the court were not entered

in the record, as required by statute, does not affect any substantial right of the defeated party, and is no ground for reversing the judgment.

Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Action by B. S. Kerns against J. P. Lee. From a judgment for defendant, plaintiff appeals. Affirmed.

W. T. Slater, for appellant. F. R. Mills, for respondent.

BEAN, J. This is an action of ejectment. The complaint is in the usual form. The answer denies the material allegations thereof, and sets up title in fee in the defendant. The reply places in issue the new matter alleged in the answer, and on April 9, 1903, a trial was had before the court without the intervention of a jury, and judgment rendered in favor of the defendant. An appeal was taken by the plaintiff. The judgment roll was lost or misplaced, and, on motion of the appellant, copies of the complaint, answer, and reply were ordered to be filed and used instead of the original pleadings, and certified copies of the substituted pleadings were filed in this court, with the certificate of the clerk of the court below annexed that "no verdict of a jury or any findings were made or filed" in the cause. The defendant's attention being called to the condition of the transcript, he moved the court below, upon affidavits and notice, for an order supplying the lost findings of fact and conclusions of law, averring that such findings were made and filed. Upon the hearing an order was made as prayed for, and copies of the substituted findings and conclusions of law were subsequently sent up by order of this court as part of the record. Thereafter, and before the hearing, the original findings of fact and conclusions of law were found. On motion of the defendant a rule was made on the clerk of the court below to certify up such findings and conclusions as part of the transcript, which was done accordingly. The errors assigned on the appeal are (1) that it does not appear affirmatively that a jury trial was waived; (2) that no findings of fact or conclusions of law were made or filed in the court below; and (3) that the judgment as rendered is not supported by the findings of fact. These assignments of error are based upon the theory that no record of the waiver of a jury trial was made, and that no findings of fact or conclusions of law were made or filed in the court below. Such, no doubt, was the understanding of counsel who took the appeal, who did not appear at the trial, and knew nothing about the matter, except what was shown by the record and the certificate of the clerk. The subsequent discovery of the original record and the certified copy of the findings of fact and conclusions of law, however, discloses that this was a mistake, and that findings of fact and conclusions of law, which counsel frankly admitted at the hearing were sufficient to sus-

tain the judgment, were actually made and filed. The ground of the appeal, therefore, fails, and the judgment must be affirmed.

That the findings of fact and conclusions of law were not entered in the record as required by the statute does not affect any substantial right of the defendant, and is no ground for a reversal of the judgment. The attention of the trial court does not seem to have been called to the omission, and it is yet within its power to direct their entry in the record.

The judgment is affirmed.

(43 Or. 619)

### HALL v. HALL.

(Supreme Court of Oregon. Feb. 1, 1904.)

#### DIVORCE—ADULTERY—EVIDENCE.

1. Evidence that plaintiff on his return to his home early in the morning found his wife in bed with a man who was boarding in their family was sufficient to entitle him to a divorce on the ground of adultery.

Appeal from Circuit Court, Clackamas County; Thomas A. McBride, Judge.

Action by William H. Hall against Laura C. Hall for divorce. From a judgment in favor of defendant, plaintiff appeals. Reversed.

W. M. Gregory, for appellant. Gordon E. Hayes, Geo. C. Brownell, and Howard M. Brownell, for respondent.

MOORE, C. J. This is a suit for a divorce instituted by the husband on the ground of adultery, alleged to have been committed by the defendant with one Silas Hedges. The answer denies this accusation, and by way of cross-bill alleges that plaintiff has been guilty of cruel and inhuman treatment, rendering defendant's life burdensome, by falsely accusing and charging her with the commission of a crime as stated. The averments of new matter in the answer were put in issue by the reply, and, the cause being tried, the suit was dismissed and plaintiff appeals. The testimony shows that the parties were married January 21, 1893, and soon thereafter moved to a homestead in Clackamas county on which the defendant lived, the plaintiff working in Portland and sending his wages to her. Silas Hedges owned land near theirs, and, having no wife, he made his home at the plaintiff's for several years, Mrs. Hall doing his washing and mending, for which service he paid her. The plaintiff, becoming suspicious, left Portland, arriving at his homestead about 1 o'clock at night, and, sleeping in an out-building until 7 o'clock the next morning, he went to the house, and found Hedges, as he testifies, lying in bed with his wife. He thereupon accused her of committing adultery with Hedges, who immediately left the premises. The defendant, as a witness, denies that she was guilty of any improper relations with Hedges, and he, as her witness,

corroborates such statement. If the plaintiff's testimony is to be believed, an error was committed in refusing to grant the relief which he demands.

It appears from the transcript that he consulted a "medium" in Portland, in whose counsel he placed great reliance, and became very angry when told that such communications were untrustworthy. In June, 1902, his wife wrote him that one of their cows had died, and, concluding from the medium's suggestion that Hedges had killed her, he secured a pistol, and started for his homestead, threatening to shoot him, but returned without executing his purpose. In a letter written to his wife, and offered in evidence, he states that on September 8, 1902, at Portland, more than 40 miles from his homestead, he could hear her and Hedges talking from 9 o'clock at night until 5 the next morning, their voices sounding as if transmitted by telephone. That the plaintiff's mind was feeble must be admitted, and it may be that his distorted reason accounts for the statement that he found Hedges and his wife occupying the same bed. There are many circumstances, however, relating to the conduct of Hedges and Mrs. Hall, which, without detailing them, lead us to believe plaintiff told the truth, and that he is entitled to a legal separation from her.

The decree of the lower court will therefore be reversed, and one entered here dissolving the bonds of matrimony heretofore existing between the parties.

(44 Or. 224)

### LADD v. MILLS.

(Supreme Court of Oregon. Feb. 1, 1904.)

#### ADVERSE CLAIM TO REAL ESTATE—SUIT TO DETERMINE—RIGHT OF ACTION BY ADMINISTRATOR—EVIDENCE OF TITLE.

1. In a suit by an administrator to determine an adverse claim to real estate in his possession as a part of his intestate's estate, a deed, regular in form, from the administrator of an intestate, whom the answer alleged was the original owner of the property, made to plaintiff as administrator, and purporting to be in lieu of a deed formerly executed and delivered to the testator in his lifetime, but lost before being recorded, was sufficient evidence of title as against defendant, who did not contend that the title held by him was valid.

2. B. & C. Comp. § 516, provides that "any person claiming an interest or estate in real estate not in the actual possession of another may maintain a suit in equity against another who claims an interest or estate therein adverse to him," to determine such claim. Held, that an administrator entitled, by section 1147, to possession and control of real estate, and to receive the rents and profits thereof until his administration was completed and the same was surrendered to the heirs by judicial order, had such an interest as entitled him to sue thereunder, especially where the estate is insolvent, and it is necessary to sell or dispose of the land to satisfy claims.

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

¶ 2. See Quietting Title, vol. 41, Cent. Dig. § 54.

Suit by William M. Ladd, administrator of A. H. Johnson, deceased, against W. L. B. Mills. From a decree in favor of plaintiff, defendant appeals. Affirmed.

This suit was brought by the administrator of the estate of A. H. Johnson, deceased, to determine an adverse claim to real estate. The complaint alleges that Johnson became the owner of the property on November 3, 1890, and, while the owner, died intestate; that the plaintiff was duly appointed his administrator, and ever since his appointment has been in the exclusive possession of the property; that Johnson's estate is insolvent, and that it will be necessary to sell the property to satisfy the claims against it; that on April 16, 1896, a pretended sale of the property was made for delinquent taxes assessed against the Bonanza Quicksilver Mining Company, which was not, and never had been, the owner, and the defendant became the purchaser at such sale, and afterward received a tax deed; that the assessment and sale were void for divers reasons set out in the complaint. The answer denies, on information and belief, the material allegations of the complaint, and sets up some affirmative matters not necessary to a decision of this case. The decree of the court below was in favor of the plaintiff, and defendant appeals.

Dexter Rice, for appellant. O. P. Coshow, for respondent.

BEAN, J. (after stating the facts). Defendant does not contend that the tax title held by him is valid, but his position is (1) that there is no legal evidence that the plaintiff or Johnson's estate is the owner of the property in controversy; and (2) that the plaintiff has no capacity to maintain this suit.

The answer alleges that one James Chenoweth was the original owner of the property. At the trial there was offered and admitted in evidence a deed, regular in form, from the administrator of Chenoweth's estate to the plaintiff as administrator of the Johnson estate, purporting to have been made in lieu of a deed formerly executed and delivered by the former to Johnson in his lifetime, but lost before being recorded. This was sufficient evidence of title as against the defendant.

The statute provides: "Any person claiming an interest or estate in real estate not in the actual possession of another may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests, or estates." B. & C. Comp. § 516. Under this provision, it is not necessary that the plaintiff have the legal title before he can maintain a suit to determine an adverse claim to real estate. If he has any substantial interest in or claim to the property, and an-

other asserts an estate or interest therein adverse to him, he is entitled to proceed under the statute. An administrator, in this state, has no legal title to the real property of his decedent; but he is entitled to its possession and control and to receive the rents and profits thereof until his administration is completed, or the same is surrendered to the heirs by order of the court or judge thereof. B. & C. Comp. § 1147. He therefore has such an interest as permits him to maintain a suit under the statute, especially where the estate is insolvent, and it is necessary to sell or dispose of the real property for the purpose of satisfying claims. This is the interpretation given to a similar statute by the Supreme Court of California in *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398, and is in harmony with its letter and spirit. See, also, *Lavery v. Sexton & Son*, 41 Iowa, 435. The statute has been amended since the decrees in *King v. Boyd*, 4 Or. 326, and *Stark v. Starr*, 6 Wall. 402, 18 L. Ed. 925, although there is nothing in either of them necessarily contrary to the doctrine above announced. The former was a suit by an administrator, brought without leave of the court, to set aside an alleged fraudulent conveyance made by his intestate during his lifetime. What is said in the opinion about the right of an administrator to bring suit to remove a cloud from title was by way of argument, and would seem to recognize his right to do so under the statute as it then stood, if the estate was insolvent. In *Stark v. Starr*, supra, the holding was simply that a mere naked possession, without more, was not enough.

The decree of the court below is affirmed.

(44 Or. 304)

#### BOLTER v. GARRETT.

(Supreme Court of Oregon. Feb. 1, 1904.)

WATERS AND WATER COURSES—IRRIGATION—PRIOR APPROPRIATOR—EXTENT OF RIGHTS—ALTERATION—INJURY TO SUBSEQUENT APPROPRIATOR—ABANDONMENT.

1. One entitled to the use of water cannot be deprived thereof on the principle of estoppel by merely seeing another constructing a ditch and making no objection thereto until the diversion is completed.

2. While a ditch originally dug by plaintiff prior to an appropriation by defendant could not be changed subsequent thereto to defendant's prejudice, an alteration in plaintiff's ditch made by tapping the creek below defendant's ditch, instead of above, as it was originally, did not deprive defendant of his rights, where defendant's ditch was constructed above plaintiff's diversion on the other side of the creek, which had never been changed, and by which the entire flow of the stream could be secured in dry weather.

3. An alteration by plaintiff in moving his ditch from above to below the point of defendant's diversion, made necessary by changes in the bed of the stream, did not manifest an intention by plaintiff to abandon the use of the water on that side of the stream.

4. The prior appropriator of water is entitled to the use of all of it if necessary to irrigate his land under cultivation, and the surplus,



after a reasonable use by him, should be distributed to subsequent claimants in the order of their respective appropriations.

Appeal from Circuit Court, Crook County; W. L. Bradshaw, Judge.

Action by E. G. Bolter against J. H. Garrett. From the decree rendered, plaintiff appeals. Reversed.

This is a suit to enjoin interference with the flow of water in Trout creek, a nonnavigable stream that rises in the eastern part of Crook county, flows westward, and empties into Des Chutes river. The complaint states that plaintiff made a prior appropriation of all the water of that stream, and that thereafter the defendant wrongfully diverted a part, and threatens to use the whole thereof, to plaintiff's irreparable injury. The answer denies the material allegations of the complaint, and for a separate defense avers that after such appropriation was made water rose in the creek below plaintiff's dam, which the defendant diverted, and applied to a beneficial use. The reply having put in issue the allegations of new matter in the answer, the cause was referred, and from the testimony taken the court found that plaintiff was the prior appropriator of the water of Trout creek, and entitled to its use, except that the defendant at all times should have sufficient thereof for his orchard and garden; but if the supply was inadequate to irrigate the orchards of both parties the water should be so divided that each might have the use thereof for that purpose, and that during the early irrigating season the defendant was entitled to the surplus after plaintiff had secured sufficient to irrigate his crops, orchard, and garden, without specifying in any manner what quantity either party was entitled to, and, a decree having been entered in accordance therewith, the plaintiff appeals.

M. R. Elliott, for appellant. Geo. W. Barnes, for respondent

MOORE, C. J. (after stating the facts). The testimony shows that in the winter and early spring the banks of Trout creek are well filled, but about June 1st the water begins to recede, and in four weeks thereafter usually becomes so low that it is insufficient to irrigate crops that might be grown on land to which the water has been appropriated. In 1879 the plaintiff settled on 160 acres of arid public land through which this stream flows in a southwesterly direction, and in 1880 and the year following he constructed ditches on the east and west sides of the creek, respectively, and diverted water therefrom which he has used in irrigating a garden, an orchard, and crops of alfalfa, grown on his cultivated land consisting of about 55 acres, which is about equally divided by the creek. The defendant settled on 160 acres of similar land adjoining plaintiff's on the south, as appears by the map

offered in evidence, and in 1896 dug a ditch from a point on the east side of the creek above plaintiff's lower dam, and diverted water which he has since used in irrigating crops, vegetables, and fruit and ornamental trees growing on his premises. In April and May Trout creek affords sufficient water by the use of which plaintiff and defendant can, without injury to each other, grow a profitable crop of alfalfa, and in the absence of further irrigation the moisture thus artificially communicated to the land enables them to grow another crop, but with the abundant use of water three harvests of this kind of hay may be secured in one season. Without irrigation the defendant's orchard must inevitably suffer, and realizing this fact the court awarded him the use of water in the dry season to keep his trees alive. The defendant's counsel seeks to justify this part of the decree by contending that the parties orally agreed upon a division of the water, thereby creating a parol license which cannot be revoked by plaintiff after defendant, relying upon the faith of the contract, has expended money in making permanent and valuable improvements to his premises. The defendant, as a witness in his own behalf, testified that when he was seeking public land to file thereon the plaintiff gave him a map of the township in which he selected a tract, telling him that the premises so chosen would make a good home, and assuring him that a neighbor would permit the construction of a ditch through his field, so that water might be diverted; that he thought plaintiff, knew he entered into an agreement with this neighbor, whereby he secured a right to conduct water to his premises; and that the plaintiff, without making any objections thereto, saw the witness expending money and labor in constructing his ditch and in improving his property, which if deprived of the use of water would be rendered almost valueless. The testimony relied upon to create an estoppel is not, in our opinion, sufficient for that purpose; the rule being settled in this state that a person entitled to the use of water cannot be deprived thereof by merely seeing another constructing a ditch and making no objection thereto until the diversion is completed. In *Lavery v. Arnold*, 36 Or. 84, 57 Pac. 906, 58 Pac. 524, in speaking of a tacit permission sought to be implied in a case of this kind, it is said: "But such license must result from some consideration paid by the licensee or some benefit accrue to the licensor; otherwise the person entitled to the use of the water might be deprived thereof by seeing a neighbor constructing a ditch, making no objection thereto until the water was diverted, under an honest belief that he intended to use only the surplus." To the same effect, see *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10; *Hallock v. Suito*, 37 Or. 9, 60 Pac. 384; *Ewing v. Rhea*, 37 Or. 583, 62 Pac. 790, 52 L. R. A. 140, 82 Am. St. Rep. 783.

The west side ditch originally tapped the creek above the defendant's dam, but owing to changes in the bed of the stream, caused by freshets, it has been moved below his point of diversion. This ditch, having been originally dug prior to the inception of defendant's appropriation, could not thereafter be changed to his prejudice. *Cole v. Logan*, 24 Or. 304, 33 Pac. 568. The alteration, however, does not manifest an intention to abandon the use of the water on the west side of the creek, nor does it deprive the defendant of any of his rights, for he constructed his ditch above plaintiff's east side diversion, which has never been changed, and by the latter means the entire flow of the stream that passed the upper dam in the dry season could have been secured. There was therefore no water rising in the creek below plaintiff's dam, as alleged in the answer, that was subject to appropriation, except the surplus after his necessary demands had been supplied, and, if it required the full flow of the stream for that purpose in the dry season, the defendant's crops, vegetables, and fruit and ornamental trees must necessarily suffer in consequence thereof. The plaintiff, being the prior appropriator, is entitled to the use of all the water in Trout creek if necessary to irrigate his crops, orchard, and garden, but what quantity may be required for that purpose it is difficult to determine from the transcript. It will be remembered that he has in cultivation about 55 acres, and in the opinion of two witnesses it requires from 8 to 12 inches of water, surface measurement, properly to irrigate an acre. The testimony does not show that these witnesses ever had any experience in irrigating crops or knew how to measure water, or what quantity was required for the purpose stated, and, although no objection was made on that account, we cannot yield our consent to the estimate given.

The time has arrived when greater care must be exercised in using water, in order that it may subserve the needs of as many people as possible, and contribute to the cultivation of crops on a greater area of land. The right of the prior appropriator must be protected, but only to the extent of his reasonable use, after supplying which the surplus should be distributed to subsequent claimants in the order of their respective appropriations.

The decree is therefore reversed, and, as it is impossible to adjudicate the rights of the parties from an inspection of the record before us, the cause will be remanded to take further testimony in relation to the quantity of water, by miner's measurement, necessary properly to irrigate plaintiff's crops, shrubbery, and fruit and ornamental trees, and after taking such testimony a decree will be entered in the lower court, awarding to him the prior right to the use of the quantity of water so to be ascertained, and giving to the defendant the surplus.

(44 Or. 280)

## TURNERY v. SOUTHERN PAC. CO.

(Supreme Court of Oregon. Feb. 1, 1904.)

RAILROADS—OCCUPANCY OF HIGHWAYS—EXCLUSIVENESS—ABANDONMENT BY PUBLIC—ADVERSE POSSESSION BY RAILROAD—INJURIES TO PEDESTRIAN—ACTIONS—PLEADING—DEFINITENESS—SPECIAL DAMAGES.

1. An order of the county court granting a railroad permission to use any part of the county road between designated points for its track, imposing on it the duty of repairing any damage caused by the construction of its road, requiring it to leave the highway in as good condition as before it began work, to construct and grade a 12-foot roadway whenever it should occupy the then traveled road, and forbidding it to obstruct the road in any manner, did not give the railroad a right to the exclusive use of such road, or deprive the public of the right to use any part thereof, subject to the paramount right of the railroad to use its track for the operation of its road.

2. A subsequent order, reciting the particulars in which the railroad had failed to comply with the first, adopting the first as the basis of the additional order, then proceeding to define more specifically the railroad's duties in the construction of the road, and the condition in which it should keep the traveled way during the progress or suspension of the work, did not enlarge the rights of the railroad, but imposed on it further restrictions and conditions in the use of the road.

3. A third order granting the railroad leave and authority to relocate its road so that it would be 14 feet nearer the river than it then was, and imposing on it the duty of constructing a fence between the traveled roadway and the track, placing a cattle guard at each end of the fence, and relieving it from building any barriers and stone walls, except for its own protection, and further expressly stating that the contract evidenced by the first order, except as modified, should remain in full force and effect, did not operate to surrender the right to the exclusive use of any part of the highway to the railroad, especially when considered in the light of the subsequent conduct of the public, acquiesced in by the railroad, in using the portion of the highway between the railroad and the river as a foot and bicycle path.

4. Orders of the county court granting a railroad the right to use a highway for its tracks, but not granting an exclusive right, and the occupancy of the highway by the railroad, did not constitute an abandonment by the public of any portion of the road, in the absence of any evidence of an intent on the part of the county court or the public to abandon the use of such part.

5. When a railroad entered upon and occupied a highway by permission of, and under contract with, the county court, its possession was not adverse to the public.

6. In an action by a pedestrian against a railroad occupying a public highway for personal injuries, an allegation that defendant negligently permitted a stick "to fall or be thrown" from the train on or against her was not subject to a motion to make more definite by stating whether the stick fell or was thrown; the facts being peculiarly within defendant's knowledge, and it being liable in either event.

7. In an action for injuries, while damages for medical care, nursing, attendance, and medicine must be specially alleged, they need not be itemized, and the amount of each separately stated.

Appeal from Circuit Court, Clackamas County; Thomas A. McBride, Judge.

Action by Rebecca Turnery against the

¶ 7. See *Damages*, vol. 15, Cent. Dig. § 410.

Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for an injury suffered by the plaintiff through the alleged negligence of the defendant. In 1863 a public road or highway, about 60 feet wide, from Canemah, in Clackamas county, south to Parrott's Farm, was inclosed by fences of abutting property owners on one side, and the Willamette river on the other. In November, 1868, the county court, upon the application of defendant's predecessor in interest for permission to occupy the road with its railway track, made the following order:

"In the Matter of the Occupation of the County Road by O. C. R. R. Co. of Salem, Leading from Canemah to Parrott's Farm, in Clackamas County. On this day came said company, by Geo. E. Cole, and the county by Johnson & McCower, and, after hearing the argument of counsel, it was ordered by the court that the Oregon Central Railroad Company of Salem be allowed to use and occupy any part of the road leading from Canemah to Parrott's Farm, in Clackamas county, for a railroad track or bed; said company repairing all damages wherever it occurs in constructing said railroad, and in no manner whatever obstructing said road; that the road shall be in all respects left in as good a condition as before said company began work. Said company also to make, construct, and grade (wherever the said company occupy the tract now traveled as a county road) a good and passable track or roadway at least twelve feet wide, on a grade to be designated by the court, upon a notice having first been given by said company to this court at a regular term thereof. Said company shall also construct barriers or guards at and in all places that may hereafter be designated by this court, and if the county road shall at any time be injured or damaged by reason of the proximity of the railroad track, or by any act of said company, then said company shall be compelled to repair the same, without delay, upon notice being given by the road supervisor of the district in which said road may be located."

When it came to the actual construction of the railway along the county road, the company wished to have the grade of the road established, and upon its application another order in reference thereto was made and entered by the county court as follows:

"In the Matter of the Application of the Oregon Central Railroad Company of Salem for the Use of the County Road from Canemah to Parrott's Farm. This matter came before the court upon the representation of Hon. Geo. E. Cole, agent of said company, that it was desirable to have an order of this court fixing the grade of such public road at points where the present traveled track is taken for the track or roadway of said company. Whereupon the court, by the favor of said company's agent, proceeded to make a personal inspection of said road and the work

which had been done. And by such examination it was found that neither the spirit nor letter of the order heretofore made by this court in granting the right of way to said company is being complied with, but that, on the contrary, said company, in constructing said roadway or bed, are confining the travel on the county road at places between Canemah and Parrott's Farm to the river bank, and in some instances to the water's edge, by building perpendicular embankments of stone, and leaving said embankments and the county road between them and the river without any protection against high water, or, if any protection is attempted, it is entirely inadequate for the purpose, and does not make the road as secure or convenient as before the company commenced work. Said company is therefore referred to the order heretofore made by this court, as above mentioned, as a basis or guide in controlling their doings in reference to said road, and the condition in which said county road must be left after being by them in any manner interfered with in constructing said railroad. This court readopts the same order as the basis of its action in making the following additional order, to wit: That said company, in confining the travel on said county road to the bank of the river in narrower limits than the sixty feet allowed by law to public roads, creates a necessity for a rock-wall protection, and that, when they desire to put in such walls at a greater angle than 45 degrees, they must build such stone walls of very large or heavy material, and, when the angle is 45 degrees or less, the stone must be at least one foot in diameter, and in all cases the openings or interstices in such walls must be well filled with spalls or stone chips, as in ordinary stone wall made in constructing their roadbed. It is further ordered that in any case where said company changed the travelway of the county road, or remove or change any bridge or filling on said county road, said new roadway, bridge, or filling shall be graded as high, and made as good, convenient, and secure in all respects, as the traveled way before said road was interfered with. And it is ordered that during the progress of said work said company must keep the travelway on said road open, safe, and convenient for the use of the public, and when work is suspended for winter said road must be left in good condition, and not unsafe or mirey, as in many places during the winter just passed."

In pursuance of these orders the track of the railway company was laid along the county road on the east side near the fences of the abutting property owners, and, as a consequence, the travel was confined to the space between the track and the river, thereby endangering the safety of teams and stock passing along the highway. In 1877 the railroad petitioned the county court for permission to change the location of its road, and after due consideration the following or-

der in reference thereto was made and entered:

"It is further considered, ordered, and adjudged that the said Oregon & California Railroad Company have leave to, and it is hereby authorized to, change the location of its railroad track, and the right of way now in use over the county road between Canemah and Parrott creek, as at present located, from a point near the county road crossing at F. Paquet's property, south of Canemah, for the distance of (5,100) five thousand one hundred feet in a southerly direction, as follows: That is to say, said Oregon & California Railroad Company have leave to, and is hereby authorized to, relocate its said road a distance of fourteen (14) feet nearer the river from railroad crossing at Paquet's property, and running from said point fourteen feet northwesterly from said crossing in a southerly direction, and parallel with the line of the railroad as at present located a distance of five thousand one hundred feet, so that the road, when relocated, shall be, except where it deflects to a connection with the road as now constructed, fourteen (14) feet nearer the river than the present location. Said company, however, shall fill up so much of the holes between said track and the fences as will fall within a twelve-foot roadway, and cause the same to be made level, and also construct a fence or barrier between the traveled roadway and the railroad track for said distance of five thousand one hundred feet, and place the cattle guard upon its road at each end of said fence, provided, if at any time said railroad company is prevented by legal proceedings by property owners adjacent thereto, or otherwise, from building or maintaining said fence, said company shall thenceforward be absolved from the obligations to construct or maintain the same, as the case may be, so far as thus prevented, all at its own expense.

"It is further considered and adjudged that said Oregon & California Railroad Company be, and it is hereby, relieved and exonerated from making any repair, building any barriers, stone walls, or otherwise, along said road, except so far as said company may deem necessary for its own protection.

"It is further ordered that the contract entered into between this county and said Oregon California Railroad Company, of date August 3d, 1869, entered of record on page 344 of Book No. 2 [3] of the records of this court, be modified to the extent and in the manner herein specified, and that, except as hereby changed and modified, said contract be and remain in full force and effect, and when said changes are made the same be examined and approved by the county court."

In accordance with this order the railway company moved its track, constructed a fence between the same and the traveled way east thereof, making a lane or road about 25 feet wide, and put in the cattle

guards as required, ever since which time all the travel on the highway, except foot passengers and bicyclists, has been confined to the part of the road east of the fence built by the railway company, and between it and the fences of the abutting property owners. Pedestrians and bicyclists, however, have continued to use the portion of the highway inclosed by the railway company without objection or protest from it; and at the time of the injury to the plaintiff there was a well-beaten and plainly marked footpath a short distance west of the railroad track, and between it and the river. On September 13, 1900, the plaintiff, who lives on the county road, about a mile south of Canemah, while going from her home to Canemah along the footpath, saw a freight train of the defendant company approaching, and stepped off the path toward the river; and, while the train was passing her, a stick of wood was projected from the engine or tender, striking and severely injuring her. In her complaint she alleges that the employees of the defendant negligently and carelessly caused and permitted the stick or piece of wood "to fall or be thrown" from the train upon and against her, and that by reason of the injury she has been compelled to pay out and has incurred "large sums for medical care and skill, nursing and attendance, and for medicine, and has been incapacitated for carrying on her usual avocation [as housewife], and whereby she has been permanently injured, incapacitated, and disfigured, and her health impaired, and will never be able to carry on her usual avocation, and has been and will be rendered an invalid, and has been and will suffer great inconvenience and discomfort, all to her damage in the full sum of fifteen thousand dollars." The defendant moved for an order requiring the plaintiff to make her complaint more definite and certain, in this: (1) To state whether or not she claimed that the stick of wood fell or was thrown from the train upon and against her; and (2) to state what sums, if any, she has been compelled to pay out and incur for medical care and skill, nursing, attendance, and medicine. This motion was overruled, and the defendant answered, denying the negligence as alleged, setting up an exclusive right to the use of that part of the highway between its fence and the river, and averring that plaintiff was a trespasser thereon at the time of the injury. A reply was filed, putting in issue the new matter set up in the answer, and upon the trial the plaintiff had a verdict and judgment, from which the defendant appeals.

Wm. D. Fenton, for appellant. A. S. Bennett and Gilbert L. Hedges, for respondent.

BEAN, J. (after stating the facts). With the exception of some questions of practice hereafter referred to, the controlling question is whether the agreement between the

county and the predecessor of the defendant gave the railway company an exclusive right to the use of that part of the county road between its fence and the river. The trial court proceeded on the theory, as we understand it, that the county court had authority to grant such a right, and that if it did so the plaintiff was a trespasser or mere licensee, to whom the defendant owed no duty except that of not willfully or intentionally injuring her. It ruled, however, that the county court did not grant the railway company an exclusive right of way, but one to be exercised in common with pedestrians or travelers on foot; and, as a consequence, the plaintiff was not a trespasser, but had a right to be where she was at the time of the accident, and is entitled to recover from the defendant if she was injured by its negligence. Now, a reference to the terms of the agreement between the county and the railroad company will, we think, give a satisfactory answer to the inquiry. The first order of the county court in relation to the matter granted the company the right "to use and occupy" any part of the county road for a railroad track or bed. It was required to repair any damage to the highway caused by the construction of its road, and, where it occupied the then traveled way, to construct a road at least 12 feet wide on a grade to be designated by the county. It was also required to construct barriers or guards at and in all places thereafter to be determined. This order clearly granted nothing more to the railway company than a mere right to use and occupy the county road, and evidently did not contemplate that its use should in any way be exclusive, or that the general traveling public should be denied a right to use any portion of the highway, subject, of course, to the paramount right of the company to use its track for the passage of trains and the operation of its road. The second order, after reciting the particulars in which the company had failed to comply with the first, readopted the latter as the basis of the action of the court in making an additional order, defining more specifically the duties of the company in the matter of the construction of rock-wall protections, the grading and building of a new road at places where the road was interfered with by its track, and the condition in which it should keep the traveled way during the progress or suspension of the work. This order was not intended to enlarge the rights of the company, but was meant to impose upon it further restrictions and conditions in the use of the county road. There was nothing in it or in the former order to indicate an intention on the part of the county to abandon any part of the road, or to relinquish its control over it. The orders simply conveyed or granted to the railway company the privilege or permission to use and occupy a portion of the road, but there is no intimation that such use shall be exclusive. The

third order was based upon an application of the company for permission to make certain changes "in the location of its railroad over certain county roads," and grants to the company leave and authority to "relocate its said road a distance of fourteen (14) feet nearer the river," so that the road "when relocated shall be, except where it deflects to a connection with the road as now constructed, fourteen (14) feet nearer the river than the present location." The company is required to fill as many of the holes between the track and the property owners' fences as will fall within a 12-foot roadway, and also "construct a fence or barrier between the traveled roadway and the railroad track for said distance of five thousand one hundred feet, and place the cattle guard upon its road at each end of said fence," and was relieved from building any barriers or stone walls along the road, except so far as it might deem necessary for its own protection. It was expressly stated that the contract entered into between the county and the company, as evidenced by the order of the county court made in 1869, should "be and remain in full force and effect," except as thereby changed and modified. By this order the railway company was given permission to move its track 14 feet nearer the river than it was then located, and the additional duty was imposed upon it of repairing and improving the road between the track and the property owners' fences so as to make a 12-foot roadway, and to construct a fence between such roadway and its track, with suitable cattle guards at either end. Prior to the making of this order the travel on the highway had been confined to that part thereof between the railway track and the river, and the evident purpose of the contemplated relocation was to change the traveled way from the west to the east side of the track, and to confine the general travel to the space between the railway fence and the fences of the abutting property owners, but there is no evidence in the order of an intention on the part of the county court to relinquish or surrender to the railway company the exclusive right to use any part of the highway. The fence between the traveled way and the track was to be built by the company as a condition to its right to use the highway, and not because that portion of the way inclosed by it was to be the exclusive property of the company. The fence was evidently intended for the protection of travelers with teams liable to be frightened by passing trains, and stock, which otherwise might get on the track and be killed. There is no provision that the railroad company should have the right to use all that part of the road except the space east of its fence. It was only permitted to relocate its track 14 feet nearer the river, and, if it had been the intention of the county court to grant it the exclusive control over all that part of the highway between its fence and

the river—being more than one-half thereof—it would, we think, have been plainly so stated in the order. This construction is borne out by the subsequent conduct of the travelling public and the company. The evidence shows that from the time of the location of the railroad up to the time of the trial the portion of the highway between the railroad track and the river had been constantly and uninterruptedly used by pedestrians and bicyclists as a highway, without objection or protest from the railway company; thus indicating that it was the general understanding of the company and the public that the exclusive right was not granted to the company, but that it exercised such right in common with the general public.

The mere grant by the public authorities of permission to a railway company to use and occupy a portion of a public street or highway does not give it an exclusive right, or deprive the public of the right to use the same in any way not inconsistent with its use by the railway company. Mr. Elliott says: "As a general rule, a railroad company has the exclusive right to use its own track, and one who goes upon it without an invitation or license from the company is a trespasser. But this rule does not apply at highway crossings, nor, under ordinary circumstances, where the track is laid longitudinally upon the surface of a street, whether it be that of a commercial or a street railroad company. The public, exercising due care, still have a right to use the street. And so the railroad company, likewise exercising due care, has also the right to use that portion of the street upon which its track is laid. Their rights are in most respects mutual, reciprocal, and equal; neither being superior or paramount to the other, except that, as the company cannot so readily stop its trains or cars, and is confined to its track, it has the right of way of passage thereon, and persons who are upon the track must leave it and give way until the train or car has passed. Where the track is laid upon a street, a traveler, although a pedestrian, in the exercise of due care, may cross it at any point, and is not confined to the regular crossings." 1 Elliott, Railroads, § 1093. So, in *Bryson v. Chicago R. Co.* (Iowa) 57 N. W. 430, the plaintiff's intestate was killed by one of the defendant's trains on a public street, and the contention was that he was a trespasser, because the exclusive use of the street at the place where the accident occurred had been granted to the company. It was held, however, that the accident happened on a street which the defendant had the right to occupy and use in common with the public, and the case presented was of an injury to one walking upon the track of a railway company which was laid upon a public street, and, while the decedent was not on the track by the invitation or consent of the company, she had a right to be there, because she was on a public highway. In *Toledo, etc., R. Co. v. Chis-*

*holm*, 83 Fed. 652, 27 C. C. A. 663, a railroad company had been granted the right to lay its track along a public highway or levee of the city of Keokuk, under certain conditions, among which was that it should build a way of certain width and dimensions for public use. The company built a bridge track on an embankment crossing the levee, and the plaintiff's intestate, a coal operator, had gone upon it for the purpose of inspecting some cars on a coal track on a lower level, and while there was struck by a moving train and killed. It was contended by the company that under the ordinances of the city the public was prohibited from going upon or using that part of the levee occupied by its track, and in disposing of this defense the court says: "In support of its contention that the aforesaid ordinance operated to prohibit the public from going upon or using that part of the levee which is now occupied by the bridge track, much stress is laid by the defendant company on that provision of the ordinance which directs that the bridge track shall be located at least 66 feet from the front of the lots lying on Water street, and that Water street shall be of a uniform width of 66 feet; also on that provision which requires a passageway for teams and vehicles to be maintained underneath the embankment at the west end of the bridge. We think, however, that these provisions of the ordinance do not indicate an intention on the part of those who framed it to devote any part of the levee to the sole use of the bridge companies, and to exclude the public therefrom. It is doubtful, to say the least, whether the municipality had the power to vacate a part of the levee, and devote it to the exclusive use of the bridge companies. But waiving the question, we do not find in the ordinance any evidence of such a purpose. The provisions of the ordinance last referred to were evidently inserted to prevent travel on the street or levee from being unduly obstructed by a location of the railroad track thereon, and by the building of an approach to the bridge; but they fall far short of declaring that the bridge companies should be at liberty to treat the space on which their track was directed to be laid as their private right of way, and that the public should be excluded therefrom. The ordinance seems to have been framed with a careful consideration for the rights of the public, and without any apparent intent to deprive the public of any of its former privileges. When considered as a whole, it shows very clearly, we think, that a joint use of the levee by the public and by the bridge companies for the movement of their trains was intended, and that such regulations were prescribed as would enable the public to use the same with ordinary safety and the least inconvenience. In this connection, it is worthy of notice that the views already expressed relative to the rights of individuals to treat the bridge track as a part of the levee, and to go upon the track for

any lawful purpose, is in full accord with the practice which was pursued in that regard after the bridge was constructed. It was proven on the trial of the case that pedestrians had been in the habit of walking along the bridge track to and from the bridge, precisely as they were accustomed to walk over other railroad tracks which were located on the levee, and that such practice had been pursued for some years before the accident occurred, with the implied consent of the bridge companies, or whoever had control of the bridge track. At all events, it was not shown that the bridge companies or any one else had ever objected to such practice, or denied the right of persons on foot to approach or leave the bridge in that way. We conclude, therefore, that the deceased was entitled to go upon the bridge track for any lawful purpose, provided he exercised due care and circumspection, and that the defense interposed by the defendant company, to the effect that he was a trespasser while he was upon said track, and that it owed him no duty while in that position, was properly overruled." See, also, to the same effect, *St. Louis R. Co. v. Neely*, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616; *Louisville R. Co. v. Phillips*, 112 Ind. 59, 13 N. E. 134, 2 Am. St. Rep. 155.

In all the cases it will be noted that where, as in the case at bar, there were no words in the agreement between the public authorities and the railway company excluding the public from the use of the highway, or granting to the railway company an exclusive use thereof, the courts have held that only a right to occupy and use the highway in common with the public was granted. Applying the doctrine of these cases to the one in hand, the several orders of the county court do not evidence an intention to grant defendant the exclusive right to any part of the highway. The first two simply granted permission to use and occupy the road for a railroad track or bed, and this right does not seem to have been subsequently enlarged. The provision in the third order allowing the company to relocate its track 14 feet nearer the river, and requiring it to construct a fence between the track and the traveled way, was intended as a protection to the traveling public, and not as an exclusive grant to the company. No particular width of the space to be occupied by the railway is specified in the order, as would probably have been the case if an exclusive use had been intended; and it is not reasonable to suppose that the county court meant to give to the railway company, absolutely and without compensation, all the highway except the small space between its fence and the fences of adjoining property owners. At least, it is but fair to assume that, if such had been its intention, it would have been expressed in clear and unmistakable language.

We are of the opinion, therefore, that the trial court did not err in its construction of the contract or agreement between the county court and the railway company. Neither did the orders of the county court and the subsequent occupation of the highway by the company indicate an abandonment by the public of any portion of the road. An abandonment is a question of intent, and there is no evidence of an intention by the county court or the public to abandon the use of the road by pedestrians. Nor can the defendant claim the right by adverse possession. Its entry and occupation of the highway were by permission, and under a contract or agreement with the county court; and, having so entered and occupied, its possession was not adverse.

The only other questions in the case requiring notice are those arising upon an order of the court overruling the motion of the defendant to make the complaint more definite and certain. As a general rule, a pleading is bad where allegations essential and material to a recovery are stated in the alternative. *Ladd & Bush v. Ramsby*, 10 Or. 207. In an action of this kind, however, a general allegation that the act which caused the injury was negligently or carelessly done or omitted is sufficient, without setting out the details of the negligence. *Cederson v. Oregon Navigation Co.*, 38 Or. 343, 62 Pac. 637, 63 Pac. 763; *Watson, Personal Injuries*, § 698. This is particularly so when the manner of the commission of the negligent act is peculiarly within the knowledge of the defendant. In the latter case the plaintiff will not be required to set out the details. *Louisville, etc., R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443. Whether the stick of wood which caused the injury to the plaintiff fell or was thrown from the engine or tender was a matter within the knowledge of the defendant, but beyond the cognizance of the plaintiff, and it was impossible for her to state which was the case. Indeed, after all the testimony on the trial was in, the truth in this regard was not clear. One witness, of apparent good standing and character, testified that he saw the stick of wood thrown from the train; but, on the other hand, the defendant's employes testified positively that such was not the case. The ultimate fact is the striking of the plaintiff by the stick of wood from the defendant's train, and that it occurred through the negligence and carelessness of the defendant's employes. It is immaterial whether it fell or was thrown from the train. In either event, the defendant would be liable, if negligent, and it was only in its evidentiary bearing as affording a stronger inference of negligence in the one case than in the other that the inquiry became important.

It was also sought to require the plaintiff to allege separately the exact amounts of damages on account of medical attend-

ance, care, and nursing, but we do not understand that the law requires such allegations. The damages which the plaintiff suffered on account of the matters referred to were special, and, to enable her to recover therefor, they must be alleged in the complaint; but this rule does not mean that the damages must be itemized, and the amount of each separately stated. Mr. Watson says in his work on Damages and Personal Injuries, § 699: "In an action for personal injuries, the plaintiff is not required to set out the several elements of recovery, and the amount claimed for each. 'When it is said that special damages must be alleged in order to be proved, it is not meant that the sum claimed for the particular injury must be separately stated, but that the injury itself, if it is not such as naturally and necessarily results from the wounds or hurts alleged, must be averred.'" And to the same effect are 5 Ency. Pl. & Pr. 750; 1 Sutherland, Damages, 770; Maybrey v. Road Co., 92 Mo. App. 596, 69 S. W. 394; Gerdes v. Iron & Foundry Co., 124 Mo. 347, 25 S. W. 557.

There are other assignments of error, but they are involved in, and intimately connected with, the questions already considered, and require no further notice.

The judgment is affirmed.

(19 Colo. App. 108)

**TABOR-PIERCE LUMBER CO. et al. v. INTERNATIONAL TRUST CO.**

(Court of Appeals of Colorado. Feb. 8, 1904.)

**MECHANICS' LIENS — MATERIALMEN — CONTRACTS FOR PARTICULAR BUILDING—SUB-CONTRACTORS—STATEMENTS—TIME OF FILING.**

1. Under the Mechanic's Lien Law (Laws 1893, p. 315, c. 117) § 1, giving a lien to materialmen furnishing materials "to be used in the construction," etc., of a building, the materialman must show that when he furnished the material he knew that it was to be used in some particular building, and, failing this, he is not entitled to a lien.

2. A subcontractor who performed labor on a building under a contract entered into prior to July 11, 1899, when the mechanic's lien law of 1899 went into effect, should have proceeded under the law of 1893, in order to have perfected his lien.

3. Under the Mechanic's Lien Law (Laws 1893, p. 315, c. 117) § 3, providing for the filing of subcontractor's lien statements within 30 days "after the completion" of the building, a filing before such completion is premature, and of no effect.

Appeal from District Court, Arapahoe County.

Action by the Tabor-Pierce Lumber Company against Carl F. Kobel and the International Trust Company, executor, substituted for Scott J. Anthony, deceased. From a judgment for defendant trust company, plaintiff and defendant Kobel appeal. Affirmed.

Chas. M. Bice, for appellant the Tabor-Pierce Lumber Company. William Knapp, for appellant Carl F. Kobel. Teller & Dorsey, for appellee.

MAXWELL, J. This was an action to enforce a mechanic's lien. It appears by the pleadings and the evidence that April 26, 1899, the Craft & Gilmore Building Company entered into a contract with Scott J. Anthony to make certain repairs and alterations upon his residence at 1280 Logan avenue, in the city of Denver. The contract price was \$1,850, and the work was to be completed on or before the 1st of July of that year. The plaintiff the Tabor-Pierce Lumber Company furnished materials to the building company to the amount of \$1,313.99, upon which there was paid \$765.03, leaving a balance of \$548.96, for which this suit was brought. Within the time and in the manner limited and provided by the statute relating to mechanics' liens, plaintiff filed its notice of intention to hold and claim a lien, and also served upon Mr. Anthony a notice of its intention to file such lien. Carl F. Kobel was made a party defendant by reason of the fact that he had filed a lien upon the same property for work done by him under a contract with the building company. At the close of the testimony for plaintiff, and also at the close of the testimony adduced in support of the Kobel lien, counsel for defendant Anthony moved the court for judgment in favor of the defendant and against the plaintiff, which motion was granted. A like motion was interposed against the defendant Kobel, and likewise granted. Plaintiff below, the lumber company, and Kobel, prosecute this appeal. We will consider and dispose of the lumber company's claim first, and, inasmuch as the disposition of this matter turns upon testimony introduced at the trial, it will be necessary to set forth so much of the testimony as is pertinent to this discussion.

Mr. Pierce, the secretary, treasurer, and manager of the Tabor-Pierce Lumber Company, the only officer or employé of the Lumber Company introduced as a witness, testified as follows: "Q. Now, as a matter of fact, whenever Craft and Gilmore came there and ordered goods, you sent them, didn't you? A. Yes, sir. Q. And you sent them just to the place where they told you to send them? A. Yes, sir. Q. And you knew nothing about where they were going, or for what they were had, except as they told you, did you? A. That is all. Q. Did you know at that time that they had a contract for a building with Anthony when you first commenced to deliver goods? A. I did not. Q. Did you ever see the record of this contract in the recorder's office? A. No, sir. Q. You simply took their statement that they were going to do some work for Mr. Anthony, and you delivered these goods when they said so? A. I don't know that they told me that they

¶ 3. See Mechanics' Liens, vol. 34, Cent. Dig. § 196.



were going to do work for Mr. Anthony. They ordered lumber, and told me where to deliver it. Q. Then all you know about it is that they ordered the lumber and told you where to deliver it? A. Yes." This witness also testified that at this time his company was selling lumber and building materials to the building company, and delivering the same at other places than the residence of Mr. Anthony, and that they had been selling lumber and building materials to Craft and Gilmore for some seven or eight years preceding this time. Further the witness testified: "Q. So you was delivering lumber to these gentlemen or to this company whenever they told you to deliver it? A. Yes, sir. Q. And you were selling them lumber on credit? A. Some of it. Some they paid cash for on delivery. Q. You was doing both a cash and credit business with them? A. Yes, sir. Q. And what you have stated of your method of selling to them is the method you have been pursuing heretofore with them? A. Yes, sir." The foregoing is all of the testimony in the record relating to the decisive question in this case. The grounds of the motion for judgment do not appear upon the record, but it was stated upon oral argument, and is also stated in the printed briefs, that the point relied upon in support of the motion for judgment in favor of the defendant was that the materials furnished by the lumber company were furnished upon the credit of the building company, and that at the time the materials were furnished it was not known by the lumber company that such materials were to be used in the alteration and repair of this particular building. Appellee relies upon this position here. The act relating to mechanics' liens (Laws 1893, p. 315, c. 117) provides as follows: "Section 1. \* \* \* Material men \* \* \* furnishing materials to be used in the construction, alteration, addition to, or repair \* \* \* of any building \* \* \* shall have a lien upon the property upon which they have \* \* \* furnished materials," etc. It seems to be well settled by the overwhelming weight of authority that a lien cannot be maintained against the owner of a building for materials used in its construction that were furnished the contractor in his own name, when the materialman had no knowledge of any contract relations existing between the contractor and owner, or of the particular building to be constructed, but intended to hold the lien upon whatever building the materials might be used in. The foregoing rule is supported by the following among a large number of other authorities: *Roebing Co. v. Irrigation Co.*, 99 Cal. 488, 34 Pac. 80; *Johnson v. Simmons*, 123 Ala. 564, 26 South. 650; *Chapin v. Paper Works*, 30 Conn. 461, 79 Am. Dec. 263; *Colorado Iron Works v. Riekenberg* (Idaho) 43 Pac. 681; *Wendt v. Martin*, 89 Ill. 139; *Hill v. Sloan*, 59 Ind. 181; *Watrous v. Elmendorf*, 55 How. Prac. 461; *Choteau v. Thompson*, 2 Ohio St.

114; *Odd Fellows' Hall v. Masser*, 24 Pa. 507, 64 Am. Dec. 649; *Whittier v. Puget Sound Co.*, 4 Wash. 666, 30 Pac. 1095, 31 Am. St. Rep. 944; *Wagner v. Darby*, 49 Kan. 343, 30 Pac. 475, 33 Am. St. Rep. 369.

Counsel for appellant have cited a number of cases as being in opposition to the rule above stated. A careful examination of these cases leads to the conclusion that they do not all support the point to which they are cited. *Clark v. Huey*, 12 Ind. App. 224, 40 N. E. 152, is cited by counsel for appellant. This was an action of foreclosure of a mechanic's and materialman's lien. Trial was to the court. A special finding of facts and conclusions of law was made, upon which a decree was rendered for a foreclosure of the lien. At page 232, 12 Ind. App., and page 154, 40 N. E., the court said: "It appears from the special finding that the appellee Huey furnished certain materials which were used in appellant's building, and that said materials were furnished at the request and on the order and credit of said Bartenick, the contractor, for said defendant, to be used in the said dwelling house, and that proper notice of lien was duly filed. It also appears that Bartenick was building other houses, and materials for appellant's house, as well as those for the others, were charged to Bartenick in a general account which appellees had against him. It does not appear, however, that on this general account the materials for appellant's house were or were not indicated, the finding being silent as to this point. Thus it is, as it seems to us, clearly and unequivocally found that the materials were furnished to be used in appellant's house. \* \* \* The other facts and circumstances contained in the finding are not, in our judgment, sufficient to overthrow the plain and distinct finding upon the essential fact that the materials were actually 'furnished,' not purchased, but 'furnished' to be used in appellant's house." *Emery v. Hertig*, 60 Minn. 54, 61 N. W. 830, is an authority in support of appellant's contention, as is also *Sodini v. Winter*, 32 Md. 130. *Wilson v. Howell*, 48 Kan. 150, 29 Pac. 151, also cited by counsel for appellant, upon examination appears to be an authority against the position assumed by counsel for appellant. As the court says: "If the material is sold on the personal credit of the purchaser, and without reference to what use he shall make of the same, no lien will attach; but if there is a mutual understanding between the parties that the material is furnished to be used in the construction of a particular building, and it is furnished and placed in such building, a lien will exist, although the exact description of the land on which the building was placed was not specifically named or accurately known by the vendor." In *Deatherage v. Henderson*, 43 Kan. 685, 23 Pac. 1053, the court say: "The right to the lien must be created at the time or before

the material is furnished. It cannot be created afterward. It is the furnishing of the material under a contract with the intention and understanding that it shall be used in erecting the building that creates the lien." So, also, in *Choteau et al. v. Thompson et al.*, 2 Ohio St. 114, it is said by the court at page 125: "So, if a materialman sell his wares with no understanding, express or implied, as to their application, he can assert no lien upon the building or vessel, in which they may be placed. He trusts to the responsibility of the buyer alone, and takes no security. He sells, not for the special purpose named in the statute of 'constructing, altering, or repairing,' but for any purpose that may seem best to the buyer. But it is only where the materials are furnished for a purpose named in the act that a lien is acquired." A careful reading of *Hunter v. Blanchard*, 18 Ill. 322, fails to disclose, in the opinion of the court, any principle involved in this case. In *Cotes v. Shorey*, 8 Iowa, 416, it is said: "If the lumber was furnished from time to time and charged in account, as a merchant or shopman charges his goods, and there was no contract, agreement, or understanding that it was to be used in the erection or reparation of a building, plaintiffs would not be entitled to a lien. To entitle the party furnishing the materials to a lien, it is not sufficient for him to show that he sold or delivered the defendant lumber company, without proof to establish the further fact that it was upon a contract that it was furnished specially or for the purpose of being used for or about the building." In *Neeley v. Searight*, 113 Ind. 310, 15 N. E. 598, it is said: "The complaint is assailed because it does not show, so the appellant contends, that the materials for the price of which plaintiff below claimed a lien had been furnished by them for the erection of the house mentioned in the complaint. While the averments in that regard are not as direct and specific as they might have been, they are nevertheless sufficient. Relevant to that subject, the averments are to the effect that in the year 1883 the defendant, Mrs. Neeley, employed William D. Gault to erect a dwelling house and other structures for her on her lot, which is particularly described, and that Gault procured from the plaintiffs certain materials to be used in the erection of the dwelling house, and that the materials so procured were thus used. It is averred further that the plaintiffs, at and before they furnished the materials to the contractor, notified the defendant that they were furnishing them. Taking these averments all together, and the inference necessarily arises that the materials were furnished for and used in the erection of the dwelling."

We have thus reviewed all the authorities cited by counsel for appellant to show that many of them are in support of the doctrine contended for by appellee and others

easily distinguishable from the case here, and that only two cases cited by counsel—*Emery v. Hertig* and *Sodini v. Winter*, supra—are opposed to that doctrine, while the overwhelming weight of authority is in support of it. When the language of our statute is taken into consideration, to the effect that the material is "to be used in the construction," etc., "of the building," in connection with the testimony of the witness Pierce, it seems that the conclusion is irresistible that at the time the lumber company furnished the material for the building company the particular building in which the material was to be used was unknown to the lumber company, and the lumber company at that time did not know that the building company intended to do any work for, or had any contract with, Mr. Anthony. In view of the testimony of Mr. Pierce, it cannot possibly be seriously contended that the materials were furnished upon the credit of a building and contract which were unknown to the lumber company. In *Small v. Foley*, 8 Colo. App. 435, 47 Pac. 64, this court said at page 445, 8 Colo. App., and page 68, 47 Pac.: "The statute gives any person who, by contract with the owner, shall furnish any material for the construction of any building, a lien upon the building and the land it occupies. He is not required to see that it actually goes into the building. If by contract he furnished it for the building, whether it is used there or not, he is entitled to a lien. This is what the statute says, and we cannot by construction distort its language to something else."

Applying the above to the facts of this case, it seems to be apparent that under our statute the materialman must, at the time when he furnishes his material, know that the material is to be used in some particular building, and in the absence of proof of this character he has failed to establish his right to maintain a lien. It will not do to say in reply to the above that there might have been officers of the lumber company who knew the necessary facts, or that they did know such facts from the method in which they did their business. If such was the case, it was incumbent upon the lumber company to produce this evidence at the trial. Failing to do so, we are of the opinion that they have failed to bring themselves within the requirements of the law, and that as to this branch of the case the judgment of the court below should be affirmed.

Taking up the Kobel branch of the case, the testimony shows that Kobel was a subcontractor for the galvanized iron and tin work under the original contractor, the building company, and this contract must have been entered into previous to July 11, 1899, the date when the law of 1899 went into effect. To have perfected his lien, he should have proceeded under the law of 1893. *Spangler v. Green*, 21 Colo. 505, 42 Pac.

674, 52 Am. St. Rep. 259; *Small v. Foley*, 8 Colo. App. 438, 47 Pac. 64; *Chicago Lumber Co. v. Dillon*, 13 Colo. App. 196, 56 Pac. 989. By the provisions of the mechanic's lien law of 1893, "every person, save the original contractor, claiming the benefit of this chapter, must within thirty days after the completion of any building," etc., "or after the completion of the alteration, addition to, or repair thereof," file for record with the county clerk and recorder of the county in which the property is situated his statement claiming a lien. Laws 1893, p. 318, c. 117, § 3. The testimony in this case shows that the building was completed September 25 or 26, 1890. Kobel filed his lien statement with the county recorder September 15, 1890. This was fatal to the validity of the lien. When the statute says that the lienor must file his claim "within thirty days after the completion of the building," a lien filed before such completion is premature, and of no effect. *Phillips, Mechanics' Liens*, § 323a; *Roylance v. San Luis Hotel Co.*, 74 Cal. 273, 20 Pac. 573; *Willamette Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 269; *Chicago Lumber Co. v. Tomlinson*, 54 Kan. 770, 39 Pac. 694. The judgment in favor of appellee and against appellant Kobel, for the above reason, must be sustained.

For the reasons above indicated, the judgment of the district court should be affirmed. Affirmed.

(19 Colo. App. 319)

**BOTTOM v. BARTON.**

(Court of Appeals of Colorado. Jan. 11, 1904.)

**BILLS AND NOTES—TRUST RELATIONSHIP—EVIDENCE—SUFFICIENCY—BONA FIDE HOLDERS.**

1. Evidence held sufficient to sustain a finding that plaintiff held a note in trust for another.
2. Evidence held not to show defendant to have been a bona fide holder, for a valuable consideration, of a note not yet due.

Appeal from District Court, Arapahoe County.

Action by Elias R. Barton, trustee for Fanny C. Hough, against John T. Bottom. From a judgment for plaintiff, defendant appeals. Affirmed.

John T. Bottom and S. L. Carpenter, for appellant. Oliver B. Liddell (Thomas Ward, Jr., of counsel), for appellee.

MAXWELL, J. Appellee, Barton, his brother, Joseph C. Barton, and his niece, Mrs. Fanny C. Hough, were legatees under will of an uncle of appellee who died in Missouri in 1893. Items 2 and 4 of the will are as follows:

"Item 2 I give and bequeath to Fanny C. Hough, daughter of Thomas W. Morgan and wife of D. M. Hough, the sum of twenty thousand dollars, to be paid over to my nephew, Elias R. Barton, son of K. L. Barton, to be by him held for the sole and separate use of the said Fanny C. Hough for and dur-

ing her natural life. The money to be loaned by the said trustee at the best interest that can be obtained, and I request that the said trustee attend to this without charge. If loaned at a less rate of interest then it must be on real estate at half cash value. I desire, however, that during the life of said Fanny C. Hough, that the said trustee shall pay her one hundred dollars per month, and in case the said Fanny C. Hough dies, leaving children, then the bequest shall go to said child or children; but in case the said Fanny C. Hough shall die without any child or children living at her death, or any grandchildren living, then I desire that the amount above bequeathed to her shall be equally divided between the following children of my brother Kimber L. Barton, to wit, Eliza Fritchey, Chas. R. Barton, Joseph C. Barton and William Barton."

"Item 4. I give and bequeath to Elias R. Barton, Joseph C. Barton and Eliza Fritchey, wife of John A. Fritchey, children of K. L. Barton, each the sum of eight thousand dollars, provided the portion given to Joseph C. Barton shall be delivered to Elias R. Barton, to be held by him in trust for said Joseph C. Barton and used for his benefit as my said trustee shall think for his interest, and I request that said trustee manage the same without charge."

In July, 1893, the executors of the will turned over to appellee, as trustee for his brother and Mrs. Hough, \$28,000 worth of securities, among which securities was the Wells note, the basis of this litigation. Shortly thereafter appellee made an allotment of the securities held by him as trustee, by writing in pencil upon a list of the securities the initials, "J. C.," "J. C. B.," or "F.," to indicate the person to whom the securities had been allotted; the Wells note being thereby allotted to Mrs. Hough. By a letter dated April 26, 1894, appellee notified Mrs. Hough of the allotment which he had made, attaching to the letter a list of the securities allotted to her, in which list appears the Wells note. During 1893 appellee procured, through appellant, two loans of H. Keeney, of Missouri, aggregating \$1,000, evidenced by two notes secured by chattel mortgage and other collaterals. During the time involved in these transactions, appellant was a practicing attorney at law in Denver, and as such was employed by appellee in various matters involving his private business, the estate of his deceased uncle, and the collection of the Wells note. At the time the Wells note was delivered to appellee, November, 1894, the Keeney notes were long past due, unpaid, and payment of the same was being urged by appellant, who in this matter was acting in his capacity as attorney for Keeney. Appellant alleges in his answer, as an affirmative defense, that appellee delivered the Wells note to him in his own behalf, and not as trustee for Mrs. Hough; that, subsequent to this delivery to him, appellee persuaded

him to release, and he did release, the collateral security held by him for the payment of the Keeney notes, upon the representation and statement of appellee that he was the owner of the Wells note, and that appellant held the Wells note as security for the payment of the Keeney notes; that, from the time the Wells note came into his possession until after the same had been collected by him, he had no knowledge or information from appellee or from any other source that the Wells note was not the property of the appellee, or that the same was impressed with a trust in favor of Mrs. Hough; that he collected \$3,623.70 on the Wells note; that after deducting therefrom the principal and interest due on the Keeney notes, disbursements at the request of appellee, and certain sums for legal services rendered appellee, there was due appellee \$338.70, which amount he paid appellee. A replication put in issue the affirmative allegations of the answer.

This controversy arose out of an attempt of appellant to pay the Keeney notes out of the proceeds of the collection of the Wells note. An injunction restrained appellant from disbursing the proceeds of the Wells note in payment of the Keeney notes, and the balance of the proceeds of the Wells note, not accounted for by appellant, \$1,945, is now on deposit in the Denver National Bank, evidenced by a certificate of deposit in the name of appellant as trustee—so designated by an order of the court below. Trial to the court resulted in a decree to the effect that Mrs. Hough is the owner of said sum of \$1,945, that appellee, as trustee, is entitled to the possession of the same, and that appellant pay said sum to appellee, which decree was based upon the following findings of fact: "The court finds from the evidence in this case that at the time the certain Wells note described in this cause of action was deposited with the defendant, Bottom, Elias R. Barton represented to the defendant that said note was his individual property; that subsequently the defendant, Bottom, at the request of Elias R. Barton, released the certain chattel mortgage securities which he then held to secure the payment to one Keeney of his notes, which the defendant at that time represented, and that Elias R. Barton agreed with the defendant, Bottom, that a sufficient sum of money arising from the proceeds of the collection of the Wells note, when collected, might be applied by the defendant, Bottom, to the payment and discharge of the Keeney notes and indebtedness; that, at the time the Wells note was left with Bottom for collection, Elias R. Barton did not reveal the fact to Bottom that he (Barton) at the time was the trustee for one Fanny C. Hough, nor that Fanny C. Hough was the owner of the whole or any part of the Wells note. The court further finds that the defendant, Bottom, did release the Keeney securities upon the faith

and representation and promises made by Elias R. Barton to Bottom with reference to the ownership of the said note, and the agreement that certain proceeds should be applied to the discharge of the Keeney notes and indebtedness. The court finds from the evidence that at the time the Wells note was left with the defendant, Bottom, for collection, the same was the property of one Fanny C. Hough, and that Elias R. Barton was then the trustee of said Hough; that he held said note in that capacity; that a fiduciary relation existed between Barton and Hough, by virtue of a certain bequest theretofore made by Elias R. Barton, of Howard county, Missouri, the deceased uncle of the plaintiff; that the Wells note was delivered to Elias R. Barton as a portion of the assets so bequeathed, and was delivered to Elias R. Barton, among other assets, for the purposes of delivery and distribution by him to the several heirs mentioned in said bequest, being twenty thousand dollars to Fanny C. Hough. The court finds that at the time the Wells' note was delivered to the defendant, Bottom, Bottom had neither actual nor constructive notice of the ownership of said note being then in Fanny C. Hough. The court finds from the evidence that subsequent to the collection of the Wells note, and subsequent to the release of the Keeney securities, Elias R. Barton did state to the defendant, Bottom, for the first time, that he (Barton) was all the time acting in the premises for Fanny C. Hough, and that all the proceeds of said Wells note was the property of Fanny C. Hough, and that the Wells note was the property of Fanny C. Hough before the collection thereof. The court further finds that the \$1,945, the balance of the proceeds of said note not accounted for by the defendant to Fanny C. Hough, is now on deposit in the Denver National Bank, evidenced by a certificate of deposit in the name of the defendant, Bottom, as trustee—so designated by a court order heretofore made; that there has heretofore been no physical delivery to Keeney of the said sum of money."

This is the second appearance of this case in this court. *Bottom v. Barton*, 12 Colo. App. 53, 54 Pac. 1031. In the course of the opinion, Judge Wilson, speaking for the court, said (page 56, 12 Colo. App., page 1032, 54 Pac.): "It is true that, if, as is claimed, this note is impressed with a trust, then, under the circumstances as set forth by plaintiff, the money arising from its collection might be also impressed with a trust, and be recovered by him, upon the familiar principle that trust money or the proceeds of trust property may be followed." The rule announced in the foregoing excerpt is the established law of this state. *First National Bank v. Hummell*, 14 Colo. 259, 23 Pac. 986, 8 L. R. A. 788, 20 Am. St. Rep. 257; *McClure v. La Plata Co.*, 19 Colo. 122, 34 Pac. 763; *Hopkins v. Burr*, 24 Colo. 502, 52 Pac. 670, 65 Am. St. Rep. 238; *Hummell v.*

First National Bank, 2 Colo. App. 571, 32 Pac. 72; Holden v. Piper, 5 Colo. App. 71, 37 Pac. 34; Banks & Bros. v. Rice, 8 Colo. App. 217, 45 Pac. 515.

It is insisted that the case under consideration does not fall within the rule above laid down, for two reasons: First, there was not sufficient testimony, or any testimony, upon which to base the finding that the Wells note was held by appellee in trust for Mrs. Hough; second, that the evidence shows, and the finding of the trial court is to the effect, that the appellant was a bona fide holder, for a valuable consideration, of commercial paper not yet due, as security for a debt due Keeney.

The consideration and determination of the above points involves an examination of the testimony taken at the trial, and, as these points are alone relied upon by counsel in his brief, it is fair to presume that the abstract of record prepared and filed by counsel would in a measure, at least, comply with rule 14 of this court (66 Pac. viii), and thereby assist the court in its consideration of the questions presented. The abstract consists, exclusive of the assignments of error, of about 43 pages, 16 pages of which are devoted to the evidence, 10 pages whereof is an abstract of certain depositions read in evidence from the bill of exceptions filed at the former trial of this cause, but not made a part of the record herein, and certified copies of the will, statements, authentications, objections, and exceptions saved. The testimony of the witnesses heard at the trial, which occupies 194 folios of the record, is attempted to be set forth in 6 pages of the abstract, and, after a most diligent and critical examination of the abstract, we have utterly failed to discover a single sentence in any degree bearing upon either of the points relied upon for a reversal. In this condition of the abstract, we would be warranted in declining to examine, consider, or decide the points presented, and either dismiss this appeal, or affirm the judgment, for a failure to comply with rule 14, under the decisions of the appellate courts of this state. *Hunt v. Ohmertz*, 15 Colo. 447, 24 Pac. 1047; *Thompson v. Ditch & Reservoir Co.*, 25 Colo. 243, 53 Pac. 507; *Sherman v. Logan Co.*, 9 Colo. App. 154, 47 Pac. 973; *Otto v. Hill*, 11 Colo. App. 431, 53 Pac. 614. However, we have decided to waive the enforcement of the rule in this case, and, at the expense of much time and labor, have examined the entire record.

Does the testimony support the finding that the Wells note was held by appellee in trust for Mrs. Hough? It is unquestioned that the executors turned over to appellee, as trustee, under the express terms of the will, \$28,000 worth of securities, in satisfaction of the legacies to Mrs. Hough and appellee's brother; that the Wells note was one of these securities; that appellee held

\$20,000 worth of these securities as trustee for Mrs. Hough. Appellee testified that after the executors delivered to him the securities, July 17, 1893, he redelivered them to the executors for collection, taking their receipt therefor, therein specifically describing each note; that thereafter (the date being uncertain) he noted in pencil on this receipt, opposite each note, the initials "J. C.," "J. C. B.," and "F.," which indicated to whom each note had been allotted, the initial "F." indicating Mrs. Hough; that the Wells note was thus allotted to Mrs. Hough, the above receipt, which was introduced in evidence, so disclosing; that September 6, 1893, he wrote Mrs. Hough that he held for her, as trustee, \$20,000 worth of notes; that April 26, 1894, he wrote Mrs. Hough, inclosing a list of the notes, as follows: "Notes received from Geo. B. Harrison Ex. on July 17, 1893, and assigned to Fanny C. Hough by Elias R. Barton, trustee. \* \* \* Note of L. C. Wells \$3,671.30. \* \* \* Value on July 17, 1893, when received by E. R. Barton, trustee, and assigned to F. C. Hough." There is not a word of testimony in the record contradictory of the above testimony of appellee. As between Mrs. Hough and appellee, there can be no question as to the ownership of the Wells note.

Appellant insists, however, that inasmuch as the notes allotted to Mrs. Hough total \$20,039.48, and as it appears that she had been theretofore paid \$150 by the executors, therefore appellee and his brother, under the terms of the will, were interested in the notes allotted to Mrs. Hough, to the amount of \$189.48, and that no allotment could have been made by appellee without the assent of his brother. It appears that appellee received from the executors his legacy in full, which disposes of this contention, so far as he is concerned. As to whether or not appellee was authorized, under the terms of the trust, to make the allotment which he did, we do not decide, but appellant is in no position to urge this point to defeat a recovery in this action.

There was no error in the finding that appellee held the Wells note in trust for Mrs. Hough.

Appellant insists that "the evidence clearly shows, and the finding of the trial court is to the effect, that the appellant, defendant in the district court, was the bona fide holder, for a valuable consideration, of commercial paper not yet due, as security for a debt due Hosler Keeney from the appellee, who was the possessor of the Wells note." Upon this point we have appellant's testimony, as follows: "Ques. I want to ask you whether this Wells note, when you took it back, in November, 1894, was due? Ans. It was not. Ques. On its face? Ans. It was not. It was past due, though, when it was collected." The foregoing was interpolated in the cross-examination of the witness, and little weight seems to have been

attached to it at the time, although it is made the basis or foundation for an argument extending through 18 pages of appellant's brief, as it comprises the entire direct testimony upon this point contained in the record. Appellant, in his answer, alleges, "that said promissory note last mentioned, which will be herein designated as the Wells note, was delivered by the said Elias R. Barton, plaintiff herein, to this defendant, for the purpose of collection, and with a request on the part of Elias R. Barton, plaintiff, that the defendant should proceed to the state of Missouri and make collection of said note." And appellant repeatedly avers in his answer that this note was in his hands for collection. It hardly seems possible that the note was in his hands for collection. It hardly seems possible that the note would have been placed with appellant for collection unless it had been collectible—that is, past due—especially when it appears from the record that appellee had arranged with the executors for collection of these securities at a commission of 2½ per cent. An authenticated copy of the inventory filed in the probate court of Howard county, Mo., March 2, 1893, described this note as follows: "Note on L. C. Wells, dated July 7th, 1890, due two years after date for \$3400.00. 7½ per cent. compound int. Int. paid in full to July 7th, 1892." The fact that appellant, in a statement rendered to appellee five days before the commencement of this suit, sought to charge appellee \$375 "for services rendered in the collection of the Wells note," etc., would indicate that he did not at that time consider himself "a bona fide holder, for a valuable consideration, of commercial paper not yet due," and we conclude that the evidence does not show him to have been such. The contention that the finding of the court was to the effect that he "was a bona fide holder, for a valuable consideration, of commercial paper not yet due, as security for the debt due Hosler Keeney from the appellee, who was in possession of the Wells note," is answered by a perusal of the findings of the court, hereinbefore set forth in full.

The facts disclosed by the record render inapplicable the many authorities cited by appellant, and for this reason they will not be discussed.

Our conclusion as to the facts is in accordance with that of the court below, and the judgment will be affirmed. Affirmed.

(19 Colo. A. 257)

DOBBINS, County Treasurer, v. COLORADO & S. RY. CO. et al.\*

(Court of Appeals of Colorado. Nov. 9, 1903.)

TAXATION—RAILROADS—ENFORCEMENT—EQUITABLE REMEDIES.

1. Where the law provides for the assessment and levy of taxes against railroads, making

them a lien on the section of the road lying within a county, as it, for reasons of public policy, will not permit the sale of such part of the road, or any of the personal property used in its operation to compel payment, and as, where a road lies in different counties, the whole cannot be sold for taxes in one county, and thus no provision is made for the enforcement of the tax, the law contemplates its enforcement by ordinary remedies, one of which is a proceeding in equity to establish and enforce the lien for the tax against its property.

Error to District Court, Boulder County.

Action by D. E. Dobbins, as county treasurer of Boulder county, against the Colorado & Southern Railway Company and another. There was judgment of dismissal, and plaintiff brings error. Reversed.

Lewis S. Young and Yeaman & Gove, for plaintiff in error. Dines & Whitted (E. E. Whitted, of counsel), for defendant in error Colorado & S. Ry. Co.

GUNTER, J. General demurrer to amended complaint sustained. Judgment of dismissal. Therefrom this proceeding. The facts appear from the complaint.

During 1898, prior to December 29th, the Union Pacific, Denver & Gulf Railway Company owned a line of railroad extending through Arapahoe, Boulder, Larimer, and Weld counties, this state; also the rolling stock and other equipments used in its operation. This property was assessed for such year, and a tax levied thereon. December 29th the Colorado & Southern Railway Company became the purchaser of this property, and since, as owner, has operated it. December 31st the tax list signed by the assessor was delivered to the county treasurer as his warrant for the collection of taxes. A part of the taxes thus levied has not been paid. By the demurrer its legality is admitted. This action is by the treasurer of Boulder county to establish the validity of the tax, and by equitable relief compel payment. Defendant in error the railway company denies that such action will lie, because not given by the legislative department. The Legislature has provided for the assessment of the property of railway companies for purposes of taxation; also for the levy of taxes thereon. It intended that such interests should contribute by way of taxes their part of governmental expenses. It would seem reasonable that, such being the intent of the legislative department, it also contemplated that in default of payment a compulsory remedy should exist. It could scarcely have intended to leave the question of payment of taxes to the will of one class of taxpayers, when it has provided compulsory remedies against other classes. The authorities sustain this reasonable conclusion, and are that, when no provision whatever has been made for the collection of a tax, resort for its enforcement may be had to ordinary remedies, one of which is a proceeding in equity to enforce a lien for the tax against property. "But instances have oc-

\*Rehearing denied February 8, 1904.

curred of tax laws which provided for laying the tax, but made no provision whatever for collection. In such a case it may well be held that the Legislature contemplated the enforcement of the tax by the ordinary remedies, and therefore, if the tax was assessed against an individual, that assumpsit would lie for its recovery. The same reason would support a proceeding in equity to enforce a lien for the tax when assessed, not against an individual, but against property." *Cooley on Taxation* (2d Ed.) 15, 16, "Sometimes, also, the implication of an intent to give a remedy by suit may be so strong as to be conclusive; as, where the statute provides for a tax, but is silent as to the method of collection." *Id.* 435. "Yet it must be admitted that the implication of an intent to give a remedy by suit may be so strong as to be conclusive; as, where the statute provides for a tax, but makes no mention of any method of collection." *Black on Tax Titles*, § 45. "The general rule is that, where the statute specifically provides a remedy for the enforcement of the assessment, that remedy must be pursued, but, if a right be given, and no remedy prescribed, the courts will usually provide the appropriate remedy." *Elliott on Railroads*, vol. 2, p. 1116, § 791; *Territory of Kansas v. Reyburn*, 1 Kan. 551, 560. "It is immaterial what you call the obligation of a citizen to pay his taxes. It is very clearly an obligation which may be enforced by the courts." *United States v. Pacific Railroad*, 4 Dill. 66, 68, Fed. Cas. No. 15,983. This delinquent tax, under the statute, is a lien upon the section of road lying within Boulder county; but the law will not permit the county treasurer to sell such part of the road, or any of the personal property used in its operation, to compel payment. The reasons are, the railway company is a quasi public corporation, the continued operation of its road is a matter of public interest, and a sale of it in fragments would be its destruction as an entirety, and thus impair, if not destroy, its usefulness. Further, to sell in parcels would unnecessarily sacrifice the property to the injury of its creditors and stockholders. It can only be sold as an entirety.

In *Farmers' Loan & Trust Company v. Whitehead and Jones*, Treasurer of Jefferson County, Colo. (United States Circuit Court, this district, No. 3,677), the treasurer of Jefferson county had sold for taxes a section of railroad lying in Jefferson county. The suit was to enjoin the conveyance of the property by tax deed. The railroad, a section of which had been sold, extended from Denver, Arapahoe county, to Golden, Jefferson county. A preliminary injunction was granted, and, while there was a reversal in the Circuit Court of Appeals [98 Fed. 10, 39 C. O. A. 34], it was not upon the point for which the case is cited. The Circuit Court, speaking by Hallett, J., said: "The question presented in the bill is whether a sale may be

made of a portion of the road and right of way of the company in the manner stated, and it seems upon authority clear that no such sale can be made. It may be true that the entire road and its franchise may be sold in satisfaction of a tax levy, as upon other indebtedness due from the company, but a part of the road cannot be sold in that way, because the effect is to break up the property into several parts, and make it unmanageable as a whole. There are two cases in the Supreme Court of the United States which show that a part only of the railway and franchise of a railway corporation or other public corporation cannot be sold upon execution under a judgment at law. The first of these cases is *Gue v. Tide Water Canal Company*, 24 How. 257, 16 L. Ed. 635. The other is *East Alabama Railroad Company v. Visscher*, 114 U. S. 310, 5 Sup. Ct. 869, 29 L. Ed. 136. A sale for taxes is for all questions arising in this suit upon the same principle. There is also a federal case relating to the subject of taxes in *3 Woods*, 434 [Fed. Cas. No. 5,351]—*State v. Atlantic & Gulf Railroad Company*—a decision which I believe has been uniformly recognized as sound ever since it was made. It relates to a tax sale, and is in all respects similar to the case under consideration." "While there is a conflict of authority on this subject, the decided weight is that the right of way, if sold to pay the assessment, must be sold as a whole, and not in broken fragments. The public have a right to have a railway remain an entirety, and it would be destructive to public interest to permit it to be broken up into disjointed and practically useless fragments." *Elliott on Railroads*, vol. 2, § 790. "As we have elsewhere shown, it would be detrimental to the interest of the public as well as to that of the railroad company and the lienholders, to permit a railroad to be broken up and sold in practically useless fragments, and for this reason it is generally held that the lien must be enforced against the entire road and all of it may be sold, in a proper case, to satisfy a lien thereon. In some instances, however, the lien has been satisfied by sequestering the earnings of the corporation or appointing a receiver, without a sale of the road." *Id.* vol. 3, § 1074. *Chicago & N. W. R. R. v. Forest County et al.*, 95 Wis. 80, 89, 70 N. W. 77.

The same principle which forbids the sale of the road in fragments forbids the sale of personal property used in its operation. "If an office safe at a depot, in which the agent deposits and keeps his daily receipts and valuable papers, is useful, and facilitates the successful operation of the road, it could no more be seized under execution than could a section of the rails or roadbed, or a water tank. These things are incident to the franchise, and cannot be disturbed. They are the means by which the franchise is exercised. They are the necessary instruments of its use." *N. P. R. R. Co. v. Shimmell*, 6

Mont. 161, 9 Pac. 889. Chicago & N. W. R. R. v. Forest Co. et al., supra. In Railroad Company v. Lewton, 20 Ohio St. 401, the court decreed a sale of the entire railroad to satisfy a specific lien upon a section of the road, and, inter alia, said: "Because a part may not be sold on account of the paramount right of the public to keep the highway intact, a necessity arises, in order that justice may be done to the defendant in error, to decree the sale of the whole line of the road to satisfy his lien." In National Foundry & Pipe Works v. Oconto Water Co. (C. C.) 52 Fed. 43, 45, 57, it was said: "Does the inseparable character of franchise and plant present an insuperable obstacle to the enforcement of a right? I think not. \* \* \*

As a matter of common equity, plant and franchise should be decreed to be sold as an entirety. I think it within the inherent powers of a court of equity to so decree; not that the lien embraces the franchise, but because plant and franchise, by act of the defendant, have been rendered inseparable." City of Covington v. District of Highlands (Ky.) 68 S. W. 669, 672, was an attempt to collect a tax owing upon and constituting a lien upon part of the system of waterworks. The court said: "In the case at bar the collecting officer could not levy upon the property of appellant and sell it at public outcry, because in both of the cases above cited we held that such proceeding was improper. Now, to deny the taxing district the right to proceed in the court for the appointment of a receiver to collect the taxes would be to leave the question of their payment entirely within the will of the taxpayer. As the court had said that the proper proceeding is by the appointment of a receiver, after reasonable demand for the payment of taxes and a default, and as a receiver can be appointed only in a suit between litigants involving a lien upon or the right to the possession of the property in question, it necessarily follows that the taxing district is thus recognized as entitled to maintain its action for the purpose of the appointment of a receiver and for the collection of the taxes."

The question before us has not been ruled in this jurisdiction. In Carlisle v. Pullman P. C. Co., 8 Colo. 320, 7 Pac. 164, 54 Am. Rep. 553—an action for the recovery of money alleged to be due the county on account of taxes—the right of a remedy by suit was not decided. The decision was for the tax debtor upon other grounds. In Toll Road Company v. Edwards, 3 Colo. App. 74, 32 Pac. 549, the county treasurer sued to recover a certain sum claimed to be due for taxes, had judgment below and upon appeal. A single point, by agreement, was submitted as decisive of the case. It was not the one here involved. The Montezuma Valley Water Supply Company v. Bell, 20 Colo. 175, 36 Pac. 1102, was an action by the county treasurer against the Montezuma Valley Water Supply Company and the Colorado Water Supply

Company to recover from the former taxes levied upon its personal and real property for 1887 and 1888, to have such taxes adjudged a lien upon the realty, and to foreclose such lien. The county treasurer had judgment below. The abstract of the record shows that all of the delinquents' property was in the one county, La Plata. The court held that the statute provided a specific remedy; that it was adequate; and, being so, must be pursued. The case quotes approvingly the following from Board of Education v. Old Dominion I. M. & M. Co., 18 W. Va. 441, as follows: "It would seem necessarily to follow that, though a municipal tax was expressly declared by statute to be a lien, yet if a specific mode be provided whereby the land may be sold to satisfy such lien no suit could be brought in a court of equity to enforce such lien; for the foregoing decisions show that the specific statutory mode of collection must be pursued, and other cases lead in the same conclusion." As all the property of the tax debtor was in La Plata county, no reason existed why, even if it was a quasi public corporation—which does not appear from the opinion—its property could not be sold as an entirety. If so, the statutory remedy was adequate. The gist of the holding was that, because the statutory remedy was adequate, the action would not lie.

The property of which the section of road in Boulder county is a part is in its entirety in four counties. The county treasurer cannot sell the section of road in his county, nor can he sell the road in its entirety because parts of it are without his county. The tax has been laid, but no provision made for its collection. In such case the law contemplates the enforcement of the tax by ordinary remedies, one of which is a proceeding in equity to establish and enforce the lien for the tax against property. Such is the proceeding before us. The complaint stated facts sufficient to constitute a cause of action. The absence of a specific statutory remedy entitled, we think, the plaintiff in error to resort to a court of equity to compel payment of the tax.

Judgment reversed. Reversed.

(19 Colo. App. 307)

CERUSSITE MIN. CO. v. ANDERSON et al.\*  
(Court of Appeals of Colorado. Dec. 14, 1903.)  
PRACTICE—MOTIONS—DISPOSITION—WAIVER  
—NOTICE OF TRIAL—APPEAL—QUESTIONS REVIEWABLE.

1. Under Mills' Ann. Code, § 171, providing that issues of law arise on demurrer to the complaint, a motion to make a complaint more specific does not present an issue of law, and the determination thereof is not governed by Mills' Ann. Code, § 174, providing for the disposition of issues of law arising upon a complaint before issues of fact.

2. Where plaintiff and defendant signed a stipulation to the effect that defendant's motion to make the complaint more specific should be overruled, and defendant afterwards filed his

\*Rehearing denied February 8, 1904.



answer, he thereby waived the motion to make specific.

3. Where a cause was set for trial in the presence of defendant's counsel, who made no objection thereto, all irregularities in the notice of trial or service on defendant were waived.

4. Under the express provisions of Mills' Ann. Code, § 178, trial by jury may be waived by failing to appear at the trial.

5. Questions predicated on the evidence cannot be considered on appeal where no evidence is preserved in the bill of exceptions.

Appeal from Fremont County Court.

Action by George Anderson and W. R. Noble, partners as Anderson & Noble, against the Cerussite Mining Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Samuel H. Baker, for appellant. Samuel P. Dale, for appellees.

MAXWELL, J. The complaint stated three good causes of action against defendant, in three counts, upon a past-due promissory note and two dishonored bank checks, and demanded judgment for \$830.62 and interest. The answer admitted the execution and delivery of the note and bank checks; attempted to aver duress in the execution and delivery of the same; averred payment of a large part of the sums claimed to be due; on information and belief, averred that plaintiffs were not the owners of the note and checks sued on, and averred willingness to pay whatever sum should be found due. A replication put in issue the affirmative defenses of the answer; admitted payment, since the commencement of the suit, of a large part of the money sued for; admitted that the note and one of the checks had been paid and delivered to the defendant; and averred that at the time of such payment no question of duress or ownership of the note or bank checks was raised by the appellant. Trial by the court, the defendant not appearing, and judgment in favor of plaintiffs for \$385.67, with costs, from which this appeal.

In apt time a motion was interposed to make the complaint more specific. Subsequently a stipulation was filed, signed by counsel for both parties, to the effect "that the motion of the defendant should be overruled," granting an extension of time within which the defendant should answer, and further stipulating that plaintiffs should furnish an itemized account before the expiration of the time within which the answer was to be filed. Thereafter two stipulations, extending the time for answer, were filed, neither of which mentioned the itemized account. No order of court was made upon the stipulation overruling the motion to make more specific.

Appellant contends that the court was without jurisdiction or authority to proceed to trial and judgment while there were motions and other interlocutory proceedings on file and undisposed of, and relies upon Mills'

Ann. Code, § 174, and authorities there cited, in support of the above contention. The above provision of the Code is inapplicable, as shown by a simple reference thereto:

"Sec. 174. When there are issues both of law and fact to the same complaint, the issues of law shall be first disposed of."

"Sec. 171. An issue of law arises upon a demurrer to the complaint."

A motion to make more specific does not present an issue of law. The parties by signing the first stipulation, had disposed of the motion to make more specific, and the defendant certainly waived it by filing its answer.

Error is assigned upon the action of the court in setting the case for trial upon a notice served by one of the plaintiffs. No objection is made to the form of the notice, or the time thereof, but solely upon the ground that the same was served and proof of service made by one of the plaintiffs. The transcript of record shows that, upon the day noticed for setting the case for trial, "said defendant comes, by Waldo and Dawson, Att'ys, \* \* \* and, it appearing to the court that said notice of trial had been regularly served upon said defendant," the cause was set for trial. No objection was made to the setting of the case, and, the same having been set for trial in the presence of defendant's counsel, all irregularities in the notice, or service thereof, were thereby waived.

As heretofore stated, the cause was tried by the court, the plaintiff waiving a jury, in the absence of defendant and its counsel; and appellant contends "that the trial order in this case was without authority of law, and that the judgment was illegal and must be reversed." "When a cause is regularly reached upon the calendar, either party may bring the issue to a trial or to a hearing, and in the absence of the adverse party, unless the court for good cause otherwise direct, the party appearing may proceed with his case, and take a finding, verdict or judgment, or dismissal of the action, as the case may require." Mills' Ann. Code, § 176.

Appellant contends that it was entitled to a trial by jury, and that failure to grant such trial was error. Mills' Ann. Code, § 178, disposes of this contention: "Trial by jury may be waived by the several parties to an issue of fact, with the assent of the court, in the following manner: First, by failing to appear at the trial," etc. Leahy v. Dunlap, 6 Colo. 552, 554.

Appellant also contends that, under the law and the evidence, judgment should have been for the defendant. We have disposed of the questions of law presented, and may dispose of this contention by the statement that no evidence is preserved in the bill of exceptions, and no question predicated thereon can be considered.

There being no error in the record, the judgment will be affirmed. Affirmed.

¶ 4. See Jury, vol. 21, Cent. Dig. § 184.

(19 Colo. App. 314)

**MURTO v. LEMON et al.\***

(Court of Appeals of Colorado. Nov. 9, 1903.)

NOTES—ACTIONS—PRESUMPTIONS—OWNER-SHIP—INDORSEMENT—DATE—TRUST DEED—RELEASE—AUTHORITY OF TRUSTEE—NOTICE TO PURCHASER—EQUITABLE REMEDIES—LACHES—LIMITATIONS.

1. The introduction in evidence of notes with indorsements thereon presumptively establishes nonpayment, and ownership in the indorsee or his administrator, in an action on the notes.

2. Undated indorsements, until the contrary appears, take the date of the note; and this presumption obtains in an action by an indorsee against the maker of the note, or in proceedings to foreclose a trust deed securing the note, and also against defendants who attempt to defeat foreclosure proceedings by an alleged release.

3. The introduction in evidence of a trust deed presumptively establishes that it has not been released.

4. Where a trust deed authorizes the trustee to release the same upon payment of notes secured thereby, the trustee is without power to release except on payment; and of this limitation on his power the purchasers of the property have knowledge through the record of the trust deed.

5. One is not guilty of laches in bringing suit on notes, to foreclose a trust deed securing them, and to cancel an unauthorized release, where he institutes his action within two years from the maturity of the notes, and where he at no time gave the defendants, who were grantees of the property incumbered by the trust deed, any reasonable ground to believe that it had been released, and there was no evidence that he knew of the conveyances to such defendant grantees until about the time of the institution of the suit.

6. Laches, so as to preclude the enforcement of a right, is a matter of defense, the burden of proving which is upon defendants.

7. Mills' Ann. St. § 2911, providing that bills for relief on the ground of fraud shall be filed within three years after the discovery of the facts constituting the fraud, does not apply to an action to recover a personal judgment against the maker of a note and to foreclose the trust deed securing the same, though incidentally it involves the cancellation of an unauthorized release deed.

Error to District Court, Otero County.

Action by Dennis Murto, as administrator to collect the estate of Samuel Turbutt, deceased, against Laura J. Lemon and others. There was a judgment for plaintiff, in which, however, the court declined cancellation of a release deed and foreclosure of a trust deed, and plaintiff brings error to review that part of the judgment. Reversed.

Dan. B. Carey and Thomas H. Hardcastle, for plaintiff in error. O. G. Hess, for defendants in error.

GUNTER, J. May 2, 1891, Laura J. Lemon and her husband, Thomas J. Lemon, gave their promissory note, due five years after date, and ten interest notes, maturing semi-annually (the Colorado Securities Company, payee), and, as security therefor, a trust deed (usual form; same date; Aldrich, trustee; recorded May 7, 1891) upon real estate in Otero county, Colo. The trustee was authorized by the trust deed to release the same

upon payment of the notes secured thereby. This deed described the notes, disclosing that the principal note matured five years after date. By undated indorsements of the payee, the principal note and five of the interest notes were transferred to Samuel Turbutt. November 26, 1892 (recorded same date), Aldrich, as trustee, executed what purported to be a release deed discharging the trust deed. December 10, 1892, Laura J. Lemon, the owner of the land covered by the trust deed, conveyed a part thereof by warranty deed (recorded same date) to defendant in error Simpson. In December, 1895, she conveyed, by deed recorded December 3, 1895, the remainder of the land so incumbered to defendant in error King. This action was brought April 22, 1898, by Turbutt, upon the principal note and the five interest notes, against defendants in error, for the purpose of obtaining a personal judgment against Laura J. Lemon, the cancellation of the release deed, and the foreclosure of the trust deed. Turbutt having died pending the action, plaintiff in error was substituted. Trial to the court resulted in a judgment in favor of plaintiff in error and against Laura J. Lemon upon the principal note and interest notes. The court, however, declined cancellation of the release deed and foreclosure of the trust deed. From such ruling is this proceeding on error.

Plaintiff in error, in making out his case below, introduced the principal note, the five interest notes, the trust deed, and rested.

The notes, with the indorsements thereon, presumptively established ownership in plaintiff in error and nonpayment. *Gumaer v. Sowers* (Colo. Sup.) 71 Pac. 1103; 22 Am. & Eng. Ency. of Law (2d Ed.) 588. As the indorsements were undated, until the contrary appeared they took the date of the notes. "A note purporting to have the indorsement of the name of the payee, with no indication of any time when it was made, independent of the date of the note, is presumed to have been indorsed on that day, because that date will apply to everything written upon the same paper." *Parker v. Tuttle*, 41 Me. 349, 351. "And in the absence of evidence to the contrary, an indorsement or transfer will be deemed to have been made at the time and place of execution." 4 Am. & Eng. Ency. of Law (2d Ed.) 319, and authorities cited. This presumption obtains in an action by an indorsee against the maker of the note; also against the maker of the trust deed securing it, in a proceeding to foreclose. "The note and mortgage are inseparable; the former as essential, the latter as an incident." *Carpenter v. Longan*, 16 Wall. 271, 274, 21 L. Ed. 813. We see no reason for denying the application of this presumption as to the date of the indorsement as against defendants King and Simpson, who, in this proceeding to foreclose the trust deed, are attempting to defeat it by the alleged release. The introduction of the trust deed raised the presumption that it had

\*Rehearing denied February 3, 1904.

not been discharged. "A contract obligation shown to have existed at one time will be presumed to continue until its discharge is shown. Thus is an indebtedness shown to have existed presumed to continue." 22 Am. & Eng. Ency. of Law (2d Ed.) 1243. "The onus was on the defendant, for the reason that, when a contract is once made between parties, it binds and is legally presumed to subsist until it be shown to have been performed or rescinded." *Love v. Edmonston*, 27 N. C. 354.

The introduction of the indorsed notes presumptively established their nonpayment, and their assignment to Turbutt on the date when made; and the introduction of the trust deed presumptively established its continued existence—that is, that it had not been released. There was no evidence adduced by defendants in error to overcome these presumptions. It was shown that the amount secured by the trust deed had been paid to Aldrich. The release deed signed by him was introduced. There was no evidence, however, that Aldrich was authorized to receive payment or to execute the release deed. It appeared that the notes were paid to Aldrich before maturity; the payment being in the fall of 1892, over three years before the maturity of the principal note. The trust deed conferred upon Aldrich, as trustee, the power to release when the notes should be paid. He was without power to release until this condition should be satisfied. Of this limitation upon his power, King and Simpson had notice through the recorded trust deed. If they relied upon the release without payment, they did so at their peril. They were not innocent purchasers under a release executed without payment of the notes. The release was without payment of the notes, and before their maturity, and, having been executed without payment of the notes, it was made without satisfaction of the condition which the trust deed made necessary to the exercise of the power of release. The release deed was therefore invalid, and of this invalidity King and Simpson, through the trust deed, were charged with notice. Upon the same principle rests *Improvement Co. v. Whitehead*, 25 Colo. 357, 54 Pac. 1023, 71 Am. St. Rep. 140.

It is said that plaintiff was guilty of such laches as to bar his right to foreclose. We think not. The principal note secured by the trust deed matured May 1, 1896. Plaintiff had six years from maturity of this note in which to bring this action for a personal judgment on the note and a decree foreclosing the trust deed. *McGovney v. Gwillim*, 16 Colo. App. 284, 65 Pac. 346. The action was brought April 22, 1898, being within two years after such maturity. Plaintiff at no time gave either of the defendants, Simpson and King, the grantees of the property incumbered by the trust deed, reasonable grounds for believing that the trust deed had been released. Further, there is no evidence

that plaintiff knew of the conveyance to Simpson and King until about the time of the institution of this action. Laches is a matter of defense. The burden was upon defendants to make it out. This they did not do.

Appellees say this action is barred by section 2911, 2 Mills' Ann. St., providing that bills for relief on the ground of fraud shall be filed within three years after the discovery of the facts constituting such fraud. This is not a bill for relief on the ground of fraud. It is an action to recover a personal judgment against the maker of the note secured by the trust deed, and incidentally to foreclose the trust deed securing the note. Incidentally the action involves the cancellation of an unauthorized release deed. The case is not within the statute. 19 Am. & Eng. Ency. of Law (2d Ed.) p. 247, and authorities cited. Plaintiff in error had six years from maturity of the note in which to bring this action. As stated, it was brought within this time.

We think error was committed in declining to cancel the release deed and in denying a foreclosure. Judgment reversed. Reversed.

(27 Nev. 369)

# GRISWOLD v. BENDER. (No. 1,649.)

(Supreme Court of Nevada. Feb. 5, 1904.)

## APPEALS—BOND—MISJOINDER—RECORD—DISMISSAL.

1. An appeal from an order rejecting a claim against a decedent's estate, from an order dismissing the suit of appellant against the estate as represented by its attorneys *ad litem* and the sole heir, and from an order dismissing his suit against the administrator of the estate, with only one undertaking for \$300, will be dismissed for misjoinder of appeals.

2. Where an appeal record shows that two cases referred to in the notice of appeal are really one, in which new parties have been substituted, and which has never been tried and determined, so far as such record governs, it shows that the case is not yet appealable, and the appeal should be dismissed.

3. Where an appeal record contains no statement on appeal, no bill of exceptions, and no specification of error, and the certified copies of the court minutes are not embodied in any statement, the appeal must be dismissed.

Appeal from District Court, Washoe County.

Action by Eugene Griswold against O. T. Bender, administrator of the estate of Warren D. Epperson, deceased. From an order rejecting his claim against the estate, an order dismissing his suit against the estate as represented by its guardians *ad litem* and sole heir, and an order dismissing his suit against the administrator, plaintiff appeals. Dismissed.

Thos. B. Haydon and Torreyson & Sumnerfield, for appellant. Cheney, Massey & Smith, for respondent.

PER CURIAM. Respondent has moved to dismiss this appeal for numerous reasons, one of which is that there is a misjoinder of appeals. The notice of appeal states that it is

taken, first, from an order of the district judge made August 4, 1902, rejecting appellant's claim against the estate of Warren D. Epperson, deceased; second, from an order of the court dismissing the suit of appellant against the estate of W. D. Epperson, represented by A. E. Cheney and W. H. A. Pike, Esqs., its attorneys ad litem, and Mrs. W. D. Epperson as sole heir, etc.; and, third, from an order dismissing the suit of appellant against Charles T. Bender as administrator, etc. One undertaking on appeal, in the sum of \$300, was given to secure the payment of costs and damages which may be awarded against appellant. The litigation in this case is based upon a claim against the estate of W. D. Epperson, rejected by the district judge, and sought to be established by suit.

If the notice of appeal is to control, it is an attempt to bring up in one appeal an order made in a proceeding for the settlement of the estate of a deceased person, and two orders made in separate and independent actions, with one undertaking. The provisions of the statute concerning appeals require an appellant to furnish a written undertaking, with at least two securities, to the effect that he will pay all damages and costs which may be awarded against him on the appeal, not exceeding \$300. Section 3436, Cutting's Comp. Laws. This provision is intended for the security of the respondent, and would be evaded by embracing in one appeal judgments, orders, or proceedings in separate causes. The statute contemplates a separate appeal for each case, unless an order consolidating causes has been made in the trial court. *White v. Appleton*, 14 Wis. 190; *Chamberlain v. Sage*, 14 Wis. 193; *Sweet v. Mitchell*, 17 Wis. 125; *Noble v. Strachan*, 32 Wis. 314; *De Silva v. Henry*, 4 Stew. & P. 409; *Ayres v. Lewellin*, 3 Leigh, 609; *Kelly v. Deegan*, 111 Ala. 153, 20 South. 378; *Renn v. Samos*, 42 Tex. 104; *Cauley v. Pittsburg (Pa.)* 40 Am. Rep. 664; *Brown v. Spofford*, 95 U. S. 474, 24 L. Ed. 508; *Rich v. Starbuck*, 45 Ind. 310. Appellant relies upon *Edgecomb v. His Creditors*, 19 Nev. 149, 7 Pac. 533. In that case there were several orders appealed from. All of them related to the question whether certain specified property was exempt from execution. The court treated them as one order upon the subject, requiring but one undertaking on appeal. If the recitals in the notice of appeal be deemed not conclusive, it may be inferred from copies of court orders in the record before us, if they can be considered for any purpose, that instead of two suits there is in reality only one, and that this action was brought against A. E. Cheney and W. H. A. Pike, as attorneys ad litem for the estate, and Mrs. Epperson, while the plaintiff was acting as executor of the estate, and as such was disqualified to sue himself; that later, and after his removal on account of his claim, C. T. Bender was appointed executor with the will

annexed, in his stead, and as such was substituted as defendant in the suit; and that orders were made, not dismissing the action, as indicated by the notice of appeal, but dismissing Mrs. Epperson as a party thereto, and ordering judgment for costs in favor of herself and Pike, and that, as to the merits of plaintiff's note and account, the suit is still pending against C. T. Bender as administrator with the will annexed, and has never been tried or determined, and consequently, to that extent, is not yet appealable, even if it be conceded that there is only one suit; that the nonappealable order rejecting plaintiff's claim should be ignored; and that only one appeal bond is required. Among the papers are orders—one dated January 23, 1903, quashing the service of summons, and another March 7, 1903, "that the motion to quash the pretended summons be sustained." What the latter means, for what reason it was made, and the grounds of appellant's exception to it, do not appear. But, beyond all this, and fatal to the appeal as held by this court in *Quinn v. Quinn*, 74 Pac. 5, 27 Nev. —, and numerous cases there cited, there is no statement on appeal, no bill of exceptions, and no specification of error, and the certified copies of the court minutes, not being embodied in any statement, cannot be considered.

It is ordered that the appeal be dismissed.

(141 Cal. 599)

SILVA v. BAIR. (S. F. 2,866.)

(Supreme Court of California. Jan. 14, 1904.)

PLEADING—BILL OF PARTICULARS—TIME FOR FURNISHING—FAILURE TO FILE—DISCRETION OF TRIAL COURT—ABUSE OF DISCRETION—LANDLORD AND TENANT—ABANDONMENT OF LEASE—DAMAGES—EVIDENCE.

1. The failure of a party to file a bill of particulars within five days after demand, as provided by Code Civ. Proc. § 454, which enacts that, in case of failure, evidence of the claim set up in the bill shall be excluded, does not necessarily give the other party a right to have the evidence excluded, but it is within the discretion of the trial court.

2. Where a bill of particulars was not served within the five days, but it was served over a month before the cause came on for trial, and no objection was made to it on the ground that it was too general or defective, it was not an abuse of discretion not to exclude evidence under the bill.

3. Where defendant claimed damages on the ground that plaintiff, who had leased a dairy ranch from him, had refused to execute a lease and had abandoned the premises, evidence as to which were the most profitable months for dairying, offered to show that the premises were abandoned at the close of a profitable season, and defendant, being compelled to rent them then, suffered a detriment, was properly excluded, as not bearing on the measure of damages, which was the difference in rentals.

4. In an action by a landlord for damages because of the tenant's refusal to execute a lease and abandonment of premises, whereby the landlord was compelled to rent at a loss, the measure of damages was the difference in rentals.

5. It appearing from the evidence that the landlord had agreed that the tenant might "turn

over" the premises to another, and had leased them to others, he could not recover.

Department 2. Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by John P. Silva against Thomas Bair. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Ernest Sevier and Denver Sevier, for appellant. Gregor & Connick, for respondent.

LORIGAN, J. Plaintiff on May 10, 1900, entered into the possession of a dairy ranch in Humboldt county, belonging to defendant, under an agreement to lease the same, with certain personal property thereon, for a term of five years, at a rental of \$166.66 per month. The lease was prepared, but was not executed by either party. In October, following his entry on the premises, plaintiff became dissatisfied with the lease, and so announced to defendant; and it was agreed between them that, if the plaintiff could find some one to take the lease off his hands, defendant would let such person have it. Thereafter plaintiff brought prospective lessees to defendant, to whom, about said month of October, defendant leased the premises for a period of 10 years, upon different terms from those upon which plaintiff held them. Plaintiff thereupon surrendered possession of the premises to said lessees. At the time of such surrender plaintiff claims that defendant purchased from him certain hay, beets, hogs, and calves which were on the premises, and it is to recover for the reasonable value thereof that this action is brought. Defendant, in addition to a denial that he ever purchased the property, interposed two counterclaims. No point is made under the first. So it will be unnecessary to consider it. Under the second he claimed damages in the sum of \$500 for the neglect and failure of the plaintiff to sign the lease or comply with its terms, and for an alleged abandonment of the premises. The cause was tried before a jury, and a verdict rendered in favor of plaintiff. Defendant appeals from the judgment entered thereon, on a bill of exceptions.

No point is made as to the sufficiency of the evidence to sustain the judgment, the points urged for a reversal being that the court erred in admitting and rejecting evidence, and likewise erred in some of its instructions to the jury. The allegations of the complaint were general—that the plaintiff had sold goods, wares, and merchandise to the defendant of the reasonable value of \$1,299, for which defendant agreed to pay whatever they were reasonably worth. Defendant, before trial, and on February 6, 1901, served a written demand on plaintiff for a bill of particulars, under section 454 of the Code of Civil Procedure, and, no bill having been furnished, made another demand on the 19th of the same month. On

March 4th thereafter, plaintiff delivered the bill of particulars demanded.

On the trial defendant objected to the introduction of any evidence upon said account, on the ground that the bill of particulars had not been furnished within five days after demand, as provided by the section. The objection was overruled, and evidence of the account permitted. The appellant claims this was error. The bill of particulars, however, was served a little over a month before the cause came on for trial. It seems to have been as full and complete as defendant wished it. No objection was made at or before the trial that it was too general or defective. The only objection was that it was not delivered within the statutory time. This, however, did not give the defendant an absolute right to have the evidence offered rejected at the trial. It was within the discretion of the court to determine whether, under the circumstances, the penalty of the statute should be enforced, and the evidence excluded. That discretion seems to have been exercised in harmony with the decision of this court in *McCarthy v. Mt. Tecarte L. W. Co.*, 110 Cal. 692, 43 Pac. 392, and we think properly so. In that case the court says: "If the defendant receives the copy long enough before the trial to enable him to examine it and prepare his defense, so far as he is concerned the statute has fulfilled its usefulness. It would be to the last degree oppressive to hold that the plaintiff must lose his cause of action because, though he had furnished the copy of his account more than forty days before the trial, he had served it upon the sixth instead of the fifth day after demand."

The next error assigned is that the court improperly refused to allow defendant to introduce certain evidence under his second counterclaim. The proffered evidence tended to show which were the most profitable months for dairying, and was offered upon the theory that defendant had a right to prove that the premises were abandoned by plaintiff at the close of the profitable season, and that defendant, being compelled to rent them at the beginning of the unprofitable season, suffered a detriment; that the rental value of the premises in October, when plaintiff abandoned them, was a great deal less than when he took possession of them in the previous May. There is no doubt but that defendant had a right to show such damage, but proof of the profitable or unprofitable months of the dairying season was not the proper way to do so. Nor was he in any manner precluded from introducing legitimate evidence to that end. When this evidence was offered, it was an undisputed fact in the case that defendant had, before plaintiff left the premises, leased them to others at a stipulated rent per month for a long term of years. The court held, in passing on the objection to the tes-

timony offered by the defendant on this point, that the true measure of damages would be the difference in the rental value of the premises—the difference between the rent agreed to be paid by plaintiff and the rent which was agreed to be paid by the tenants to whom the premises had been subsequently rented, if it were less. In so holding, the court announced the correct rule.

Aside from this, however, we do not think the defendant was entitled to any damages under any rule. His claim for them was based upon the theory that the plaintiff had repudiated the lease and abandoned the premises before the end of the term. The evidence clearly shows, however, that plaintiff surrendered his rights under the lease and possession of the property without objection from, and by express consent of, the defendant. In this particular the defendant himself testified: "When Mr. Silva [plaintiff] complained to me about the place, I told him, if he could find anybody that would take it off his hands, I would let them have it. \* \* \* I told Mr. Silva he could turn the ranch over to the Swiss boys [the persons to whom defendant did lease it] if he wanted to." This is made more certain, if additional certainty were necessary, by the fact that, before plaintiff had actually left the premises, defendant arranged to lease and did lease them to others on different terms and for a different period than contained in the lease to plaintiff. Under these circumstances, defendant would not, under any theory, be entitled to damages for breach of the terms of the lease which he agreed should be rescinded, and which was in fact rescinded.

Appellant complains of the refusal of the court to give two instructions asked by him. They were properly refused. They assumed to state rules for estimating damages in favor of defendant which were neither pertinent nor correct.

Some of the instructions which were given are challenged as being argumentative and trenching on the province of the jury. Our attention is not particularly called to their alleged argumentative character, and we cannot discover that there was any invasion of the province of the jury by the court. The instruction to the jury that if they found that the transaction between plaintiff and defendant operated as a sale of the hay, etc., to defendant, they should find a verdict against defendant for their value, less the amount of any counterclaim in his favor, is open to no objection. Neither is the instruction which was given concerning growing crops.

We do not perceive that any of the objections urged by appellant call for a reversal of the judgment, and it is therefore affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(141 Cal. 610)

**FRIES v. AMERICAN LEAD PENCIL CO.**  
(S. F. 2,736.)

(Supreme Court of California. Jan. 14, 1904.)

**MASTER AND SERVANT—INJURIES TO MINOR—INSTRUCTIONS—CREDIBILITY OF WITNESS—MANNER OF WITNESS.**

1. Code Civ. Proc. § 1847, declares that the presumption that a witness speaks the truth may be repelled by the manner in which he testifies. *Held*, that an instruction that the jury were to judge of the credibility of a witness by his "appearance" was error.

2. Civ. Code, § 3333, declares that for the breach of an obligation not arising from contract the measure of damages is the amount which will compensate for the detriment proximately caused thereby. *Held*, that an instruction in an action for injuries to a servant that plaintiff should recover such damages as the jury should "feel" plaintiff entitled to was erroneous.

3. In an action for injuries sustained by a minor servant the court instructed that, if the jury should find that the child was of that character and intelligence that it knew of the danger itself, and that the negligence of defendant did not contribute to the injury, they should find for defendant. *Held*, that the instruction was erroneous, since, if defendant was not negligent, there was no liability.

4. If a minor servant, with knowledge of dangers of his employment, voluntarily encounters the risk, and is injured through his own negligence, the employer is not responsible, whether he has instructed the minor or not.

5. In an action for injuries sustained by a minor servant defendant requested the court to charge that the law requires of a child care and prudence, equal to its capacity, and that, if plaintiff knew of the character of the machine which caused his injury, but, while speaking to the one operating it, carelessly placed his hand on the machine, so that the injury was inflicted without fault on the part of defendant, the verdict should be for defendant. *Held*, that such instruction was not covered by an instruction that, if the child was possessed of such intelligence that it knew of the danger, and the negligence of defendant did not contribute to the injury, the verdict should be for defendant.

Department 2. Appeal from Superior Court, Fresno County; J. R. Webb, Judge.

Action by Alec Fries, by his guardian ad litem, against the American Lead Pencil Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

L. L. Cory (C. H. Wilson, of counsel), for appellant. A. M. Drew and F. H. Short, for respondent.

**HENSHAW, J.** Plaintiff sued to recover damages for personal injuries sustained while in the employ of the defendant at its lead pencil factory. He had been engaged to assist an older brother, who was sawing blocks of wood into little slabs, from which the pencils are made. The brother was running a small circular saw, and it was the duty of the plaintiff to bring to the machine the blocks which were being sawed, and to gather up and tie into bundles the slabs that fell from the machine to the floor. Although plaintiff's employment was about the machine, he was not concerned with the ma-

chine nor with the saw. While engaged in his occupation, his brother called to him to give him some directions, and as he stood near his brother to receive them his hand came in contact with the revolving saw, and the accident occurred. The complaint charges the defendant with negligence in failing to instruct the plaintiff as to the dangers of his employment. The verdict was for plaintiff, and from the judgment defendant appeals.

1. The sole instruction which the court gave upon the credibility of witnesses and the weight to be accorded to their testimony was in the following language: "In this case you are the judges of the weight and credibility of the testimony that has been introduced before you, and you are to judge of that by the appearance of the witnesses who have appeared on the witness stand and their interest as it may appear in the case." This is a departure from the plain and explicit language of the law. The Code of Procedure says (section 1847): "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility." If, to meet the needs of a case, amplification of this rule is desirable, that also will be found in section 2061 of the same Code. Here the jury was told that the weight and credibility of the testimony given by a witness was to be measured by the appearance of the witness as he was presented to them. Such is not only not the law, but it is in hostility to the law. The law says that the presumption of truth-telling may be repelled by the manner in which the witness testifies, together with the character of his testimony. The appearance of the witness upon the stand is but one of the elements going to make up the manner in which he testifies, and to limit the jury in weighing the evidence to the appearance alone; and to charge them, as here they were charged, that the appearance of the witness alone is to govern them, is an error as injurious as it is unnecessary.

2. The court further instructed the jury: "If in this case you believe from the evidence that the defendant in this case failed to instruct the child as to the danger surrounding the work where it was employed, and that by reason of that failure to instruct the child the child was injured, then it will be your duty to give the child such amount of damages as you feel it is entitled to, not exceeding the amount prayed for in the complaint." Here again is an unnecessary departure from the plain and express rule of law governing damages. Section 3333 of the Civil Code declares: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise

expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby whether it could have been anticipated or not." The damages, therefore, permissible in such cases, is the amount in money which will compensate for all injury proximately caused thereby. To say that the jury may award such damages as they feel the plaintiff is entitled to is the equivalent to telling them that they may give play to their emotions of sympathy for the injured child, emotions which, eminently proper in themselves, can have no just place in fixing an award for actual damage. Thus the jury would be justified in departing from the express rule that the damages must be proximate, and would be permitted, under the influence of their feelings to make an award which, based upon sympathy, would contain elements of damage, both speculative and remote. *Erie Iron Works v. Barber*, 102 Pa. 156.

3. The court, after instructing the jury as to the responsibility of defendant for failing to inform the child of the dangers surrounding its employment, proceeded: "If, on the other hand, you should find from the evidence that the child was of that character and possessed of such intelligence that it knew of the danger itself, that it was familiar with the danger of such work, the danger surrounding it, and that the negligence of the defendant did not contribute to the injury, then it would be your duty to find for the defendant." This instruction is clearly erroneous. If the negligence of the defendant did not contribute to the injury, that was an end to the liability of the defendant, under all circumstances, and without regard to other considerations. If, however, the child, as in the instruction premised, was of sufficient intelligence to be able to comprehend, and did in fact comprehend, the danger surrounding its occupation, then no negligence could be imputed to defendant, if it did not give the employé instructions upon that point. The insertion of the clause, "and that the negligence of the defendant did not contribute to the injury," imports a wholly erroneous conception into the instruction. Having regard to the tender years of a minor employé, its capacity for understanding, and its opportunities to understand, if, with knowledge of the dangers, it voluntarily encounters the risk, and through its own negligence is injured, the employer is not responsible, whether he has instructed the child as to those dangers or not. *Rodgers v. Railway*, 67 Cal. 608, 8 Pac. 377; *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160; *Bailey's Master's Liability for Injuries to Servant*, p. 114. Moreover, even if the negligence of the defendant did "contribute to the injury," yet if plaintiff, having regard to his tender years and his capacity and opportunities for understanding, was himself negligent, there can be no recovery. *Studer v. Railway Co.*, 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39;

McGraw v. Lumber Co., 120 Cal. 574, 52 Pac. 1004.

4. The defendant proposed the following instruction, the giving of which was refused: "You are further instructed that the law requires of a child suing for personal injury care and prudence equal to its capacity, and if you find from the evidence that the plaintiff in this action knew of the character of the machine which caused his injury, and was aware of its dangerous character, and, knowing that fact, went to speak to the person operating said machine, and carelessly and negligently placed his hand on the machine so that the injury to plaintiff occurred or was inflicted without fault on the part of the defendant, then your judgment will be in favor of the defendant." That this instruction is unimpeachable in point of law is not gainsaid. Bailey's Master's Liability for Injuries to Servant, p. 114; notes and cases. But it is answered by respondent that the matter of the instruction was fully covered by an instruction actually given. That instruction was the one discussed under subdivision 3 hereof; and not only did not cover the matter proposed, but was in itself erroneous and injurious.

For the foregoing reasons the judgment appealed from is reversed, and the cause remanded.

We concur: LORIGAN, J., MCFARLAND, J.

(141 Cal. 604)

PEOPLE v. STRATTON. (Cr. 1,010.)  
(Supreme Court of California. Jan. 14, 1904.)  
CRIMINAL LAW—INCEST—DURESS—INFORMATION—EVIDENCE—ACCOMPLICE.

1. An information that one had "sexual intercourse" with his daughter sufficiently states the crime of incest, defined in Pen. Code, § 285, as the commission of "fornication or adultery" by persons within the degrees of consanguinity within which marriages are prohibited.

2. Testimony of the daughter of one charged with incest to frequent acts of sexual intercourse forced upon her by her father was admissible.

3. Where a daughter had testified to acts of intercourse forced on her by her father, a question whether she had not had sexual intercourse with other persons was properly excluded, though it would have been admissible, after proof of the condition of her sexual organs, to show that the condition was not caused by her father.

4. A physician's testimony that the sexual organs of a woman with whom it was alleged incest had been committed were in the condition of those of a married woman was admissible to corroborate her testimony that acts of sexual intercourse had been forced on her.

5. Under Pen. Code, § 285, providing that persons, being within the degrees of consanguinity within which marriages are incestuous, who commit fornication or adultery with each other, are punishable, consent of both parties is not essential to the crime of incest.

6. Where one with whom accused committed incest was the victim of force, and did not willingly join in the act, she is not an accomplice.

Department 2. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

W. S. Stratton was convicted of incest, and appeals. Affirmed.

F. H. Thompson and W. H. & C. L. Shinn, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

HENSHAW, J. The appellant was charged on information, tried and convicted of the crime of incest, and appeals from the judgment, from the order denying him a new trial, and from the order denying his motion in arrest of judgment.

1. The information charged that the defendant "did willfully, unlawfully, and feloniously have sexual intercourse with Nina E. Stratton, a female child, she, the said Nina E. Stratton, being then and there the daughter of the said W. S. Stratton," etc. It is said that the charge of felonious "sexual intercourse" is not within the purview of our statute, which declares (Pen. Code, § 285), "Persons, being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void \* \* \* who commit fornication or adultery are punishable," etc. Adultery is the sexual intercourse of a married person with a person other than the offender's husband or wife. Fornication is distinguished from adultery by the fact that the guilty person is not married. To each and both offenses sexual intercourse is essential, and the charge in the information that the defendant willfully, unlawfully, and feloniously had sexual intercourse with his daughter fully apprised the defendant of the charge which he was called upon to meet. In *People v. Cease*, 80 Mich. 576, 45 N. W. 585, the information charged the defendant with the crime of fornication committed with one Elizabeth Cease, his daughter. It was proved that the defendant at the time was a married man, and it was urged that the information was fatally defective, in not charging that he committed adultery. But the court said: "The gist of the offense was the act of sexual intercourse with his own daughter. He could not have been prejudiced by the averment that the act which constituted the crime was fornication instead of adultery."

2. The daughter with whom the incest was charged was the first witness. She was permitted to testify to frequent and repeated acts of sexual intercourse forced upon her by her father. The evidence was admissible. *Lefforge v. State*, 129 Ind. 531, 29 N. E. 34; *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733; *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *People v. Cease*, supra; *Wharton's Criminal Evidence* (9th Ed.) § 35.

3. Upon cross-examination she was asked if she had not had sexual intercourse with other persons besides the defendant in the

¶ 2. See Incest, vol. 27, Cent. Dig. § 11.



case. The people's objection to the question was sustained. The ruling was proper. The admission of the evidence would in no way have tended to disprove the charge. Her reputation, and indeed her character, for chastity and virtue, were not material; and, as is said in *State v. Winingham* (Mo.) 27 S. W. 1107, "even that she was a prostitute would not have excused or mitigated his offense." Subsequent to the testimony of the daughter, the state called Dr. Norman Bridge, a physician, who testified, as to the daughter's sexual organs, that they were in the condition of those of a married woman. This testimony, without regard to its weight, was competent, relevant, and material, in tending to corroborate the daughter's statement as to the frequent acts of intercourse to which she had been subjected. If, after the introduction of this evidence upon the part of the physician, the defense had recalled the daughter, and had undertaken to show by her, or by any other appropriate means, that she had permitted others to have sexual intercourse with her, the evidence then would have been admissible in disproof of the fact sought to be shown—that the condition of her sexual organs was caused by her father—but no such offer or attempt was made.

4. The most serious question in the case is found in the evidence to the effect that the daughter submitted to her father's passion under duress and fear of death or great bodily injury, taken with the instructions of the court, given as follows: "The court instructs you that the consent of both parties is not essential to the crime of incest. If the party charged have sexual intercourse with a female related to him within the degree of consanguinity within which marriage is prohibited, he is guilty of the crime of incest, whether the intercourse was with or without the consent of such female." Incest is defined by our Code as follows: "Persons, being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other are punishable by imprisonment in the State Prison not exceeding ten years." Pen. Code, § 285. Upon this it is urged and argued that the crime of incest cannot be committed without the mutual consent of the parties, and that where, as here, the act is shown to have been accomplished under circumstances amounting to the rape of the female, the crime is not incest, but rape. In support of this view there is authority of great weight and dignity. Incest was not known to the common law, and being, therefore, a statutory crime, its definition will be found to be as various as the statutes themselves. But in many states where no substantial distinction can be discerned between their laws defining the offense and our own, the decisions fully support appellant's contention. The Supreme Court of Oregon, in a careful and learned

opinion, reviews many of the cases, and reaches the conclusion which it expresses as follows: "We think the decided weight of authority is that, under a statute like ours, the crime of rape by forcible ravishment and incest cannot be committed by the same act, but that of incest requires the concurring assent of both parties." *State v. Jarvis*, 28 Pac. 302, 23 Am. St. Rep. 141. In *De Groat v. People*, 39 Mich. 124, the learned Justice Cooley, speaking for the court, said: "Fornication, when the element of near relationship makes it incest, may be an offense equally detestable and heinous, but it still lacks the distinguishing characteristic of rape. The one is accomplished by the impelling will of one person, and the other by the concurrent assent of two." The reasoning by which this conclusion is reached in all of the cases which so hold can be stated in the language of the Supreme Court of Oregon, in the case above cited, as follows: "It will be noticed that the language of the statute is 'with each other,' which necessarily implies a concurrent act and the consent of both parties. If one of the parties is compelled by force to submit to the act, there can be no consent of such party, and the act cannot be committed 'with each other,' as declared by the statute." But this reasoning does not commend itself. It interprets the law as making mutuality of agreement and joint consent of the essence of the crime. This is done by judicial construction, and not by the express declaration of the law. The gravamen of the crime of incest, as of rape, is the unlawful carnal knowledge. In rape it is unlawful because accomplished by unlawful means. In incest it is unlawful, without regard to the means, because of consanguinity or affinity. Where both the circumstances of force and consanguinity are present, the object of the statute being to prohibit by punishment such sexual intercourse, it is not less incest because the element of rape is added, and it is not less rape because perpetrated upon a relative. In this, as in every offense, the guilt of the defendant is measured by his knowledge and intent, and not by the knowledge and intent of any other person. That such has been the view of this court is evidenced by *People v. Kaiser*, 119 Cal. 456, 51 Pac. 702, where the defendant was indicted for the crime of incest, alleged to have been committed upon his daughter, a girl under 13 years of age. As intercourse with a female child incapable in law of giving consent is declared to be rape, it was argued against the indictment that the offense charged was rape. But this court said: "Assuming that the facts stated in the indictment in this case were sufficient to constitute the crime of rape, the daughter then being under the age of consent, still, under section 285 of the Penal Code, they clearly constituted the crime of incest, and the defendant was therefore properly put upon trial for that offense." In further support of this view may be cited

Bishop, Statutory Crimes, § 660; Wharton, Criminal Law, § 1751; State v. Ellis, 74 Mo. 385, 41 Am. Rep. 321; Mercer v. State, 17 Tex. App. 452; People v. Barnes, 2 Idaho (Hasb.) 161, 9 Pac. 532; Smith v. State, 108 Ala. 1, 19 South. 306, 54 Am. St. Rep. 140; State v. Chambers, 87 Iowa, 1, 53 N. W. 1090, 43 Am. St. Rep. 349; State v. Ellis, 11 Mo. App. 588; Porath v. State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

If the prosecutrix, being of the legal age of consent, consents to the incestuous intercourse, unquestionably she is particeps criminis, and her testimony, like that of any other accomplice, uncorroborated, is insufficient to uphold a conviction. Schoenfeldt v. State, 30 Tex. App. 695. But if, upon the other hand, she is the victim of force or fraud or undue influence, or is too young to be able to give legal assent, so that she does not willfully and willingly join in the incestuous act, she cannot be regarded as an accomplice. Porath v. State, supra. In this case the instructions fairly left this matter open to the determination of the jury.

The judgment and orders appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

(141 Cal. 535)

HURGREN v. UNION MUT. LIFE INS. CO.  
(S. F. 2,045.)

(Supreme Court of California. Jan. 13, 1904.)

MALICIOUS PROSECUTION — GROUND OF ACTION — TERMINATION OF FORMER PROCEEDINGS — EVIDENCE — ADMISSIBILITY.

1. A verdict or final determination on the merits of a malicious suit or prosecution is unnecessary to the maintenance of an action therefor, but it is sufficient to show that the former proceeding was legally terminated.

2. The dismissal of an action after defendant's appearance constitutes a sufficient legal determination thereof to support an action for malicious prosecution.

3. In an action against an insurance company for malicious prosecution based on a suit against plaintiff to recover the amount of a premium, brought in the name of a person to whom the alleged cause of action was assigned by defendant merely "for the purpose of collection," the plaintiff in that suit, having testified that it was dismissed, was asked by plaintiff "at whose request the suit was dismissed," and whether he had "orders to dismiss the suit, and, if so, from whom," and other similar questions. *Held*, that it was error to sustain objections thereto, as plaintiff was entitled to know the cause of the dismissal, and whether it was done by order of defendant, who apparently had control thereof; and, if defendant procured the dismissal, no just reason being shown therefor, it was evidence to prove want of probable cause and malice.

4. In an action against an insurance company for malicious prosecution, based on several suits against plaintiff growing out of transactions with an alleged agent of defendant, plaintiff offered in evidence as to the agency a newspaper published by defendant while the last suit was pending, referring to the person in

question as having been acting as its agent "for the past seven months," and stating that he was no longer connected with it. *Held*, that this was some evidence tending to show the agency, and it was error to sustain an objection thereto.

5. In an action against an insurance company for malicious prosecution, based on several suits by defendant against plaintiff for the amount of a premium on a life policy, the amount of which plaintiff claimed was fraudulently raised by defendant's agent, a letter written by plaintiff to defendant before the commencement of the last suit, informing it of what had occurred, and of his claim that its agent had raised the policy, etc., was admissible to show that defendant knew of the alleged act of the person in question as defendant's agent, and the alleged fraud as to raising the policy, and was put on inquiry as to the real facts.

In Banc. Judgment of nonsuit, affirmed in department (69 Pac. 615), reversed.

R. W. Miller, for appellant. Myrick & Deering and Van Ness & Redman, amici curiæ. D. H. McKinlay and W. H. Sigourney, for respondent.

McFARLAND, J. This is an action to recover damages against defendant for the alleged prosecution of certain civil suits against plaintiff maliciously and without probable cause. The court below granted a nonsuit, and gave judgment for defendant, and from the judgment plaintiff appeals.

The learned judge of the trial court granted the nonsuit upon the ground that it had not been shown that the former suits complained of as malicious had been determined upon the merits in favor of the defendant therein, and this view was sustained when the appeal was decided here in department. But upon further consideration of the question we are satisfied that, whatever may have been some of the former decisions in England and this country, it is now the well-established rule that a verdict or final determination upon the merits of the malicious civil suit or criminal prosecution complained of is not necessary to the maintenance of an action for malicious prosecution, but that it is sufficient to show that the former proceeding had been legally terminated. The fact that such legal termination would not be a bar to another civil suit or criminal prosecution founded on the same alleged cause is no defense to the action for malicious prosecution; otherwise a party might be continuously harassed by one suit after another, each dismissed before any opportunity for a trial on the merits. It is suggested that the plaintiff might commence the suit upon a perfectly good cause of action, and for some legal reason dismiss it, and afterwards bring and successfully prosecute to judgment a second suit; while in the meantime the defendant might have brought and maintained an action for the malicious prosecution founded upon the first action. If such an improbable thing could be imagined, the law would not thereby be changed. But it must be remembered that plaintiff in the

¶ 1. See Malicious Prosecution, vol. 33, Cent. Dig. §§ 71, 72.

action for malicious prosecution must show affirmatively, not only that the action complained of had been terminated, but that it was commenced maliciously, and without probable cause; which could not well be done in the case suggested. The many cases cited in 19 American & English Encyclopedia of Law, p. 681, fully sustain the text, which correctly states the law on the subject, and is as follows: "It is not easy to lay down in a few words any general rule that would satisfactorily state when proceedings may be regarded as terminated for the purposes of an action of malicious prosecution. It may be briefly said, however, that a prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute proceedings de novo." We will refer briefly to a few of the many cases to the point (the italics are ours): In *Clark v. Cleveland*, 6 Hill (N. Y.) 344, the court, speaking through Cowen, J., say: "Nor can it be essentially necessary that there should be an adjudication of the magistrate, or, indeed, any judicial decision upon the merits by any court. \* \* \* The technical prerequisite is only that the particular prosecution be disposed of in such a manner that it cannot be revived, and the prosecutor must be put to a new one. \* \* \* The mere discontinuance of a civil suit in any way satisfies the rule." In *Apgar v. Woodston*, 43 N. J. Law, 57, the court declare (we quote from the syllabus, which correctly states the decision) as follows: "The law requires only that the particular prosecution complained of shall have been terminated, and not that the liability of the plaintiff for prosecution for the same offense shall have been extinguished, before the action for malicious prosecution is brought. Consequently, the refusal of the grand jury to file an indictment, a nolle prosequi, or any proceeding by which the particular prosecution is disposed of in such a manner that it cannot be revived, and that the prosecutor, if he intends to proceed further, must institute proceedings de novo, is a sufficient termination of the prosecution to enable the plaintiff to bring his action." In *Casebeer v. Drabole*, 13 Neb. 465, 14 N. W. 397, the court say: "The weight of authority, as well as of reason, is in favor of the position that the right of action is complete whenever the particular prosecution be disposed of in such manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one." In *Casebeer v. Rice*, 18 Neb. 203, 24 N. W. 693, a criminal charge had been made by defendants against plaintiff before a county judge, and "such proceedings were had as resulted in a dismissal of the cause and the discharge of the accused by reason of the failure of the prosecution to give security for costs," and this was held to be such a determination of the proceeding as to warrant the action

for malicious prosecution; the court restating the language used in *Casebeer v. Drabole*. In *Lytton v. Baird*, 95 Ind. 349, the court held that an order quashing an indictment and discharging the defendant was a sufficient termination of the prosecution to warrant an action for malicious prosecution. In *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35, the court held as follows: "It is not necessary, to sustain an action for malicious prosecution, that the defendant should be acquitted in the criminal proceeding. It is sufficient that the defendant was discharged without a trial, by a withdrawal or abandonment of the prosecution, not made at his request or by arrangement with him, if the jury should find on the whole evidence that there was want of probable cause." There are many other decisions to the same effect, but the foregoing are sufficient to cite here in support of a principle which we deem to be well founded in reason. There are no decisions of this court to the contrary. What constitutes such a legal termination of a former suit or proceeding as will enable the defendant therein to maintain an action for malicious prosecution was not decided, or, indeed, touched, in *Berson v. Ewing*, 84 Cal. 89, 23 Pac. 1112, *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777, or *Jones v. Jones*, 71 Cal. 89, 11 Pac. 817, cited on behalf of respondent. On the other hand, in *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703, it was held, as to one count, that, where the suit for malicious prosecution was founded on the arrest of plaintiff for alleged threat to commit an offense against property, the discharge of the accused on habeas corpus was a sufficient legal termination of the proceeding, and that, as to another count, a dismissal of the proceeding was sufficient; and the principle above stated seems to have been declared in *Dowling v. Polack*, 18 Cal. 626, which was a suit on an injunction bond, where the court, referring to the former action, say: "The suit was dismissed for want of prosecution, and with respect to the particular case the judgment of dismissal had the same effect upon the rights of the parties as would have resulted from a judgment upon the merits."

It is averred in the complaint, in substance, that defendant solicited plaintiff to make application, and plaintiff did make application, for a policy on his life for \$1,000, for which he was to pay an annual premium of \$53; that defendant afterwards presented to him a policy in which the amount had been raised to \$2,000, and demanded a premium of \$103.40; that plaintiff refused to receive the policy or to pay the \$103.40; that afterwards defendant brought suit against plaintiff in a justice's court in Santa Rosa township, county of Sonoma, to recover said last-named sum of money, and that, after plaintiff had appeared in said action, the defendant (plaintiff there) dismissed it; that afterwards defendant brought an-

other similar action in said justice's court; that plaintiff appeared to defend, and that on the day fixed for hearing the cause defendant failed to appear, and the action was dismissed; that afterwards defendant brought a third similar action in the justice's court of the city and county of San Francisco; that the plaintiff again appeared and attended court on the day fixed for trial, and that before that time defendant had dismissed the action. These averments—under the views above expressed—state a sufficient legal ending of the suits; and, as to the dismissals, the averments are beyond question sustained by the evidence.

Defendant moved for a nonsuit, upon the grounds that the plaintiff had not succeeded in showing that a certain alleged agent, one Sturtevant, was the agent of defendant, and had failed to prove that the former suits were brought maliciously, and without probable cause. Of course, if we could say that the nonsuit should have been granted on any one of these grounds, the nonsuit would be sustained, no matter on what ground it was granted; but we cannot say that there was no evidence sustaining plaintiff's contentions as to the matters mentioned in said grounds for nonsuit. The court below did not pass on these matters, and expressly said that as to the main issue there was a "conflict of evidence."

There are a number of rulings of the court below which were excepted to by appellant, and as there may be another trial it is perhaps necessary to notice a few of them. The court, on motion of respondent, struck out as irrelevant, immaterial, and redundant matter nearly one-half of the complaint; and we think that in so doing the court erred. We do not deem it necessary to quote here the parts stricken out, which occupied nearly 2½ pages of the printed transcript. Some parts of the matter stricken out may possibly be redundant and irrelevant, but not the whole of it. It states some facts touching the origin and causes of the suits complained of which were proper and necessary to be stated, and the parts stricken out left the complaint disrupted and incomplete and without grammatical connection.

The third suit complained of was brought in the name of W. Rigby, Jr., to whom the alleged cause of action had been assigned by respondent merely "for the purpose of collection." Rigby, having testified that the suit was dismissed, was asked by plaintiff "at whose request the suit was dismissed," and whether he had "orders to dismiss the suit, and, if so, from whom," and some other similar questions, and objections to the questions were sustained. The objections should have been overruled. Plaintiff had the right to inquire why the suit was dismissed, and whether it was done by order of the respondent, who, apparently, had control of it. If respondent procured the dismissal of the suit, no just reason being

shown therefor, that fact was some evidence tending to prove want of probable cause and malice.

The original transactions out of which the litigation arose were between appellant and J. B. Sturtevant, and a question in the case was whether Sturtevant was the agent of respondent; and as evidence to this issue appellant offered a notice published by respondent, while the last suit was pending, in a public newspaper, which stated that "J. B. Sturtevant, who for the past seven months has been acting as agent for the Union Mutual Life Insurance Company in Sonoma county, is no longer in any way connected with the company"; and an objection to the evidence was sustained. This ruling was erroneous. The notice was certainly some evidence tending to show that Sturtevant was respondent's agent when the transactions involved here took place.

We think, also, that it was error to rule out a letter written December 5, 1898, by appellant's attorney to the respondent, the receipt of which was acknowledged by the latter. This letter was written and received before the commencement of the third suit, and informed plaintiff therein of what had occurred, and of appellant's claim that Sturtevant had raised the policy, etc. This letter was admissible as evidence expressly showing that respondent had knowledge of the alleged act of Sturtevant as its agent, and the alleged fraud as to raising the policy, and was put on inquiry as to the real facts.

There are no other alleged errors necessary to be noticed.

The judgment appealed from is reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

(141 Cal. 581)

#### PEOPLE v. PERALES. (Cr., 1,006.)

(Supreme Court of California. Jan. 13, 1904.)

##### ASSAULT—INFORMATION—DESCRIPTION OF MEANS EMPLOYED—SUFFICIENCY.

1. Pen. Code, §§ 950-952, requires an information to contain a statement of the acts constituting the offense and the particular circumstances, so as to enable defendant to understand the nature of the accusation against him. Section 245 declares that every person committing an assault with a deadly weapon, or by means of force likely to produce great bodily injury, is punishable, etc. *Held*, that while it would be sufficient, in charging an assault by means of a deadly weapon, to follow the language of the statute, yet when the offense charged is assault by means of force, etc., the information must charge the particular means used, as required by sections 950-952, and the phrase "a heavy wooden stick" is not a sufficient description.

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

\*Rehearing denied February 12, 1904. Beatty, C. J., dissenting.

Clemente Perales was informed against for assault by means likely to produce great bodily injury. A demurrer was sustained to the information, and the state appeals. Affirmed.

U. S. Webb, Atty. Gen., E. B. Power, Dep. Atty. Gen., and Cassius Carter, Dist. Atty., for the People.

LORIGAN, J. This is an appeal from a judgment sustaining a demurrer to an information. The charging part of the information is as follows: "Clemente Perales is accused by the district attorney of the county of San Diego, state of California, by this information, of the crime of assault by means likely to produce great bodily injury, committed as follows: The said Clemente Perales, on the 16th day of November, A. D. 1902, in the said county of San Diego, state of California, and before the filing of this information, did unlawfully and feloniously commit an assault upon the person of J. M. Soto, by means likely to produce great bodily injury, to wit, with a heavy wooden stick, contrary to the form and effect of the statute," etc. The demurrer challenged the sufficiency of this information on various grounds, among others that it did not substantially conform to the requirements of sections 950 and 952 of the Penal Code in this: that it did not set forth the particular circumstances or statement of the acts constituting the offense. The demurrer was sustained generally. No appearance is made for the respondent on this appeal.

Section 245 of the Penal Code, under which this information was framed, reads: "Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable," etc. It is not claimed, as we understand the position of the appellant, that the information is sufficient to charge assault with a deadly weapon, or that it sufficiently sets forth the means by which the assault was committed. But it is insisted that the words, "to wit, with a heavy wooden stick," may be treated as surplusage and rejected, and that the information is still good, because it charges the assault to have been committed "by means likely to produce great bodily injury," which is the exact language of the statute. While it is the general rule that it is sufficient to charge an offense in the language of the statute, yet this rule is subject to the qualification that, where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made. The statute may, and often does, define the offense by the use of precise and technical words which have a well-recognized meaning, or designates and specifies particular acts or means whereby an offense may be committed. Under such circumstances, to charge the offense substantially in the language of the statute

will be sufficient. When, however, the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted. The section in question affords an application of both rules. It particularly designates a deadly weapon as a means the use of which shall constitute an assault. The term "deadly weapon" has a precise, well-recognized meaning, and the nature of such weapon as being one likely to produce great bodily injury is well understood. It is expressly declared by the statute a specific means, the use of which in making an assault shall constitute an offense, and therefore, under the general rule, an assault with it may be pleaded in the language of the statute. The term, however, "or by any means of force" likely to produce great bodily injury, immediately following in the section, is a general and comprehensive term, designed to embrace many and various means or forces, which, aside from a deadly weapon or instrument, may be used in making an assault. What these means or forces may be, other than that they must be such as are likely to produce great bodily injury, the statute does not declare or define. As an example of such means, it specifies a deadly weapon; as to any other means its language is general and indefinite. Under such circumstances, in charging an offense claimed to be embraced within the comprehensive terms of the section, the qualification to the general rule obtains; and applying it, as it properly should be applied, to the information under consideration here, it was not enough to charge the defendant, in the language of the statute, with the use generally of means likely to produce great bodily injury, but the information should have specified the particular means used, which it is claimed constitute an offense within the general terms of the section. The information should, in that particular, conform to the rules of criminal pleading (sections 950-952, Pen. Code), which require that the information shall contain a statement of the acts constituting the offense, and the particular circumstances of the offense charged, in such a manner as will enable a defendant to understand the nature of the accusation against him. It will

be observed that the information at bar conforms to none of these requirements. It is entirely general in its terms. There is no precise description of the offense. There is no proper or particular designation of the means which it is claimed were used in its commission. All information in that regard is retained by the pleader, while its proper place is on the face of the information. If the information under review could be declared good because it charges in the general language of the section, we cannot, just now, conceive of any information charging an offense under the general language of any section of the Penal Code which would be bad.

As previously said, we do not understand appellant to claim that the information is sufficient under the section because it charges the means used in making the assault to have been "a heavy wooden stick." The use of these words, as descriptive of the means, did not aid it either to charge an assault with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury. A "heavy wooden stick" is not *ex vi termini* a deadly weapon or a deadly instrument. Nor does this description suffice to show that it is either. Neither, as described, is it necessarily a means likely to produce great bodily injury. In fact, it is not described at all, except by the indefinite statement that it was "heavy." Describing a stick as "heavy" imparts no certain information. The term is relative. A stick which in the hands of a boy, or a feeble person, would be considered heavy, in the hands of a robust person would be deemed light. Again, it might be heavy, and yet so large and unwieldy as to be useless, in the hands of a powerful man, towards the commission of an assault. It might, too, be heavy, and yet so small or short that no danger of bodily harm could reasonably be apprehended from its use. Aside from the use of the term "heavy," there is no description in the information as to the definite weight, strength, or size of the stick, or other qualities, properties, or characteristics showing that it was a means likely to produce great bodily injury.

The lower court properly sustained the demurrer to the information, and its order is affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.

(141 Cal. 576)

SWORTFIGUER v. WHITE et al. (S. F. 2,557.)

(Supreme Court of California. Jan. 12, 1904.)  
PROCESS—SERVICE—DISMISSAL OF ACTION.

1. Under Code Civ. Proc. § 581, subd. 7, providing that all actions shall be dismissed unless summons has been issued in one year, and served, and return made or appearance made by a defendant within three years, of the commencement of the action, an action in which there was no appearance by defendant until

five years after its commencement, and in which the summons was never served, should be dismissed, notwithstanding the recent substitution of a new party as plaintiff.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Esther E. Swortfiguer against Charles G. White and others. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Pringle & Pringle, for appellant. W. H. Barrows, W. S. Brann, and William H. Jordan (Jordan, Treat & Brann, of counsel), for respondents.

VAN DYKE, J. This is an appeal from the judgment of the lower court dismissing the action. The defendant White on the 9th day of July, 1888, made his promissory note to La Societe d'Epargnes et de Prevoyance Mutuelle (a corporation), and on the same day executed a mortgage on his land to secure said note. On July 8, 1893, said corporation, mortgagee, commenced an action to foreclose said mortgage. Summons was issued the same day, but was never served or returned. R. M. Murray and E. H. Hansen were made defendants for the reason, as alleged in the complaint, that they claimed some interest in the premises covered by the mortgage. Defendant Hansen filed an appearance January 31, 1899, but there is no evidence in the record that defendant Murray ever appeared. Defendant White, instead of appearing in the action, procured Thomas M. Quackenbush to advance the money to satisfy the claims of the mortgagee, the French bank, and to give him further time to make payment. Quackenbush thereupon paid the amount due the original mortgagee, the French bank, and took an assignment of the mortgage and of the cause of action, and allowed the matters thereafter to rest until November 11, 1896, when he assigned and transferred the notes and mortgages to his daughter Esther E. Swortfiguer, who thereafter, on August 10, 1897, was substituted as plaintiff. And thereafter, on August 7, 1898, the substituted plaintiff and appellant herein filed an amended and supplemental complaint in said action, and caused a second alias summons to be issued thereon. The first alias summons, issued before the filing of said supplemental complaint, had been quashed on motion of the defendant White, and thereafter the second alias summons was likewise quashed for some informality. At the time of the motion to quash the second alias summons, defendant White moved the court to dismiss the action. The court refused to dismiss the action, and announced that it would issue a third alias summons upon the payment by the plaintiff of the sum of \$25 costs, which was tendered and refused; and thereupon said defendant and respondent White applied to this court for a writ of prohibition direct-

ed against the superior court, and upon the hearing of that application this court issued a peremptory writ of prohibition. *White v. Superior Court*, 126 Cal. 245, 58 Pac. 450. In the opinion of the court in that case it is said: "Petitioner has a present right to the dismissal of the action as against himself, and the removal of the lien by which his property is incumbered, and such right cannot be protected or enforced by an appeal from a possible judgment in the action to foreclose." In *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 Pac. 470, referred to and approved in *White v. Superior Court*, the provision of the Code of Civil Procedure, as amended in March, 1889, was set out and construed. The amendment adds subdivision 7, § 581, and reads as follows: "And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued in one year and served, and return thereon made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years." In commenting upon that amendment to the section in question, this court, in the Case of *Li Po Tai*, said: "This provision is very sweeping, and is expressly made applicable to pending suits. It is prohibitory; otherwise it would have no force at all. The courts were already authorized and required to dismiss suits upon motion when there had been culpable failure to prosecute. To hold this statute directory would therefore be to repeal it. Then the language could hardly indicate more plainly the intent that it should be mandatory. Besides being absolute in form, it contains a prohibitory clause—'and no further proceedings shall be had therein.' Such a negative cannot be, and never has been, considered as directory merely." See, also, to the same effect, *Grant v. McArthur*, 137 Cal. 270, 70 Pac. 88. It is stated in appellant's brief that defendants Hansen and Murray appeared in said action. The record fails to show that Murray ever appeared, and the appearance of Hansen was over five years from the commencement of the action; and, under the mandatory provisions in question of the Code of Civil Procedure and the decisions of this court, such appearance cannot help out the case of the appellant. There having been no service and return made of the summons within three years from the commencement of the action, or appearance within that time by any of the defendants, that action was practically put an end to, and it was the imperative duty of

the court to have dismissed it at the expiration of three years from its commencement; and the substitution of the appellant in place of the former plaintiff in that action, the French bank, over four years after the commencement of the action, and the filing of a so-called amended supplemental complaint thereafter, could not revive the former action so as to change the result.

The order and judgment entered March 23, 1900, dismissing the action, from which this appeal is taken, was in accordance with the imperative command of the law. The court below thereupon lost all jurisdiction over the cause, and the so-called amended judgment of dismissal entered September 21, 1900, attempting to limit the former judgment of dismissal to defendant White alone, was *ultra vires* and void.

The judgment dismissing the action is affirmed.

I concur: ANGELLOTTI, J.

I concur in the judgment: SHAW, J.

On Rehearing.

(Feb. 12, 1904.)

In Banc.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing, not because I differ with the court as to any point decided, but because the department opinion completely ignores the only proposition upon which the appellant contended for a reversal—the only proposition, that is to say, which at the close of the argument was contested. When Quackenbush furnished the money to satisfy the claim of the original mortgagee, and took an assignment of its mortgage, he at the same time took from White a new mortgage to secure a new obligation. The supplemental complaint filed by appellant in 1897 counted upon this new mortgage, and within less than three years after the filing of the supplemental complaint the respondent Hansen entered his appearance in the action. The contention of appellant—and it was all he contended for in submitting his case—was that as to the second mortgage, and the moneys thereby secured, the filing of the supplemental complaint was, in legal effect, the commencement of a new action, and that the voluntary appearance of Hansen within three years thereafter gave the court jurisdiction to foreclose the second mortgage as against him. This proposition may or may not be sound, but, whether tenable or not, I think, since it presented the only question in the case, the appellant was entitled to have it stated and decided.

(141 Cal. 573)

FAY v. STUBENRAUCH et al. (S. F.  
2,838).\*

(Supreme Court of California. Jan. 12, 1904.)

CLERICAL MISPRISION—CORRECTION—CORRECTION  
PENDING—APPEAL—RIGHT  
TO COMPLAIN.

1. Where, in mortgage foreclosure, a Mrs. M. Q. was made a defendant, and an injunction prayed, and summons was served on her, and the decree enjoined Mrs. A. M. Q., the use of the initial "A." was evidently a clerical misprision.

2. The court has inherent power to correct a clerical misprision on the face of its records.

3. The right of the trial court to correct a clerical misprision on the face of the records of a cause is not lost by an appeal when the correction does not affect any substantial right.

4. In mortgage foreclosure a Mrs. M. Q. was made a defendant, and an injunction prayed, and summons was served on her, and the decree enjoined Mrs. A. M. Q., who appealed. *Held*, that such appellant could not complain of an amendment by the trial court, pending appeal, whereby the initial "A." was struck from the records, as the correction freed her from all liability under the decree.

Department 2. Appeal from Superior Court, Napa County; E. D. Ham, Judge.

Suit by Susan M. Fay against H. Stubenrauch and others. From a decree for complainant, defendant A. M. Quinn appeals. Affirmed.

W. H. Barrows, for appellant. Theo. A. Bell (A. O. Colton, of counsel), for respondents.

LORIGAN, J. This action was brought to foreclose a mortgage executed to plaintiff by defendants H. and V. Stubenrauch. It was alleged in the complaint that the other defendants, James O'Reilly and one Mrs. M. Quinn, claimed some interest in the mortgaged premises; that the said Mrs. M. Quinn was in possession thereof, cutting and destroying trees, and threatening to continue to do so; and an injunction was prayed prohibiting her from the commission of such acts. Summons was issued in said cause, and served on all the defendants, including Mrs. M. Quinn, and the defaults of all the defendants, including said Mrs. M. Quinn, were duly entered. Thereafter a decree of foreclosure was entered against the said H. and V. Stubenrauch, James O'Reilly, and one "Mrs. A. M. Quinn," foreclosing all their interest in said premises, and as to the said "Mrs. A. M. Quinn" enjoining her from cutting and destroying any trees upon said premises. This decree was duly entered on April 24, 1901. On May 16, 1901, an appeal was taken by "Mrs. A. M. Quinn" from said decree. On May 21, 1901, after such appeal was taken, the court, on motion of the attorney for plaintiff, made an order reciting that there had been a clerical misprision in the decree of foreclosure in the insertion of the initial "A." before the initial "M." in the

name of "Mrs. M. Quinn," the defendant in said action, and ordered the decree corrected by striking out such initial "A." wherever it appeared therein. A stipulation in the transcript shows that such correction was made by the clerk as directed by the court. The effect of the order is that the decree of foreclosure now stands against "Mrs. M. Quinn," and the name of "Mrs. A. M. Quinn" nowhere appears therein.

Appellant contends that, notwithstanding such correction, the decree of foreclosure should be reversed; that the order of the lower court was, in effect, an amendment of the decree, and, being made after the court had lost jurisdiction of the cause by appeal, was void. There is no question but that if an appeal had not been taken the lower court would have had the power to make the correction.

It is quite manifest that the use of the initial "A." in the name of the defendant, so as to make her name read "Mrs. A. M. Quinn" instead of "Mrs. M. Quinn," was merely a clerical error in the decree. "Mrs. A. M. Quinn" was not a party to the suit, but "Mrs. M. Quinn" was. The latter was named as defendant, had been served with summons and suffered default, and a decree might properly be taken against her. All these matters appear in the record, and conclusively show that the person against whom the decree was intended to be entered was "Mrs. M. Quinn," not "Mrs. A. M. Quinn," who, as far as the record is concerned, was an entire stranger to the proceedings. Whenever it is apparent upon the face of the record that the error to be corrected consists of a clerical misprision, the court has always in herent power to correct it. *Estate of Schroeder*, 46 Cal. 316; *Fallon v. Brittan*, 84 Cal. 511, 24 Pac. 381; *San Joaquin L. & W. Co. v. West*, 99 Cal. 347, 33 Pac. 928; *Chicago Clock Co. v. Tobin*, 123 Cal. 378, 55 Pac. 1007.

Nor is the right of the lower court to amend suspended or impeded by an appeal where an amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record. It is true that the court by the appeal loses jurisdiction of the cause for the purposes of the appeal, but it does not lose jurisdiction of its records. These remain within its physical control and custody, and as to the error suggested the court had a right, as well after the appeal is taken as before, to amend it. *Black on Judgments*, § 162; *Freeman on Judgments*, § 73; *People v. Murback*, 64 Cal. 372, 30 Pac. 608. Certainly no substantial right of the appellant was affected by the amendment. In fact, it accomplished all that she could hope for on this appeal. Her complaint here is that the decree against her was void. This is true, but as the correction of that decree relieved and freed her from all liability under it there is nothing left of

\*Rehearing denied February 11, 1904.

¶ 2. See Courts, vol. 13, Cent. Dig. § 369.



which she can complain. The decree now stands against Mrs. M. Quinn, the party to the action against whom, as appears from the record, it should have been originally entered. If this court should reverse the judgment, as appellant contends it should, such reversal would confer no benefit upon the appellant. It would give her nothing she has not already obtained through the correction of the decree by the lower court, but, on the contrary, such reversal would operate to the advantage of the party against whom apparently the decree should have been originally and it is now entered, the defendant Mrs. M. Quinn, who is not now before us asking for any relief. Appellant cannot be concerned in the matter any further than to the extent that her own interests are involved.

We are satisfied that the lower court, notwithstanding the appeal, had a right to correct the apparent clerical error in the decree; that such correction has relieved appellant entirely from its operation; that the error she complains of here has been effectually cured thereby; and that the judgment, as far as it is attacked by her on this appeal, should be affirmed. As this error, until it was corrected, substantially affected appellant, and was not corrected until after her appeal was taken, we think that she should, therefore, be allowed her costs on appeal.

The decree appealed from is affirmed, with costs in favor of appellant.

We concur: McFARLAND, J.; HENSHAW, J.

(141 Cal. 538)

In re BRUNDAGE'S ESTATE. (S. F. 3,580.)\*  
(Supreme Court of California. Jan. 9, 1904.)  
FOREIGN WILLS—PERSON ENTITLED TO ADMINISTRATION.

1. As between two persons, one of whom has, as against the other, an absolute right to letters of administration, the fact that he makes an adverse claim to property claimed by the estate, which is not made a ground of disqualification by the statutes, does not authorize the denial of the letters to him, and the granting of them to the other.

2. Under Code Civ. Proc. § 1379, providing that administration may be granted to a competent person, though not otherwise entitled to the same, at the request of the person entitled, one may not be so appointed administrator with the will annexed in case of a foreign will, as against a resident son of testator, a beneficiary under the will, at the request of the nonresident testator, such executor being entitled only to letters testamentary, and not to administration; nor at the request of nonresident children of testator, they being incompetent because of their nonresidence.

3. Under Code Civ. Proc. § 1366, entitling a son of testator to administration as against a daughter, the assignee of the daughter's interest in the estate acquires no greater right to administration than she had.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Mary Ann Brundage, deceased. From an order granting letters of administration to another and refusing them to Charles S. Brundage, he appeals. Reversed.

Goodfellow & Eells, for appellant. Beverley L. Hodghead, for respondent.

ANGELLOTTI, J. This is an appeal from an order granting letters of administration with the will annexed upon the estate of Mary Ann Brundage, deceased, to the Union Trust Company of San Francisco, and refusing to grant such letter to Charles S. Brundage. The deceased was a resident of New York, and left property, real and personal, in this state. By her will, which was duly admitted to probate in the state of New York, she appointed one Schafmeister, a resident of that state, executor. Six children survived her, each of whom was a devisee and legatee under the will. One of these children was her son, Charles S. Brundage, the appellant here. He was a resident of this state, and competent under our laws to act as administrator of her estate. None of the other children resided in California. The appellant filed a duly authenticated copy of the will and the probate thereof in the superior court of the city and county of San Francisco, with a petition for its admission to probate here, and the issuance to him of letters of administration with the will annexed. The respondent, Union Trust Company, a corporation authorized to act as administrator, also filed its petition praying that said will be admitted to probate, and that it be appointed administrator with the will annexed. Its claim was based upon the fact that it was the nominee of the nonresident executor, who had regularly requested that it be appointed, and the nominee of nonresident children, heirs and legatees of deceased; and also upon the fact that it was a party interested in the will by reason of being the assignee of a portion of the legacy of Mary A. Hilliard, a daughter of deceased. It was also alleged and found to be a fact that appellant claimed an interest in certain real property adversely to the estate of deceased. The superior court admitted the will to probate, and ordered the issuance of letters of administration with the will annexed to the Union Trust Company, and denied the petition of Brundage.

It is admitted that the appellant was not disqualified by reason of his adverse claim to property claimed by the estate. Estate of Muersing, 103 Cal. 585, 37 Pac. 520; Estate of Bauquier, 88 Cal. 302, 26 Pac. 178, 532. Our statute prescribes the grounds of disqualification, and the courts have no right to add to the disqualifications prescribed by the Legislature. The fact of adverse claim is urged by the respondent solely as a justification of the exercise of the discretion of the superior court in favor of respondent, it being claimed that under the law the court

\*Rehearing denied February 8, 1904.

was invested with the power to appoint either of the applicants; in other words, that the appointment was in the discretion of the court. The appellant claims that under the circumstances of this case he had the absolute right to letters of administration as against respondent, and that the court had no discretionary power whatever. This claim of appellant must, under the statutes and decisions, be sustained.

The sections relating to the probate of foreign wills (Code Civ. Proc. §§ 1322-1324) provide that when the copy of the will and the probate thereof are produced "by the executor, or by any other person interested in the will," a hearing shall be had upon notice, and that, when so admitted to probate, "letters testamentary or of administration shall be issued thereon." *Estate of Richardson*, 120 Cal. 344, 345, 52 Pac. 832. The nonresident executor could have made application for letters testamentary to himself, and would have been entitled to the same as against appellant. *Estate of Brown*, 80 Cal. 381, 22 Pac. 233; *Estate of Richardson*, supra. He did not, however, apply for letters testamentary. The law applicable to such a case provides that, if the executor fails to apply for letters for himself, "letters of administration with the will annexed must be issued as designated and provided for the grant of letters in case of intestacy." *Estate of Richardson*, supra; *Estate of Coan*, 132 Cal. 401, 403, 64 Pac. 691, 692. In *Estate of Coan*, supra, this court said: "The section just quoted from [section 1350, Code Civ. Proc.] is not restricted to any class of wills, and it certainly must include foreign wills in its provisions." While the statute authorizes the issuance of letters testamentary to the nonresident executor, it does not entitle him to letters of administration, or give him the right to nominate an administrator with the will annexed. *Estate of Beech*, 63 Cal. 458; *Estate of Richardson*, supra. The case of *Estate of Harrison*, 135 Cal. 7, 66 Pac. 846, relied on by respondent, is not in conflict with this view, when we take into consideration the well-settled proposition that in the case of a foreign will the public administrator is not "entitled" to letters of administration. In *re Bergin*, 100 Cal. 376, 34 Pac. 867; *Estate of Engle*, 124 Cal. 292, 56 Pac. 1022. This rule is apparently based upon the fact that he is not "interested in the will." In *Estate of Harrison*, supra, the contest was between the nominee of the foreign executor and the public administrator, neither of whom was interested in the will or "entitled" to letters, and the court undoubtedly had the discretionary power to appoint either; but such power was not derived from section 1379, Code Civ. Proc. In the opinion in that case the court quotes with apparent approval the portion of the opinion in *Estate of Richardson*, supra, to the effect that there is no provision in the statute giving the foreign ex-

ecutor the right to nominate an executor with the will annexed. Section 1379, Code Civ. Proc., which provides that administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, and which is relied upon by respondent as giving the court discretionary power in this case, has no application. This section has been considered by this court on numerous occasions, and it is well settled that the only effect thereof is to give the court the discretionary power to appoint as administrator a person not otherwise entitled upon the written request of the person "entitled." If the person making the written request is not himself "entitled" to administration, either because incompetent or because another applicant with a better claim is entitled, the nominee cannot be considered by the court. *Estate of Beech*, 63 Cal. 458; *Estate of Bedell*, 97 Cal. 339, 341, 32 Pac. 323; *Estate of Muersing*, 103 Cal. 585, 37 Pac. 520; *Estate of Healy*, 122 Cal. 162, 163, 54 Pac. 736. Here the nonresident executor was not, under the statute, entitled to letters of administration, and his written request was therefore ineffectual for any purpose. The nonresident children, heirs and legatees, were incompetent by reason of their nonresidence, and consequently were not entitled to administration. Their request, also, was therefore ineffectual for any purpose.

It is, however, claimed that respondent, by reason of the assignment to it of a portion of the legacy of a daughter of deceased, was "interested in the will," and that the court had the discretionary power to grant letters of administration to it. It has been held that the assignee of a devisee is entitled, as a person interested in the will, to administration as against the public administrator. *Estate of Engle*, 124 Cal. 292, 56 Pac. 1022. That the assignee of the legacy of a daughter is not entitled to letters of administration as against a son, who is also a legatee and in other respects competent, is settled by the case of *Estate of Coan*, 132 Cal. 401, 64 Pac. 691, which is decisive of this question. In that case the contest for letters of administration with the will annexed upon a foreign will was between a son and daughter, both of whom were legatees. The lower court granted letters to both, and the order was reversed by this court. This court there said: "The cases of intestacy referred to in said section 1350 are provided for in said section 1365 et seq. It seems, therefore, beyond question that these sections apply to the probate of a foreign will, where, as in this case, the controversy as to who shall administer is between parties interested in the will." It was held that, while the children of a deceased were, under section 1365, Code Civ. Proc., apparently equally entitled, said section 1365 was qualified by section 1366, Id., which provides that "of

several persons claiming, and equally entitled to administer, males must be preferred to females," and that, therefore, a son and a daughter are not equally entitled to administer, and the court had no discretion to do otherwise than appoint the son. Waiving the question as to whether a corporation formed for the purpose, among others, of acting as executor or administrator, is in any better position, in a contest for letters, by reason of the fact that it has acquired by assignment an interest under the will, it certainly occupies no better position than its assignor. Its assignor, a daughter, would not have been entitled to letters of administration as against the appellant son, even if she were a resident of this state, and the superior court would have had no discretionary power to appoint her.

The appellant had the absolute right to letters of administration with the will annexed. The order directing the issuance of such letters to the Union Trust Company and denying the petition of Charles S. Brundage is reversed, and the cause remanded.

We concur: SHAW, J.; VAN DYKE, J.

(141 Cal. 592)

PEOPLE v. MANOOGIAN. (Cr. 1,024.)

(Supreme Court of California. Jan. 13, 1904.)

HOMICIDE—DEFENSE OF INSANITY—EVIDENCE  
—OPINIONS OF WITNESSES—INSTRUCTIONS—HARMLESS ERROR.

1. In a prosecution for murder, defended on the ground of insanity caused by a personal injury, evidence as to the acts and conduct of defendant between the time of his injury and the date of the homicide is admissible.

2. In a prosecution for murder, defended on the ground of insanity caused by a personal injury, the testimony of witnesses, acquainted with defendant, as to his appearance between the time of the injury and the date of the homicide, with reference to his being rational or otherwise, was excluded on the ground that they were not "intimate acquaintances" within the meaning of Code Civ. Proc. § 1870, subd. 10, and that their opinions respecting the insanity were therefore inadmissible. *Held*, that the questions calling for such testimony did not call for the "opinions" of the witnesses as to defendant's insanity, within the meaning of the statute, but only for the result of their observation as to the manner or conduct of defendant, and that the exclusion of such testimony was prejudicial error.

3. The question as to whether witness was an "intimate acquaintance" of defendant, and therefore qualified to express an opinion as to his sanity, was addressed to the discretion of the trial court.

4. In a prosecution for murder, defended on the ground of insanity, an instruction cautioning the jury against being imposed on by an "ingenious counterfeit of insanity" cannot be held to be prejudicially erroneous, though the same is not approved.

5. In a prosecution for murder, the exclusion of testimony of a witness for the people, material only on the question of self-defense, was not prejudicial error, conceding that the ruling was erroneous, there being no testimony tending to show that the homicide was committed in self-defense.

6. In the absence of evidence as to self-defense in a prosecution for murder, instructions on the law of self-defense were properly refused.

In Banc. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Richard Manoogian was convicted of murder, and he appeals from the judgment and from an order denying a new trial. Reversed.

Frank Kauke and W. D. Tupper, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

ANGELLOTTI, J. The defendant having been convicted of murder in the first degree, and adjudged to suffer imprisonment for life, appeals from the judgment and from the order denying his motion for a new trial.

The defense was insanity, the homicide being admitted, and the principal exceptions urged are based upon certain rulings made in relation to the admissibility of testimony offered by defendant to sustain that defense. The homicide occurred on the evening of July 4, 1902. It appeared that during the month of May, 1902, defendant received a severe injury by being knocked down, his head striking the concrete pavement, and there was evidence tending to show a concussion of his brain resulting therefrom, and a derangement of his mental faculties existing from that time to and including the time of the homicide. The prosecution made practically no attempt to rebut the evidence introduced in this behalf on the part of defendant. This much is said for the purpose of indicating that the defense was not entirely without merit, and for the purpose of showing the importance to the defendant, on whom, under the rule in this state, the burden rested to show that at the time of the homicide his mental faculties were so deranged as to render him incapable of distinguishing between right and wrong in relation to the act with which he was charged, of having all competent testimony offered by him, bearing upon that defense, admitted for the consideration of the jury.

Evidence as to the acts and conduct of defendant between the time of his injury, May 25, 1902, and the date of the homicide, July 4, 1902, was received on behalf of defendant, on the issue of insanity. Such evidence was, of course, admissible as bearing upon the question of his mental condition at the time of the homicide. *Estate of Toomes*, 54 Cal. 509, 516, 35 Am. Rep. 83; *People v. Lee Fook*, 85 Cal. 300, 24 Pac. 654. In this connection, various witnesses who had seen and conversed on various occasions with the defendant during that period of time were asked as to his appearance on those occasions with reference to his being rational or irrational, or acting rationally or irrationally. The witness Isakoolian, who testified that he had known defendant for one year, was "pretty well ac-

¶ 6. See *Homicide*, vol. 26, Cent. Dig. § 624.

quainted with him during that time," and had seen him many times between the time he was hurt and the date of the homicide, was asked, "Well, now, what was his appearance at those times when he talked with you, with reference to his being or acting as men ordinarily do in their right minds, or otherwise?" The objection of the prosecution thereto, on the ground that the witness had not shown a sufficient knowledge of defendant's acts to give an opinion as to his sanity, was sustained. The witness Eguinlan, who testified that he had been "quite well acquainted" with defendant for two years preceding the trial (October, 1902), that he had seen him frequently from the time he was hurt until July 4, 1902, and that he had noticed something different in his actions and demeanor after he was "hurt," was asked, "Now, just state to the jury how he would act, what peculiar ways he had, if any, after he got hurt." He answered, "Well, he was acting peculiar; *all his answers kind of not reasonable answers, and he was irrational; he was brooding over that trouble all the day, all the time.*" On motion of the prosecution the court struck out all that portion of the answer that we have italicized, leaving the question practically unanswered. The witness was further asked, "Now, at the various times that you saw the defendant and talked with him, or observed him, noticed his conversation or his actions after that injury, what can you say as to the appearance of the defendant at those times with reference to his being or acting rational or irrational?" The objection of the prosecution to this question, on the ground that the witness was not qualified to give an opinion and not competent to testify, was sustained. Neither of these witnesses was allowed to testify as to the appearance of the defendant in the respect suggested by the question noted, and exceptions were duly taken to the various rulings of the trial court.

These rulings were apparently based upon the theory that the witnesses were not "intimate acquaintances" of the defendant, within the meaning of that term as used in subdivision 10 of section 1870 of the Code of Civil Procedure, and that their opinions respecting his mental sanity were therefore not admissible. The questions noted, however, did not call for the opinion of the witnesses as to the mental sanity of the defendant, but for the result of their observations, at the various times they came in contact with him, as to his appearance in the respects suggested. The distinction is a clear one, and has been pointed out in many decisions of this court. In *People v. Lavelle*, 71 Cal. 351, 12 Pac. 226, it was held that the trial court did not err in allowing a witness for the prosecution to testify as to the appearance of the defendant at the time of his arrest, with reference to his being rational or irrational, the question asked in that regard being almost precisely the question asked the witness Eguinlan as to

the appearance of defendant, and the objection urged being that the witness was not competent under subdivision 10 of section 1870 of the Code of Civil Procedure. This court there said that the evidence sought to be elicited was not the opinion of the witness as to the mental sanity of the defendant based on acquaintance with him, but was rather as to a fact, viz., his appearance at the time, and that the evidence was admissible. The court said in that case: "The appearance of a person at a given time is one thing; the opinion of a witness as to the mental condition of that person, based on an acquaintance with him, is quite another." This ruling was followed in *Holland v. Zollner*, 102 Cal. 633, 636, 36 Pac. 930, 37 Pac. 231, where the question asked the witness was the same as that asked in *People v. Lavelle*, supra. The force of the opinion is somewhat weakened by the language used by the court in denying a rehearing, where it is said that, conceding the question to have been erroneous, the error was not of sufficient importance to warrant a reversal. In the *Estate of Wax*, 106 Cal. 343, 349, 39 Pac. 624, however, a substantially similar question put to one not an intimate acquaintance was held to be a relevant, material, and proper question, on the authority of *People v. Lavelle*, supra, and *Holland v. Zollner*, supra. In *People v. McCarthy*, 115 Cal. 255, 260, 46 Pac. 1073, a capital case, the jailer who received the defendant at the county jail on the day of his arrest was permitted to testify that defendant appeared "rational" at that time, and this court, in banc, held that, under the rule laid down in the authorities cited, the evidence was unobjectionable. In *People v. Arrighini*, 122 Cal. 121, 123, 54 Pac. 591, the prosecution was allowed to ask certain witnesses as to the appearance and manner of the defendant shortly after the homicide. This court, in approving the ruling of the trial court, distinguished the case from *Estate of Carpenter*, 94 Cal. 406, 29 Pac. 1101, relied on by the learned Attorney General, saying that in the last-named case the questions did not call for a description of the manner or conduct of the persons concerning whom the inquiry was being made, nor whether he acted rationally or irrationally at any particular time. The court further said, speaking through Mr. Justice Temple, who wrote the opinion in the *Estate of Carpenter*, supra: "In *People v. McCarthy*, 115 Cal. 255 [46 Pac. 1073], the court held that it was proper to ask a witness whether the defendant acted rationally or appeared 'rational' at a particular time. So I think any witness may testify to the demeanor of the defendant, whether he was intoxicated, appeared to be excited, was angry, or timid. \* \* \* A witness may state whether the person was \* \* \* melancholy, morose, peevish, irritable, or the opposite. And no doubt other mental habits may be testified to; such as whether he was incoherent, forgetful, or irrational."

The reasons underlying the conclusion in the cases cited are well stated in *Holland v. Zollner*, *supra*. Certain questions are of such a nature that it is impossible for a witness to convey to a jury an adequate conception of the ultimate fact except by announcing the result of his observation. This is particularly true in regard to the qualities suggested by Mr. Justice Temple in the portion of his opinion in *People v. Arrighini*, quoted above. As was said in *Holland v. Zollner*, *supra*: "To say that a man acts 'rational' or 'irrational' is but to describe an outward manifestation drawn from observed facts. It is the last analysis, the ultimate fact, deduced from evidentiary facts coming under observation, but so transitory and evanescent as to be like drunkenness—easy of detection and difficult of explanation. Such conduct is not so much a matter of judgment as of observation." As was said of the person whose sanity was in question in that case, so here, no one will doubt but the facts in relation to the conduct of defendant were admissible in evidence, and that, could the witnesses have explained every look, gesture, expression, and motion, it would have been competent to do so. All that the doctrine asserted in the cases cited seeks to do is in such a case, "by reason of the impossibility of giving form to all these varied manifestations, to permit the witness from necessity to produce the result of the manifestation as a whole." The right of cross-examination affords the person against whom such testimony is given full opportunity to show whether the conclusion of the witness is warranted by the facts. As has been said before, questions like those under consideration do not call for the opinion of the witness as to the sanity of the person concerning whom the inquiry is being made. Such an opinion can properly be given only by an intimate acquaintance or an expert. They simply call for the result of the observation of the witness as to the manner of conduct of such person at a certain time. That such person, at a time shortly before the homicide, appeared to be rational or irrational in conduct or conversation, is a fact which the jury are entitled to consider in determining the ultimate question as to whether or not he was insane at the time of the homicide. The rulings of the trial court excluding this testimony were in conflict with the authorities hereinbefore cited, and, in our opinion, erroneous. We cannot say that defendant was not injured thereby.

The two witnesses already named, and one other, were asked as to their opinion as to defendant's sanity, and the objection of the prosecution that they had not been shown to be intimate acquaintances of defendant was sustained, and the testimony excluded. This court has many times said that the question as to whether one has been shown to be an intimate acquaintance, and therefore qualified to express an opinion as to the sanity of

a person, is from its nature peculiarly one that is addressed to the discretion of the trial court, and that the appellate court will not interpose unless an abuse of that discretion is clearly apparent. *Wheelock v. Godfrey*, 100 Cal. 578, 584, 35 Pac. 317, and cases there cited; *People v. McCarthy*, 115 Cal. 256, 46 Pac. 1073. While the evidence as to the extent of acquaintance of these witnesses was such that this court would have held that the trial court was warranted in allowing them to give their opinion as to defendant's sanity, the reasons for such opinion being also given, as required by the statute, we cannot say that there was any abuse of discretion in holding that they were not intimate acquaintances.

Complaint is also made of a portion of an instruction given by the court upon the subject of insanity. This portion was taken verbatim from *People v. McCarthy*, 115 Cal. 265, 46 Pac. 1073, and was designed to caution the jury against being imposed upon by an "ingenious counterfeited of insanity." It has been given in several cases, and, while this court has frequently said that it would be better if this instruction were omitted altogether, it has also been said that, as it has been given so often in the past and approved by this court, it will not now be held prejudicially erroneous. *People v. Methever*, 132 Cal. 330, 64 Pac. 481; *People v. McCarthy*, *supra*.

We see no error in defendant's requested instruction No. 26 upon the subject of insanity or mental delusion as to some particular matter or regarding a particular person; and are of the opinion that under the circumstances shown by the record it should have been given.

It is claimed that the court erred in sustaining the objections to certain questions asked on cross-examination of Julia Johnson, a witness for the people, as to whether or not she had, either at the coroner's inquest or on the preliminary examination, said anything at all as to the position of the hands of the deceased at the time of the homicide, and concerning which she did testify at the trial on her direct examination. If it be conceded that the ruling was erroneous, the error was without prejudice. The testimony was material only upon the question of self-defense, and there was no testimony tending to show that the homicide was committed in self-defense.

Certain instructions requested by the defendant upon the law of self-defense were properly refused, for there was no evidence in the case to warrant the giving of the same.

None of the other points made calls for notice.

The judgment and order denying a new trial are reversed, and the cause remanded.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.; VAN DYKE, J.

(7 Cal. Unrep. 182)

**PEOPLE v. CHRONES.** (Cr. 1,043.)

(Supreme Court of California. Jan. 13, 1904.)

**FALSE PRETENSES—STATUTE—FAILURE OF PROOF.**

1. Pen. Code, § 1110, provides that if a false pretense was expressed in language, unaccompanied by a false token or writing, or by some note or memorandum thereof in writing subscribed by the defendant, there can be no conviction, unless the pretense is proved by the testimony of two witnesses. The information charged that defendant falsely represented that he owned the goods and fixtures in his place of business, and that he was not indebted to any person, and by means thereof obtained the goods in question. *Held*, that as but one witness testified to the pretense, and there was no token or writing given or shown, there could be no conviction.

Department 1. Appeal from Superior Court, City and County of San Francisco; F. H. Dunne, Judge.

Lewis Chrones was convicted of the crime of obtaining goods under false pretenses, and appeals. Reversed.

Denson & Schlesinger, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

SHAW, J. The defendant was convicted in the court below of the crime of obtaining goods by false pretenses. He appeals from the judgment, and from the order denying his motion for a new trial.

The principal error assigned is that the pretense by means whereof it is alleged the goods were obtained was not established by sufficient evidence. The information charges that the defendant falsely represented that he owned the goods and fixtures in his place of business, and that he was not indebted to any person, and by means thereof obtained the goods in question. Section 1110 of the Penal Code provides that if a false pretense was expressed in language, unaccompanied by a false token or writing, or by some note or memorandum thereof in writing subscribed by, or in the handwriting of, the defendant, there can be no conviction, unless the pretense is proved by the testimony of two witnesses, or of one witness and corroborating circumstances. The only witness who testified to the pretense in this case was W. J. O'Brien, the agent of the owners of the goods. There was no token or writing given or shown. We have carefully read the testimony presented in the bill of exceptions, and fail to find therein any evidence of circumstances constituting any substantial corroboration of the testimony of O'Brien with relation to the pretense.

It is not necessary to discuss the other errors assigned. Upon another trial the district attorney will doubtless make clearer the point that the goods in question were sold by the agent, O'Brien, duly authorized to do so, and that the owners of the goods had no part in the transaction, except to deliver

the same in pursuance of the sale made by O'Brien, and in reliance upon his report.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

(141 Cal. 567)

**MERRIMAN v. WICKERSHAM.** (S. F. 3,371.)

(Supreme Court of California. Jan. 12, 1904.)

**REAL ESTATE BROKERS—COMMISSIONS—ACTION AGAINST EXECUTOR—DISQUALIFICATION OF WITNESSES.**

1. A contract in the form of a receipt for \$1,000, "in part payment of purchase price, \$30,000, of the property known and described as follows," etc., signed by the owner, is a sale, though conditional, such as to bind him to pay a commission which he had agreed to pay the firm which procured the purchaser.

2. Where one agreed to pay a commission to real estate brokers for the sale of a tract, if sold to any person having received information thereof through them, he is liable therefor when they produce a person able and willing to buy, though he then refuses to sell.

3. Code Civ. Proc. § 1880, providing that parties or persons in whose behalf an action is prosecuted against an executor, on a claim against a deceased person's estate, cannot be witnesses as to any fact occurring before the death of such person, does not disqualify a stockholder and officer of a corporation from testifying as to such facts in an action by it or its assignee against an executor.

4. Code Civ. Proc. § 1880, disqualifying as witnesses, in an action against an executor, parties or persons in whose behalf an action is prosecuted, does not disqualify one who is neither party nor a person in whose behalf the action is prosecuted, though he has an interest in the outcome.

Department 2. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by E. S. Merriman, assignee of the Burnham & Marsh Company, against F. A. Wickersham, and continued after his death against Mary Catherine Wickersham, his executrix. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Campbell, Metson & Campbell and Thomas H. Breeze, for appellant. Edward C. Harrison, for respondent.

HENSHAW, J. Plaintiff is the assignee of the Burnham & Marsh Company, a corporation, real estate brokers. The action is for commissions due upon an alleged sale for F. A. Wickersham. Suit was commenced against Wickersham in his lifetime. He suffered default. Plaintiff afterwards consented that his default might be set aside. His death following, his executrix was substituted as defendant.

Wickersham had given to the Burnham & Marsh Company a power of attorney to sell certain described property for the sum of \$30,000. The instrument provided: "I hereby agree to pay to said Burnham & Marsh Company two and one-half per cent. commission on the amount of the sale if a purchaser

is found by or through said Burnham & Marsh Company, or myself, or any other person, during said period [of 10 days], or if sold thereafter to any person having received information of said property through the said Burnham & Marsh Company." The complaint pleaded, and the court found, that after the expiration of the 10 days the Burnham & Marsh Company, acting as the broker of Wickersham, negotiated a sale of the property and sold it for him to one G. L. Page for the sum of \$30,000, and received from Page a deposit upon the sale in the sum of \$1,000, and that this sale was on the 6th day of February, 1901, with all its terms and conditions as specified in the receipt given to and taken by Page, ratified in writing by Wickersham; and, further, that Page first received information of the fact that the property was for sale by Wickersham through the Burnham & Marsh Company. Thereafter, and without just cause or reason, Wickersham refused to consummate the sale, and instructed the Burnham & Marsh Company to return to Page his deposit, which was accordingly done.

The evidence supports the findings so made. It appears that Wickersham was present at the execution of the contract between the Burnham & Marsh Company and Page. That contract was in form an acknowledgment of the receipt of the sum of \$1,000 "in part payment of purchase price \$30,000 of the property known and described as follows," etc. It further appears that Wickersham evidenced his acceptance and approval of the sale by his signature upon the instrument.

It is contended by appellant, however, that the contract between Wickersham and the Burnham & Marsh Company contemplated an actual and completed sale, and that, as Wickersham repudiated the contract before its full execution by the transfer of title, he was not bound to pay the commissions contemplated. But the answer to this is twofold. First, the contract which Wickersham approved was a sale of his property, and thus the literal terms of his contract with the Burnham & Marsh Company had been complied with. It was a conditional sale, to be sure, but none the less it was a sale. Second, the law as to this contract is no different from the law as to brokers' contracts generally; that is to say, where the contract fixes the broker's right to remuneration upon his sale, if he shall produce a purchaser able and willing to buy, he has performed his part of the contract, and the owner's liability for his compensation or commission is complete, and cannot be avoided by any arbitrary or wanton refusal to consummate the sale. *Crane v. McCormick*, 92 Cal. 176, 28 Pac. 222; *Smith v. Schiele*, 93 Cal. 144, 28 Pac. 837; *Gregory v. Bonney*, 135 Cal. 589, 67 Pac. 1038.

The Burnham & Marsh Company is a corporation. Mr. Marsh, vice president and one of its principal stockholders, was allowed to

testify to matters and facts in issue. It is contended that the evidence was improperly admitted, in violation of section 1880 of the Code of Civil Procedure, which provides that "the following persons cannot be witnesses: \* \* \* Parties, or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." At common law interest disqualified any person from being a witness. That rule has been modified by statute. In this state interest is no longer a disqualification, and the disqualifications are only such as the law imposes. Code Civ. Proc. § 1879. An examination of the authorities from other states will disclose that their decisions rest upon the wordings of their statutes, but that generally, where interest in the litigation or its outcome has ceased to disqualify, officers and directors of corporations are not considered to be parties within the meaning of the law. In example, the statute of Maryland (Pub. Gen. Laws, art. 35, § 2) limits the disability to the "party" to a cause of action or contract, and it is held that a salesman of a corporation, who is also a director and stockholder, is not a party, within the meaning of the law, so as to be incompetent to testify in an action by the company against the other party, who is insane or dead. *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418. To the contrary, the Michigan law expressly forbids "any officer or agent of a corporation" to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person. *Howell's Ann. St. Mich.* § 7545. The Supreme Court of Michigan, in refusing to extend the rule to agents of partnerships, said: "It is conceded that this testimony does not come directly within the wording of the statute, but it is said there is the same reason for holding the agent of a partnership disqualified from testifying that there is in holding the agent of a corporation. This is an argument which should be directed to the legislative rather than to the judicial department of government. \* \* \* The inhibition has been put upon agents of corporations, and has not been put upon agents of partnerships. We cannot, by construction, put into the statute what the Legislature has not seen fit to put into it." *Demary v. Burtenshaws' Estate* (Mich.) 91 N. W. 649. In New York the statute provides that against the executor, administrator, etc., "no party or person interested in the event, or person from, through, or under whom such party or interested person derives his interest or title shall be examined as a witness in his own behalf or interest." This is followed by the exception that a person shall not be deemed interested by reason of being a stockholder or officer of

any banking corporation which is a party to the action or proceeding or interested in the event thereof. Ann. Code Civ. Proc. N. Y. § 829. Here it is apparent that the interest of the witness is made a disqualification, and it is of course held that stockholders and officers of corporations other than banking corporations are under disqualification. *Keller v. West Bradley Mfg. Co.*, 39 Hun, 348.

To like effect is the statute of Illinois, which declares that no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify under the given circumstances. Under this statute it is held that stockholders are interested, within the meaning of the section, and are incompetent to testify against the representatives of the deceased party. *Albers Commission Co. v. Sessel*, 193 Ill. 153, 61 N. E. 1075. The law of Missouri disqualifies "parties to the contract or cause of action," and it is held that a stockholder, even though an officer of the bank, is not disqualified by reason of his relation to the corporation when he is not actually one of the parties to the making of the contract in the interest of the bank.

Our own statute, it will be observed, is broader than any of these. It neither disqualifies parties to a contract nor persons in interest, but only parties to the action (Code Civ. Proc. §§ 1879, 1880); and thus it is that in *City Savings Bank v. Enos*, 135 Cal. 167, 67 Pac. 52, it has been held that one who is cashier and at the same time a stockholder of a bank was not disqualified, it being said: "To hold that the statute disqualifies all persons from testifying who are officers or stockholders of a corporation would be equivalent to materially amending the statute by judicial interpretation." It is concluded, therefore, that our statute does not exclude from testifying a stockholder of a corporation, whether he be but a stockholder, or whether, in addition thereto, he be a director or officer thereof.

The examination of the witness Page undoubtedly discloses that he had an interest in the outcome of the litigation, but that fact did not bring his testimony within the inhibition of the law. It was not established that he was a person "in whose behalf the action was prosecuted," and his testimony was therefore properly admitted.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

(141 Cal. 558)

**SWEENEY v. ADAMS.** (Sac. 1,157.)

(Supreme Court of California. Jan. 11, 1904.)

**ELECTIONS—CONTESTS—QUO WARRANTO.**

1. Code Civ. Proc. § 1111, providing that any elector of a county may contest the right of any person declared elected to any office therein, authorizes a contest where one is merely

shown by the election returns to be elected, and it is not necessary that he shall have filed his official oath and bond.

2. Proceedings in the nature of quo warranto are not necessary instead of proceedings in the nature of a contest where one has been merely shown by election returns to be elected.

In Banc. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Election contest by William Sweeney against Geo. L. Adams. Judgment for contestant. Contestee appeals. Affirmed.

T. W. Street, for appellant. J. P. O'Brien, for respondent.

**LORIGAN, J.** This is an election contest. The parties to this proceeding were rival candidates for the office of sheriff of Tuolumne county at the last general election. The board of supervisors, sitting as a canvassing board, declared the appellant elected to such office, and a certificate of election was duly issued to him. Respondent, in due time, commenced a contest on the ground of misconduct on the part of the board of judges of election in counting the votes. Issue was joined, the cause tried, and the court found the charge of misconduct to be true, and that the respondent had received the highest number of legal votes cast for such office. A judgment was entered accordingly, annulling the certificate of election issued to appellant, and declaring the respondent elected to such office.

On this appeal no question is made by appellant as to the sufficiency of the evidence to sustain the findings. His principal point is that the lower court had no jurisdiction to hear or determine the contest, and should have granted his motion to dismiss it, and this point is based upon certain facts which the lower court found to be true, and which are not contradicted. These are that after appellant had been declared elected to the office of sheriff by the board of supervisors acting as a canvassing board, and the proper certificate of election had been issued to him by the county clerk, he inadvertently failed to file his official oath and bond as such sheriff within the time required by law; that such oath and bond had not been filed when the contest was commenced or thereafter; and that the office had become vacant.

To fully appreciate the claim made by appellant from these facts, it is necessary to set forth the section of the Code authorizing an election contest, for it is upon his construction of the section that his point is based. It reads: "Any elector of a county \* \* \* may contest the right of any person declared elected to any office to be exercised therein for any of the following causes."

Appellant insists that the proper construction of this section is that it provides only for a contest where the right to an office exists at the time the contest is begun; that the right to office which is contemplated is the right which has been made perfect by taking all the legal steps necessary to au-



thorize him to enter upon the discharge of his official duties when the term of office commences. And from this construction he argues that, notwithstanding the appellant was declared elected by the canvassing board, yet, as he failed to qualify, he thereby lost his right to the office, and, the right being gone, there was nothing to contest. We cannot agree with this construction of the section, or accord with the reasoning which is indulged in to sustain it.

It is not the apparently perfect right to the office which alone the elector may contest, such a right as is presumed from the issuance of a certificate of election and due qualification under the law, but it is the presumptive right to the office, which results from the fact that the board of supervisors, sitting as a canvassing board, has declared a person elected. It is this apparent official right which their declaration creates that may be contested. This is all the statute provides for. The canvassing board is the only body authorized under the election law to declare from the returns what candidates are elected, and when the section concerning contests says that an elector may "contest the right of any person declared elected to an office" it means the apparent right which the declaration of such board creates. No other right is involved, and the jurisdiction of the court to entertain or the right of the elector to commence such contest does not in any manner depend upon whether the person so declared to be elected by the board qualifies for the office by filing his official oath and bond or not. It is not necessary that he qualify to confer jurisdiction, nor can the court be divested of jurisdiction because he fails to do so.

The object of a contest, which is initiated upon the ground of malconduct on the part of the board of judges of election, is not to examine into matters transpiring subsequent to the declaration of the canvassing board, and which may strengthen or weaken the claim of the person declared elected by it. It has a far more effective and extended purpose. The contest attacks the election itself. It is not concerned with the certificate of election or the proceedings subsequent thereto, which are merely the indicia of the right to enter upon the duties of the office, but goes back of all these to the fountain source of official title, and ascertains whether the sovereign will as expressed at the polls, and upon which the canvassing board assumes to declare the result of the election, has by such declaration been fairly, honestly, and legally expressed. It probes into and examines the conduct of the election officers upon whose returns the canvassing board acts. It recanvasses the votes cast, and ascertains whether the person declared elected by such canvassing board had the highest number of legal votes; and as a result the law requires the court, "if in any \* \* \* case it appears that another person than the one returned

has the highest number of legal votes," to "declare such person elected." Code Civ. Proc. § 1123.

From the use of the term "the one returned" in the quoted section it is quite obvious that the right to office which is being investigated by the court in the contest is such right only as the "election returns" (Pol. Code, § 1281) disclose exist in favor of a candidate, as it is from the face of these returns, and from no other data, that the canvassing board declares who is elected.

In addition to what has been said, and aside from the consideration given to the language alone of the section for the purpose of determining its meaning, it must be borne in mind that the right to contest is not designed exclusively for the benefit of rival candidates in an election. The right to a public office is not a matter which concerns them alone, nor is it the interest alone of the contending individuals that is to be considered in a contest. As far as they are concerned, their interest is exclusively a personal and pecuniary one. Paramount to their claims is the deep public concern involved as to who are entitled to hold an office for which the suffrages of the electors have been cast. According to the view of counsel for appellant, this interest is entirely lost sight of, and the contest becomes one between individual aspirants, involving personal interests. This is not the correct view. No special right of contest is given to a candidate as such. The right is conferred upon any elector, and can only be invoked as an elector, and when so invoked the contest is regarded as of a public nature, where irregularities and frauds at the ballot box, or in the vote, or official misconduct of the election officers are investigated, so that by a purgation of the polls, if necessary, the right of the electors to have such public officers as have been honestly and legally elected by them assume their offices is sustained and enforced. This doctrine finds expression in the case of *Minor v. Kidder*, 43 Cal. 236, where this court says: "It is the wholesome purpose of the statute to invite inquiry into the conduct of the popular elections. Its aim is to secure that fair expression of the popular will in the selection of public officers without which we can scarcely hope to maintain the integrity of the political system under which we live. With this view, it has provided the means of contesting the claims of persons asserting themselves to have been chosen to office by the people. It has not authorized every citizen or member of the body politic at large to institute proceedings for that purpose, but has limited the authority in that respect to those who are themselves electors, and it has required the statement of the grounds of contest in every instance to be verified by the oath of the contestant. When such a statement is presented by an elector to the tribunal whose duty it is to investigate its merits, it should not be received in a spirit

of captiousness, nor put aside upon mere technical objections designed to defeat the very search after truth which the statute intended to invite. The investigation proposed is one in which the public at large are deeply concerned. It certainly involves a question of broader import than the mere individual claim of a designated person to enjoy the honors and emoluments of the particular office brought directly in contest. The inquiry must be as to whether or not the popular will in the selection of officers to administer the public affairs has been in a given instance or is about to be defeated or thwarted by mistakes happened or fraud concocted. It is therefore not an ordinary adversary proceeding, for, as against this high public interest concerned, there can be no recognized adversary. \* \* \* The public interests imperatively require that the ultimate determination of the contest should in every instance, if possible, reach the very right of the case."

This construction placed by the court upon the statute, and which inspired it to declare that a contest is not an ordinary adversary proceeding, that there can be no recognized adversary, and that the ultimate determination of the contest should reach the heart of the case, would be of no consequence if the failure to qualify by the person declared elected could deprive the court of jurisdiction to hear or determine a contest. If the section were to be construed as counsel contends, any person elected could, by simply failing to qualify, effectually cut off all inquiry into the most flagrant frauds practiced by election officers, whereby such person was not only declared elected, but another regularly entitled to the office defeated. It may well happen in a contest inaugurated by an elector, other than a candidate, against the person returned elected, or even when inaugurated between two rival candidates, where several other candidates besides themselves sought election to the same office, that the court may find, in the first instance, that the contestee was not elected, or, in the second, that neither the contestant nor the contestee were elected, but that some other candidate was. When this is shown, it is provided by sections 1122 and 1123 of the Code of Civil Procedure relative to such contests that the court must annul the election of the person returned, and declare such other person elected. This result could never be attained if the right which is to be contested is the absolute right or title to the office, as appellant contends. It is, however, a matter of plain and easy accomplishment if the right which the section declares may be contested is simply the right to the office which accrues solely from having been "declared elected" thereto by the canvassing board. Under the construction claimed by appellant the policy of the law is thwarted, the sovereign will defeated, and the jurisdiction of the court lost by the failure of a per-

son to qualify for an office to which he was never legally elected. Under the other construction the public interest in honest elections is conserved, the popular will given effect, and a judgment rendered, as the law designs it shall be, irrespective of who are the parties to a contest, giving the office to the one shown to have been legally elected thereto. This last is the end which the law has in view, and it is fully effected when the inquiry under the contest is addressed solely to the validity of the right which exists from the fact that he has been "declared elected" by the canvassing board, unaffected by any subsequent action or inaction of such person which may have destroyed such right.

It is further claimed by counsel for appellant that, instead of instituting proceedings in the nature of a contest, respondent should have commenced proceedings in the nature of quo warranto. There is nothing in this point, nor does it merit extended consideration. If the appellant had qualified, it could not be seriously contended that proceedings in the nature of a contest would not be a proper remedy, and, as we have concluded that his failure to so qualify did not affect that right, it is unnecessary to further discuss the question of quo warranto.

The judgment is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.; HENSHAW, J.

(141 Cal. 564)

GRUNDEL v. UNION IRONWORKS. (S. F. 3,083.)\*

(Supreme Court of California. Jan. 12, 1904.)  
SHIPPING—PRIVATE VESSEL—PASSAGEWAYS—  
NEGLIGENCE—DEATH OF LICENSEE.

1. In an action for causing the death of decedent, it appeared that defendant was the owner of a sailing vessel, which was tied to defendant's private wharf. Decedent, "having business to perform" on the vessel, attempted to board it by walking on the gang plank from the wharf to the vessel. *Held* that, in the absence of a showing that decedent was in the employ of defendant, or had been invited or had permission to enter on its premises, or to go on the vessel, or that his business was in some way connected with defendant, he was a trespasser, or, at best, a mere licensee.

2. The owner of a sailing vessel, which is tied to the owner's private wharf, owes no duty to licensees to keep its premises or the passageway from the wharf to the vessel in a safe condition.

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Henry Grundel, administrator of the estate of Frank Grundel, deceased, against the Union Ironworks. From a judgment for plaintiff, defendant appeals. Reversed.

Willson & Willson, for appellant. Sullivan & Sullivan, for respondent.

\*Rehearing denied February 11, 1904.

HENSHAW, J. This action was to recover damages from the Union Ironworks for negligently causing the death of the plaintiff's intestate, Frank Grundel. The complaint charged that upon the 28th of December, 1893, a certain sailing vessel named "Gracie S." was in the possession and under the control of the defendant; that while so under its control the vessel was placed alongside of a wharf belonging to the defendant; that for the purpose of affording a passage-way to and from the vessel the defendant on that day extended a gang plank from the wharf to the vessel; that the gang plank was negligently, insecurely, and defectively attached to the wharf and the vessel; that "Frank Grundel, having business to perform upon said vessel, attempted to board the same by walking on said gang plank from said wharf to said vessel." While so walking, by reason of the insecure, negligent, and defective manner in which the gang plank was placed, it slipped, and in slipping caused Grundel to fall against the rail of the vessel, fracturing his skull and inflicting fatal injuries.

This complaint does not state a cause of action, and the demurrer interposed to it, for that reason, should have been sustained. The allegations show that the Union Ironworks had caused a vessel under its possession to be tied to its private wharf, and had placed a gang plank between the wharf and the vessel. It is alleged that Grundel, "having business to perform upon the vessel," attempted to board it by means of the gang plank. There is no pretense that Grundel was in the employ of the Union Ironworks, that he had been invited by the Union Ironworks to enter upon its premises, or to go upon the vessel, or that his business was in any way connected with the defendant. It is not even pretended that he had permission of the Union Ironworks to be upon the premises. His business, for aught that appears, might have been wholly foreign to any of the interests of the Union Ironworks, or even in hostility to it. It is not shown, therefore, that he was not a trespasser, and, under the most favorable view which could be taken of the pleading, he was at the best a mere licensee. As such licensee, the defendant owed him no duty to keep its premises or its passageways in safe condition, and, no duty being owed by defendant to plaintiff, no negligence can be imputed to the former. It would seem unnecessary to cite cases in support of this doctrine, so well settled as to be beyond controversy, but there may be instanced *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; *Kennedy v. Chase*, 119 Cal. 640, 52 Pac. 33, 63 Am. St. Rep. 153; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; *Brehmer v. Lyman*, 71 Vt. 98, 42 Atl. 613; *Dobbins v. M., K. & T. R. R. Co.*, 91 Tex. 62, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856; *Evansville, etc., R. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep.

783; *Taylor v. Haddonfield, etc., Turnpike Co.* (N. J. Sup.) 46 Atl. 707; *Mathews v. Bensen*, 51 N. J. Law, 30, 16 Atl. 195; *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262; *Redigan v. R. R. Co.*, 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520; *Moffatt v. Kenny*, 174 Mass. 311, 54 N. E. 850; *Cusick v. Adams*, 115 N. Y. 55, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520; *Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376; 2 *Shearman and Redfield on Negligence*, § 705; *Cooley on Torts*, p. 358.

For the foregoing reasons the judgment and order are reversed, with directions to the trial court to sustain the defendant Union Ironworks' demurrer to the complaint.

We concur: MCFARLAND, J.; LORIGAN, J.

(141 Cal. 554)

LACRABERE v. WISE et al. (S. F. 2,590.)

(Supreme Court of California. Jan. 11, 1904.)

FORCIBLE ENTRY AND DETAINER—RENT—NON-PAYMENT—NOTICE—SERVICE—PROOF—MODE—AFFIDAVIT—STATUTES.

1. In forcible entry and detainer to recover leased premises for nonpayment of rent, the service of a three-days notice demanding payment of rent or possession required by Code Civ. Proc. § 1161, subd. 2, must be alleged, and proved, if denied.

2. In forcible entry and detainer the service of a three-days notice demanding payment of rent or possession, required by Code Civ. Proc. § 1161, subd. 2, cannot be proved by the affidavits of persons making the service, but only by their testimony as witnesses given in open court, as the best evidence.

3. Code Civ. Proc. § 2009, providing that an affidavit may be used to prove the service of a notice in an action or special proceeding to obtain a provisional remedy, etc., does not authorize the proof of service of a three-days notice demanding payment of rent or possession in forcible entry and detainer by affidavit of the persons making the service, where such service is denied.

In Banc. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Opinion in department (71 Pac. 175) affirming opinion below, reversed.

Frank J. Murphy (Fred H. Hood, of counsel), for appellants. George P. Burke, for respondent.

LORIGAN, J. This is an appeal by defendants from an order denying their motion for a new trial. The action is for unlawful detainer, and the points made by appellants here are that the evidence was insufficient to sustain any of the findings, and that the court erred in denying their motion for a nonsuit. The complaint was in the form usual in such actions, alleging lease of the premises in controversy to defendants at a specified monthly rental, a failure to make payment of the rents for several months, the

¶ 1. See *Landlord and Tenant*, vol. 32, Cent. Dig. §§ 1238, 1243.

service of a three-days notice to make such payment or deliver possession of the premises, and the failure of defendants to do either. The answer puts squarely in issue every allegation in the complaint. Upon the trial, counsel for plaintiff, to prove the allegation in the complaint of service of three days' notice, offered in evidence a paper purporting to be such notice, having attached to it affidavits of several persons tending to show service by them upon the defendants of the proffered paper. Over the objection and under the exception of defendants this notice, with the accompanying affidavits as sufficient proof thereof, was admitted in evidence. This was all the evidence offered to prove such service. At the close of plaintiff's case defendants moved for a nonsuit, urging, among other grounds therefor, specially the one that there was no proof of service of such notice. The motion was denied.

We are satisfied it should have been granted. It is an essential prerequisite to the maintenance of an action for unlawful detainer under section 1161 of the Code of Civil Procedure that a three-days notice, demanding payment of the rent due or possession of the leased premises, should be served upon the defendants, as subdivision 2 of that section requires. It is equally essential to allege the service of such demand in the complaint, and, if controverted, prove it on the trial. Service is an act to be performed before suit, a fact to be alleged in bringing suit, and a fact to be proven to successfully maintain it, and such fact is to be proven as any other disputed fact in the case. The rule is that the best evidence must be produced which the nature of the transaction will permit—the testimony of witnesses given in open court, where the adverse party may have an opportunity of cross-examination. Affidavits are not in the nature of the best evidence by which to prove issuable facts. They rank on no higher plane for that purpose than hearsay evidence. Counsel for respondent relies solely upon the construction he places on section 2009 of the Code of Civil Procedure to support the method of proof adopted by him. That section provides that: "An affidavit may be used \* \* \* to prove the service of a summons, notice or other paper in an action or special proceeding, to obtain provisional remedy, the examination of a witness, or a stay of proceedings," etc.; and he insists therefrom that, as an action for unlawful detainer is a special proceeding, and the notice in question is one pertaining to a special proceeding, that service of the notice on the hearing of such proceeding could be proven by affidavit under the section. But this section has no application to the proof of facts which are directly in controversy in an action. It was not intended to have the effect of changing the general rules of evidence by substituting voluntary *ex parte* affidavits for the testimony of witnesses. The section only

applies to matters of procedure; matters collateral, ancillary, or incidental to an action or proceeding; and has no relation to proof of facts the existence of which are made issues in the case, and which it is necessary to establish to sustain a cause of action. It might with the same plausibility be argued that in those cases where it is essential that a demand should be made before an action for claim and delivery can be maintained proof of service of such demand could be made by affidavit, or that in any action (because the section applies to actions as well as special proceedings) where issue is joined as to service of a notice or demand or other "paper" proof could be made of the fact by affidavit. Aside from this, however, the service of the notice sought to be proven by affidavit in this case was not service of a "summons, notice, or other paper in an action or special proceeding." An action or special proceeding referred to in the section means a cause already commenced and pending in court, and it is to proof of service of notices and papers incidentally used in such pending cause that the section relates; notices or papers served upon the opposite party, or his attorney, under the general rules of procedure, and relating to the pending action or proceeding.

Nor was the notice served on the defendants to pay the rent or surrender possession a notice given in any special proceeding. It was a notice given before any special proceeding was commenced. It antedated it. The giving of it was a condition precedent to the right to commence such proceeding at all, and proper proof of it was necessary to warrant recovery, and that proof should have been made by the testimony of the persons who made the service, taken at the trial, and not by their affidavits.

The same point is presented under a specification that the evidence is insufficient to support a finding of the court that such notice was given, and this must also be sustained.

For the reasons given, the order denying the motion for a new trial is reversed, and the cause remanded.

We concur: BEATTY, C. J.; McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.

(141 Cal. 550)

PEOPLE v. CHEW LAN ONG. (Cr. 900.)  
(Supreme Court of California, Jan. 11, 1904.)  
HOMICIDE—PLEA OF GUILTY—DETERMINING  
DEGREE—CONSTITUTIONAL LAW—  
WARRANT OF EXECUTION.

1. Pen. Code, § 1192, devolving on the court the duty of determining the degree of crime, where defendant pleads guilty, does not violate the constitutional provision that trial of crimes shall be by jury.

2. Pen. Code, § 1192, devolving on the court the duty of determining the degree of crime where defendant pleads guilty, is supplemented

¶ 1. See Jury, vol. 31, Cent. Dig. § 143.

by Code Civ. Proc. § 187, providing that, where jurisdiction is by any statute conferred on a court, all means necessary to carry it into effect are also given.

3. Though Pen. Code, § 1217, merely provides that, in case of a judgment of death, the judge shall, in the warrant of execution, designate the date of execution, and require the sheriff to deliver defendant to the warden for execution, the insertion therein of a direction to the warden to execute defendant does not invalidate it, but is mere surplusage; sections 1224, 1226, and 1227, designating the warden as the official to execute the judgment.

In Banc. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Chew Lan Ong was convicted of murder, and appeals. Affirmed.

H. H. McCloskey and Barnes & Farquar, for appellant. Tiley L. Ford, Atty. Gen., A. A. Moore, Dep. Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

LORIGAN, J. An information was filed against the defendant in the superior court of the city and county of San Francisco, charging him with the crime of murder. Upon arraignment he pleaded "Not guilty," but subsequently withdrew this plea, and entered one of "Guilty." When this latter plea was received by the court, it was conceded by the attorney for the defendant that the duty devolved upon the court of determining, and fixing, under section 1192 of the Penal Code, the degree of crime, before passing sentence; and it was stipulated that the testimony taken at the preliminary examination of the defendant be introduced in evidence, and used by the court for that purpose. Thereafter, on March 10, 1902, the court determined from such evidence that the crime was murder of the first degree, and adjudged that the defendant suffer the penalty of death; and on March 12, 1902, the judge of said court signed and issued a warrant of execution, directing the warden of the State Prison at San Quentin to execute the judgment of death against said defendant on the 6th day of June, 1902. The defendant appeals from said judgment and the order of execution, and contends, first, that the court had no authority to determine the degree of the crime; and, secondly, that the judgment and order of execution are void, because the court had no power to direct the warden of the State Prison to execute the defendant.

In their briefs, counsel for appellant, upon the first point, urge that the power attempted to be conferred on the court by said section 1192, to determine the degree of crime upon the plea of guilty before passing sentence, is violative of that provision of both the state and federal Constitutions providing that the trial of all crimes shall be by jury. This is no new point. The same contention was made in this court 40 years ago, and decided adversely to appellant's claim. In *People v. Noll*, 20 Cal. 164, this court said: "The proceeding to determine the degree of the crime

of murder after a plea of guilty is not a trial. No issue was joined upon which there could be a trial. There is no provision of the Constitution which prevents a defendant from pleading guilty [to the indictment] instead of having a trial by jury. If he elects to plead guilty to the indictment, the provision of the statute for determining the decree of the guilt, for the purpose of fixing the punishment, does not deprive him of any right of trial by jury." *People v. Lennox*, 67 Cal. 115, 7 Pac. 260, is to the same effect; and in *Haltinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986, the Supreme Court of the United States declare that a statutory provision conferring power on the court, under such a plea, to determine the degree of crime, violates no provision of the Constitution of the United States.

On the oral argument, counsel made an additional point, not presented in their brief, that this section is unconstitutional because it does not provide any manner or mode whereby the court is to reach its determination as to the degree of crime; that it does not provide for the taking of evidence on the subject. Jurisdiction to determine the matter is, however, expressly conferred on the court by the section. This means that there shall be a judicial determination; and where power is especially conferred upon a court of general jurisdiction to determine a particular question, and no special mode for that determination is pointed out, the jurisdiction conferred necessarily implies authority in such court to call to its assistance in determining the particular question the same aid as is usually employed by it in reaching a judicial determination in other cases. The universal aid is evidence. This was the means employed by the lower court in determining the degree of crime in the case at bar. It is the only means by which a judicial determination can be had, and was the means which it was contemplated by the Legislature should be invoked by the court. If there could be any doubt of this general rule, we are satisfied that the course pursued by the lower court is provided for and sanctioned by section 187, Code Civ. Proc., which declares that "when jurisdiction is by the Constitution or this Code, or by any other statute conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." The method adopted by the lower court was entirely conformable to that spirit which provides for a judgment upon a conviction or plea of guilty of crime. If appellant's contention could prevail, a plea of guilty, generally, in those cases where the crime is divided into degrees—murder, burglary, arson—would be tantamount to immunity from punishment, be-

cause, as the determination of the degree of crime by the court is an essential prerequisite to the imposition of sentence, if the court is powerless to determine that degree it is equally powerless to impose sentence, and hence, being unable to hold the defendant for any legal purpose, would be required to discharge him. This situation itself illustrates the wisdom of the general Code provision, and the necessity for its application.

Under the second point, appellant insists that the judge of the lower court had no power to insert in the warrant of execution a direction to the warden of the State Prison to execute the defendant. Such a direction, however, would not render the order void. The law provides that the judge, in such warrant, shall designate the date of execution, and require the sheriff to deliver the defendant to the warden for execution. Section 1217 of the Penal Code. The fact that the warrant, in addition, directed the warden to execute the judgment of death, is of no moment, as this was a duty devolving upon the warden under the law, independent of the order of court. The order, to that extent, was surplusage. We are mindful of counsel's contention that there is no provision of law directing the warden to execute a judgment of death, but hardly think the contention worthy of serious consideration. The provisions of the Penal Code—sections 1224, 1226, 1227—designate him as the official who must execute such judgment. But assuming that such direction to the warden in the warrant of execution was error, it could not now be available to the defendant for a reversal. From lapse of time, the order has become *functus officio*, in as far as it directed the execution of the defendant. He was directed to be executed on June 6, 1902. That time having elapsed, another order of execution must be made, under which the point urged now cannot arise, because, by section 1227 of the Penal Code, the defendant must be brought before the court, and an order made which shall expressly require the warden to execute the judgment at a specified time.

We perceive no reason why the judgment and order should be disturbed, and they are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J.

(141 Cal. 548)

PEOPLE v. LEW FOOK. (Cr. 858.)

(Supreme Court of California. Jan. 11, 1904.)  
HOMICIDE—MORAL CERTAINTY—INSTRUCTION.

1. Defendant in a murder case cannot be prejudiced by the use of the word "impression" in an instruction: "'Moral certainty' is that degree of proof which the law requires of moral evidence. Moral certainty is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it. It is

also declared to be a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

In Banc. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Lew Fook was convicted of murder, and appeals. Affirmed.

H. V. Moorehouse, J. E. Alexander, and Dibble & Dibble, for appellant. Tiley L. Ford, Atty. Gen., A. A. Moore, Jr., Dep. Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

HENSHAW, J. The defendant was convicted of murder, and upon this appeal presents the single proposition of alleged error contained in one of the instructions given by the trial court. That instruction is as follows: "'Moral certainty' is that degree of proof which the law requires of moral evidence. Moral certainty is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it. It is also declared to be a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

The last sentence of the instruction is a quotation from the famous charge of Chief Justice Shaw in the Webster Case, and has been uniformly if not universally approved. Appellant's attack, however, is directed to the preceding part of the instruction, and it is said that this language was inaccurate and injurious to the appellant in that it permitted the jury to be governed by their "impressions," and not by their "convictions." In this connection it is pointed out that section 1826 of the Code of Civil Procedure itself defines moral certainty as being "that degree of proof which produces conviction in an unprejudiced mind," and that elsewhere the Code declares "that evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind." Code Civ. Proc. § 1835. We think, however, that no defendant can present any just reason for objecting to this amplification of the definition of moral certainty, since that amplification makes so clearly in his favor. The jury was here instructed as to the nature of the conviction which satisfies the reason and judgment of those who are bound to act conscientiously upon it, and was told that it was a conviction which impelled them by necessity or coercion to act upon it, or otherwise they entertained a reasonable doubt of which the defendant must be given the benefit. "Impression," as here employed, does not vary essentially in meaning from "conviction." "Impression" itself is a stamping in upon the mind. The language objected to is taken from Burrill on Circumstantial

Evidence (page 199), and that careful author fully justifies the language both by reason and authority.

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; VAN DYKE, J.

McFARLAND, J. (concurring). I concur in the judgment, because the instruction complained of could have done appellant no injury; but I think that it should not have been given. As shown in the opinion in *People v. Huntington*, 138 Cal. 261, 70 Pac. 284, the instruction includes only a part of a sentence in Burrill—omitting the part which makes his meaning clear.

BEATTY, C. J. (concurring). I concur in the judgment on the ground stated by Justice McFARLAND, and I agree with him that the language quoted from Burrill should have been omitted from the instruction. It adds nothing, either of force or clearness, to the oft-approved definition of "moral certainty" given by Chief Justice Shaw in the *Webster Case*, and I deprecate the disposition to expand and vary approved instructions in criminal cases, the only effect of which is to raise new questions and furnish new grounds for appeals.

(141 Cal. 543)

PEOPLE v. LEWIS. (Cr. 979.)

(Supreme Court of California. Jan. 9, 1904.)

CRIMINAL LAW—ENTICING FEMALE—VENUE—JURISDICTION—INSTRUCTIONS.

1. Pen. Code, § 267, provides that every person who takes away any female under the age of 18 years from her father, without his consent, for the purpose of prostitution, is punishable, etc. *Held*, that the gravamen of the offense was the intent with which the female was abducted, and hence, where there was sufficient evidence to warrant a finding that at the time defendant took the female from her home in B. county with her father's consent it was for a proper purpose, and that defendant's intent to use her for purposes of prostitution did not arise until after she had been taken by him into A. county, the court of A. county had jurisdiction of the offense.

2. In a prosecution for taking away a female from her father, without his consent, for purposes of prostitution, a requested instruction that, if defendant abducted the girl from her home in B. county, the jury could not find him guilty, as he had not committed the offense with which he was charged, to wit, the abducting of a girl for the purposes of prostitution in A. county, was properly refused, since the word "abduct" was not synonymous with the taking for purposes of prostitution within Pen. Code, § 267, defining such offense.

Department 1. Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

F. K. Lewis was convicted of taking away a female for purposes of prostitution, and he appeals. Affirmed.

Charles L. Burnell and Wm. B. Craig, for appellant. U. S. Webb, Atty. Gen., and E. B. Power, Dep. Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was convicted in the superior court of the county of Alameda of the offense of taking away a female under the age of 18 years from her father, without his consent, for the purpose of prostitution (see section 267, Pen. Code), and appeals from the judgment pronounced on such conviction and from an order denying his motion for a new trial.

The principal point made for reversal is as to the jurisdiction of the superior court of Alameda county. The information filed against defendant in said court alleged the commission of the offense in Alameda county, and it is claimed that the evidence shows that, if the offense was committed by defendant, it was committed entirely in the county of San Benito, and that such evidence therefore fails to show any offense within the jurisdiction of the superior court of Alameda county. The girl, who was 16 years of age, lived at her father's home in San Benito county, and on October 16, 1901, left her father's home with the defendant and another female, and went with them to Oakland, by way of Gilroy and San José, at each of which places they remained for a few days. They arrived in Oakland, Alameda county, about October 23, 1901, where they continued to live in a camp wagon, in which they had traveled from San Benito county, until about the middle of November, 1901, when, as the evidence very clearly shows, the defendant placed the girl in a house of prostitution in said city of Oakland for the purpose of profiting by her earnings therein. The testimony of the defendant himself in this connection was such that any rational jury could not come to a different conclusion. There was evidence sufficient to warrant the jury in concluding that the father, who was without means, and had a large family, allowed the defendant to take his daughter upon the understanding that, if she suited the niece of defendant's wife, who, he said, was then in Gilroy, she would take her to Oakland and give her a trade, and that the father never consented to her being placed in a house of prostitution. The father testified that defendant said, "Well, I guess she will send her to school and send her to learn the millinery trade." The defendant himself testified: "I took the girl \* \* \* from her home at San Juan by consent of her father, to better her condition. There was nothing specially spoken of in what way I should put this girl—whether in a family. A private family was spoken of. There was millinery spoken of." It must be conceded, as claimed by defendant, that the offense defined by section 267 of the Penal Code is complete when there is a taking for the purpose of prostitution. The section provides that

"every person who takes away any female under the age of eighteen years, from her father, mother, guardian, or other person, having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable," etc. The actual placing in a house of prostitution is not made an essential element of the crime by the statute. It is the taking from the parent or other person having the legal charge of her person, for the prohibited purpose, that constitutes this crime. As said in *State v. Gibson*, 111 Mo. 92, 19 S. W. 980, of a similar statute: "The gravamen of the offense is the purpose or intent with which the enticing and abduction is done, and the offense is complete whenever the abduction for the prohibited purpose is complete, no matter whether any sexual intercourse result or not." See, also, *People v. Dolan*, 96 Cal. 315, 31 Pac. 107; *State v. Bobbst*, 131 Mo. 338, 32 S. W. 1149; *Henderson v. People*, 124 Ill. 614, 17 N. E. 68, 7 Am. St. Rep. 391; *State v. Johnson*, 115 Mo. 495, 22 S. W. 463. Therefore, if the evidence was such as to compel the conclusion that the defendant took the girl from her father, in San Benito county, with the intent then and there existing to use her for purposes of prostitution, we would be compelled to hold that the offense was wholly committed in San Benito county, and that no offense within the jurisdiction of the superior court of Alameda county was shown, unless such jurisdiction was conferred by section 784 of the penal code. The evidence was, however, such as to sustain a finding of the jury to the effect that at the time the girl was given into the charge of defendant by her father there was no intent on defendant's part to use her for purposes of prostitution, and that such intent was not conceived by him until some time after their arrival in Alameda county, while the girl was still in his actual charge, committed thereto by the father for a proper purpose, and that thereupon the defendant, in said Alameda county, placed her in a house of prostitution. Under these circumstances it must be held, in support of the verdict, that the taking of the girl from the father "for the purpose of prostitution" was in Alameda county, and not in San Benito county.

As was said by the Supreme Court of Missouri of a similar statute: "The statute does not require, in order to establish the crime, that the female should be taken from the house or premises of the person having legal charge of her person, from the actual possession of such guardian, but only that she be taken away from such person for the purpose named in the statute." *State v. Round*, 82 Mo. 679. In that case it was held that a father residing in the state of Missouri had the care and custody of a daughter at the time of the taking, although she was then visiting her uncle in the state of Iowa. In the case of *State v. Gordon*, 46 N. J. Law, 432, where the defendant had

brought a girl into the state of New Jersey from another state, and there persuaded her not to return to her home, and seduced her, it was held, under a statute similar to ours, so far as the provision concerning the taking is concerned, that the girl, although in the state of New Jersey, was still in the custody and care of her legal guardian, within the meaning of the statute, and that when "the defendant, with the intent set out in the statute, interposed his will or persuasion between her and her guardian's control," he accomplished the abduction in the state of New Jersey. The decisions constitute full and complete authority for the proposition that, within the contemplation of the statute, a girl may be in the custody of the person having legal charge of her person although absent from him, with his consent, in the care of another for some proper purpose; and that one who then takes her for the prohibited purpose takes her "from" the person having such legal charge of her person. When the defendant, to whom this girl had been temporarily committed for a proper purpose, conceived the intent to use her for another purpose, one prohibited by this statute, and "interposed his will between her and her guardian's control," he took her from her father for that purpose. This was done, according to the finding of the jury, in Alameda county, and the crime was therefore wholly committed in that county. This being our view of the law, it is unnecessary to consider the question as to the application of section 784 of the Penal Code to a case of this character.

We have examined the rulings of the court relating to the admission of evidence, complained of by counsel for defendant, and find no prejudicial error.

The defendant assigns as error the refusal of the court to instruct the jury as follows, viz.: "If you find that the defendant abducted the girl from her home in San Juan, San Benito county, then you must find the defendant not guilty, as he has not committed the offense with which he is charged—in abducting a girl for the purpose of prostitution in Alameda county." The instruction was properly refused. The word "abduct" does not necessarily mean a taking for purposes of prostitution. According to this instruction, if the defendant had taken the girl from her home in San Benito county for a proper purpose, and without any intent to use her for the prohibited purpose, he could not subsequently take her from her father for such prohibited purpose, within the meaning of section 267 of the Penal Code. As we have seen, this is not the law. We are satisfied that no error substantially affecting defendant's rights has been shown, and that he has been properly convicted of a most despicable offense.

The judgment and order are affirmed.

We concur: SHAW, J.; VAN DYKE, J.



(29 Mont. 548)

## LANE v. BAILEY.

(Supreme Court of Montana. Feb. 11, 1904.)

ELECTIONS — CONTEST — VERIFICATION OF STATEMENT — REGISTRATION OF VOTERS — FAILURE TO TAKE OATH — INCOMPETENT EVIDENCE — TRIAL BY COURT — INSUFFICIENCY OF EVIDENCE — SUFFICIENCY OF EXCEPTION — CONSPIRACY — ACTS OF CO-CONSPIRATORS — ADMISSIBILITY OF EVIDENCE — IMMATERIAL ERROR — IDENTIFICATION OF BALLOT — BEST EVIDENCE — SECRECY OF BALLOT — WAIVER.

1. Code Civ. Proc. § 731, provides that a party must verify pleadings by an affidavit to the effect that the pleading is true, to deponent's knowledge, except as to matters therein stated on information and belief, and that as to those he believes it to be true. Section 2014 prescribes that in election contests a statement of the grounds of contest must be verified by contestant's affidavit that the matters and things therein contained are true. *Held*, that a verification of such a statement, in conformity with section 731, was sufficient.

2. Pol. Code, § 1209, as amended by Sess. Laws 1897, p. 118, requires electors applying for registration to take an oath as to their qualifications. Section 1234, as amended by Sess. Laws 1897, p. 123, makes the fact that an elector's name appears in the check lists and copy of the official register in the possession of the judges of election prima facie evidence of his right to vote. Sections 1213 and 1214, as amended by Sess. Laws 1897, p. 121 et seq., require the registry agent to prepare lists and post them in public places and furnish a copy to the county clerk, and that in such lists the agents shall give notice that they will receive objections to the right of registered persons to vote until a certain date; and also provides that, if on election day a person objected to applies to vote, the judges of election shall test his qualifications under oath. Certain persons applied for registration, giving the agent all information requested, and their names were entered in the official register, check lists, etc. The oath required by section 1209 was not administered, the agent testifying that he did not think it was necessary. *Held*, that the failure to take the oath did not disqualify the electors.

3. Where a cause is tried to the court without a jury, the admission of incompetent evidence will not afford ground for reversal, the presumption being that the court did not consider it in arriving at its conclusion.

4. Code Civ. Proc. § 1151, provides that a final decision in an action or proceeding shall be deemed excepted to by the adverse party, no bill of exceptions being required. Section 1152 provides that, when the exception is to the verdict or decision on the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which the evidence is alleged to be insufficient. *Held*, that a specification of error, in an election contest, of "insufficiency of the evidence to justify the findings of fact made by the court herein," was insufficient to permit a review thereof.

5. In an election contest it appeared that certain persons conspired to colonize voters by employing men prior to election to go into the county to obtain work and vote a certain ticket. Their expenses were paid, and the conspiracy was carried out, the colonized voters knowing the illegal purpose of their employment, and perjuring themselves in obtaining registration. *Held*, that their declarations, as well as those of the original conspirators, from the time of the negotiations for their employment up to and during the election, which were germane to the conspiracy or a part of the res gestæ, were admissible.

6. In an election contest in which a conspiracy to colonize voters was alleged, contestant introduced testimony tending to show that men employed as ranch hands were hired mainly for

political purposes, witnesses testifying that there was no demand for ranch hands in the neighborhood, that the employer had no special use for men hired, and that most of them simply "killed time." *Held*, that the exclusion of the testimony of such a voter, offered by contestee, as to whether he was able to state whether the men were kept busy during the time they were at the ranch, and whether he knew and could state when a man was doing a day's work and was kept busy, was error.

7. Where, in an election contest, testimony erroneously excluded does not affect sufficient votes to overthrow the decision of the lower court, such exclusion is not ground for reversal.

8. Pol. Code, § 1364, as amended by Sess. Laws 1901, p. 120, authorizes judges of election to assist voters who cannot read and write, etc., in making out their ballots, the judges to certify on the outside of the ballot that it was made out with their assistance. Section 1358, as amended by Sess. Laws 1901, p. 118 et seq., provides that no elector shall place any identifying mark on his ballot. Section 1413 authorizes the use of ballots as evidence in election contests. *Held* that, where it appeared in an election contest that a voter's ballot had been so indorsed, it was necessary to show that it could not be thereby identified, in order to let in, as secondary evidence, the voter's own testimony as to how he voted.

9. The privilege of refusing to testify as to how he voted may be waived by an elector.

Commissioners' Opinion. Appeal from District Court, Rosebud County; C. H. Loud, Judge.

Election contest by Clarence R. Lane against Charles W. Bailey. Judgment for plaintiff, and defendant appeals. Affirmed.

E. J. Dierks, F. V. H. Collins, and Sydney Sanner, for appellant. T. J. Porter and J. C. Lyndes, for respondent.

CALLAWAY, C. Election contest. Clarence R. Lane, an elector of Rosebud county, contests the right of Charles W. Bailey to hold the office of county clerk. Bailey and one Roderick McRae were opposing candidates for the office, Bailey being the Democratic, and McRae the Republican, candidate. The canvassing board found that Bailey had received a majority of the votes cast for the office of county clerk, and declared him elected. As ground for contest, Lane alleged that a number of persons, exceeding contestee's majority, who were not entitled to vote in said county, had voted for contestee; that they were not bona fide residents thereof, but had been brought into the county 30 days or thereabouts prior to the election, pursuant to a conspiracy entered into by James S. Hopkins, Fred Ramsey, William McCarthy, William J. Nix, and others, to colonize Rosebud county by illegally importing and bringing into the county large numbers of persons shortly before the election, and causing them to be registered and to vote the Democratic ticket, and for said Charles W. Bailey; which conspiracy, according to the allegations of the complaint, was accordingly carried out. The complaint, or statement of contest, contains this allegation: "That said persons so illegally brought into said county of Rosebud were induced by the

aforesaid parties to go into said county under a promise of unusual and exorbitant wages being paid them for their services as laborers, and on the further promise and representation that they could return to their various homes without expense as soon as the election was over." To the complaint the contestee filed an answer which, in addition to a general denial, alleged that Bailey was in fact elected over McRae by a majority of 82 legal votes, for the reason that at Hathaway precinct 18 persons, and at Rosebud precinct 49 persons, had illegally registered without ever having taken or subscribed, or offered to take or subscribe, the oath prescribed by section 1209 of the Political Code, as amended. This the contestant denied in his reply, and further alleged that said persons were in fact duly qualified voters in all respects, and that if they did not take the oath it was the fault of the registry agent, and not the fault of the voters. The pleadings are of great length, and only the gist of the issues is given here. Trial was to the court, sitting without a jury. The court found that 24 illegal votes had been cast and counted for the contestee, deducted the same from the number of votes received by him, and declared McRae elected, and entitled to the office of county clerk. From this judgment the contestee has appealed.

1. Counsel for contestee urge that the complaint is not verified as required by the statute, which prescribes that the statement must be verified by the affidavit of the contesting party that the matters and things therein contained are true. Code Civ. Proc. § 2014. The verification attached was in the usual form required by section 731 of the same Code when a party to an action verifies a pleading. This was a substantial compliance with section 2014, supra, and is sufficient. *Kirk v. Rhoads*, 46 Cal. 398.

2. Contestee insists that the 67 men named in his answer were not qualified voters, because they failed to take the oath set forth in section 1209 of the Political Code, as amended. Sess. Laws 1897, p. 118. The proof shows that the electors presented themselves before the registry agent for the purpose of complying with the law which requires a voter to be registered. They gave the agent all the information he asked concerning their qualifications as voters, and he entered their names as such upon the official register. According to his testimony, he did not think it was necessary for them to take the oath. Their names regularly appeared upon the official register, the copies thereof, and the check lists, as well as upon the lists posted in the precincts and in the office of the county clerk. The fact that their names appeared in the check lists and copies of the official register was prima facie evidence of their right to vote. Pol. Code, § 1234, as amended; Sess. Laws 1897, p. 123. That the electors were registered without taking

the oath was not their fault. That a registry agent neglects his duty should not deprive an elector of the right to exercise his franchise. If the elector may be deprived of his right to vote in this manner, an unprincipled registry agent may change the political status of a precinct at will, and by concerted action on the part of a number of such the political complexion of a county may be easily changed, and the popular will effectually thwarted. If the elective franchise may be thus tampered with, incalculable abuses will creep into the state. The purpose of the statute is to prevent any but legal electors from voting. It demands good faith. It is not intended to prevent those who are qualified to vote from doing so. Before the elector is entitled to be registered he may be compelled to take the oath prescribed in section 1209, supra—the statute contemplates that he shall be compelled to take it. If he fails to take the oath through the fault of the registry agent, and is challenged on that ground before that officer closes his book, he may qualify on election day. This is clearly one of the purposes of sections 1213 and 1214 of the Political Code, as amended. Session Laws 1897, p. 121 et seq. Section 1213 provides that, on the next day succeeding that on which the registration of electors shall be closed, the registry agents must with all reasonable expedition, and within four days, prepare and cause to be written or printed a full, complete, and true list of all the names registered by them and then remaining on the official register for each election precinct, alphabetically arranged, commencing with the surname of each, and then must write or print such reasonable number of copies of each registration district list as they may deem necessary, showing on one sheet, but under separate headings in such list, the registered voters in each precinct in the district, and post copies of the same in at least five public and conspicuous places within each and every district to which they apply, and shall also furnish one, attested by his oath as true and correct, to the county clerk. Section 1214 provides that: "The registry agents must give notice in said lists that they will receive objections to the right to vote of any person so registered until six o'clock p. m. on the Saturday previous to the day of the election; and also requesting all persons whose names may be erroneously entered in said lists or erroneously cancelled upon the 'Official Register' to appear at the proper registry office and have such error corrected. Such objections to the right to vote of any person registered must be made only by a qualified elector, in writing duly verified setting forth the grounds of objection or disqualification. The registry agent before whom any such affidavits are made must carefully preserve the same and deliver them, with the 'Check List' and other papers required by this chapter, to be delivered to the judges of election, as is in this chapter

provided and he must write distinctly opposite to the name of any person to whose qualifications as an elector objections may be thus made, the words 'to be challenged' or words to that effect. It is the duty of the judges of election, if on election day such person who has been objected to applies to vote, to test, under oath his qualifications and if he is found to be disqualified, from any cause under the law, or if he refuses to take an oath as to his qualifications he must not be permitted to vote. \* \* \* McCrary, in his work on Elections, says: "It is a rule well-grounded in justice and reason, well established by authority and precedent, that the voter shall not be deprived of his rights as an elector, either by the fraud or mistake of the election officer, if it is possible to prevent it." 3d Ed. § 196. Section 2 of article 6 of the North Carolina Constitution provides that: "It shall be the duty of the General Assembly to provide from time to time for the registration of all electors, and no person shall be allowed to vote without registration, or to register without first taking an oath to support the Constitution." The Supreme Court of that state says: "This section of the Constitution provides that the 'General Assembly' shall pass registration laws, and that no one shall be entitled to register without taking an oath, and that no one shall vote who is not registered. This provision of the Constitution, that no one shall be entitled to register without taking an oath to support the Constitution of the state and of the United States, is directed to the registrars. It must be to them and to them alone, as is said by this court in *Southerland v. Goldsboro*, 96 N. C. 49 [1 S. E. 760]. But if the registrar, through inadvertence, registers a qualified voter, who is entitled to register and vote, without administering the prescribed oath to him, shall he, for this negligence of the officer, be deprived of his right to vote, and thereby the will of the majority defeated? And if this omission was not through inadvertence, but with a view to entrap the voter and thus defraud him out of his vote, it is much more the reason why he should not be, and that such methods should not be allowed to prevail. We do not hold that, where a registrar proposed to administer the oath, and the party wishing to be registered refuses to take the oath, it is the duty of the registrar to register him. We would say that under such circumstances he should not be registered. \* \* \* And a qualified elector cannot be deprived of his right to vote, and the theory of our government that the majority shall govern be destroyed, by either the willful or negligent acts of the registrar, a sworn officer of the law." *Quinn v. Latimore*, 120 N. C. 426, 26 S. E. 638, 58 Am. St. Rep. 797. In *State v. Fransham*, 19 Mont. 273, 48 Pac. 1, the court adopts the following quotation from *People v. Wood* (N. Y.) 42 N. E. 536: "We can conceive of no principle which permits the disfranchisement of inno-

cent voters for the mistake or even willful misconduct of election officers in performing the duty cast upon them." And see *State v. Sadler*, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 123, 83 Am. St. Rep. 573; *Moyer v. Van De Vanter*, 12 Wash. 377, 41 Pac. 60, 29 L. R. A. 670, 50 Am. St. Rep. 900; *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491. Election statutes, being intended to promote purity in public elections, to the end that a full and fair expression of the public will may be had, are remedial and beneficial, and should be liberally construed. We therefore hold that the electors of Hathaway and Rosebud precincts were not disqualified because, through no fault of theirs, they failed to take the oath prescribed. *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502.

3. Under the head of "leading questions" contestee presents 26 specifications of error. We find that but 3 questions of the 26 were objected to upon the ground that the questions were leading. We cannot say that the court committed reversible error in overruling contestee's objections to the three mentioned. *Hefferlin v. Karlman* (Mont.) 74 Pac. 201. No jury was in attendance, and the court does not appear to have abused its discretion in this respect.

4. The court permitted contestant to introduce in evidence some incompetent testimony, against contestee's objections, and upon this branch of the case, as presented, the contestee assigns numerous errors. A great deal of testimony was adduced—the transcript consists of over 480 pages of typewriting. As we shall hereafter show, we are not permitted to look to the sufficiency or insufficiency of the evidence to sustain the court's findings and judgment. What we have just said implies that there was testimony, and a great deal of it. The record has received a thorough sifting by respective counsel. We have examined all the assignments of error in detail, and on this point reaffirm the rule laid down in *Fihlen v. Heinze*, 28 Mont. —, 73 Pac. 123, in which the court said: "But the cause was tried to the court, sitting without a jury, and the presumption must be indulged that such evidence, if improperly admitted, was not considered in arriving at a conclusion."

5. As to the insufficiency of the evidence. This case comes up on a bill of exceptions, duly settled and allowed. Counsel have indulged in considerable argument as to whether, in an election contest, a motion for a new trial is proper or permissible. That matter not being in issue in this case, we express no opinion thereon, counsel having elected to appeal upon a bill of exceptions. That a bill of exceptions is proper in a case of this nature admits of no doubt. If, however, a case is presented to this court upon a bill of exceptions, the bill must be prepared conformably to the statutes prescribed for the preparation of such in other cases. This being true,

it follows that the bill must be prepared in accordance with article 1, c. 7 (sections 1150-1158, inclusive), Code Civ. Proc. By section 1151 we find that certain actions of the court are deemed excepted to by the adverse party, and no bill of exceptions is required to present them; among these is "the final decision in an action or proceeding." Section 1152 provides: "When the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." Appellant's specification of error No. 238 is "insufficiency of the evidence to justify the findings of fact made by the court herein." We thus see that appellant relies for a reversal of the case upon the insufficiency of the evidence, and this exception is not presented as required by the statute. Section 1152, *supra*; *Robertson v. Longley*, 28 Mont. —, 72 Pac. 422. Thus we are not permitted to proceed further with this so-called exception.

6. Contestee insists that it was error for the court to admit in evidence the declarations of the alleged conspirators, and says that before declarations of conspirators can be admitted it must first be shown independently that a conspiracy existed; and then their admissibility is limited to such as were made during the pendency of the conspiracy, and in furtherance of its plans; and under these rules they are not admissible when they relate to a past transaction. The correctness of these general principles will not be disputed. In answer to this it is sufficient to say that even a cursory inspection of the transcript discloses that there was evidence sufficient to justify the conclusion that the conspiracy charged in the statement of contest did in fact exist; that the conspiracy was for the purpose of employing a sufficient number of men to carry the county in the interest of the Democratic ticket, or a portion of it; that in furtherance of it a large number of men were employed a little over a month prior to the election, with the understanding that they were to go into Rosebud county for the purpose of obtaining employment for one month, and of voting the Democratic ticket; that their expenses were to be paid in traveling to and from Rosebud county; that a large number of them actually registered and voted in Rosebud county; that, indeed, the conspiracy was actually carried out. These men, if the testimony be true, knew the illegal purposes for which they were employed, perjured themselves in order to obtain registration, violated the election laws of the state, and thus became parties to the conspiracy themselves. Their declarations, as well as those of the persons who instigated the unlawful acts (the original conspirators), during the pendency of the conspiracy—while the negotiations for the men's employment were pending, after they were employed, during the election—and which

were germane to the conspiracy, or a part of the *res gestæ*, are admissible in this case. The conspiracy existed as between the parties to it until all its ends were accomplished. See *State v. Byers*, 16 Mont. 565, 41 Pac. 708; *Pincus v. Reynolds*, 19 Mont. 564, 49 Pac. 145; *State v. Dotson*, 26 Mont. 305, 67 Pac. 938; *Underhill on Evidence*, § 69; *Underhill on Criminal Evidence*, §§ 491, 492, 493; *Jones on Evidence*, § 255.

7. Under the rule that, where in an election contest it does not appear from the direct evidence of the voter for whom the ballot was cast, circumstantial evidence is admissible to establish the fact (*Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547; *Sorenson v. Sorenson*, 189 Ill. 179, 59 N. E. 555; *Black v. Pate*, 130 Ala. 514, 30 South. 434; *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *McCrary on Elections* [4th Ed.] p. 363), and for the purpose of establishing that a conspiracy existed, contestant introduced considerable testimony tending to show that a number of men employed by Ramsey as ranch hands, and who voted at the election, were hired mainly for political purposes, and not to work on the ranch. Witnesses testified that there was no demand for ranch hands in the immediate neighborhood of Ramsey's Ranch, and that Ramsey had no special use for the 10 men he had there. Testimony was given tending to prove that these 10 men, or most of them, simply "killed time." Contestee introduced considerable evidence to contradict this line of testimony, and excepted to several rulings of the court upon questions his counsel asked the different witnesses. For example, the witness Miller, one of the alleged illegal voters who was employed on the Ramsey Ranch, and who had qualified himself to answer, was asked: "From your observation, are you able to state whether or not they were kept busy during the time they were there?" Also: "From your experience and observation do you know, and can you state, when a man is doing a day's work and is kept busy?" Contestant objected to these questions as incompetent, and the objections were sustained. This testimony, having been offered in contradiction of that on part of contestant, should have been admitted, and the court erred in sustaining the objections, but the case cannot be reversed on that account. The testimony called for by the two questions just quoted related solely to the conduct of the men employed at Ramsey's Ranch, and who voted at Kirby. The court found that only six illegal votes were cast at that precinct. These it deducted from the total vote counted for contestee by the election officers. In its findings and judgment the court found McRae elected over contestee by nine votes. Therefore, had the testimony called for been admitted, and the six illegal votes been counted for contestee, McRae would still have a majority of three. An appellate court will

not reverse a judgment merely because the lower court committed error; it is only when the error has materially affected appellant's rights on the merits of the case.

8. The court found that one Joko Petrovich was an illegal voter, and that he voted for the contestee at the precinct of Forsyth. Contestee sought to prove that Petrovich in fact voted for McRae, the Republican candidate. For this purpose he placed Terrett, one of the judges of election, on the stand. Terrett testified that Petrovich said he could not make his ballot out, and that Marcyes, one of the other judges, made it out for him, and that he (Terrett) saw Marcyes mark it. Then this question was asked: "Now, you may state how Mr. Petrovich's ticket was marked by Mr. Marcyes." Upon objection being lodged by contestant, the court ruled as follows: "As I recollect the law, if it is marked by a judge, the ticket should be indorsed as being marked by a judge. If that is true, the ticket is the best evidence, and should be produced. It is merely secondary evidence as to how it was marked. I will sustain the objection under and by virtue of the provisions of section 1364 of the Political Code, as amended." Section 1364 of the Political Code, as amended, provides: "Any elector who declares to the judges of election, or when it appears to the judges of election that he cannot read or write or that because of blindness or other physical disability he is unable to mark his ballot, but for no other cause, must upon request receive the assistance of two of the judges, who shall represent different parties, in the marking thereof, and such judges must certify on the outside thereof that it was so marked with their assistance, and must thereafter give no information regarding the same. The judges must require such declaration of disability to be made by the elector under oath before them, and they are hereby authorized to administer the same. No elector other than one who may, because of his inability to read or write or of his blindness or physical disability, be unable to mark his ballot, must divulge to any one within the polling place the name of any candidate for whom he intends to vote, or ask, or receive the assistance of any person within the polling place in the preparation of his ballot." Sess. Laws 1901, p. 120. Whether the ballot is the best evidence as to how Petrovich voted depends upon whether it may be identified: if it can be identified, it is the best evidence; if it cannot be, then the testimony of one who knows how it was marked is the best evidence. Having shown that the ballot bore the certificate of the judges, in order to introduce the testimony of Terrett it was incumbent upon contestee to show that the ballot could not be identified. If Petrovich's ballot was the only one bearing the certificate of the judges, Terrett and Marcyes, such certificate would serve to identify it; but if there were sev-

eral ballots cast at Forsyth, under the provisions of section 1364, supra, all of which bore the certificate of the said judges, then it is probable that Petrovich's ballot could not be identified. No elector shall place any mark upon his ballot by which it may afterwards be identified by him. Section 1358, Pol. Code, as amended; Sess. Laws 1901, p. 118 et seq. And the judges should not place any distinguishing marks thereon, except as provided by law. The law evidently contemplates that the same certificate, in effect, shall be placed upon all ballots to which the judges certify. Upon proof that Petrovich's ballot could be identified, the court could have ordered the same produced, under the provisions of section 1413 of the Political Code. The court was therefore right in excluding the testimony.

9. At the precinct of Kirby, McRae received but five votes. In order to show that all of the illegal votes cast there were for contestee, contestant produced five witnesses who were legal voters in that precinct, each of whom testified that he voted for McRae. The admission of this testimony was objected to by contestee as incompetent, irrelevant, and immaterial. No question was raised as to whether the ballots of these several voters could be identified. Counsel insist that under our voting system an absolutely secret ballot is contemplated, and to this end extraordinary precautions are provided for: bystanders are prohibited from approaching within a given distance from the voting booth; the voter is prohibited from placing a distinguishing mark upon his ballot; he must retire and mark his ballot alone, and fold it so its contents cannot be discovered. These precautions are provided for the protection of the voter. The design is to make it impossible for others to prevent him from exercising his own free will. It is generally held that a legal voter may refuse to testify as to how he voted, but this is a privilege he may waive. *Van Winkle v. Crabtree*, 34 Or. 542, 55 Pac. 831, 56 Pac. 74; *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665, 10 Am. St. Rep. 547; *Black v. Pate*, 130 Ala. 514, 30 South. 434; *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180; *Dixon v. Orr*, 49 Ark. 238, 4 S. W. 774, 4 Am. St. Rep. 42; *Cooley's Constitutional Limitations*, 762; *McCrary on Elections* (4th Ed.) §§ 438, 491, 492. There is reason in this rule. While public policy requires that all electors be enabled to cast their ballots in absolute secrecy and with the utmost freedom, yet it is also to the public interest that a correct expression of the popular will be ascertained. Hence, when the validity of an election is being inquired into, legal voters are encouraged to give testimony concerning it. Courts should give a wide latitude to all such inquiries. Nothing concerns the people nearer than the purity of their elections. A fundamental principle of our government is that the majority shall control. When the popular will is subverted by

conspiracies and other illegal practices, the searchlights of the courts should be fully turned on.

10. After a diligent examination of contestant's specifications, we find no reversible error in the record. In a number of instances the proper objection was not made to the admission of testimony, and in others the right reason for the motion to strike out was not assigned. Again, we find that where the court in several instances sustained contestant's objections, perhaps erroneously, the error was cured by the subsequent testimony of the several witnesses to whom the questions were put.

For the foregoing reasons, we are of opinion that the judgment should be affirmed.

CLAYBERG, C. C., and POORMAN, C., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(29 Mont. 530)

#### In re O'BRIEN.

(Supreme Court of Montana. Feb. 9, 1904.)

#### INTOXICATING LIQUORS—LOCAL OPTION—CONSTITUTIONAL LAW—LOCAL LAW—DELEGATION OF LEGISLATIVE POWER.

1. The local option liquor law (Pol. Code, pt. 3, tit. 7, c. 10, §§ 3180-3188) is not unconstitutional as being a delegation of legislative power.

2. The local option liquor law (Pol. Code, pt. 3, tit. 7, c. 10, §§ 3180-3188) is not violative of Const. art. 5, § 28, prohibiting local or special legislation.

3. The local option liquor law (Pol. Code, pt. 3, tit. 7, c. 10, §§ 3180-3188), providing for a petition to the county commissioners for an election, for notice of the election, for the form, supply, and method of marking ballots, for an election and notice of its result, for a definite date when the law shall become operative, and for a penalty for its violation, is complete in its provisions, though it takes effect in each county only on a vote favorable to its provisions.

4. Any invalidity of the local option liquor law (Pol. Code, pt. 3, tit. 7, c. 10, §§ 3180-3188) on account of its failure to except from its provisions liquor for medicinal or sacramental purposes, or imported in original packages, cannot avail one who sold liquor otherwise than for those purposes or in that manner.

5. The liquor law giving counties local option (Pol. Code, pt. 3, tit. 7, c. 10, §§ 3180-3188) applies to sales of liquor in an incorporated town in a county which has voted against the sale, notwithstanding Pol. Code, pt. 4, § 4800, as amended by Sess. Laws 1897, p. 203, giving towns power to license saloons, and section 5162, providing that, if the provisions of one title conflict with those of another, those of each title must prevail as to matters arising out of the subject-matter of the title.

6. That when a writ of habeas corpus was served on a sheriff the complainant was not in fact confined in jail, but was permitted to go about without apparent restraint, is sufficient to justify a dismissal of the petition of the writ.

Application by W. P. O'Brien for a writ of habeas corpus. Dismissed.

Chas. S. Wagner and Thos. C. Marshall, for petitioner. R. A. O'Hara and W. P. Baker, for respondent.

HOLLOWAY, J. On the 1st day of December, 1903, an election was held in Ravalli county, Mont., pursuant to the provisions of chapter 10, tit. 7, pt. 3, §§ 3180-3188, of the Political Code, at which election a majority of all the votes cast were for "Sale of Intoxicating Liquors: No," and thereafter the returns of the election were duly canvassed, and the result published, as required by law. The provisions of said chapter thereupon became operative in that county on the 7th day of January, 1904. Within the confines of Ravalli county is the town of Hamilton, incorporated under the general incorporation act of Montana. Pursuant to that act the town council had enacted an ordinance regulating and licensing the saloon or retail liquor business, and had regularly issued to this complainant a license to conduct such saloon business in that town. On January 7, 1904, after the local option law is claimed to have become operative in Ravalli county, the complainant was arrested and tried for and convicted of selling intoxicating liquors in violation of that law, and sentenced to pay a fine of \$100, and in default of payment was confined in the county jail. He thereupon applied to this court for a writ of habeas corpus, which was issued. Upon the petition and the return of the sheriff thereto the cause was submitted for decision to this court, it being conceded that no questions of fact were raised by the return of the sheriff.

Only two questions were argued and submitted for determination, and we have carefully confined our decision to them. In order that no broader application may be made of the language herein used than is intended, the following is quoted from complainant's brief as showing the scope of this inquiry: "It will be conceded here that the proceedings of the trial and conviction were regular, and that, if the said so-called local option law is valid and constitutional, and has operative force in the territorial limits of the town of Hamilton, then this petition and writ should be dismissed. First. We take the position, as we have indicated, that the law is invalid, unconstitutional, and void. Second. That the law, even if valid, has no operative force within the corporate limits of the town of Hamilton, and there can be no violation of it within that territory. That the law is unconstitutional upon the several grounds and for the reasons following: (a) That it is a delegation of legislative power. (b) That it delegates to the people the legislative function of determining the expediency of the law. (c) That it is local and special legislation. (d) That it is not complete in all its terms and provisions. (e) That it undertakes to absolutely prohibit the sale of spirituous, vinous, malt, and intoxicating liquors, making no exceptions for medical or sacra

¶ 6. See Habeas Corpus, vol. 25, Cent. Dig. § 10.

mental purposes, or for physicians, or for lawful interstate commerce."

1. Is the law unconstitutional? The same objections which are urged against the constitutionality of this act have been frequently lodged against so-called local option laws, and, while in comparatively few instances such laws have been held unconstitutional, the very great weight of authority and nearly all the later decisions have upheld them.

(a, b) The most frequent objection made is that such laws are an unwarranted delegation of legislative power to the people. Under our system of government the lawmaking authority is vested in the legislative assembly, and can be exercised by no one else. The legal effect of the popular vote, however, is not infrequently misconceived. If the law is complete in all its parts, it is an expression of the legislative will none the less that the contingency upon which it takes effect in any particular locality is made to depend upon a favorable vote of the people of that locality. The act under consideration was passed by the Legislature, received the Governor's approval, and became a law of state-wide application on July 1, 1895. A vote of the people of Ravalli county adds nothing whatever to the efficacy of the law, but merely furnishes the occasion for the exercise of the power inherent in the law. The law remains intact, and is a valid enactment on the statute books, whether a vote be taken upon it in any county, or whether any vote so taken results favorably or unfavorably to calling into operation its provisions. While the Legislature may not delegate to the people the authority to make the law, or to say what kind of a restrictive measure shall be adopted, or propose a law and submit it to a vote of the people to say whether or not it shall in fact be enacted into law, it may pass an act which takes effect only upon the happening of a contingency—a favorable vote of the people. With equal propriety could it be said that the general incorporation act under which the town of Hamilton assumes to license and regulate the saloon business within its corporate limits is unconstitutional for the same reason, for that act is purely a local option law, which is to be put into operation in the same manner as the law in question. In fact, this same objection was urged against the act of the territorial Legislature incorporating the city of Butte; but this court disposed of the question adversely to the contention of the relator, and, after citing numerous authorities in support of its position, among other things said: "These cases have been cited to show, first, that it is within the competency of legislative authority to enact laws the taking effect of which may be conditional or contingent, depending upon some uncertain future event; and, second, that it is competent for a legislature to delegate to one man, or to a certain designated body or class of men, or to the whole people, the question as to when the

contingency or event has or shall take place. And such determination is not in any sense the making of the law. It is declaring when a law already made shall go into effect." *People ex rel. Boardman v. City of Butte*, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 348; *Cooley's Constitutional Limitations*, 145; *Black on Intoxicating Liquors*, 45, and numerous cases cited.

(c) Is the law local or special in the sense that it is prohibited by section 26, art. 5, of the Constitution? Considering this same question, the Supreme Court of Dakota, in *Territory v. O'Connor*, 5 Dak. 752, 41 N. W. 746, 3 L. R. A. 355, said: "That it is in conflict with the statute of the United States prohibiting special legislation (by the territorial Legislature), or that it is a delegation of legislative power, might have been urged with some plausibility in the earlier days of American jurisprudence. It is now too late to argue the question as an original proposition. Matters affecting the police, such as the sale of intoxicating drinks, running at large of cattle, and kindred questions, are so differently regarded in different localities that it has been by no means uncommon to submit them to the people of the locality to be affected by their exercise; and laws so submitting such questions have been almost uniformly sustained, though not always upon the same ground. Many of the authorities in a case like the one before us hold that the law was perfect in all its parts, and complete, so far as any further action of the Legislature was concerned, when it was approved by the executive; and that its adoption or rejection by the voters, or rather the favorable or unfavorable vote as to execution of the law, was a contingency merely provided for by the Legislature as to the time when it should become operative." The mere fact that the adoption of this law in Ravalli county, and its rejection or nonacceptance in Missoula county, for instance, will make that unlawful in the former which is lawful in the latter, does not render the act void. The error in the argument made in support of this contention lies in the assumption that the vote makes the law, and that what is a law in Ravalli county is not a law in Missoula county. The law is the same for all, and equally available to all. *Territory v. O'Connor*, supra; *State v. Pond*, 93 Mo. 606, 6 S. W. 469.

Considering this objection to a like statutory enactment the Supreme Court of New Jersey in *Paul v. Circuit Court*, 50 N. J. Law, 585, 15 Atl. 272, 1 L. R. A. 86, said: "The inhibition in the Constitution is not intended to secure uniformity in the exercise of delegated police powers, but to forbid the passing of a law vesting in one town or county a power of local government not granted to another. If one town or county was excepted from the operation of this law, it would be special and local. Under it one county or town has neither greater nor less



power than every other, nor does such power differ in any respect. The authority granted is in every aspect of it the same. It may be exercised in a different way or the same way. \* \* \* The law, in my judgment, is unquestionably a general law. The quality of uniformity in result coexists with the right of self-government in various sections of the state." In discussing a township organization act which was purely a local option law, the Supreme Court of Missouri, in *Township Organization Act*, 55 Mo. 295, said: "It is a general law, made for the whole state, and by its terms took effect from its passage. Every county in the state may avail itself of the privileges offered by this law by a majority vote of the people. It is left to the option of the counties whether they will organize under the law or not. If a majority vote for it, such vote does not create the law, but places the county so voting within its provisions, and the organization then takes effect, and also the law as it existed before the vote was taken. The law does not delegate, nor was it the intention of the lawmakers to delegate, legislative authority to the counties. Unless the counties avail themselves of the right to organize, they remain as they were, unaffected by any of the provisions of this statute."

(d) Is the law complete? The law provides, first, for a petition to the board of county commissioners praying for an election; second, for the notice to be given of the impending election; third, for the particular form of ballots, for their supply, and the method of marking them; fourth, for an election, and the canvassing of the returns according to the general election laws; fifth, for a notice of the result of the election, and a definite date when the law shall become operative; and, finally, for a penalty for a violation of its provisions. The only question submitted to the people is: Shall intoxicating liquors be sold in this county? or, in other words: Shall the people of this county become subject to the operations of the local option law? And that question, we have already seen, may properly be submitted to a popular vote. The law is a complete legislative enactment. It was passed with all due formality by the Legislature and was approved by the Governor. As was said of a like statute by the Supreme Court of Missouri in *State v. Pond*, supra: "The law is complete and effective when it has passed through the forms prescribed for its enactment, though it may not operate, or its influence may not be felt, until a subject has arisen upon which it can act. In the case we are considering the act took effect with the other laws contained in the statutes. It was passed according to the prescribed forms designated in the Constitution. Its enactment did not depend upon any popular vote, but parties to be affected by it were at liberty to accept the privileges granted and incur the burdens and obligations it imposed,

as their interests or will should dictate. If they elected not to avail themselves of its privileges, it did not in the least impair its force. It still stood a valid enactment on the statute book. If they organized under it, they were entitled to the benefit of its provisions; but in either event the law remained the same." See, also, *State v. Wilcox*, 45 Mo. 458.

(e) Because no exception is made for liquors for medicinal or sacramental purposes, or for sales in original packages imported from other states, this law, it is claimed, is unconstitutional and void. However, the complainant was not arrested for selling liquors for medicinal or sacramental purposes, or for selling in original packages which had been imported from another state, and, while these subjects have received consideration at the hands of the courts, and a review of such adjudicated cases might be interesting, this court will not decide a moot case. The complainant cannot urge these objections, and it will be time enough to consider them when they become directly involved. *State v. Pond*, supra.

2. Is the local option law operative within the incorporated town of Hamilton? The local option law is a portion of part 3 of the Political Code, while the general incorporation act for cities and towns is embraced in part 4 of the same Code. The portion relating to the legislative powers of cities and towns is found in section 4800. Whether section 4800, as amended by act of the Fifth Legislative Assembly approved March 8, 1897 (Sess. Laws 1897, p. 203), or the act of the Third Legislative Assembly approved March 7, 1893 (Sess. Laws 1893, p. 113, retained by section 5186, Pol. Code), be in force, is immaterial for the purposes of this case. Counsel for complainant contend that under the provisions of section 4800 the town of Hamilton has been granted power to license and regulate saloons within its corporate limits, and that, if the local option law be given force in that town, there is a direct conflict in the laws, and therefore the canon of interpretation provided in the Political Code, § 5162, must be applied, viz.: "If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." The general license law of this state is found in part 3 of the Political Code along with the local option law, and, if the contention of complainant is correct, then no license can be exacted from residents of the town of Hamilton under the general license law; in other words, the license exacted by the town of Hamilton would be exclusive. But no one would seriously contend that in granting power to incorporate towns to license and regulate the liquor traffic the state had surrendered its power to license and regulate it also. *Corbett v. Territory*, 1 Wash. T. 431. The power conferred on in-



corporated towns by the general incorporation act is but a mere grant of limited power to the municipality, which it holds subject to the general laws of the state. "But municipal corporations are subordinate parts of the state and invested with limited powers. The Legislature, in granting such powers, does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted." *Wilcox v. Deer Lodge County*, 2 Mont. 574. The general incorporation act only authorizes the city council to license and regulate the sale of intoxicating liquors where it can be done without violating existing state laws. *Cooper v. Shelton*, 97 Ky. 282, 30 S. W. 623; *Tatum v. State*, 79 Ga. 176, 3 S. E. 907. In other words, by section 4800 the state merely says to the municipality: "You may license such business so long as that business may be lawfully carried on under the general laws of the state, and no longer." This intent on the part of the Legislature is made manifest by subdivision 3 of section 4800, which reads as follows: "The city or town council has power: \* \* \* (3) To license all industries, pursuits, professions, and occupations for which under the state law, a license is required, but the amount to be paid for such license must not exceed the sum required by the state law." With the local option law in operation in Ravalli county, there is no one there who can lawfully sell intoxicating liquors, and therefore there is no one whom the city of Hamilton can lawfully license to conduct such business. The limited grant of power to the town of Hamilton is merely held in abeyance so long as the local option law is in effect. *Robertson v. State*, 5 Tex. App. 155; *Butler v. State*, 25 Fla. 347, 6 South. 67. The license granted to complainant is a mere permit, and he took it charged with the full knowledge that at any time the state, in the exercise of its police power, might revoke it (*McKinney v. Salem*, 77 Ind. 213), and that the adoption of the local option law in Ravalli county would have such effect (*State v. Cook*, 24 Minn. 247, 31 Am. Rep. 344), for the powers of the city council are subordinate to the general laws of the state (*State v. Langston*, 88 N. C. 602). Neither is the grant of the power by the Legislature made to, or directly for the benefit of, the individual, but it is made to the municipality as such, to enable it to properly conduct its corporate affairs.

The cases cited by complainant from California are not in point. There the counties are more nearly municipal corporations, and the boards of county commissioners are legislative bodies to a limited extent, at least. In *Ex parte Campbell*, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418, it is said: "Section 25 of the county government act [St. 1883, p. 303, c. 75] confers upon the boards of supervisors in their respective counties power to make and enforce 'all such local, police, sanitary, and other regulations as are not in

conflict with general laws.' There is nothing in the case before us to show whether the board of supervisors of Los Angeles county have ever made any regulations with respect to the sale of wines or liquors in saloons and barrooms, but manifestly such regulations, if made, could not operate to divest the authorities of the city of the right to legislate upon the same subject, and enforce such regulations within the city limits. The regulations of the board of supervisors would not be a general law within the meaning of the provisions of section 11, art. 11, of the Constitution." In this state the counties are at most only quasi municipal corporations, with no legislative authority vested in the several boards of county commissioners in the sense that they may adopt ordinances and prescribe penalties for a violation thereof, or define nuisances and provide for their abatement. Complainant apparently assumes that by virtue of the vote favorable to the enforcement of the local option law in Ravalli county the law therefore became, in effect, an enactment or ordinance of that county; but, as we have said before, the law was in existence as a state-wide measure before the vote was taken, and the only possible effect of the vote was to put that law into effect in that particular locality.

We agree with counsel for complainant when they say that ordinances passed by the town of Hamilton under the power granted to that town by the general incorporation act cannot be controlled, suspended, altered, or amended by the county, either by its board of county commissioners or by a vote of its inhabitants. But it is not the county government of Ravalli county which is seeking to prohibit the sale of intoxicating liquors, but the state itself. The county is not depriving the town of Hamilton of the revenue which it formerly had from saloon licenses, but the state is doing so by operation of a general law. The law is not an ordinance of the county, and the vote of the people had nothing to do with its enactment. If the law had not already been on the statute books, the people of Ravalli county would have been helpless in the matter, so far as controlling the liquor traffic by any vote which they may have cast. In *State v. Pond*, supra, it is said: "By its provisions the law, and not the vote, extended its influence over the locality voting against the sale of intoxicants. It was the law that authorized the vote to be taken, and, when taken, the law, and not the vote, declared the result that should follow the vote. The vote was the means provided to ascertain the will of the people, not as to the passage of the law, but whether intoxicating liquors should be sold in their midst. If the majority voted against the sale, the law, and not the vote, declared it should not be sold. The vote sprang from the law, and not the law from the vote. By their vote the electors declared no consequences, prescribed no penalties, and exercised no

legislative function. The law declared the consequences, and, whatever they may be, they are exclusively the result of the legislative will."

In *Ex parte Lynn*, 19 Tex. App. 293, this same question was before the court. Under the Texas local option law the people of Milam county had voted against the sale of intoxicating liquors. The petitioner, Lynn, was arrested for a violation of the law, and defended upon the ground that he resided in the city of Rockdale, an incorporated city within Milam county, which had issued to him a license to sell liquors, and that the charter of that city authorized it to issue such license. The Court of Appeals, however, held the law operative throughout the county, and, among other things, said: "But, even viewing it as a general law, it was unquestionably the intent of the Legislature that it should have the effect, whenever adopted in a particular locality, to prohibit the sale of intoxicating liquors in that locality by any person, without regard to whether such person had been licensed by the state, county, city, or town to sell. Any other construction of the law would seriously impair its efficacy, and in a great measure defeat the purposes for which it was enacted. \* \* \* we hold, therefore, that the local option law, having been legally adopted in Milam county, it became operative throughout the county, and upon all persons within said county alike, and had the effect to repeal and abrogate all licenses for the sale of intoxicating liquors granted by said county, or by any city or town within said county."

Counsel contend that the decisions of the courts of Texas and Kentucky should not be considered by this court, for the reason that the local option laws of those states were enacted pursuant to constitutional provisions; but we are unable to perceive the difference in effect between a law passed by a Legislature because it is compelled to do so, and one passed by a Legislature because it has full power and authority to do so. Each is alike a legislative mandate when duly passed, and each is of equal dignity and importance.

From the foregoing considerations we are of the opinion that the adoption of the local option law in Ravalli county prohibits the sale of intoxicating liquors in the town of Hamilton. *Smith v. Patton* (Ky.) 45 S. W. 459; 19 Enc. Law (2d Ed.) 510. The right to manufacture and traffic in intoxicating liquors is one which is exercised subject to the regulation and control of the police power of the state; a power of which the Legislature cannot divest itself (*Burnsides v. Lincoln County*, 86 Ky. 423, 6 S. W. 274; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 980); and such body is the exclusive judge of the manner in which such police power shall be exercised, and its action should be liberally construed (*Garrett v. Mayor*, 47 La. Ann. 618, 17 South. 238. In the early history of this class of legislation a few courts

held local option laws unconstitutional. *Rice v. Foster*, 4 Har. (Del.) 479; *Thornton v. Territory* (Wash.) 17 Pac. 896; *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425; *Parker v. Com.*, 6 Pa. 507, 47 Am. Dec. 480; *Maize v. State*, 4 Ind. 342; *State v. Wier*, 33 Iowa, 134, 11 Am. Rep. 115. A Michigan local option law was held unconstitutional, but because of a defective title to the act (*Hauck's Case* [Mich.] 38 N. W. 269; but afterwards, in *Feek v. Township Board*, 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69, an act similar to the one under consideration, in so far as the objections here urged are concerned, was upheld. The case of *Ex parte Wall*, supra, was decided by a bare majority of the court, as was the case of *Thornton v. Territory*, supra. *Parker v. Com.* was overruled in *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716, decided in 1873. *Maize v. State*, above, is overruled in fact, though not in express terms, by the later decision in *Groesch v. State*, 42 Ind. 547; while the effect of the decision in *State v. Forkner*, 94 Iowa, 1, 62 N. W. 683, must be held to have destroyed the effect of the decision in *State v. Wier*, above, as an authority.

So far as our investigation goes, the only states which now hold such laws invalid are Delaware, California, and Washington, while they are upheld by the following authorities: *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *State v. Wilcox*, 42 Conn. 364, 19 Am. Rep. 536; *Frederickton v. Queen*, 3 Duv. (Can.) 505; *Territory v. O'Connor*, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 353; *Well v. Calhoun* (C. C.) 25 Fed. 865; *Caldwell v. Barrett*, 73 Ga. 604; *State v. Forkner*, 91 Iowa, 1, 62 N. W. 683; *Com. v. Dean*, 110 Mass. 357; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83; *Feek v. Twp. Board*, 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69; *State v. Cook*, 24 Minn. 247, 31 Am. Rep. 344; *Schulherr v. Bordeaux*, 64 Miss. 59, 8 South. 201; *State v. Pond*, 93 Mo. 606, 6 S. W. 469; *Paul v. Circuit Ct.*, 50 N. J. Law, 585, 15 Atl. 272, 1 L. R. A. 86; *Gloversville v. Howell*, 70 N. Y. 287; *Gordon v. State*, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *Ex parte Lynn*, 19 Tex. App. 293; *Savage v. Commrs.*, 84 Va. 619, 5 S. E. 565; *Bancroft v. Dumas*, 21 Vt. 456. Commenting on these laws, Cooley says: "Such laws are known in common parlance as 'Local Option Laws.' They relate to subjects which, like the retailing of intoxicating drinks, or the running at large of cattle in the highways, may be differently regarded in different localities, and they are sustained on what seems to us the impregnable ground that the subject, though not embraced within the ordinary power of the municipalities to make by-laws and ordinances, is nevertheless within the class of police regulations, in respect to which it is proper that the local judgment should control." *Cooley's Const. Lim.* 146.

Finally, every reasonable intendment is to be resolved in favor of the constitutionality of the law, and before this court can pro-

nounce a solemn enactment of the legislative assembly invalid, such invalidity must be made manifest beyond a reasonable doubt. *State v. Camp Sing*, 18 Mont. 128, 44 Pac. 516, 82 L. R. A. 633, 56 Am. St. Rep. 551; *State v. Clancy*, 20 Mont. 498, 52 Pac. 267; *State v. McKinney*, 29 Mont. —, 74 Pac. 1095.

After this cause had been argued to this court at great length, it appeared from the testimony of the complainant, taken in open court, that at the time the writ of habeas corpus was served upon the sheriff of Ravalli county complainant was not in fact confined in the county jail, but was permitted to go about without apparent restraint. Upon this testimony of complainant this court would have been justified in dismissing his petition, but because of the importance of the questions and the public interest involved we have considered it upon its merits.

The complainant is remanded to the custody of the sheriff of Ravalli county to be imprisoned until he shall be discharged according to law, and the proceedings are dismissed. Dismissed.

BRANTLY, C. J., concurs.

MILBURN, J. (concurring). While I believe that Mr. Justice HOLLOWAY is correct in what he says in the foregoing well-considered opinion as to the constitutionality of the statute, yet it is not because of this belief that I decide, as I do, that the writ should be quashed and the proceedings dismissed. I so decide upon the single ground that the complainant was not in the custody of the sheriff, or at all restrained of his liberty, when he prayed for the writ. The complainant, in his petition addressed to the justices of this court, declared under oath that he was "unlawfully imprisoned, detained, and confined of his liberty by Joshua Pond, sheriff of Ravalli county, \* \* \* in the county jail of said county." A writ of habeas corpus was issued by order of the chief justice, returnable before this court. The sheriff, under oath, made his return that "at the time said writ was issued \* \* \* and served upon me the said W. P. O'Brien was by me imprisoned and restrained of his liberty, and confined in the county jail of Ravalli county, and that such imprisonment and restraint would have continued until this time, had not this honorable court directed that said W. P. O'Brien, relator herein, be released upon executing a satisfactory bond in the sum of \$500. \* \* \*". The complainant, being examined upon his oath in this court at the time of the hearing, declared that at the time the petition was made and at the time the sheriff was served with the writ he was not in the custody of the sheriff at all, but had been allowed to go at his own will pending his application for said writ. Looking

to article 8, § 3, of the Constitution of this state, we find that a petition for a writ of habeas corpus addressed to a justice of this court must show that the complainant is "held in actual custody." In section 170 of the Code of Civil Procedure is said the same thing. The writ of habeas corpus is to enable a person unlawfully held in actual custody to regain his liberty. It is not designed for the purpose of assisting persons to get expeditiously, or at all, a mere decision of the court upon unsettled and disputed points of law. In the case of a bona fide petition of a person actually in custody this court may and will grant a writ returnable and order a hearing to be had as provided by law. But it will not permit the sacred writ, which was intended to protect the citizen from unlawful imprisonment, to be made, by convenient arrangement, a mere means of securing such a decision as is referred to above.

(29 Mont. 523)

#### STATE v. STICKNEY.

(Supreme Court of Montana. Feb. 8, 1904.)

#### KIDNAPPING — INFORMATION — SUFFICIENCY — APPEAL — RECORD — BILL OF EXCEPTIONS.

1. Under Pen. Code, § 2229, subd. 1, designating the information as a part of the judgment roll in a criminal case where a conviction had been had, and *Sess. Laws 1903*, p. 47, c. 34, providing that motions to set aside informations, or demurrers to informations, shall be embodied in a bill of exceptions, and cannot be reviewed in any other manner, the original and first amended informations, and demurrers to them which were sustained, and a motion to dismiss the prosecution, and order overruling it, were not a part of the appeal record, where they were not embodied in the bill of exceptions.

2. Under Pen. Code, § 2171, providing that a draft of a bill of exceptions in a criminal case shall be presented for settlement on at least two days' notice to the county attorney, where the record on appeal does not show affirmatively that such notice was given, the bill of exceptions will not be considered.

3. Under Pen. Code, § 380, subd. 3, as amended by *Sess. Laws 1901*, p. 189, providing that whoever willfully entices or by force or fraud takes away another from a place without the state, and afterwards brings such person into this state, is guilty of kidnapping, the crime is complete when these acts are done, though without intent to cause the person to be secretly confined and imprisoned within the state, notwithstanding subdivision 1, making that an element of the crime where the person is seized in this state.

4. That the concluding phrase of the counts of an information, "against the peace and dignity of the state of Montana," etc., modifies only the last sentence preceding such words in each count, does not render the counts insufficient.

5. Under Pen. Code, § 1830, providing that the rules by which the sufficiency of pleadings in criminal actions is to be determined are those prescribed by that Code, an information is sufficient where it conforms substantially to the form laid down in section 1833, and to the rules prescribed in section 1841, and there is no imperfection in matter or form thereof tending to the prejudice of a substantial right of the defendant on its merits (section 1842).

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Robert Stickney was convicted of kidnapping, and appeals. Affirmed.

Downing & Stephenson, for appellant.  
James Donovan, for the State.

**HOLLOWAY, J.** The defendant, Robert Stickney, was convicted of the crime of kidnapping, and sentenced to imprisonment in the State Prison for the term of seven years. From the judgment he appeals.

Bound together as the record, and filed in this court, are a copy of the original information, the demurrer filed thereto, the order of the district court sustaining the demurrer, the first amended information, the demurrer thereto, the order of the district court sustaining it, the second amended information—being the one upon which the defendant was tried—a motion by defendant to dismiss the prosecution against him, the order of the district court overruling the motion, the defendant's pleas, the minute entries of the trial, including a copy of the verdict, the instructions given to the jury, the judgment, a bill of exceptions embodying the testimony given at the trial, a stipulation, the notice of appeal, and the certificate of the clerk. Counsel for the state has moved this court to strike out all that portion, except the information upon which the defendant was tried, the record of his pleas, the minute entries of the trial, the instructions given, the judgment rendered, the notice of appeal, and the clerk's certificate. The motion to strike the original and first amended informations, together with the demurrers thereto, and the orders of the court with reference to the same, together with the motion to dismiss the prosecution, and the order of the court overruling the same, and the stipulation of the attorneys respecting the time for the presentation of the bill of exceptions for settlement, is made upon the ground that the several papers just enumerated are not a part of any bill of exceptions, and therefore not properly a part of the record in this case.

Section 2229 of the Penal Code designates the papers which shall constitute the judgment roll or record of the action in a criminal case, where a conviction has been had. Subdivision 1 is, "The indictment or information, and a copy of the minutes of the plea or demurrer." It is contended by appellant that the motion to dismiss the prosecution was in effect a demurrer, and properly a part of the judgment roll. However, Sess. Laws 1903, p. 47, c. 34, has amended subdivision 1 of section 2229, above, by providing that motions to set aside indictments or informations, or demurrers to indictments or informations, shall be embodied in a bill of exceptions, and further provides that they cannot be reviewed in any other manner. The information which is made a part of the judgment roll has reference only to the information upon which the defendant was tried. If he was tried on an amended information, that amended information succeeds all prior informa-

tions filed, and they cease to have any effect whatever as pleadings. It is apparent that the defendant recognized this rule, for he sought to have the original and first amended informations introduced in evidence as exhibits, but upon objection they were excluded, and are not copied in the bill of exceptions. It appears, then, that the judgment roll or record of the action in this case is composed of copies of the following papers only: (1) The information, and defendant's pleas thereto; (2) the minutes of the trial; (3) the instructions given; and (4) the judgment. Section 2 of chapter 34, Act of 1903, above, among other things, provides: "The only method of preserving for review by the Supreme Court on appeal, any proceeding, evidence or matter not designated by the Penal Code as part of the record on appeal without bill of exceptions, shall be by bill of exceptions prepared and settled under either section 2171 of the Penal Code or this act, as the one or the other may be appropriate." It is apparent, then, that with reference to the original information, the demurrer thereto, the order of the court sustaining it, the first amended information, the demurrer thereto, and the order of the court sustaining it, the defendant's motion to dismiss the prosecution, and the order of the court overruling the same, and the stipulation of the attorneys, none of which are embraced in the bill of exceptions, nor are a part of the judgment roll, are not part of the record before this court for any purpose whatever, and must therefore be stricken out.

It is contended by the Attorney General that the bill of exceptions should be stricken from the record, for the reason that it does not appear affirmatively from it that the same was presented to the judge for settlement upon two days' notice to the county attorney. Section 2171 of the Penal Code provides: "When a party desires to have the exceptions taken at the trial settled in a bill of exceptions the draft of a bill must be prepared by him and presented, upon notice of at least two days to the county attorney, to the judge for settlement within ten days after judgment has been rendered against him, unless further time is granted by the judge, or by a justice of the Supreme Court, or within that period the draft must be delivered to the clerk of the court for the judge. \* \* \*"

In *State v. Gawith*, 19 Mont. 48, 47 Pac. 207, this same question was before the court; and it was there held that the provisions of section 2171, quoted above, are mandatory, and, where the record on appeal does not show affirmatively that such notice was given, the bill of exceptions will not be considered. In *State v. Moffatt*, 20 Mont. 371, 51 Pac. 823, the same question was presented, and the doctrine announced in *State v. Gawith* reaffirmed, so that it may be said to have become a settled rule of practice in this state. Eliminating therefore from the record the bill of exceptions and those papers which are not

properly a part of the judgment roll, and there remains for consideration only the judgment roll as provided for in section 2229 as amended by the Act of 1903.

The only question presented for determination is, does the information state a public offense? The information is drawn and the prosecution had under the provisions of subdivision 3 of section 380 of the Penal Code, as amended by the Seventh Legislative Assembly (Sess. Laws 1901, p. 169). So much of that section as is applicable to this case reads as follows: "Every person who willfully \* \* \* (3) abducts, entices or by force or fraud unlawfully takes or carries away another, at or from a place without the state \* \* \* and afterwards sends, brings, has or keeps such person, or causes him to be kept or secreted within this state, is guilty of kidnapping and is punishable by imprisonment in the State Prison for not less than one year." The information is in three counts, but upon the trial the first count was abandoned by the prosecution, and consideration of it withdrawn from the jury by an appropriate instruction. The second count charges that the defendant on December 11, 1902, by means of false and fraudulent representations, which are detailed at length, did unlawfully, willfully, and feloniously entice one Hallie Wolcott from Denver, Colo., and afterwards, on December 18, 1902, did, by means of such false and fraudulent representations, willfully, unlawfully, and feloniously bring the said Hallie Wolcott into this state, and into a certain place in the city of Great Falls. The third count charges the defendant with willfully and feloniously taking the said Hallie Wolcott from Denver, Colo., and afterwards unlawfully and feloniously bringing her into Montana. The various terms employed in the first part of subdivision 3, above, merely designate the means by any one of which the crime may be initiated; and if the defendant willfully and feloniously enticed the prosecuting witness from Colorado, and afterwards unlawfully and feloniously brought her into this state, the crime would be complete, as charged in the second count. Or, if he willfully and feloniously took her from Colorado, and afterwards unlawfully and feloniously brought her into this state, the crime would be complete, as charged in the third count. The contention of the appellant that the information must allege that the defendant brought her into this state "with intent to cause her, without authority of law, to be secretly confined and imprisoned within this state," etc., is untenable. If the prosecution was had under subdivision 1 of section 380, above, then the objection made by the appellant would be applicable. But under subdivision 3, above, if the defendant willfully and feloniously enticed or took the prosecuting witness from Colorado, he could then have completed the crime of kidnapping, as defined in that section, by

any one of the following means, viz.: by sending her, by bringing her, by having her, by keeping her, or by causing her to be kept or secreted in this state.

Finally it is contended that the concluding phrase of each count, "against the peace and dignity of the state of Montana," etc., only modifies or characterizes the last sentence of each count preceding such concluding words. But with equal propriety could that argument be made against the allegations of almost every information. In *People v. Biggins*, 65 Cal. 564, 4 Pac. 570, such contention is characterized as hypercritical. We are of the opinion that there is no merit in it. The sufficiency of every information is to be tested by the rules prescribed by the Penal Code. Section 1830 reads as follows: "All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code." Section 1833 provides a form for informations and indictments, and it is sufficient to say that the information in this case conforms to that model in all substantial particulars. Sections 1841 and 1842 provide the rules for the interpretation and construction of informations and indictments as follows:

"Sec. 1841. The indictment or information is sufficient, if it can be understood therefrom: (1) That it is entitled in a court having authority to receive it, though the name of the court be not stated. (2) If an indictment, that it was found by a grand jury of the county in which the court was held; or if an information, that it was subscribed and presented to the court by the county attorney of the county in which the court was held. (3) That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury or county attorney, as the case may be, unknown. (4) That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein. (5) That the offense was committed at some time prior to the time of finding the indictment or filing of the information. (6) That the act or omission charged as the offense, is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. (7) That the act or omission charged as the offense, is stated with such a degree of certainty, as to enable the court to pronounce judgment upon a conviction, according to the right of the case.

"Sec. 1842. No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits."

Tested by the foregoing rules, we are of the opinion that the information states a public offense.

The judgment is affirmed. Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

(44 Or. 246)

CITY OF DALLAS v. HALLOCK et al.  
(Supreme Court of Oregon. Feb. 1, 1904.)

MUNICIPAL CORPORATIONS—EXERCISE OF EMINENT DOMAIN—CONDEMNATION OF PROPERTY FOR WATERWORKS—CONDITIONS PRECEDENT TO ACTION—PLEADINGS—SUFFICIENCY.

1. Dallas City Charter, § 51 (Sp. Laws 1903, p. 671), authorizing the city to construct and maintain waterworks, and, where unable to agree with the owner, to condemn real property, waters, streams, and riparian rights, confers ample power to institute an action to condemn lands and riparian rights for a contemplated system of waterworks.

2. The complaint in an action for condemnation under such section, which authorizes the taking of private property "necessary or convenient" for a waterworks plant, alleged that it was necessary for plaintiff to lay down and construct a pipe line on the land of defendant, and for that purpose to condemn a described strip and a site for reservoir purposes, and that it was also necessary to appropriate a specified amount of water of a creek flowing past and through defendant's premises. *Held*, that the complaint sufficiently showed that the property sought to be condemned was necessary for the designated use.

3. As the city is empowered to condemn property for a waterworks system without any limitations confining its choice to any particular property, it has a discretion within reasonable limits to choose the source of its water supply, the route of its pipe lines, and the location of its reservoirs and pumping stations; and, unless there is a clear abuse of it to the detriment of private individuals and property rights, the courts cannot interfere to control it, and the mere fact that a supply of water can be had from a more convenient and less expensive source is no objection to an action for condemnation by the city.

4. Dallas City Charter, § 27, authorizes the city, inter alia, to erect, construct, and purchase waterworks, and section 51, in addition to granting the same power, provides as well for the exercise of eminent domain for procuring property therefor in case of inability to purchase the same. *Held*, that the latter power was distinct from the power conferred by section 27, and, not being included in the latter section, its exercise was not subject to a provision in section 28 that the power or authority granted by section 27 could only be exercised by ordinance unless otherwise specified, and a resolution was accordingly adequate for the purpose of instituting an action under such section 51.

5. Where a contract for the construction of a waterworks system contemplates that the city should own the system when completed, the fact that the builder, as a part consideration for its construction, is to take as lessee the tolls for a term of years, could not affect the right to construct, and for that purpose to acquire the easements necessary thereto; and hence defendants to an action for condemnation cannot object thereto on that account.

6. Where a city is authorized to contract for the construction of a waterworks system, as well as to purchase the property necessary therefor, it is unnecessary that it provide at once for meeting the payments contemplated before exercising the right of eminent domain;

but, even if it were required to do so, it could not affect defendants in condemnation proceedings, who were neither residents of the city nor taxpayers therein, and whose demands are subordinated when the money is paid into court for them, regardless of where it comes from.

7. Dallas City Charter, § 51 (Sp. Laws 1903, p. 671), having authorized an action to condemn property for waterworks, and prescribed only that the proceedings therein should be the same as those provided by the general laws for condemnation for railroad purposes, it was not necessary to submit the question of whether it would institute the action and make payment to a vote of the taxpayers pursuant to B. & C Comp. § 5108.

Appeal from Circuit Court, Polk County  
George H. Burnett, Judge.

Action by the city of Dallas against Mary E. Hallock and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action instituted in the exercise of the right of eminent domain to condemn certain rights of way over and upon the premises of the defendant Mary E. Hallock for conducting water from Canyon creek, a tributary of La Creole creek, to the city of Dallas; also a reservoir site and 500,000 gallons of water flowing every 24 hours in La Creole creek for the construction, maintenance, and operation of a system of waterworks in said city. The complaint sets forth the incorporation of the plaintiff as a municipality, the adoption by the common council on September 17, 1902, of Ordinance No. 23, providing for supplying the city and its inhabitants with water for public and private use, and contracting with H. V. Gates, his successors or assigns, for the construction of a water plant within and for the city, and for the payment to him of \$12,000, and a lease of the plant for a period of 20 years, or until terminated by agreement of the contracting parties; the adoption on March 23, 1903, of Resolution No. 17, selecting the real property, water, and water rights sought to be appropriated and condemned; the adoption on April 20th following of Resolution No. 19, providing that the city shall by proper action appropriate and condemn the property, rights of way, water, and water rights selected by Resolution No. 17; that the city is proceeding to construct the plant; that in the construction, maintenance, and operation thereof it is necessary for plaintiff to lay down and construct a pipe line on and above the lands of Mrs. Hallock, and for that purpose to condemn a strip 20 feet wide, particularly describing the same, with its termini and location upon the ground and a site for reservoir purposes; that it is also necessary for the purposes indicated to appropriate and condemn 500,000 gallons each and every 24 hours of the water of La Creole creek, flowing past and through her premises; and that the parties plaintiff and defendant are unable to agree upon suitable compensation for the several rights and properties involved. A demurrer interposed to the complaint was overruled, and the defendants answered, setting

up, first, damages on account of the appropriation of the lands, water, and water rights; and, second, that the city of Dallas can be supplied with abundant and wholesome water by appropriation from streams flowing into La Creole creek below the water power of the defendant Hallock, which can be utilized at 25 per cent. less cost than from Canyon Creek; and praying that the complaint be dismissed, but, if not, then for damages as alleged. At the trial Mrs. Hallock obtained a verdict for \$600 damages, and, the plaintiff having paid the money into court, together with the costs and disbursements then accrued, a judgment was rendered in its favor, condemning the lands and water rights as prayed for, from which the defendants appeal.

Ordinance No. 23 is made a part of the bill of exceptions, and provides, among other things, that H. V. Gates, his successors or assigns, is to furnish all labor and materials necessary to construct and install a plant in the city of Dallas for a system of waterworks, with circulating mains and reservoir pressure; that the water shall be supplied from Canyon creek, or from any other source where water of equal quality can be obtained; that the contractor shall construct a masonry reservoir, with supply and waste pipes, furnish and lay the pipes, the length, dimension, and quality being designated, and as much more as from time to time may be necessary to supply actual patrons; that the city shall provide sufficient ground for a reservoir site, the right of way thereto and therefrom, the right of way for all water mains, the right to use the water of Canyon creek or other source of supply, and the right of way therefrom to the reservoir. It is further provided that, in consideration of the benefits to be derived from said plant, the city shall pay to the contractor \$12,000, in two installments, the last to be when the plant is completed, at a cost to the contractor of not less than \$20,000, exclusive of the rights of way, water, and water rights to be furnished by the city; that thereafter the plant shall be and remain the property of the city; that the contractor shall retain, as lessee, the use of said plant for the period of 20 years for a nominal consideration of \$1 per year, he to keep the same in repair and make such extensions as are necessary to meet the demand for water; that at the expiration of 20 years, or each succeeding period of 5 years thereafter, optional with the city, the value of the plant shall be determined in manner designated; that when it is so ascertained it shall be paid to the contractor, less the \$12,000, the payment of which is first provided for, and that the city shall, after the acceptance of the contract, and its election to issue bonds, at once proceed to sell as many thereof as will be necessary to procure the funds for the payment of the \$12,000 stipulated to be paid on completion of the plant. Resolution No. 17 selects certain

real property, rights of way, water, water courses, and riparian rights necessary to be used for the purpose of constructing, maintaining, and operating a system of waterworks in the city of Dallas, to be owned by it for the benefit of the city and its inhabitants, the same to be acquired by appropriation and condemnation through proper proceedings for the purpose, specifically describing them, and provides that the question whether the city shall acquire and make payment for and institute actions to condemn such property and rights so selected shall be submitted to a vote of the taxpayers of the city at an election to be held April 6, 1903, prescribing minutely the manner of holding such election. Resolution No. 19 authorizes and directs the appropriation and condemnation by proper actions of the property, rights of way, water, and water rights and privileges designated in resolution No. 17, and the employment of an attorney to prosecute such actions.

W. H. Holmes, for appellants. W. T. Muir, for respondent.

WOLVERTON, J. (after stating the facts). It is first insisted that the city of Dallas is without competent authority to institute condemnatory proceedings of the nature here in progress, but it is quite apparent that section 51 of the charter, as amended in 1903 (Sp. Laws 1903, p. 671), confers ample power for the purpose.

It is next urged that the complaint does not state facts sufficient to constitute a cause of action, because (1) it is not shown that the property and rights sought to be appropriated and condemned are necessary and convenient for the purposes contemplated; (2) that the city is proceeding by resolution, and not by ordinance, as required by the charter; and (3) that it is transcending its powers in leasing the plant, instead of operating the same upon its own account. Of these in their order.

It may be premised in this connection that a motion was interposed after verdict for judgment notwithstanding in favor of defendants for a dismissal of the action, which reserves the questions suggested for our consideration. Section 51, *supra*, among other things, authorizes and empowers the city to construct, operate, and maintain waterworks within or without its limits for the purpose of supplying the city and its inhabitants with water, and to charge tolls therefor, and to that end to purchase all real property, whether located within or without its limits, necessary for reservoirs, pumping stations, other buildings, and pipe lines, and all waters of lakes and streams and riparian rights necessary or convenient therefor, and, if unable to agree with the owner of any such property for the purchase thereof, to appropriate and condemn to its own use for the purposes aforesaid any and all such real



property, waters, streams, and riparian rights; the proceedings in such action to condemn to be the same as those provided by the laws of Oregon for the condemnation of lands for railway purposes; and for the purposes indicated to issue interest-bearing negotiable coupon bonds, to the amount of \$25,000, to run not more than 20 years, and to draw interest not to exceed the rate of 5 per cent. per annum. Within the intendment of this section, the complaint should undoubtedly show by appropriate allegations that the property and rights sought to be condemned were necessary, or at least convenient, for the construction, maintenance, and operation of waterworks for the city's use and benefit. The general rule applicable where it is sought to take lands or property of another and appropriate them to a public use or benefit is that the necessity therefor must not only be averred, but proved, and that it must further appear that the party seeking the appropriation has been unable to agree with the owner for the purchase thereof. 7 Enc. Pl. & Pr. 528; Cemetery Ass'n v. Redd, 33 W. Va. 262, 10 S. E. 405; City of Helena v. Harvey, 6 Mont. 114, 9 Pac. 903; Portland & Greenwood Turnpike Co. v. Bobb, 88 Ky. 226, 10 S. W. 794. Whether a proposed use is in fact public, so as to justify the taking of private property without the consent of the owner, is a matter for judicial determination; but the question of the necessity, propriety, or expediency of appropriating such property to such a use, and the extent to which it shall be taken, rest wholly in legislative discretion, subject only to the restraint that just compensation must be made. Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 46 Pac. 790, 34 L. R. A. 368, 60 Am. St. Rep. 818; Apex Trans. Co. v. Garbade, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882; Fanning v. Gilliland, 37 Or. 369, 61 Pac. 636, 62 Pac. 209; Shoemaker v. United States, 147 U. S. 282, 298, 13 Sup. Ct. 361, 37 L. Ed. 170; Secombe v. Railroad Co., 23 Wall. 108, 118, 23 L. Ed. 67. When, therefore, the use is determined or admitted to be public, as it is here, and the Legislature has declared that private property necessary or convenient to that use may be taken in furtherance of the enterprise, the power to take is complete. It then becomes a matter for the municipality or incorporation authorized to exercise the right of eminent domain to show by apt allegations and proofs the necessity or convenience for the appropriation of the property sought to be condemned to such a use. The complaint here is manifestly sufficient in that particular. The allegations bearing upon the subject may not be as direct as they might have been, but they show by all reasonable intendment that the property sought to be condemned is necessary for the use designated.

It is suggested that it ought to have been alleged that the property was both neces-

sary and convenient for the contemplated use. But this is not the mandate of the charter, and it is quite sufficient that it is shown to be necessary. In this connection we will determine another question cognate thereto, which is pertinently presented by the attempt of the defendants to show under their second further and separate answer that it was more convenient and less expensive for the city to procure a supply of water from Ellendale creek, which flows into La Creole creek below the water power of Mrs. Hallock, instead of Canyon creek, and therefore that the city ought not to be permitted to prosecute the present action to condemn; in other words, the objection goes to the necessity of the particular property for the use designed, not that it is excessive, thus conceding that some property was necessary thereto, but not that which it is here sought to have condemned. "But," says Mr. Lewis, "this objection is unavailing. Except as specially restricted by the Legislature, those invested with the power of eminent domain for a public purpose can make their own location according to their own views of what is best or expedient, and this discretion cannot be controlled by the courts." 2 Lewis, Em. Dom. (2d Ed.) 891. Mr. Chief Justice Dixon indicates the reason for the rule, and states the consequences of the doctrine insisted upon here with convincing power, in *Ford v. Chicago & Northwestern R. Co.*, 14 Wis. 609, 617, 80 Am. Dec. 791. He says: "So far as the judge placed his decision on the ground that there was no necessity of appropriating the street to the use of the railroad, because there were other adjoining lands which could be as conveniently occupied for that purpose, he was clearly in error. The propriety of taking property for public use is not a judicial question, but one of political sovereignty, to be determined by the Legislature, either directly or by delegating the power to public agents, proceeding in such manner and form as may be prescribed. \* \* \* Whether the company should appropriate this particular piece of land or that to the use of the road was, therefore, under their charter, a matter which was committed entirely to their discretion; and the logic of the county judge, if good for anything, would be sufficient to defeat the company's location of the line of their road in ninety-nine cases out of every hundred, for in about that proportion of instances the land selected is not so indispensably necessary that some other might not be taken without very great inconvenience." So it is said in *Railway Co. v. Petty*, 57 Ark. 359, 369, 21 S. W. 884, 886, 20 L. R. A. 434: "Having determined that the side tracks are necessary for the conduct of the company's business, the location must be left to the company's discretion, unless there is a very clear abuse of it." See, also, *Rialto Irrigating Dist. v. Brandon*, 103 Cal. 384, 37 Pac. 484. The city of Dallas is empowered,



under section 51, *supra*, to condemn property necessary for the use contemplated, and no limitations or restrictions are imposed confining its choice to any particular property. It has a discretion, within reasonable limits, as to the kind and capacity of the plant it may install, and so it has a discretion, within like limits, to choose the source of its water supply, the route of its pipe lines, and the location of its reservoirs and pumping stations, and, unless there is a clear abuse of it to the detriment of private individuals and property rights, the courts cannot interfere to control it.

The second point relates to the manner in which the city shall exercise the power to condemn. By section 27 of the charter the city is accorded power to do many things, among which (subdivision 35) to provide the city with good and wholesome water for domestic, fire, and power purposes, and for the erection, construction, or purchase of such waterworks and reservoirs within or without the limits of the city as may be necessary or convenient therefor; but the cost of the erection, construction, or purchase of such works is to be provided for in the manner prescribed in section 51. The same power is also granted by section 51, as amended, and, as we have seen, the costs attendant upon the purchase or construction of such waterworks may be provided for by the issuance of bonds of a kind therein designated. By section 28 it is provided that the power and authority granted by section 27 can only be exercised or enforced by ordinance, unless otherwise specified. By Resolution No. 17 the city attempted to make selection of the water and property rights it desired to appropriate, and by the same resolution it provided for submitting the question whether the city should acquire, institute actions to condemn, and make payment for such property and rights to the taxpayers for their determination. Now, the power conferred, within the purview of section 27, is to erect, construct, or purchase waterworks. Section 51, as amended, provides as well the means for procuring property necessary to that purpose in case a purchase cannot be had, and to that end confers the power to exercise the right of eminent domain. The two powers are manifestly distinct, the latter not being included in section 27, but only being conferred by section 51 as amended. The resolution was a step in the direction of an exercise of the latter power, looking to the condemnation of the property, and, although in aid of the construction and maintenance of waterworks, is not within the inhibition of proceeding otherwise than by ordinance. The resolution being adequate for the purpose, therefore, the second objection is unavailing. Section 51 originally merely authorized the city to issue \$25,000 interest-bearing bonds. The amendment confers additional powers, as we have seen, and limits the purpose for

which they may be issued; but such powers as do not come within the purview of section 27 may as well be exercised by resolution as by ordinance.

The third reason assigned wherein the complaint is insufficient involves two objections. One proceeds upon the ground that the act of leasing the plant as contemplated by Ordinance No. 23 is *ultra vires*, and the other that the steps prescribed by the charter (Sp. Laws 1901, §§ 52-56) for issuing and disposing of the bonds for the purpose of raising the means with which to pay for the plant have not been taken, it being insisted that all of these provisions of the charter must be complied with before the city can lawfully acquire the requisite rights of way, water, and water rights and privileges necessary to the construction of such waterworks. The defendants do not claim to be residents or inhabitants of the city, or taxpayers therein, so as to question the regularity of the proceedings by which the city is attempting to procure the construction of the waterworks system, and the only matters in which they are concerned are the existence of the municipality as a corporation with power to exercise the right of eminent domain, the necessity for taking the property for the public use designated, and the injuries they will sustain by the taking. Whether the city intends leasing the plant when it has acquired it, or has not provided the ready funds with which to pay for its construction, cannot affect them in the least. The contract contemplates that the city shall own the system when completed, and the fact that the builder, as a part consideration for its construction, is to take as lessee the tolls for a term of years, cannot affect the right to construct, and for that purpose to acquire the easements necessary thereto; so that defendants cannot complain or object to the exercise by the city of the right of eminent domain on that account. For a discussion of the principles here involved, see *Singerland v. Newark*, 54 N. J. Law, 62, 23 Atl. 129.

The city is authorized and empowered to contract for the construction of a waterworks system, as well as to purchase, and it is not necessary that it provide at once for meeting the payments contemplated. This it can do at another time. But if it should be required to provide immediately for such payments, it is difficult to understand how it could affect these defendants. The contractor might insist upon it, but why is it necessary that it should be done that the city might exercise the right of eminent domain in securing the rights of way for pipe lines, water, and water rights and privileges requisite to the construction of the system? It is neither expressly nor impliedly made a condition precedent thereto, nor do we think that a reasonable interpretation in *pari materia* of all the sections of the charter bearing upon the subject requires that the whole should be pro-

vided for at one and the same time, and especially does it not require that the bonds shall be issued and disposed of and the money actually in hand before the city can exercise the right accorded it to acquire the property and privileges necessary to the initiation of the work of construction.

It is said in argument that the city has no authority to pay the money necessary to the appropriation out of the general fund, and that the sale of the bonds is the exclusive source from which it could be derived. Grant it. The defendants, not being taxpayers or residents within the city, cannot be affected thereby, and their demands are subverted when the money is paid into court for them. Where it comes from—whether from one fund or another, or whether paid by the city or a stranger—cannot affect them injuriously. It is no defense to condemnation proceedings begun by a city for such purpose that the general fund is insufficient to defray the current expenses of the city, because it is said the landowner is not concerned in the city's ability to pay, as he is not required to give credit. In *re Application of Cedar Rapids*, 85 Iowa, 30, 43, 51 N. W. 1142. So it is here. The defendants are not concerned in the source from which they are to receive their compensation. It is enough that it has been actually provided for them, and is ready for their acceptance. *Secombe v. Railroad Co.*, supra.

Another argument we will notice in passing is that the city should have proceeded in its condemnatory proceedings under the general laws (B. & C. Comp. § 5108), and submitted the question of whether it would institute the action to condemn and make payment for the property involved to a vote of the taxpayers. We think, however, this is not required, as the charter has authorized the condemnatory proceedings, and prescribes only that the proceedings in such action to condemn shall be the same as those provided by the general laws for condemnation for railway purposes. But, if it be conceded that counsel's contention is correct that the question alluded to should have been submitted to a vote of the taxpayers, it may be answered that that is just what Resolution No. 17 provided for.

There was another question presented, relative to the time of taking effect of the act of the Legislature amending section 51 of the city charter, in view of the emergency clause adopted with it; but it is fully settled and determined by the late case of *Kadderly v. Portland* (Or.) 74 Pac. 710.

These considerations affirm the judgment of the trial court, and such will be the order here.

(44 Or. 302)

**CITY OF DALLAS v. BOISE et al.**  
(Supreme Court of Oregon. Feb. 1, 1904.)  
**WATER RIGHTS—CONDEMNATION—VALUE—EVIDENCE.**

1. In an action to condemn water rights, evidence of the value of water powers two miles distant from the one in question is inadmissible, in the absence of a showing that the conditions surrounding the different water powers were similar, so as to make their value equal.

Appeal from Circuit Court, Polk County; George H. Burnett, Judge.

Action by the city of Dallas against R. P. Boise and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

R. P. Boise and W. H. Holmes, for appellants. W. T. Muir, for respondent.

**WOLVERTON, J.** This is an action to condemn certain real property, water, and water rights and privileges for the purpose of constructing a waterworks system in the city of Dallas. The issues presented by the pleadings are similar to those in the case of *Dallas v. Hallock* (just decided) 75 Pac. 204, and the questions arising upon the record are the same, except that there is an additional one presented here. The decision of that case is therefore decisive of this as far as it goes.

The question alluded to relates to the refusal of the court to permit witnesses for the defendants to testify respecting the value of water powers at Salem, in Marion county, Derry, in Polk county, and at Dallas; the latter being distant two miles from the water power for the impairment of which the principal defendant herein is claiming damages, the inquiry being limited to the value of the particular water power involved. Unless there was a marked similarity in the conditions attending and surrounding the respective water powers, so as to make their values relatively equal, the testimony could have been of no definite or material utility in determining the value of the particular water power concerned, or the amount of injury thereto. Such a similarity was not made to appear, and hence there was no error in excluding the testimony proffered.

Another question, touching the court's refusal to admit certain testimony respecting the character of the lands lying in proximity to defendants' water power for building and residence purposes, is somewhat discussed in the briefs, but, as it is not certified up by the bill of exceptions, it is not here for our determination.

The judgment of the trial court will be affirmed, and it is so ordered.

¶ 1. See Evidence, vol. 20, Cent. Dig. § 420.

**HANLEY v. KUBLI et al.**

(Supreme Court of Oregon. Feb. 8, 1904.)

On petition for rehearing. Petition allowed.

For former report, see 74 Pac. 224.

**BEAN, J.** This case involves to some extent the question as to the power of the Legislature over general judgment liens. The question is of great importance, and the authorities seem to be in conflict. It is believed, therefore, that a rehearing should be had before the decree becomes final.

The petition for a rehearing is allowed.

(44 Or. 347)

**MILLER v. WATTIER.**

(Supreme Court of Oregon. Feb. 8, 1904.)

**SWAMP LANDS—SALE—PURCHASERS—QUALIFICATIONS—DETERMINATION BY STATE BOARD—REVIEW—FORFEITURES—WAIVER—BONA FIDE PURCHASER—EVIDENCE.**

1. Laws 1870, p. 55, § 3, authorized the sale of swamp and overflowed lands to any person over the age of 21 years who was a citizen of the United States, or who had filed his declaration to become such, on his making application and paying 20 per cent. of the purchase money to the Land Commissioner. *Held*, that the board of Land Commissioners being a part of the administrative department of the government, and being required, before granting a certificate of purchase, to determine the applicant's qualifications, its certificate granting plaintiff's application necessarily implied a finding that plaintiff had the necessary qualifications to purchase, which was not subject to review by the courts in a subsequent action between the certificate holder and a subsequent grantee of the land by such commissioners.

2. Laws 1870, p. 55, § 3, authorized the sale of swamp lands, and required the purchaser to pay 20 per cent. of the purchase money at the time his application was granted. Section 4, p. 56, provided that a patent should issue on proof that the land had been drained or otherwise made fit for cultivation, and the payment of the balance of the price within 10 years, and, if such proof and payment were not made, the land should revert to the state, and the money paid be forfeited. Laws 1878, pp. 41, 46, declared that all applications made prior to that act which had not been completed should be void. Laws 1887, p. 10, § 2, provided that all purchases of swamp land sold pursuant to Act 1870 which had not been reclaimed or paid for were declared void, except that any legal applicant who had complied with the act, including the payment of the 20 per cent., prior to January 17, 1879, might, without reclamation, on payment of the balance, be entitled to a deed, provided such payment was made prior to January 1, 1889, and that no deed to any one person should exceed 640 acres. *Held*, that where plaintiff's grantor applied to purchase a tract containing less than 640 acres under Act 1870, and received a certificate on payment of the 20 per cent. of the price on April 9, 1872, and though no proof of reclamation was made, and the balance of the price was not paid until April 18, 1882, when such balance was paid by plaintiff and accepted by the commissioners, the forfeiture incurred by such failure of proof and payment was waived.

3. In an action to remove a cloud on plaintiff's title to certain swamp land, evidence reviewed, and *held* to establish that defendant, who subsequently purchased the land from the state, did so with notice of plaintiff's claim, and was not, therefore, a bona fide purchaser.

75 P.—14

Appeal from Circuit Court, Marion County; H. H. Hewitt, Judge.

Action by William P. Miller, for whom Dav. Rafferty, as administrator of his estate, and others, were substituted after his death, against Vallier Wattier, for whom Vallier Wattier, Jr., as administrator of his estate after his death, and others, were substituted. From a judgment in favor of plaintiffs, defendants appeal. *Affirmed*.

This suit was instituted some ten years ago by W. P. Miller against Vallier Wattier, substitutions having since been made as to both parties; its purpose being to have the defendant declared to hold the legal title of lot No. 3, section 7, township 6 south, range 1 west, Willamette meridian, containing 55.22 acres, in trust for plaintiff. The complaint states, in substance, that the tract described was in March, 1860, and still is, swamp and overflowed land, and as such was, by act of Congress approved March 12, 1860, granted to the state of Oregon; that on November 11, 1871, said tract, with other land, was by the board of commissioners for the sale of university and other school lands belonging to the state of Oregon duly selected; that thereafter, "upon due application made by John F. Miller for the purchase of said land," the board, on April 9, 1872, sold the above tract to him as swamp and overflowed land, for which he paid the state 20 per centum of the purchase price, and thereupon received from the board a certificate of sale; that on June 29, 1891, Miller, for a valuable consideration, assigned and transferred said certificate, together with all his right, title, and interest in said land, to William P. Miller, the plaintiff; that on April 18, 1882, the plaintiff paid to the state of Oregon the balance of the purchase price, which was accepted by the said board of commissioners in full payment thereof, and paid into the State Treasury; that the defendant, with full knowledge of the facts here alleged, and with the intention to defraud plaintiff, applied on January 9, 1893, to said board of commissioners to purchase said land; that the board, without notice to plaintiff or rightful authority, executed and delivered to him a deed thereto; that the plaintiff is the equitable owner thereof, and entitled to a conveyance from defendant of the legal title. Every fact as alleged in the complaint is denied by the answer, and for a further defense it is alleged that defendant purchased the land in good faith, without notice or knowledge of plaintiff's claim of right thereto. The decree was for plaintiff, and the defendant appealed.

S. B. Linthicum and R. L. Glisan, for appellants. W. H. Holmes, for respondents.

**WOLVERTON, J.** (after stating the facts). The complaint is challenged at the outset as not stating facts sufficient to constitute a cause of suit. This question seems to us to

have been made here for the first time, but is now strenuously insisted upon, and commands consideration. The contention centers about the allegation that the sale was made on due application of John F. Miller; it being urged that this is but a conclusion of law, and not an ultimate and issuable fact, and was therefore wholly insufficient to support the decree. It is suggested that, as a good pleading, it should have set out the qualifications of the applicant to take under the law, and his subsequent compliance with the conditions imposed upon a purchaser from the state of such lands. This involves an examination of the several acts of the Legislature of this state bearing upon the subject.

Section 3 of the act of 1870 (Laws 1870, p. 55), provided for the sale of swamp and overflowed lands at a price not less than \$1 per acre, and that any person over the age of 21 years, being a citizen of the United States, or having filed his declaration to become such, might become an applicant to purchase upon filing his application for the tract desired, describing it. It further provided that within 90 days after public notice of the application, approval, and filing of maps and descriptions of the lands selected as swamp and overflowed, 20 per centum of the purchase money should be paid to the commissioner, whose duty it was to issue to him a receipt therefor; the balance to be paid on proof of reclamation. It was further provided by the same section that, in case of adverse applicants for the same tract or parcel, it should be the duty of the commissioner to sell the same to the legal applicant therefor, whose application was first filed. Section 4, p. 56, provided that patent should issue upon proof that the land had been drained or otherwise made fit for cultivation, and the payment of the balance of the purchase money, but that, if no such proof or payment had been made at the expiration of 10 years from and after the first payment, then that the land should revert to the state, and the money paid therefor be forfeited. Section 6 provided that, in case the office of Commissioner of Lands was not created by law, the provisions of the act should be executed by the Board of Commissioners for the Sale of School and University Lands. By section 9 of the act of 1878 (Laws 1878, pp. 41, 46), all applications for purchase made previous to the passage of the act, which had not been regularly made in accordance with law, or had not been fully complied with, including the payment of 20 per centum of the purchase money, were thereby declared void and of no effect. By section 2 of the act of 1887 (Laws 1887, p. 10), all swamp or overflowed lands sold in pursuance of the act of 1870 which have not been reclaimed or paid for in accordance with the provisions thereof are declared forfeited, and the certificates of sale void, and the board of commissioners is authorized to cancel the sale. But section 5 provides that any legal appli-

cant who has complied with the provisions of the act of 1870, including the payment of 20 per centum of the purchase price, prior to January 17, 1879, shall, without reclamation, upon payment of the balance of the purchase price, be entitled to, and shall receive, a deed for the land, provided that such payment be made prior to January 1, 1889, and provided, further, that no deed shall issue to any one person for more than 640 acres.

This is not a suit against the Board of Commissioners for the Sale of School and University Lands, to require it to issue a patent, but is to determine, as between the plaintiff and defendant, who has the better right to the legal title, which has passed out of the state, and become vested in the defendant. Plaintiff based his right upon his certificate of sale, which he alleged that his predecessor received from the board upon payment of 20 per centum of the purchase price, and a compliance with the law by payment of the balance of such purchase price to the state of Oregon on April 18, 1882. Under the provisions of section 3 of the act of 1870, only legal applicants were entitled to purchase swamp land; and, to constitute one such an applicant, he must have been over 21 years of age, and a citizen of the United States, or have filed his declaration to become such—a very simple qualification. It was the duty of the board of commissioners to determine as to this, and it was given the authority to decide as between adverse applicants, in which case it was required to sell to the legal applicant whose application was first filed. Thus the board was clothed with the power to sell and the authority to determine as to the fitness and qualifications of the applicant to purchase under the act; it being the agent of the state, with restricted authority, for the sale and disposition of its public lands. It is more than an agent. It is part of the administrative department of the government—made so by the Constitution. But its power to dispose of the public domain is subject to the control of the legislative department. It exercises its power, however, independent of the judiciary department, and its decisions are not subject to revision by the courts. "It occupies in this state," says Mr. Justice Boise in *Corpe v. Brooks*, 8 Or. 222, 224, "the same relation to the state judiciary as the Land Department of the United States does to the United States courts. \* \* \* But the courts may, on a proper showing, decree that the patentee holds the land as the trustee of one having a better right in equity." To the same purpose is *Robertson v. State Land Board*, 42 Or. 183, 70 Pac. 614. Acting in pursuance, therefore, of the duty and restrictions imposed, a certificate of sale, when granted, or a receipt of the board acknowledging the first payment of 20 per centum of the purchase price, is at least *prima facie* evidence, if not more, that the applicant was duly qualified to purchase, for we must assume that such certifi-

cate or receipt would not have been issued or given without a due compliance by the applicant with the statute. Having been issued or given after the time for determination as to the applicant's qualifications, it is paramount to a certification that he possessed the necessary fitness, as to age and citizenship, to become a purchaser. Now, the plaintiff, as we have seen, based his right to the patent upon his certificate of purchase, and his subsequent compliance with the law in making final payment; and it was therefore only necessary for him to allege, as has been done here, that upon due application made for the purchase of the land, and a payment of 20 per centum of the purchase price, the board issued to him a certificate, which stands as its determination as to his fitness to become a purchaser, and any inquiry that is to go behind the certificate must be inaugurated by the defendant. The case of *Stewart v. Altstock*, 22 Or. 182, 29 Pac. 553, is not an authority against this view. It is simply not in point here. There the settler had no receipt or certificate from any authorized officer showing compliance with the law, but was depending alone upon a settlement upon the land; and, having failed to show by the allegations of his complaint that he was qualified to take as a homestead settler, the court very aptly decided that the complaint was insufficient. It is well to say in this connection, however, that a copy of the application presented to the board, upon which the sale was made and the certificate issued, is in evidence, and it shows that the purchaser was legally capacitated to purchase at the time, so that not only is the complaint sufficient in the respect criticised, but the proof supports the determination of the board.

The next question presented is whether the plaintiff's predecessor complied with the further requirements of the law in completing the purchase; it being urged on the part of counsel for defendant that he was in default, and that the land reverted to the state, and was again subject to sale when the defendant obtained his patent. As to the final payment, the complaint shows what the fact is proven to be, that it was made April 18, 1882. The only evidence touching the matter is the receipt of the clerk of the board, indorsed upon the back of the certificate, which is as follows: "Salem, April 18, 1882. Received on the within the sum of \$488.93, being the balance of the purchase price of the within described lands. By order of the Board of this day. E. P. McCornack, Clerk of Board." The certificate shows a purchase of 611.16 acres, the tract in question being included therewith, and the payment indicated by the receipt, added to the \$122.23 shown to have been paid by the certificate of sale, exactly equals the full purchase price of the whole at \$1 per acre. There is not a scintilla of evidence to show that this latter payment was made at any earlier date than that indicated by the receipt. Ten years and more had

elapsed, therefore, from the time of the first payment before the last was made. It is not claimed that any reclamation of the land was ever made, so there was an absolute failure to comply with the act of 1870; and, without more, we are clear that the land reverted to the state, and the purchaser incurred a forfeiture of the first payment. It was competent for the state to make time of payment and reclamation the essence of the contract (*Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *Husbands v. Mosler*, 26 Or. 55, 62, 37 Pac. 80), and the language employed shows an unmistakable intentment to do so. The declaration of the Legislature is that, "at the expiration of ten years from and after his first payment, all swamp lands claimed by an applicant, upon which no such proof of reclamation and payment has been made, shall revert to the state, and the money paid thereon shall be forfeited." Laws 1870, p. 56, § 4. Language could hardly be more explicit for the purpose of indicating that time was intended to be of the essence of the contract, and that an absolute reversion and forfeiture should take place if the conditions of the sale in the respects alluded to were not absolutely observed. Nor was it necessary that the forfeiture be judicially declared before the board could sell to another purchaser. It took place ipso facto upon the nonobservance of the conditions of the sale, and the purchaser at once lost all right or interest therein. *Borland v. Lewis*, 43 Cal. 569. Beyond this, some reliance is had upon section 9 of the act of 1878 as a direct declaration of forfeiture. But its provisions did not affect the case at bar, as the first payment had been made in full accord with the act of 1870 under which the application was filed. The board has itself placed a construction upon that section, which has met with the approval of the Supreme Court of the United States (*Pennoyer v. McConnaughy*, *supra*), showing that the intentment was to declare all applications void and of no effect where the applicant had not paid the 20 per centum of the purchase price in accordance with the act of 1870; that is, where such payments had not been made at the time thereby specified. It therefore did not affect the title of the applicant, as in the present case the payment was timely and in accordance with that act. While it was and is perfectly competent for the state to impose such terms and conditions as it may deem proper relative to the sale and disposal of its public lands, it could unquestionably, if it saw fit, waive a forfeiture. *Borland v. Lewis*, *supra*. Whether the board could make such a waiver without authority from the Legislature is not clear. If it could, the receipt of the last payment after the 10 years had fully elapsed would be a persuasive circumstance, indicative of its purpose to do so. Plaintiff's cause, however, has not to depend upon that, for the Legislature has itself, by section 5 of the act of

1887, by explicit and positive declaration, waived both the reversion and the forfeiture. It applies to any legal applicant who had complied with the provisions of the act of October 26, 1870, including the payment of the 20 per centum of the purchase price prior to January 17, 1879, and declares that such a one, without reclamation, upon the payment of the balance of the purchase price prior to January 1, 1889, shall receive a deed for the land, provided, further, that no deed shall issue to any one person for more than 640 acres. Plaintiff's predecessor was clearly within this statute. His first payment was made in 1872, his second in 1882, and the amount of land for which the patent or deed is sought is less than 640 acres. Being relieved of making reclamation, he has complied with every feature of this late act, and the waiver of forfeiture in his behalf is operative to entitle him to a deed. To overcome this condition, it is alleged in behalf of defendant, by way of separate defense, that he purchased from the board in good faith, for value, and without any intimation or notice of plaintiff's claim or right to the land. His deed was executed and delivered to him by the board January 9, 1893. At the time of its execution and delivery the board was evidently of the impression that Miller had absolutely forfeited all right to a deed, superinduced by the mistaken idea that Miller had not made the second payment, when, as a matter of fact, he had made such payment—not within the time prescribed by the act of 1870, it is true, but he had been relieved of the forfeiture thereby incurred, and was entitled notwithstanding to a deed. Why it had not been previously issued to him does not appear, but the fact of payment had somehow been lost sight of. Mr. McCornack's testimony convinces us that Wattier had notice of Miller's rights in the premises. He says: "I showed him the record, which disclosed the fact that this lot had been sold to John F. Miller—on the certificate of sale, I think, twenty per cent. of the purchase price had been paid—and that the balance of the purchase price had been paid by Mr. Miller. My recollection just as to the details of that is not distinct. It is the general idea that he called as to the condition of the land, and was informed." On cross-examination he further says: "I do not remember distinctly what words we used. He called, and my recollection is that he was fully informed as to the condition of the land, but just what was said by either of us I do not remember." Aside from this, Wattier's testimony shows that he and Miller had had litigation with reference to the drainage of this particular piece of land, with other swamp lands in the neighborhood. He took counsel, however, before buying, and was advised that he could purchase with safety, but by some oversight his counsel were not made aware of the indorsement of the last payment upon Miller's certificate; otherwise the advice

would evidently not have been given. The fact remains, however, that Wattier knew of it, or should have known of it. He denies that Miller ever claimed the land or ever filed on it, but in this he is in error, as every other person connected with the matter who testifies in the case concedes as much, and his deed was given him upon the mistaken idea that this particular tract had lapsed and had become again subject to sale, when in reality it had not. We are clear that Wattier had such notice and knowledge of the condition of the title as to exclude the idea that he took as an innocent purchaser, and the plaintiffs here are therefore entitled to the relief sought.

Affirmed.

(44 Or. 332)

**RADLEY v. COLUMBIA SOUTHERN RY. CO.**

(Supreme Court of Oregon. Feb. 8, 1904.)

**CARRIERS — FREIGHT TRAINS — PASSENGERS — DANGEROUS POSITION — RIDING ON ENGINE — CONTRIBUTORY NEGLIGENCE.**

1. Plaintiff desired to travel on a freight train which carried passengers in a caboose, and, on going to the station just as the train was about to leave, was informed by the station agent that he would have to go some distance from the depot, to where the train was standing, as it would not stop after it started. After plaintiff reached the train, and had passed the engine toward the caboose, the engineer called to him to get on the engine, as he could not wait for plaintiff to go to the caboose, which plaintiff did. Thereafter plaintiff was injured by jumping from the train, on the advice of the fireman, just prior to the engineer's running the engine and some of the first cars off the track at a derailing device. *Held*, that the engineer had no authority to accept plaintiff as a passenger on the engine, and that the conductor's knowledge that plaintiff was riding there, without objecting thereto, did not entitle plaintiff to the rights of a passenger.

2. Since plaintiff was not injured at the station, but some distance therefrom, after he had taken passage on the train, he did not become a passenger by reason of the fact that he went to the station on the morning of the accident, intending to take passage on the train, and was directed by defendant's station agent where to go to board the same.

3. Where plaintiff took passage on the engine of a freight train, which carried passengers, at the direction of the engineer, and was injured by the derailment of the engine, which injury would not have occurred if he had taken passage in the caboose provided for passengers, plaintiff, though regarded as a passenger, was guilty of contributory negligence, as a matter of law, in riding on the engine, and was therefore not entitled to recover.

Appeal from Circuit Court, Sherman County; W. L. Bradshaw, Judge.

Action by D. M. Radley against the Columbia Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an action to recover damages for an injury the plaintiff received in jumping from one of the defendant's locomotives upon which he was riding. The defendant

¶ 2. See Carriers, vol. 3, Cent. Dig. §§ 1240, 1252.

owns and operates a railroad from Biggs Station, on the line of the Oregon Railroad & Navigation Company, south to Shaniko. For some distance out of Biggs there is an up grade on defendant's road, at the foot of which, in pursuance of the demand of the Oregon Railroad & Navigation Company, it had put in a derailer for the purpose of derailing a runaway car or train, and preventing a collision with either Oregon Railroad & Navigation or its own trains on the line or in the yard. The plaintiff resides at Biggs. On the day before the accident he went on some business to Wasco, the first station on defendant's road. When ready to return home in the evening, he went to the station to learn whether a delayed freight train, which carried passengers, was going on through, and there met the conductor of the train, who told him that it would not go until morning, and that he might go down on it then, provided he was at the station in time. The next morning the plaintiff purchased some provisions, and had them delivered at the station. He soon after went down himself, and met the station agent, who told him that his things had been put aboard the train, and that, if he desired to ride thereon, he would have to go to where it was standing, some three or four hundred feet south of the depot, as it would not or could not stop after it had started. The train consisted of an engine and tender, 15 loaded cars, and the caboose. The plaintiff, without purchasing a ticket or paying his fare, started up the track to get on the caboose, but before he reached it the signal to start had been given, and after he had gone two or three car lengths past the engine, the engineer called out to him, saying: "Come, get on here. I haven't time to wait. We want to start right out"—when the plaintiff got aboard the engine. At that time the conductor was on the top of the train, about two-thirds of the way back to the rear, but he did not say anything, and there is no direct evidence that he saw the plaintiff, or knew that he got aboard the engine. The plaintiff rode on the engine to Biggs, but when the train reached the derailing switch it was not stopped, as was the custom, so that some one could go forward and close the switch, but, as we must assume from the verdict of the jury, through the negligence and carelessness of the defendant and its servants, the engine and the first three cars ran off the track and onto the ties, the caboose and the other cars remaining on the track. When it was apparent that the engine was going into the open switch, the plaintiff, in response to a suggestion from the fireman, leaped to the ground, breaking his leg, for which injury he seeks to recover in this case. His action is based upon allegations that he was a passenger, and that the accident occurred on account of the carelessness of the defendant. The defense is that he was not a passenger, but a trespasser, and that the accident was

due to his contributory negligence in riding at an exposed and unusual place on the train. He had a verdict and judgment in the court below, and the defendant appeals.

Wallace McCamant, for appellant. W. H. Wilson, for respondent.

BEAN, J. (after stating the facts). There were many points discussed by counsel at the argument and in the briefs, but the controversy centers around the question as to whether the plaintiff was a passenger at the time of the accident, and entitled to the rights and protection of such, and, if so, whether he is guilty of such contributory negligence in riding on the engine as will bar a recovery. There is no contention that he was a passenger because of anything said or done by the engineer. It is admitted by the plaintiff that the engineer had no authority to bind the defendant by inviting plaintiff to ride on his engine, or to create the relation of passenger and carrier between him and defendant. It is argued, however, that plaintiff was a passenger, because (1) he was riding on the engine with the knowledge of, and without objection from, the conductor; and (2) he went to the station on the morning of the accident, intending to take passage on the train, and was directed by the station agent of the defendant where to go to board the train. There is no pretense that the plaintiff was on the engine by the express invitation, direction, or permission of the conductor. It is only sought to infer from the testimony and surrounding circumstances that the conductor probably knew that he was aboard the engine, although such an inference is hardly warranted by the testimony. But even if the conductor had knowledge of the fact, it was not sufficient to make him a passenger. The train was about to start at the time the plaintiff boarded the engine; the signal had already been given; and it was not the duty of the conductor to delay the departure of the train, or to stop it after it had started, before reaching the next station, to put the plaintiff off, in order to prevent him from becoming a passenger. *Downey v. Railway Company*, 28 W. Va. 732; *Atchison, etc., R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822. Again, the company had provided a car attached to the train for the carriage of passengers, and the plaintiff had knowledge of that fact. The mere silent acquiescence of the conductor in his riding on an engine would therefore not make him a passenger. 4 *Elliott, Railroads*, § 1580; *Virginia Midland R. Co. v. Roach*, 83 Va. 375, 5 S. E. 175. A conductor, of course, has charge of the train, and has authority to assign passengers to cars and seats. Ordinarily, if he directs a passenger to take a certain place on the train, the passenger may obey him without losing his status as a passenger, or being

guilty of contributory negligence, as a matter of law, unless, perhaps, the place is so obviously unsafe and dangerous that no reasonably prudent person would consent to occupy it, even if directed to do so. But a conductor's mere knowledge that a person is riding at an unsuitable or exposed place on the train, or one he knows is not designed for carrying passengers, does not make the person a passenger, or charge the carrier with that high degree of care toward him which it owes to one whom it has accepted and agreed to transport as a passenger. Where one has, by entering a car provided by a railway company for that purpose, become in fact a passenger, he perhaps does not lose such status by assuming a dangerous position on the train, assigned him by the direction or consent of the employés in charge thereof, although under such circumstances he may even be guilty in some instances of such contributory negligence as would preclude a recovery. 3 Thompson, Negligence, § 2671; *Brown v. Scarboro* (Ala.) 12 South. 2d 9; *Willmot v. Corrigan Consolidated St. Ry. Co.* (Mo. Sup.) 17 S. W. 490; *Lake Shore & Michigan Southern Ry. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; *Indianapolis, etc., Ry. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898. Before this principle can apply, however, he must first become a passenger, and he does not assume that relationship by voluntarily boarding an engine, which is obviously not designed for the carriage of passengers. *McGucken v. Western N. Y. & P. R. Co.*, 77 Hun, 69, 28 N. Y. Supp. 298; *Virginia Midland R. Co. v. Roach*, supra; *Robertson v. New York & Erie R. Co.*, 22 Barb. 91. The plaintiff, therefore, did not become a passenger by riding on the engine with the silent acquiescence of, and without objection from, the conductor, even if the evidence is sufficient to sustain his position on this point.

Nor did he become a passenger on the train because he went to the station for that purpose. Where one goes to a railway station at a reasonable time before the departure of a train for the purpose of traveling thereon, he may be regarded as a passenger in so far as it may relate to an injury received through the negligence or carelessness of the company while in or about the station or attempting to board the train. *Alender v. Chicago, Rock Island & Pacific R. Co.*, 37 Iowa, 264; *Grimes v. Pennsylvania Company* (C. C.) 36 Fed. 72; *Warren v. Fitchburg R. Co.*, 8 Allen, 227, 85 Am. Dec. 700; *Exton v. Central R. Co.*, 62 N. J. Law, 7, 42 Atl. 486. The plaintiff, however, was not injured at the station, but while riding on the train eight or ten miles distant therefrom; and the duty of the company to him must be determined by the relation he bore to it on the train, and not while he was at the station. One does not become a passenger on a railway train until he has come

under the charge of the carrier by boarding, or attempting to board, at its invitation, a car thereof used or held out by it for the transportation of passengers. The relation of passenger and carrier is one of contract, and requires the assent of both parties. To become a passenger, one must put himself in charge of the carrier, with the bona fide intention of being carried, and the carrier must receive and accept him as such. 4 Elliott, Railroads, § 1579; 5 Am. & Eng. Ency. Law (2d Ed.) 488; *Webster v. Fitchburg R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Illinois Central R. Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. Rep. 68. Of course, there is hardly ever any formal act by the passenger in putting himself in the care of the carrier, or by the carrier in accepting him as a passenger, but these relations are commonly implied from the circumstances. The railway company holds itself out as ready to receive as passengers all who are willing to be governed by its rules and regulations, and who present themselves at a proper place, at a proper time, and in a proper manner. By providing certain cars attached to a train for the carrying of passengers, the company impliedly invites all persons desiring to be transported to enter such cars, and one who accepts such invitation in good faith becomes a passenger without any further act on the part of the company. The providing of such cars, however, manifests an intention on the part of the company not to accept a person as a passenger who in boarding the train voluntarily enters one of its cars or vehicles which is obviously not intended for the carriage of passengers, even though he may have been at the station for the purpose of traveling on the train, and has a ticket entitling him to ride. The relation of passenger and carrier can only begin when the passenger puts himself in charge of the carrier for the purpose of being transported on the train. It is not enough that he may have a ticket, or may have an immediate intention to become a passenger. He is not such, so far as the act of carriage is concerned, until he actually puts himself under the charge of the company by entering a car provided by it for the purpose. Thus, in *Illinois Central R. Co. v. O'Keefe*, supra, the deceased, who had transportation entitling him to ride on the train, got upon the front platform of the baggage car after the train had started from the station, and while riding there was killed by a collision with a freight train. The conductor and engineer saw him climb on the front platform, but did not see him afterward. The court held that he was not a passenger, because he was riding in a place not provided by the company for the carriage of passengers. In the course of the opinion it is said: "It was also necessary for the plaintiff to prove that the relation of passenger and carrier existed be-



tween the deceased and the defendant. This relation which was claimed to exist is a contract relation. A railroad company holds itself out as ready to receive and carry, and is bound to receive and carry, all passengers who offer themselves as such at the places provided for taking passage on its trains, and who take such passage in the cars provided for passengers. When one so presents himself, the contract relation under which he acquires the rights of a passenger may be either express, or may be implied from the circumstances. If a person goes upon cars provided by the railroad company for the transportation of passengers, with the purpose of carriage as a passenger, with the consent, express or implied, of the railroad company, he is presumptively a passenger. \* \* \* Both parties must enter into and be bound by the contract. The passenger may do this by putting himself into the care of the railroad company to be transported, and the company does it by expressly or impliedly receiving him and accepting him as a passenger. The acceptance of the passenger need not be direct or express, but there must be something from which it may be fairly implied. One does not become a passenger until he has put himself in charge of the carrier, and has been expressly or impliedly received as such by the carrier."

Again, in *M. & T. Ry. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855, the plaintiff desiring to return to his home, got on the front platform of a passenger train at one of the stations, because he did not have time to get on elsewhere. He had money with which to pay his fare, and intended to do so, but had no ticket. After the train started the fireman began throwing water on him from a hose, and continued doing so until he jumped off the train and was injured. It was held that he was not a passenger, and could not recover, because he did not take passage on that part of the train provided by the company for carrying passengers. The court, after discussing what constitutes a passenger, and saying that, in order to raise the implied contract, the party desiring to be carried by the railroad company must take passage on that part of the train provided by it for carrying passengers, say: "Notwithstanding the statute permits the payment of fares upon the train, we think it a reasonable regulation for the company to make that it should establish places at which to receive its passengers, and designate coaches for them to ride in. It is proper that the carrier should be notified of the presence of all persons claiming the protection of passengers; otherwise it would be unable to distinguish between such persons and those who might be trespassers, where they enter portions of the train not used for the carriage of passengers. By this rule the rights of a carrier and a passenger would be alike guarded, while, on the other hand, if the person seeking passage on the train were permitted to board any part of the

train, as expressed in the instruction, the carrier would be placed under the highest obligation to one with whom it did not know it sustained the relation of carrier to passenger." In *Chicago & Erie R. Co. v. Field*, 7 Ind. App. 172, 34 N. E. 406, 52 Am. St. Rep. 444, the plaintiff was at the station on defendant's road, and desired to go to another station. When the train stopped, he boarded the front platform of the express car. After the train started, a brakeman appeared, inquired where he was going, and demanded his fare, which was paid in full. He rode on the platform until a short distance from his destination, when he was discovered by the conductor and expelled from the train. In an action against the company for breach of contract, the court held that plaintiff was not a passenger, but a trespasser, and that the payment of fare to the brakeman created no contractual relation between plaintiff and defendant, because it was paid at a place and upon a vehicle not set apart for passengers. In *Merrill v. Eastern Railroad*, 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705, the plaintiff's intrastate had been traveling on an engine, but got off at one of the stations, and after the conductor had called "All aboard," and the train had started, got on the front platform of the first car, and when the train had gone a short distance he fell off and was killed. The court held that he did not become a passenger by riding on the engine, because it was a place which every one knows is not intended for passengers, but, assuming that his status on the engine did not give character to his subsequent relation to the company, and that he was in the same position at the time of the accident as if he had attempted to get on the train at the station for the first time, he was still not a passenger, because outside of any implied invitation of the company, and was riding at an improper place on the train. Other cases might be referred to to the same effect, but these are sufficient for the purpose. In each of them the injured party attempted to board the train at the station, and was therefore, perhaps, a passenger, in the sense that, if he had been injured at the station by the negligence of the defendant, he could have recovered; but his right to recover for any injury received while riding on the train was made to depend upon whether the company had accepted and agreed to carry him as a passenger thereon. There is no suggestion in any of the cases that his right to ride on the engine or other exposed place on the train was affected in any way by the fact that he went to the station intending to take passage on the train. Going to a railway station for such purpose only indicates a design to enter into the relation of passenger and carrier, but it does not create it so far as it may relate to the contract of carriage. All the authorities concur that, in order to entitle a person to the rights of a passenger, he must intend to ride in a proper place on the train. "Every

person being carried upon a public conveyance usually employed in the carriage of passengers," says Mr. Hutchinson, "is presumed to be lawfully upon it as a passenger. But if a person, by his own solicitation or by his own consent, is carried upon a vehicle or conveyance which is not used for the purpose of passenger carriage, and this be known to him, there can be no such presumption, although the owner may be a common carrier of passengers by other and different means of conveyance." Hutchinson, Carriers, § 554. A railway company owes to its passengers the highest possible degree of skill in transporting them, and in the management and operation of the train, and is liable for slight negligence. Therefore, as said by the Supreme Court of Illinois in *Chicago & Eastern Illinois R. Co. v. Jennings*, 180 Ill. 478, 60 N. E. 818, 54 L. R. A. 827, "it seems plain that the circumstances must be such that the company will understand that such a person is a passenger in its care, and entitled to its protection. The company certainly has a right to know that the relation and duty exist, and the passenger must be at some place provided by the company for passengers, or some place occupied or used by them in waiting for or getting on or off trains. Whenever a person goes into such a place with the intention of taking passage, he may fairly expect that the company will understand that he is a passenger and protect him. If he could be a passenger before reaching such a place, there would be no limit or place where it could be said that he became a passenger." Or, as expressed by the Supreme Court of Virginia *Jammison v. Chesapeake, etc., R. Co.*, 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813: "Railroad corporations owe a high degree of duty to their passengers. They must do all for their safety that human skill and foresight may suggest, and are responsible for any—even the slightest—neglect; but, that the passenger may hold the company to this high degree of responsibility, it is incumbent upon him to occupy the position upon the train assigned to passengers, and, if he voluntarily assumes a position of peril, and injury results from it, he cannot recover." The plaintiff, having voluntarily entered a car on the train of the defendant which was obviously not intended for the carriage of passengers, and which he must have known and did know was designed exclusively for the employés of the railway company, was not, in our opinion, a passenger, and is not entitled to recover for that reason.

But, if we are mistaken, and under any possible view he is to be regarded as a passenger at the time of the accident, he was guilty of such contributory negligence, as a matter of law, in riding in the engine, as would bar a recovery. A railway locomotive is not a place intended for the carriage of passengers, and an adult person who is injured in consequence of riding thereon, even with the silent acquiescence of the conductor

or the direction of the engineer, cannot recover, where he would not have been injured if he had been in his proper place on the train. 5 Am. & Eng. Ency. Law (2d Ed.) 674; 3 Thompson, Negligence, 2943; Beach, Con. Negligence, 154; 1 Fetter, Carriers, § 175. The engineer has no authority to bind the company by accepting him as a passenger on his engine, and the mere consent of a conductor will not justify a passenger in occupying a place of obvious danger, not designed or intended for the use of passengers. Thus, as said by Mr. Wood: "Where a person voluntarily and unnecessarily puts himself in a position of danger, he cannot excuse the act because he was permitted to do so by the company's agents, in direct violation of their rule." Wood, Railway Law, p. 1109, § 304. Again, on page 1083, § 301, the same author says: "The presumption of law is that persons riding upon trains of a railroad carrier which are palpably not designed for the transportation of persons are not lawfully there, and, if they are permitted to be there by the consent of the carrier's employés, the presumption is against the authority of the employés to bind the carrier by such consent." In *Hickey v. Boston & Lowell R. Co.*, 14 Allen, 429, the court use the following language: "If sufficient and suitable provisions be made within the car for all passengers, the managers of the train are not under obligations to restrict them to their proper places, nor to prevent them from acts of imprudence. If they voluntarily take exposed positions, with no occasion therefor, nor inducement thereto, caused by the managers of the road, except a bare license by noninterference or express permission of the conductor, they take the special risks of that position upon themselves." In *S. L. S. W. R. Co. v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 525, the plaintiff at the time of the accident was riding on the top of the caboose with the assent of the conductor, because, as he contended, the car was so crowded that there was no room inside. The court held that there being no room inside the car would not justify the plaintiff in taking a position of obvious danger by riding at a place not designed by the company for the use of passengers, nor would the consent of the conductor relieve him from using that degree of care that a person of ordinary prudence would exercise. In *Texas & Pacific Ry. Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086, a passenger who was riding on the engine was injured in a collision; and it was held, in effect, that by voluntarily taking a place upon the train more hazardous than that provided by the carrier for passengers, when such hazard was known, or might have been known by the use of ordinary care, he thereby assumed the risks of the increased danger, and could not recover for an injury received while so riding which would not have been received if he had been at a proper place

on the train. In *Sanders v. Chicago, Rock Island & Pacific R. Co.*, 10 Okl. 325, 61 Pac. 1075, the plaintiff went to the railway station, and purchased from defendant's agent a ticket entitling him to ride on a train then standing at the station. Before he could get on the train, however, the vestibule door was closed and locked; and, as he was unable to get the door open, he concluded to ride on the step, which he did for a time, and then fell off and was injured. It was held that he was guilty of contributory negligence, and could not recover, although it would seem that he was compelled to ride on the step or wait for another train. In *Railroad Company v. Jones*, 95 U. S. 439, 24 L. Ed. 506, the plaintiff, an employé of the defendant, whom, with other employés, it was accustomed to carry to and from his work, was told by the person in charge of the train that they were about to start, and to "jump on anywhere," and climbed upon the pilot of the locomotive, and rode there until he was injured. The court held that he was guilty of such negligence as would preclude a recovery, Mr. Justice Swayne saying: "There was room for him in the box car. He should have taken his place there. He could have gone into the box car in as little, if not less, time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor non compos. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise." These authorities all go to the effect that when a passenger assumes a place of obvious danger on a railway train, not intended by the carrier for passengers, he assumes the increased risk caused thereby. But it is argued that this rule can only apply to persons who voluntarily ride at exposed and dangerous places, and that the plaintiff was not so riding on the engine, but was in some way compelled to do so, and therefore the doctrine has no application to him. There is, however, no evidence showing or tending to show that the plaintiff was compelled or required to ride on the engine by any one having authority to act for the defendant. He came to the station late, and was told by the engineer that the train was about to start, and to get on the engine. But the engineer could not thereby bind the defendant, or require the plaintiff to ride at any particular place. The conductor was in charge of the train, and there is no pretense that he ordered or directed the

plaintiff to get on the engine, or even that he knew, unless through the merest possible inference, that the plaintiff was riding there, until the accident occurred. If the plaintiff had got on the engine by the command or direction of the conductor, a different question would be presented. As it is, however, his act was purely voluntary; and therefore there is no ground, as we view the record, for the position that his riding there was compulsory. If he had been riding in the caboose at the time of the accident, he would have been a passenger, because in a place provided by the railway company for the carriage of passengers, and, if injured by the negligence of the defendant, would have had a cause of action against it. But, as he was voluntarily on the engine, and would not have been injured if he had been at a proper place on the train, the defendant is not liable. *Indianapolis v. Horst*, 93 U. S. 291, 23 L. Ed. 898, and *Lake Shore, etc., Ry. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510, are not in any way parallel cases. In each of them the injured party was being carried by the company under a contract, and at the time of the accident was riding at the place on the train provided by the defendant for his carriage, while here the plaintiff was riding in a car obviously not designed for the carriage of passengers, although a car for that purpose was, to his knowledge, attached to the train. In the two cases referred to the injured parties were riding where the company intended them to ride, while here the plaintiff was riding at a place where he knew the company did not intend passengers to ride.

It follows from these views that the judgment of the court below must be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

(44 Or. 357)

CARLYLE v. SLOAN et al.\*

(Supreme Court of Oregon. Feb. 8, 1904.)

VENDOR AND PURCHASER — BOUNDARIES — PLATS — SURVEY — CLOUD ON TITLE — REMOVAL — ACTION — ESTOPPEL — PLEADING — OBJECTIONS AFTER TRIAL.

1. The owner of urban property lying between a river and the Pacific Ocean platted the same and directed a surveyor to lay out the addition in lots and blocks, etc., the owner intending that the west boundary of the subdivision should extend to the east boundary of the tide land belonging to another, which was supposed to be the government meander line of the ocean. The surveyor, however, so surveyed the tract as to leave a strip of land 100 feet wide between high-water mark and the west line of the blocks as actually surveyed, but the plat of the subdivision made by the surveyor and filed did not show such strip, but represented the ocean as the west boundary of the land. Thereafter defendant H., who was the owner's agent, caused copies of the recorded plat to be made for exhibition to intending purchasers, and a sale of all of the west lots of the addition was made to plaintiff based on such plat, all the parties believing at the time that

\*Rehearing denied April 23, 1904.

the west line of the block extended to high-water mark. Thereafter defendants discovered the error, and defendant H., after representing to the previous owner that plaintiff did not want the intervening strip, succeeded in purchasing the same from him. *Held*, that plaintiff was justified in assuming that the plat by which she purchased was correct, and was not bound by the survey as actually marked out on the ground.

2. Where a plat of city lots showed them to extend to the high-water mark of the Pacific Ocean, and plaintiff purchased the lots without noticing the figures on the map indicating the size thereof, and such figures would not necessarily convey information that the lots purchased did not extend to the ocean, plaintiff was not put on inquiry by such figures that the lots did not extend to high-water mark.

3. Where, on a sale of lots, a plat showing the lots to extend to the Pacific Ocean was used in the negotiations for the purpose of determining the boundaries thereof, and there was no evidence that the purchaser's attention was called to survey stakes in the ground which would have disclosed a strip extending between the western boundary of the lots as surveyed and high-water mark, the purchaser was not bound by such stakes.

4. Where, in a suit to remove a cloud on title to certain lots, the facts pleaded were sufficient to raise an estoppel against the defendants, plaintiff's failure to allege that by reason of such facts defendants were estopped to assert title to the property in question as against plaintiff was immaterial in equity after answer and trial.

Appeal from Circuit Court, Clatsop County; Thomas A. McBride, Judge.

Suit by Clara S. Carlyle against Katherine E. Sloan and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

This is a suit to remove a cloud from title and to enjoin the defendants from trespassing upon or asserting any claim to certain real property. In 1898 Thomas D. Honeyman owned a tract of land in Clatsop county, which he laid out and platted into lots, blocks, and streets, dedicating the same as "Ocean Grove Annex." This tract was about 208 feet wide north and south, and from 1,000 to 1,100 feet long east and west, and was bounded on the east by the Necanicum river and on the west by the Pacific Ocean. It was laid out with one street extending east and west and one north and south, making four blocks of ten lots each. The lots extended through the block, and were numbered from 1 to 10, respectively, beginning at the east end of the block. The tide land west of Honeyman's property was owned by E. M. Grimes. A surveyor employed to lay out the town was directed to include therein all of Honeyman's property, but, supposing that Grimes' tide land extended to the government meander line, he adopted that as the west boundary of the tract, thereby leaving a strip of land about 100 feet wide between high-water mark and the west line of blocks 2 and 3 as actually surveyed and laid out. The plat of the town as made by the surveyor does not show the strip of land referred to, but represents the ocean as the west boundary of the blocks 2 and 3. The descrip-

tion in the dedication states that the north line of the land platted extends "west to the Pacific Ocean," and the west line runs "southerly with the meanderings of said ocean." The lots shown on the plat are 40 by 90 feet in size, except the fractional ones along the river on the east and the ocean on the west. The width of the lots along the river is not shown on the plan, but the north line of lot 10 in block 2 on the ocean is stated to be 38 feet, and the south line of lot 10 in block 3 is 91.18 feet. About the time the property was laid out and platted Honeyman appointed Charles K. Henry his agent for its sale. Henry caused a plat or map to be made for exhibition to intending purchasers, which shows the property to be bounded on the west by the ocean, and, so far as any question in this case is concerned, is the same as the one made and filed by Honeyman, except that the two lots fronting the ocean are shown to be relatively much wider than on the original, and considerably wider than the figures on either map would indicate. In 1896 the plaintiff and her sister, Mrs. Carlyle, purchased of Henry, as agent for Honeyman, two lots, upon which they constructed a summer boarding house. Henry thereafter sold some of the lots in blocks 2 and 3 to other persons, and in August, 1900, sold to the plaintiff the remainder of the property in the town, consisting of about 27 lots, including those fronting and abutting upon the ocean. She immediately went into possession, and subsequently paid the purchase price, and received a deed from Honeyman describing the property as certain blocks and lots in Ocean Grove Annex, "according to the recorded plat thereof in the office of the recorder of conveyances for said Clatsop county." Some time afterward, during negotiations with Grimes for the purchase of the tide land in front of Ocean Grove Annex. Henry learned that it was not true that the town extended to the ocean, as indicated by the map used by him in the sale of the property to the plaintiff, and in reliance upon which plaintiff purchased, but that Honeyman still owned a strip about 100 feet wide between the west line of blocks 2 and 3 and the ocean. He thereupon sought to purchase the same from Honeyman, who, being assured by him that it was not wanted by the plaintiff, sold and conveyed it by deed to the defendant Sloan at his request. Thereafter, as the agent and representative of Mrs. Sloan, he attempted to take possession of the property and construct a fence thereon, and this suit was brought. The complaint, after describing the location of the property, the making and dedication of the map or plat thereof by Honeyman, the sale of the lots fronting on the ocean and other property to plaintiff, avers that during the negotiations for the sale Henry represented to her and "to her agent in the purchase of said property that said lot 10 of said block 2 and said lot 10 of said block 3 fronted upon and

extended to the Pacific Ocean, and said Charles K. Henry, acting as such agent, produced and showed to plaintiff and to her agent in the purchase of said lots and blocks maps and plats of Ocean Grove Annex, whereon said lots were shown to front upon and to extend to, and as being bounded on the west by, the Pacific Ocean, and represented to plaintiff and to her said agent that said maps and plats were correct maps and plats of said Ocean Grove Annex; all of which representations were believed and relied upon by plaintiff in making the said purchase of said lots and blocks, and was an inducement for plaintiff to purchase said lots and blocks." The answer admits the platting of the land by Honeyman, the agency of Henry, and the sale to plaintiff, but denies the representations alleged in the complaint, and for an affirmative defense avers, in substance, that at the time the purchase was made the plaintiff was shown the property, and made an examination thereof; that the stakes set by the surveyor indicating the corners of the lots were then in place and visible; that such stakes showed the line of blocks 2 and 3 to be 120 feet east of the high-water mark of the Pacific Ocean; that at the time of the purchase the plaintiff and her agent well knew and admitted that the lots did not extend to or abut upon the ocean, but knew that there was a tract of land lying between the west line thereof and the ocean, which was not included within the boundaries of Ocean Grove Annex, and was not intended to be included in the sale to the plaintiff. The reply put in issue the allegations of new matter in the answer, and upon the trial a decree was rendered in favor of the plaintiff.

W. E. Thomas and Otto J. Kraemer, for appellants. Charles H. Carey, for respondent.

BEAN, J. (after stating the facts). It appears from the evidence to be practically undisputed that at the time of the sale to the plaintiff of the then remaining property in Ocean Grove Annex it was understood by all parties that it extended to and was bounded on the west by the ocean. Honeyman says that he supposed that lots 10 in block 2 and 10 in block 3 extended to the west line of the property owned by him; that he did not know there was any land between them and high-water mark; that he intended to sell and supposed he had sold to the plaintiff all the land then owned by him; that he thought the figures on the plat indicating the size of the fractional lots fronting the ocean were sufficient to cover the space between their east line and the ocean, but did not consider the figures very material; that after the sale to the plaintiff Henry requested him to join in a deed with Grimes for the ocean frontage, in which he then had an interest, but he declined to do so because it was understood that purchas-

ers of lots in Ocean Grove Annex should have the right to use the beach; that later Henry advised him, to his surprise, that the property he desired to purchase did not belong to Grimes, but to him; that he supposed the surveyor had laid out all the land to which he was entitled in lots and blocks, and therefore he would not make or execute the deed as requested by Henry; that he supposed the property Henry wanted would go to the plaintiff under her purchase; that he asked Henry about it, and Henry afterward told him that he had seen the plaintiff, and that she did not want the property; that he thereupon, at Henry's request, made a deed conveying to the defendant Sloan whatever property he might own between the west line of blocks 2 and 3 and the ocean for the consideration of \$100; that he did not know Mrs. Sloan, and never had any conversation with her.

A. C. Emmons testifies that Henry prepared a deed for Honeyman to execute, describing the strip of land in controversy by metes and bounds, but that Honeyman refused to sign it because he was not sure that he owned any such property; that he (the witness) explained the matter to Henry, and himself prepared a deed, the description of which was so worded as to convey whatever land, if any, Honeyman had, and, if he had none, the description would simply follow the west line of blocks 2 and 3 and return on the same.

Mrs. Carlyle, who was the agent of the plaintiff in making the purchase, and who transacted all the business in connection therewith, testifies that early in 1900 Henry requested her to buy all the property then owned by Honeyman in Ocean Grove Annex; that, after examining the property, she made him an offer for it, which was accepted; that before the purchase she and Henry counted the number of lots on a map or plat furnished by him, and looked over the ground; that for some time prior thereto she had had her bathhouses just inside the high-water line, and was buying the ocean frontage, to be used for her bathhouses, and to prevent the construction of buildings thereon which would obstruct the view from her boarding house; that nothing was said between her and Henry at the time about the size of the west lots, but she thought and understood that she was buying all the remainder of the Honeyman tract; that before the purchase Henry gave her a map or plat of the property, showing the lots and blocks thereon, which he had prepared for exhibition to purchasers, and it was used at the time; that lots 10 in block 2 and 10 in block 3 were both ocean lots, and not worth very much, and Henry told her at the time that she would have to sell the inside lots for a higher price to make up the deficiency; that some time after her purchase Henry told her that he claimed there was a strip of land between the west

line of the property sold to her and the ocean, which belonged to Honeyman; that she asked him if he did not sell her all the Honeyman tract up to high-tide mark, and he said he thought he did, and such was his intention; that Henry asked her to purchase the property now in dispute for \$350; that in 1896, at the time she bought the property where her boarding house now stands, the lots purchased were staked out, but she does not know whether the other stakes were standing or not, as her attention was not called to them; that there were no stakes marking the corners of the lots next to the ocean at the time she bought the remainder of the tract from Henry; that at the time she and Henry went over the ground they did not look for the west line of blocks 2 and 3, nor was she shown any stakes marking the boundaries of lots; that in examining the property they walked out to the drift logs where her bathhouse was, and back to the river, but she did not look for stakes; that she never had any conversation with Henry about the boundaries of the lots, and never measured any of them; that she knew from an examination of the map that the ocean lots were larger than the ordinary lots, and irregular in shape, because it so appeared thereon; that she intended to buy, and thought she was buying, to high-water mark; that she was not advised by Henry or any one else that the lots did not extend to that point; that when Henry asked her \$350 for the disputed strip she told him she thought she had bought it, but, if there was any land between her property and the ocean, she would buy it, although she did not think it necessary to buy the same property twice; that soon after she purchased the lots where her boarding house stands Grimes ran a fence along the east side of the tide land, cutting her off from access to the beach, and that Honeyman bought her a right of way over and across the tide land; that the fence built by Grimes was just inside the drift wood, and her bathhouse was just inside the fence; that the fence was torn down some time prior to her purchase of the remainder of the Honeyman tract, but some of the posts were still standing at that time.

Miss Carlyle testifies that she bought the fronting on the ocean because she needed it for her bathhouses, and to preserve the view from the boarding house; that at the time of the purchase she knew nothing about there being any stakes marking the boundaries of the ocean lots, or that there was any other property between her purchase and the ocean; that Grimes' fence was inside the drift logs, and about high-water mark.

Henry testifies that about August 1, 1900, after considerable negotiation, he sold to the plaintiff, through Mrs. Carlyle, all the property in Ocean Grove Annex then owned by Honeyman; that prior to that time he had

given her a map of the town, with the size and prices of the lots marked thereon, so she could aid him in selling the property; that when he first went down to the property in 1897 or 1898 the stakes set by the surveyor marking the corners of the lots were visible; that in June prior to the purchase by the plaintiff he went out over the land with her agent, Mrs. Carlyle, beginning at the beach and going back to the river; that they did not pay much attention to the beach frontage, as it was thought only the lots in the grove were valuable; that they figured out the size of the lots and the number she would get for her money; that they saw one or two of the stakes on the line between lots 9 and 10 in block 2—he was not sure which, but thinks they were at the southwest corner of 9 and the southeast corner of 10; that he and Mrs. Carlyle took the plat and went over the lots; that nothing was said about the west boundary, or the size of lots 10 in block 2 and 10 in block 3, at that time; that about a year prior thereto Mrs. Carlyle had attempted to sell lot 10 to a Mrs. Maxwell, and at that time the size of the lot was discussed, and attention called to the fact that it was larger than an ordinary lot; that it was understood by them at the time of the sale to plaintiff that Grimes owned up to Ocean Grove Annex. He denies that he represented or stated to Mrs. Carlyle that blocks 2 and 3 extended to the ocean, but says that he supposed that Grimes owned the property in front of them; that it was the understanding of all the parties at the time of the sale that the Grimes tract and Ocean Grove Annex adjoined each other, and it was six months later that the mistake was discovered.

Mr. Hubbard, who was employed by Henry to fence the tract in dispute after it had been conveyed to Mrs. Sloan, testifies that the fence run by him along the west side was only four or five feet west of the line of the fence built by Grimes some years before to inclose his tide land, and that the bathhouses of the plaintiff were on the land in dispute, and near the line of Grimes' fence.

From this testimony it is manifest that at the time of the sale by Henry to the plaintiff all parties understood and believed that the sale included all the remainder of the Honeyman tract, and extended up to the east line of Grimes' tide land. All the witnesses so testify. Henry says that such was the understanding, but that he thought Grimes' land extended to the west line of Ocean Grove Annex, as surveyed and marked out by the surveyor. He does not say, however, that he pointed out to the plaintiff's agent the surveyed west line of Ocean Grove Annex, and advised her that Grimes' land extended to that point, or that she so understood. The location of the west line was not discussed or referred to in the negotiations, and the posts set by Grimes for his

fence indicate clearly that he made no such claim. It is but reasonable to infer, therefore, under the circumstances, that Mrs. Carlyle believed, and, indeed, all parties believed, that Ocean Grove Annex extended in fact up to the line of the Grimes fence, and included the property now in controversy. Upon the evidence, therefore, the equities are with the plaintiff. She understood that she was buying to the ocean, and both Honeyman and Henry intended to sell to her all the remainder of the Honeyman tract, and supposed and believed they had done so. It is insisted, however, that, notwithstanding this evidence, she did not purchase or acquire title to any property not included within the town as actually surveyed and marked out upon the ground, because the sale and conveyance were made by reference to lots and blocks. As already stated, the plat or map as prepared by the surveyor and acknowledged and recorded by Honeyman, as well as the copy thereof prepared by Henry for exhibition to intending purchasers, shows the ocean to be the west boundary of the property, although, as actually surveyed and laid out on the ground, it did not extend to the ocean by perhaps 100 feet. As a general rule, where there is a variance between a map or plat of a town and the survey as actually made upon the ground, a grantee under a conveyance made by reference to the plat only takes according to the actual survey. *Bean v. Bachelder*, 78 Me. 184, 3 Atl. 279; *Williams v. Spaulding*, 29 Me. 112; *Thomas v. Patten*, 13 Me. 329; *O'Farrel v. Harney*, 51 Cal. 125; *Turnbull v. Schroeder*, 29 Minn. 49, 11 N. W. 147; *Root v. Cincinnati*, 87 Iowa, 202, 54 N. W. 206. This rule is applicable in determining the legal rights of successive purchasers of lots and blocks in a platted town, but we are not dealing here with such a case. The question is whether, under the circumstances as disclosed by the testimony, the defendants should be permitted to assert title to the land in controversy as against the plaintiff. The case stands in this aspect the same as if Henry had been the original owner of the Honeyman tract, and had himself sold and conveyed the land to the plaintiff by reference to the plat thereof, without any knowledge on her part of the actual boundaries of the property as marked out on the ground. Henry was the agent of Honeyman, and negotiated the sale. He was also the agent of the defendant Sloan in negotiating the purchase by her of the disputed tract. So the case stands the same as if it were a question between the purchaser of lots and blocks in a town who relied upon a map or plat thereof describing and defining the boundaries of the lots purchased by him by natural monuments or landmarks and one who promulgated the map or plat. In such case "the purchaser will not be held at his peril to ascertain whether or not the plat agrees with the original survey of the land subdivided and platted;

but he is justified in assuming that the plat is correct, and that the lot or lots purchased by him are of the dimensions and bounded by the courses and distances as indicated on the plat, to which, for particulars, his deed must refer, when the lot number alone is given in the deed." *Whitehead v. Atchison*, 136 Mo. 485, 37 S. W. 928. The complaint alleged that at the time of the sale Henry represented that the lots extended to the ocean, and exhibited a map showing that fact, and, relying thereon, the purchase was made by the plaintiff. These allegations are supported by the testimony. It is true Henry did not expressly state to the plaintiff's agent at the time of the sale that the land extended to the ocean, but the map made and exhibited by him, and upon which the plaintiff relied, was a continuing statement to that effect, equally as persuasive as his words would have been. He was offering to sell to her all the remainder of the Honeyman tract. The map which was used showed that the property extended to the ocean, and he did not advise the plaintiff to the contrary. No representations could have been made by him more likely to induce the purchase, or more strongly justifying the interposition of a court to prevent him or his principal, with knowledge thereof, from profiting by the mistake.

It is argued that, because the size of the lots fronting upon the ocean was marked upon the plan, it was evident therefrom that they did not extend to high-water line. There is no evidence, however, that the plaintiff ever noticed the figures on the map indicating the size of the lots, and, if she did, it would not convey to her information that the lots did not extend to the ocean. She would have had no more reason to suppose that the initial point of the survey was on the river than that it was on the ocean; and, if the survey had commenced at the ocean and run east, then the figures showing the width of the lots would have indicated the distance of the east boundary thereof from the ocean.

Again, it is said that at the time of the sale the original stakes set by the surveyor on the west line of lots 10 in block 2 and 10 in block 3 were still standing and visible. This contention is based upon the evidence of Henry. We have read his testimony with care, and are not clear just what he intended to say. It is difficult to segregate what occurred at the time of the sale from that in reference to some measurements made by him after he discovered that Grimes' tide land did not extend to the west boundary of Ocean Grove Annex as surveyed and marked out on the ground. The witness Hubbard, who was employed by Henry a few months after the sale to fence the property, says that he dug up a stake at the northwest corner of lot 10 in block 2, which was buried a foot under ground, and was so marred and disfigured by time and the elements that it was scarcely possible to tell that it had

ever been painted. But if the stakes were standing at the time of the sale to the plaintiff it would be of little value in this case. There is no evidence that the plaintiff's attention was called to them, or that she was advised that they were the west boundary of the land offered for sale. All parties to the transaction were familiar with the location of the land, and the question of boundaries was not a subject of consideration. The map used at the time showed that the property was bounded on the west by the ocean and on the east by the river, both permanent and visible landmarks, and there was no occasion for the purchaser or the seller to be concerned about the actual boundaries of the property. All the lots that had been previously sold by Henry were marked upon the plat used by the parties at the time, so that their general location was known, and, as the plaintiff was purchasing the remainder of the tract, it was not necessary to be particular about the actual boundaries.

And, finally, it is said that estoppel is not pleaded. The facts are set out in the complaint, and the failure to allege that by reason thereof the defendants are estopped to assert title to the property in question as against the plaintiff is not fatal after trial. Equity is not governed by such technical rules. Where facts which entitle the plaintiff to the relief sought are set out in the complaint and sustained by the testimony, the relief will, after answer and trial, be granted, notwithstanding the complaint may lack some of the requisites of a technical pleading. *McCall v. Porter*, 42 Or. 49, 70 Pac. 820, 71 Pac. 976. The plaintiff in this case in purchasing the property relied upon the map as exhibited by Henry and the general understanding of all the parties, and it would now be inequitable and unjust to allow either Henry, or any one for whom he might act, to profit by the mistake.

The decree of the court below is therefore affirmed.

(44 Or. 118)

**KADDERLY et al. v. CITY OF PORTLAND et al.**

(Supreme Court of Oregon. Feb. 8, 1904.)

**ACTIONS—THEORIES—CHANGE.**

1. Where a suit was brought to enjoin a city from reassessing plaintiff's property for a street improvement, the fact that the contractors and the owners of the warrants issued on account of the improvement were made parties did not authorize plaintiff to change the theory of the suit to one by taxpayers to cancel illegal municipal warrants.

On petition for rehearing. Denied.

For former opinion, see 74 Pac. 710.

**BEAN, J.** The object of this suit was to enjoin the city of Portland from reassessing the property of the plaintiffs for a street improvement previously made in front thereof. The fact that the contractors for the original

improvement and the owners of the warrants issued on account thereof were made parties to the suit does not authorize it to be now changed from its original purpose, and converted into a suit by taxpayers of the city to cancel illegal municipal warrants. The decree was in all things affirmed, and there is no reason why the ordinary rule as to costs should not obtain.

The petition is denied.

(44 Or. 300)

**CASEDAY v. LINDSTROM.**

(Supreme Court of Oregon. Feb. 1, 1904.)

**ADMISSIONS BY SILENCE—RES JUDICATA.**

1. In a suit against one on the ground that money was paid to him, he is not prevented from denying the payment, on the ground of an admission by silence when he ought to have spoken, because when he was in court in another action, to which he was not a party, he said nothing when a person testified such payment was made to him.

2. A complaint, after setting forth grounds for divorce, alleged that defendant was the owner of half of a quarter section of land, except a certain 45 acres thereof, and prayed for divorce, for custody of the children, that plaintiff be decreed owner of one-third of the real estate described, and for general relief. The court found in favor of plaintiff as to the allegations of the complaint, and found that defendant conveyed the 45 acres to T., to hold 40 acres thereof to be used in maintaining and educating the minor children of the parties, and the other 5 acres in trust for plaintiff in fee, and that he, as consideration for the 5 acres, gave defendant a team. The conclusions of law were that plaintiff was entitled to a decree for a divorce, the care and custody of the children, and an undivided third of the 35 acres. *Held* that, though the decree following made no reference to the 45 acres, it was an irresistible inference that the finding as to the agreement on which it was conveyed was one which influenced in an appreciable manner the decree, so that such finding was conclusive in a subsequent action by defendant to recover the price of the 45 acres, on the ground of a different consideration.

Appeal from Circuit Court, Clackamas County; Thomas A. McBride, Judge.

Action by Minnie Caseday against P. A. Lindstrom. Judgment for plaintiff. Defendant appeals. Reversed.

Two causes of action are stated in the complaint. The first is for money lent by plaintiff to one Grondahl, which it is alleged that defendant, as the agent of plaintiff, collected and received to her use, and refused to account therefor. By the second it is stated, in effect, that on or about October 1, 1898, while plaintiff was the wife of defendant, she sold and thereafter conveyed to defendant a certain tract of realty, consisting of 45 acres, describing it; that said conveyance was at his request first made to him in the name of the Title Guarantee & Trust Company, and by it subsequently conveyed to him, and that its market value was and is \$2,250; that defendant so acquired the property upon the agreement with plaintiff that besides the consideration named in the first conveyance, to

¶ 1. See Evidence, vol. 20, Cent. Dig. § 773.



wit, \$1,000, he would pay therefor such additional sum as would make the total consideration equal to the market value of the property. The defendant, by his answer, interposed two separate defenses, the latter of which is, in effect, that prior to October 1, 1898, plaintiff and defendant were husband and wife; that plaintiff was unfaithful to defendant, and had determined to abandon him and their minor children; that defendant instituted a suit against her for divorce, with the view, also, of determining their property rights, and that the effect of the transfer and conveyance of the said 45 acres of land mentioned in the complaint to the trust company by plaintiff was put in issue by the pleadings; that thereafter such proceedings were had therein that the court found that on October 1, 1898, the defendant therein (plaintiff here) conveyed to the trust company 45 acres of land for the purpose of holding 40 acres of the same for P. A. Lindstrom (this defendant), to be used by him in maintaining and educating the said minor children, Blanche Adeline Lindstrom and Herman Adolf Lindstrom, and 5 acres for himself in fee; that Lindstrom paid to defendant (plaintiff herein) a valuable consideration for said 5 acres of land, to wit, a span of horses and a wagon; that the conveyance was executed and delivered prior to October 4, 1898; that said 45 acres of land referred to in said findings are the same as described in the complaint, and that thereafter a decree was rendered in accordance with such findings. The reply, as a defense to the new matter contained in the answer, sets up that neither of the facts alleged in said answer to have been found as a finding of fact was in issue or material to any issue or issues in the suit mentioned, nor was either thereof included in any part of the conclusions of law made and filed by the court, or in the decree given and rendered therein. To support the issues thus tendered by the answer and reply, the defendant offered in evidence the judgment roll in the suit for divorce. The complaint in that suit, after setting forth the grounds relied upon for divorce, alleges that defendant is the owner of the south half of the southwest quarter of section 23, township 1 north, range 2 east, Willamette meridian, excepting 45 acres off the east end thereof, which excepted tract is described in a deed from the defendant to the Title Guarantee & Trust Company, stating where and when recorded. The prayer was (1) for a dissolution of the bonds of matrimony; (2) that plaintiff have the care and custody of the minor children, naming them; (3) that he be decreed to be the owner of one-third of the real property described; and (4) that he have his costs and disbursements, and for general relief. The defendant in such suit admitted only her ownership of the realty described, and for a separate defense alleged that on or about the 21st day of September, 1898, her husband declared he would no longer cohabit with her, and that

thereupon he and she, being each owners in their own right of certain real and personal property, entered into the following agreement and settlement of their property rights, viz.: (1) She to relinquish all her right, title, and interest in certain lands and personal property of the plaintiff, said lands being situate in Comstock, Or., and at Sunnyside, in Multnomah county, of the value of \$1,500; (2) also to convey to the Title Guarantee & Trust Company for her husband and the three minor children of the marriage 45 acres of land, situate in the south half of the southwest quarter of section 23, township 1 north, range 2 east, Willamette meridian; (3) he to relinquish to his wife all title and interest in one span of horses, a wagon, harness, household furniture, and one cow; and (4) further to institute a suit for and obtain a decree of divorce from her at his own expense, and thereafter to pay her \$20 per month for six months. Her prayer was that, should the equities be found to be with the plaintiff therein, then that such agreement be respected, and that plaintiff be not decreed to have any right or interest in or to the land described in the complaint, but that in all other respects he be required to carry out said postnuptial agreement. The reply denied the new matter in the answer in toto. The court made findings of fact, finding in accordance with the allegations of the complaint in every particular, and in response to the issues formulated by the answer and reply, in substance, as follows: That on or about September 21, 1898, and after plaintiff informed defendant that he intended to procure a separation from her, he consulted his attorneys with relation thereto, and was induced by them, for the sake of the children, to try to live with her; that thereupon defendant conveyed to the Title Guarantee & Trust Company 45 acres of land, the same being the 45 acres excepted from the property in the complaint described, for the purpose of holding 40 acres of the same for P. A. Lindstrom, to be used by him in maintaining and educating the said minor children, Blanche Adeline and Herman Adolf Lindstrom, and 5 acres of the same in trust for P. A. Lindstrom in fee; that Lindstrom paid to defendant a valuable consideration for said 5 acres of land, to wit, a span of horses and wagon; and that said conveyance was made, executed, and delivered prior to the 4th day of October, 1898. The conclusions of law were that plaintiff was entitled to a decree (1) dissolving the bonds of matrimony; (2) giving him the care and custody of the minor children, naming them; (3) granting him an undivided one-third interest in the land described in the complaint; and (4) awarding him the costs and disbursements of the suit. The decree follows the conclusions of law, nothing being mentioned therein with reference to the conveyance of the 45 acres of land to the trust company. Every part of this roll was admitted, except the

finding of fact with respect to the 45 acres, for the purpose of showing admissions of the plaintiff herein against her interest. The verdict and judgment were for plaintiff, and defendant appeals.

Wm. A. Munly and M. L. Pipes, for appellant. H. E. Cross and Edward Mendenhall, for respondent.

WOLVERTON, J. (after stating the facts). The first question presented relates to the first cause of action. Grondahl gave testimony at the trial tending to show that he borrowed some money of the defendant, giving his note therefor, and that he paid it back to him, but failed to give the date of the repayment. It was sought to establish this date by the admission of the defendant. After submitting testimony to the effect that defendant was present in court at the trial of an action instituted by plaintiff against Grondahl for the recovery of the sum of money here sued for, and that Grondahl testified in that case, Mr. Cross was called, and permitted, over the objections of the defendant, to testify with reference to the date that Grondahl then fixed as the time when he paid the money back to the defendant; it being insisted that, as defendant did not then deny the statement of Grondahl, he is bound by it, as a tacit admission by silence when he ought to have spoken. This was error, as the defendant could not be bound by his silence in court. He was not a party to that cause, and had no control or management of the case from the standpoint of either plaintiff or defendant; and it was not only not his duty to speak in refutation of what was then being given in evidence, but it was his duty, in deference to the court and the rules governing its proceedings when in the progress of a trial, not to speak in interruption thereof.

It is next insisted by counsel for defendant that the decree in the divorce case operates as an estoppel in bar of plaintiff's right of recovery upon the second cause of action, and that the court erred in not admitting the same for such purpose. It has become the settled rule of this court that a judgment or decree rendered upon a different claim or demand than the one being presently litigated can only operate as an estoppel against matters actually litigated or facts distinctly in issue. *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442; *Applegate v. Dowell*, 15 Or. 513, 16 Pac. 651; *White v. Ladd*, 41 Or. 324, 68 Pac. 739; *La Follett v. Mitchell*, 42 Or. 465, 69 Pac. 916. The rule is stated thus in *Caperton v. Schmidt*, 26 Cal. 479, 85 Am. Dec. 187: "The matter adjudicated, to become, as a plea, a bar, or, as evidence, conclusive, must have been directly in issue, and not merely collaterally litigated. It must be a fact immediately found according to the pleadings, not that on which the verdict was merely based—a fact in issue, as distinct from a fact in controversy." Further expressions of the

courts well indicate the extent as well as the limitations of the doctrine. "The rule is that the judgment of a court of competent jurisdiction is not only conclusive on all questions actually and formally litigated, but as to all questions within the issue, whether formally litigated or not." *Barrett v. Failing*, 8 Or. 152, 156. Such is the language of the court in *Bellinger v. Craig*, 31 Barb. 534, 537. "The conclusiveness of the judgment or decree extends beyond what may appear on its face—to every allegation which has been made on one side and denied on the other, and was in issue and determined in the course of the proceedings." *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809. "A fact or matter at issue is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings." *Garwood v. Garwood*, 29 Cal. 514. This is the utterance, also, of the court in *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675. "It may be stated generally that the ultimate facts upon which the recovery is had—facts which, if found the other way, the recovery must have been different—are facts in issue." *Marshall v. Shafter*, 32 Cal. 176, 193.

In the case at bar, the fact upon which the question turns is as to the transfer or conveyance of the 45 acres of land, the alleged purchase price of which is sued for—whether such conveyance was in pursuance of a sale, as alleged in plaintiff's complaint here, or of an agreement and settlement, as set up in her answer in the divorce suit, and found by the court. All her allegations there were denied, and the pleadings unquestionably formulated issues touching the existence of such an agreement and settlement, and the terms and conditions thereof. It may be appropriately inquired, were they material and pertinent to the controversy? There were involved the respective rights of the parties in the property designated in the alleged agreement, the custody and maintenance of the minor children, the institution of the suit for divorce, the payment of the costs thereof, and a provision for alimony to the wife. These are all incident to divorce proceedings. In a proper case, all of them, with the exception of the agreement that one spouse should procure a divorce from the other, and perhaps the disposition of the costs with reference thereto, might legally have been provided for in a postnuptial contract. *Henderson v. Henderson*, 37 Or. 141, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. Rep. 741; *Ogilvie v. Ogilvie*, 37 Or. 171, 61 Pac. 627. The court found the true agreement to be only in part as alleged, viz., that plaintiff (defendant here) was induced to endeavor to live with his wife for the sake of their children, and that thereupon she conveyed to the Title Guarantee & Trust Company the land in question—40 acres thereof in trust for her husband, to be used by him in maintaining and educating the children, and 5 acres in trust for him in fee; that he paid her a val-

uable consideration for the 5 acres, namely, a span of horses and a wagon; and that said conveyance was executed prior to October 4, 1898. The decree dissolved the bonds of matrimony, gave the plaintiff therein the custody of the children and one-third interest in the 35 acres of land owned by his wife, and his costs and disbursements. If the agreement and settlement had been as plaintiff herein alleged in her answer in the divorce suit, the court could not, and, we must assume, would not, have rendered a decree of divorce, as the contract was contrary to public policy; but the agreement as found is not subject to that objection, and the finding is such as to exclude every possible hypothesis of the sale of the tract of land herein by plaintiff to defendant for the consideration as she now alleges. The effect of the consummated agreement was to convey to defendant herein 5 acres of the land in fee, for a good and valuable consideration, and 40 acres to be held in trust for the care and maintenance of the children, whom the court has awarded to him—an agreement and settlement perfectly legitimate in every respect.

It is urged, however, with emphasis, that the decree rendered was not in pursuance of this particular finding, or that none was rendered upon it, and therefore that such decree cannot operate as an estoppel or bar to the present action. But was it necessary that the decree should have been so affirmatively pronounced? The deed was the consummation of the agreement and settlement. It was not necessary for the court to go further and validate the instrument, nor was it necessary to declare in the decree upon what consideration it was based, although it might have been done with propriety. It is very plain, however, that the agreement had an important bearing upon the decree that was actually rendered, and, had it not been for such an agreement and settlement as found, the decree certainly would have been materially different. For instance, the court might have required that the divorced wife make certain other provisions for the support of the children, or it might have treated the 45 acres as her property, and awarded the husband a one-third interest therein. The agreement and settlement, therefore, was a fact in issue, and one which influenced in an appreciable manner the nature of the decree given and rendered; and, having been once solemnly determined, it constitutes an absolute bar to plaintiff's cause of action against the defendant for the market value of the land in question. "The estoppel," say the court in *Burien v. Shannon*, 99 Mass. 200, 203, 96 Am. Dec. 733, "is not confined to the judgment, but extends to all facts involved in it as necessary steps, or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, 'upon the obvious principle that, where a conclusion is indisputable, and could have been drawn only from certain

premises, the premises are equally indisputable with the conclusion.' But such an inference must be inevitable, or it cannot be drawn." The inference in the case at bar is one that follows naturally and irresistibly from the facts as they have been established. In further support of the principle, see *Redden v. Metzger*, 46 Kan. 285, 26 Pac. 689, 26 Am. St. Rep. 97; *Woodin v. Clemons*, 32 Iowa, 280; *Bissell v. Kellogg*, 60 Barb. 617; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; *Blackinton v. Blackinton*, 113 Mass. 231; *The Town of Fulton v. Pomeroy*, 111 Wis. 663, 87 N. W. 831.

Nor does the circumstance that only two of the children are named in the decree alter the case. Manifestly, there is a clerical error in the entry. But the consideration for the conveyance appears, and it is not the consideration now claimed for the recovery of which this action was instituted, so that the plaintiff is now precluded to claim otherwise.

Based upon these considerations, the judgment of the trial court will be reversed, and the cause remanded for such further proceedings as may be deemed appropriate.

(9 Idaho, 519)

**FIRST NAT. BANK OF ST. ANTHONY v. STEERS, Sheriff.**

(Supreme Court of Idaho. Jan. 23, 1904.)

**CHATTEL MORTGAGE—POSSESSION OF MORTGAGED PROPERTY—CLAIM AND DELIVERY.**

1. Where a chattel mortgage contains a stipulation providing that upon the happening of certain contingencies therein named "the mortgagee may take possession of said property, using all necessary force to do so, and may immediately proceed to sell the same in the manner provided by law," it is held that upon the happening of such contingency the mortgagee may maintain the action of claim and delivery to recover possession of the mortgaged property from an officer who claims to hold the same under writ of attachment issued and levied subsequent to the mortgage lien, and who refuses to deliver up the property upon demand of the mortgagee, or to pay the mortgage debt.

(Syllabus by the Court.)

Appeal from District Court, Bingham County; Jas. M. Stevens, Judge.

Action by First National Bank of St. Anthony against Peter A. Steers, sheriff. Judgment for defendant, and plaintiff appeals. Reversed.

Caleb Jones, Rice & Thompson, and W. E. Borah, for appellant. Wallis & French and F. S. Deltrich, for respondent.

**AILSHIE, J.** This action was commenced by the plaintiff in claim and delivery to recover the possession of a band of about 3-100 head of sheep and 750 head of lambs. Plaintiff filed its complaint, alleging that on or about the 17th day of October, 1902, one J. M. Jolly was the owner and in possession

¶ 1. See *Chattel Mortgages*, vol. 9, Cent. Dig. §§ 318, 319.

of a certain band of sheep, and was then indebted to the plaintiff in the sum of \$5,000; that upon said date Jolly made, executed, and delivered to plaintiff his two certain promissory notes for the sum of \$5,000, and secured the same by chattel mortgage upon the above-mentioned personal property. It is further alleged that on the 13th day of June, 1903, and while the notes and mortgage were yet unpaid, the defendant, sheriff of Bingham county, levied an attachment upon the property covered by the chattel mortgage, and that at the time of the commencement of plaintiff's action herein the defendant was still wrongfully and unlawfully withholding possession of the mortgaged property against the will and without the consent of the plaintiff. The mortgage was attached to the complaint, and made a part thereof, and contains the following provision: "It is also agreed that, if the mortgagor shall fail to make any payment as in said promissory note provided, or if the said mortgagor shall attempt to sell the property herein described, or any part thereof, without the written permission of the mortgagee, or if the said property shall be levied upon by attachment or execution, or if the mortgagor shall attempt to remove the property from the county in which it is situated without the written consent of the mortgagee, the said debt shall at once become due, and the mortgagee may take possession of said property, using all necessary force to do so, and may immediately proceed to sell the same in the manner provided by law." To this complaint the defendant filed a general demurrer, which was sustained by the trial court, and the plaintiff refused to amend. Thereupon a judgment was entered dismissing the action, and for costs in favor of the defendant. From such judgment the plaintiff has appealed.

The only question presented here, and upon which we are asked to pass, is: Can a mortgagee maintain the action of replevin, or claim and delivery, as it is designated by our statute, for the recovery of possession of personal property covered by his mortgage? It will be seen that in this case the mortgagor contracted with the mortgagee that upon the happening of certain contingencies named therein the mortgagee might take possession of the property. It is contended by the respondent here that a provision of this kind in a mortgage cannot be lawfully made under the laws of this state. This contention is based upon the fact that a mortgage of personal property within this state does not pass any title to the mortgagee, and does not entitle him to the possession of the property, and that, therefore, the mortgagee obtains no such right of property or right of possession under the chattel mortgage as will authorize him, upon any possible contingency, to maintain the action of claim and delivery. Sections 3386, 3387, Rev. St. 1887, were amended in 1899 (Sess. Laws

1899, p. 121), and it is provided by these sections that all mortgages of personal property, in order to be valid as against subsequent purchasers and incumbrancers, shall, among other things, be acknowledged and filed for record with the recorder of the county where the property is located. It is not contemplated by the laws of this state that the possession or right of possession of personal property mortgaged shall be transferred from the mortgagor to the mortgagee, and such is not necessary to the validity of the mortgage; but section 3387, supra, as amended, closes with the following sentence: "Provided, further, that if the mortgagee receive and retain actual possession of the property mortgaged, he may omit the filing of his mortgage during the continuance of such actual possession." The statute therefore recognizes the right of the mortgagor to contract with the mortgagee whereby the latter may have the actual possession of the property mortgaged. In face of the expressed recognition of this right as embodied in the statute, we do not think the court would be justified in holding a stipulation in the mortgage invalid which authorizes the mortgagee upon named contingencies taking possession of the mortgaged property.

It is insisted by the respondent that the judgment of the lower court in this case is authorized and supported in *Rein v. Callaway*, 7 Idaho, 634, 65 Pac. 63, and *Marchand v. Ronaghan* (Idaho) 72 Pac. 731. It may be fairly said that some of the expressions used in each of these cases, if considered apart from the particular facts before the court in each case, would, to a certain extent, justify the conclusion of respondent; but when read in connection with the questions directly under consideration in each of these cases we think the conclusion drawn therefrom by respondent is not justified. In *Rein v. Callaway* the court was considering the validity of a stipulation in a chattel mortgage whereby the mortgagee was authorized to seize and sell the mortgaged property without resorting to foreclosure proceedings. The court there held that the mortgagor cannot legally authorize the mortgagee, by provision in the mortgage, to take possession of the mortgaged property and sell it in any other manner than that provided by law for foreclosure of such mortgages. The validity of a contract authorizing the mortgagee to take possession of the mortgaged property upon breach of any of the terms thereof was not under consideration in that case, and was not passed upon by the court. In *Marchand v. Ronaghan* there was no provision in the mortgage authorizing the mortgagee to take possession of the property upon breach, and such question was not considered in that case. There the mortgagee had seized the mortgaged property, and sold a large portion of it, and at the time the case was tried still had a small portion thereof in his possession. It was held that he

could not foreclose his mortgage in that way, and that he was therefore guilty of conversion, and liable to the mortgagor for the value of the property so converted. It will be seen that in both of these cases this court held directly that the mortgagee cannot seize and sell the mortgaged property in any other manner than that provided by statute for the foreclosure of such mortgages. On the other hand, it has never been held by this court that a mortgagee cannot take possession of the mortgaged property when so authorized by stipulation in the mortgage.

It is argued by respondent that the action of claim and delivery for obtaining possession of such property should not be allowed for the reason that under such stipulation, upon the happening of the contingencies named, the debt becomes due, and the mortgagee immediately has the right of foreclosure, which is a more speedy remedy for collection of the debt secured, and that, therefore, the creditor should not be allowed to maintain one action for the possession of the property and then another for the foreclosure of his mortgage, when a single action would suffice for both. It would seem that the foreclosure proceedings would in most cases answer the double purpose of securing possession of the property and making the mortgage debt, but we can conceive of exceptions to this general proposition, and of cases arising where it would be necessary to resort to the writ of replevin to enable the officer to get possession of the property before a foreclosure could be had. As soon as he obtains possession of the property, he will be obliged to pursue his remedy by foreclosing the mortgage. An action of claim and delivery merely looks to the recovery of possession of the property described in the mortgage, and cannot in any sense be termed an action for the recovery of the debt secured by the mortgage. *O'Neill v. Whitcomb*, 3 Idaho (Hash.) 624, 32 Pac. 1133.

It has been suggested that, in view of the laws of this state, it would be contrary to public policy for the court to sustain a stipulation in a mortgage such as the one here under consideration. No reason has been shown us which we think would justify holding this contract contrary to public policy. This phase of the case is very ably discussed and clearly stated by the Supreme Court of Texas in *Singer Mfg. Co. v. Rios*, 71 S. W. 275, 60 L. R. A. 143, and the court there concludes that there are no reasons of public policy why such contracts should not be upheld. It is true, as argued by respondent, that very few, if any, of the states have statutes exactly like ours with reference to mortgages upon personal property and the foreclosure of the same; but we find nothing in our statute which by any inference precludes the application of the general principle so uniformly applied throughout this country that the mortgagee may, in such cases as the one here discussed, maintain

his action in replevin to recover possession of the mortgaged property. The following are some of the authorities upholding this principle: *Flinn v. Ferry* (Cal.) 60 Pac. 434; *Rankine v. Greer*, 38 Kan. 343, 16 Pac. 680, 5 Am. St. Rep. 751; *Bank of Woodland v. Duncan*, 117 Cal. 416, 49 Pac. 414; *Mayes v. Stephens* (Or.) 63 Pac. 760; *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452; *Wood v. Weimar*, 104 U. S. 786, 26 L. Ed. 779; *Jones on Chat. Mtgs.* §§ 442, 706; *Cobbey on Replevin*, §§ 191, 194. We therefore conclude that the action of claim and delivery may be maintained in such case. The only thing called to our attention as to the insufficiency of the complaint in this case is the validity of the foregoing stipulation contained in the mortgage, and that question is therefore the only matter we pass upon in this opinion.

Judgment reversed, and cause remanded, with directions to the lower court to take further action in accordance with the views herein expressed. Costs awarded to appellant.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

(9 Idaho, 483)

#### STATE v. LEVY.

(Supreme Court of Idaho. Jan. 21, 1904.)

MURDER—INSUFFICIENCY OF EVIDENCE—CIRCUMSTANTIAL EVIDENCE—REASONABLE DOUBT—WEIGHT OF EVIDENCE—INSTRUCTIONS—JURY ATTENDING THEATER—WITNESS—REWARD—COMPETENCY OF JUROR—NEW TRIAL.

1. Evidence considered, and held sufficient to sustain the verdict of the jury.

2. The convincing effect that follows from positive evidence is not necessarily expected to follow from circumstantial evidence, although the latter kind of evidence is often the most satisfactory and convincing that can be produced.

3. It is a strong circumstance, which the jury ought to consider, if it is shown to their satisfaction and beyond a reasonable doubt that the accused had a strong, impelling motive to commit the crime with which he is charged.

4. To authorize a conviction on circumstantial evidence alone, the facts and circumstances shown by the evidence must be incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis or rational conclusion other than that of the guilt of the accused.

5. A reasonable doubt is a fair doubt arising from all of the evidence. It is not a mere imaginary, capitious, or possible doubt, but a fair doubt, based upon reason and common sense.

6. The admission of certain evidence of the diseased condition of one of the women with whom the accused was living held not prejudicial error.

7. The jury is the judge of the weight to be given to the testimony of the witnesses, and this court will not interfere unless it is clearly shown that the verdict resulted from prejudice or passion, or is clearly against the evidence.

8. It is not error for the court on its own motion to instruct the jury that the neglect or refusal of the defendant to testify in his own be-

¶ 4. See Criminal Law, vol. 14, Cent. Dig. § 1261.

half shall in no manner prejudice him, nor be used against him on the trial.

9. With the permission of the court, the jurors were taken to a theater, and six jurors were placed in one open box and six in another, each six with a sworn officer, and in sight of each other, and the play had no reference whatever to the trial. *Held* not a sufficient cause for granting a new trial.

10. That a witness in a capital case received a part of the reward offered for the conviction of one who committed the crime is not of itself a cause for granting a new trial.

11. Where the credit or veracity of a juror is attacked on the ground that he had sworn falsely on his voir dire, it is not error for the judge to consider affidavits sustaining the character of such juror.

12. Newly discovered evidence examined, and *held* not sufficient to warrant the granting of a new trial.

Ailshie, J., dissenting in part.  
(Syllabus by the Court.)

Appeal from District Court, Ada County;  
Geo. H. Stewart, Judge.

George Levy was convicted of murder, and appeals. Affirmed.

Alfred A. Fraser and N. M. Ruick, for appellant. John A. Bagley, Atty. Gen., and Hawley & Puckett, for the State.

SULLIVAN, C. J. On February 20, 1902, the defendant was convicted of the crime of murder in the first degree for the killing of one Davis Levy. By information of the county attorney of Ada county the defendant was accused of said crime, in that on the 3d day of October, 1901, at the county of Ada, in the state of Idaho, the said defendant did feloniously and of his deliberate, premeditated malice aforethought, kill and murder said Davis Levy by means of a rope, and beating, bruising, and strangling said deceased. After the verdict aforesaid was rendered, the court passed the sentence of death upon the defendant. Thereafter counsel for the defendant moved for a new trial, which was heard upon a bill of exceptions and certain affidavits, by which it was claimed that one of the jurors held and expressed an opinion of the defendant's guilt prior to his having been accepted as a juror, and on the ground of newly discovered evidence. The motion for a new trial was denied by the court, and this appeal is from the judgment and the order denying the new trial.

Numerous errors are assigned as ground for granting a new trial which go to the admission and rejection of certain evidence and the insufficiency of the evidence to support the verdict and error in giving certain instructions to the jury. Counsel also contend that a new trial should be granted upon the ground of the newly discovered evidence set forth in certain affidavits used on the motion for new trial. Counsel for the defendant contends with great zeal and ability that the evidence was insufficient to sustain the verdict of the jury. The evidence was mostly circumstantial, and among the mass of evidence admitted on the trial the following facts appear:

The deceased was the owner of a brick building situated on Main street, between Sixth and Seventh streets, in Boise City, the second story of which was occupied as a lodging house, in one room of which deceased had his office, living and sleeping therein. Upon the back part of the lots upon which the building stands there were situated several small houses, commonly known as "cribs," which "cribs" were occupied by "women of the town." Said "cribs" faced on the alley between Main and Idaho streets. The defendant had two of these unfortunate women under his protection, and, as the evidence would show, under his control. They, like himself, were of French origin. For some months prior to the death of Levy the defendant's women had occupied one of those "cribs" in the nighttime, living in the daytime with defendant, on Bannock street, several blocks distant from said "cribs." The main entrance to the deceased's building aforesaid was and is on Main street, and from that entrance a person could go upstairs, pass the said office of the deceased through a hallway to the back door, from which door stairs reached below to the back part of the lots on which said building stood. An arch of brick stood on the back of the lots next to the alley. The "crib" occupied by the defendant and his said women was alongside of said arch. A person could pass up the stairway from Main street, pass the said office of deceased, and go through the building down the said back stairs, and through the archway into the alley. At the time of the murder a colored woman occupied one of the "cribs" near said archway, which "crib" has a back entrance into the yard back of the main building. It is shown that Davis Levy was an eccentric, excitable man of about 70 years of age, and the defendant comparatively a young man. It appears from the record that the defendant and his women had removed from said "crib" on the 2d day of October, the day preceding the murder of the deceased, and he was making preparation to go with his women to Baker City, in the state of Oregon. It also appears that the defendant had occupied a room in said lodging house for some months during the year or two previous to the date of the homicide, and that he and the women had occupied the "crib" referred to for months prior to the date of the homicide. The evidence shows that there was a very hostile and bitter feeling between the defendant and the deceased. It is shown that as early as May, 1901, they had a fight, and the defendant struck the deceased with a piece of board. The evidence discloses numerous threats by the defendant against the deceased, in some of which he had declared he would kill the deceased; said that he would cut his throat; that he would cut his neck off at his shoulders. It is shown that on October 2, 1901—that being the day prior to the day of the homicide of the deceased—the

defendant moved from said "crib." It appears that he was compelled to do this by one of the police officers of the city, because one of his said women was unable to obtain a doctor's certificate of good health, which it seems was required by that class of women. The evidence indicated that the defendant was greatly incensed at this, and he said on that day that Davis Levy, the deceased, had run him out, and that he would get even with him; and on the same day he threatened the deceased in the presence of another witness, apparently charging the deceased with having been the cause of his being compelled to leave the city. There is much other evidence which tends to show the malicious feeling of the defendant toward the deceased. It is shown that some months prior to October 3, 1901, the defendant was skinning a live rabbit, and a person present protested against such cruelty, and the defendant replied that he would skin Levy (the deceased) that way. This evidence was evidently introduced to show the malice and hatred of the defendant toward the deceased.

The evidence shows that the body of the deceased was found on October 5, 1901, in one of the rooms of said lodging house. He had been gagged—a rope tightly drawn around his neck, tight enough to cause strangulation. His hands and feet were tied. The appearance of his said office, which he used as a living and sleeping room, and a wound on the left side of his head, indicated that he had been struck down while eating his evening meal, and that he had been taken to the room where the body was found, which was one of the lodging rooms in said house. There was no evidence of a struggle in the latter room. When found, the body was dressed and lying on the bed, and several keys and two tobacco or money sacks and some other articles were found laid alongside of the body, on the bed, in regular order. His shoes had been taken off and placed near the foot of the bed. A gag made of a knotted napkin was in his mouth, and a towel and pillow laid over his face. There was no indication of a struggle after the body had been placed on the bed. There was no money found on his person, but two checks were found under the bedclothing on the opposite side of the bed from the body. In his said office or living room was found on the table a bowl of broth, part of a loaf of barley bread, a piece of which had been cut off and a mouthful bitten out of the piece; also some butter and cheese were on the table. A kettle containing some small pieces of meat was on the stove. So far as the evidence shows, the deceased was last seen between half after 6 and 7 o'clock on the evening of October 3, 1901, and the evidence shows that, if deceased had been living for any length of time after 7 o'clock, he would have been seen. It is shown that a piece of board used to bar the door to the front entrance of said lodging house, which was usually left in the

hall by Levy when he went to bed at night, was not there that night; and the light that deceased kept at the front door was not lit that night, nor was the back door locked. This and other circumstances would go to prove that the deceased was killed before his retiring time, and while at supper. Taking all the evidence, it is clear to us that the deceased was killed between 7 and 8 o'clock on the evening of October 3, 1901. The circumstances also show that he must have been killed by some one familiar with the premises. It appears that said office of deceased was locked, and found so at the time the body was discovered. A key that would unlock said office was found in a refuse box back of the "crib" which had been occupied by the women of the defendant, and also some small pieces of rope like that found around the neck, arms, and legs of the deceased.

The defense of the defendant was an alibi, and much of the evidence tends to show the malice and ill will of the defendant toward the deceased, and of the defendant's whereabouts from 7 o'clock until half after 10 o'clock on the evening of October 3, 1901. Counsel for appellant contends that the defendant has clearly established an alibi, in that the evidence shows the whereabouts of defendant during said time, and that it would have been impossible for him to have murdered the deceased; while it is contended by counsel for the state that the evidence clearly shows that the defendant was around and in the said lodging house at least two or three times during that period. One of the witnesses for the state testified that she saw the defendant standing in said brick archway back of the lodging house, and afterward disappear in the rear of said "crib" where said trash box was situated. He was seen by another witness going out of said archway at about half past 7 o'clock, and was seen in the alley near there by two other witnesses between 7 and 8 o'clock. The evidence further shows that about 15 or 20 minutes before 8 o'clock on that evening the defendant appeared at the barber shop opposite Well's cigar store on Main street, between Seventh and Eighth streets, in Boise, and went to the back part of the shop and asked for a bath. He went into the bathroom, remained there some 15 or 20 minutes, came out, and asked for a quick shave. The barber who shaved him was at that time busy with another customer, and the defendant sat down and waited a few minutes for his turn. It is also shown that it was the custom of the defendant to get shaved twice a week, and that he had been shaved the day before. It is the custom to close all barber shops in Boise promptly at 8 o'clock. It appears that the curtains were drawn in said shop and the door locked before the defendant was shaved. After the defendant was shaved, the barber unlocked the door and let him out, and the barber im-

mediately went across the street to Well's cigar store and began to play a game of cards known as "solo" with two other persons, and continued to play for about half an hour, when the defendant came into the room. The barber testified that the defendant acted in a very strange and unusual manner, and seemingly was laboring under considerable excitement. The defendant remained there watching the game until he was notified that the busses were going to the hotels to take passengers to the depot to take the 10:40 train. Upon said announcement being made, the defendant left. The evidence shows that the busses go to the hotels for passengers for the 10:40 train at 10 o'clock. It appears that the defendant left Well's cigar store at about 10 o'clock, and arrived at the depot about 10:25 or 10:30 o'clock, and appeared to be laboring under some excitement, and was perspiring. It also appears that it takes less than five minutes to walk from Well's cigar store to the depot. The evidence shows that the electric lights in Boise went out on said night of October 3d about 25 minutes after 10 o'clock; and one of the witnesses for the state testified that shortly before those lights went out she saw the defendant come down the back stairs of said lodging house, and at the bottom of the stairs saw him pull out his watch, and put it back in his pocket. Then he walked to said archway, and stood there looking up and down the alley. He then went down back of said "crib" that his women had occupied, and that just as he disappeared the electric lights went out. Another witness for the state testified that between 10 and 11 o'clock on the night of October 3d he was playing billiards in his saloon on the north side of Main street between Seventh and Eighth streets, and that defendant came in the back entrance—that being the entrance from the alleyway. Another witness testified that he was in said saloon when the defendant came in there; that defendant seemed to be in a hurry, and was sweating and perspiring considerably; that the first witness above referred to spoke to the defendant, and wanted to know what was the matter he was sweating so. He put his hand on his stomach and said, "I am sick." While one of the witnesses referred to is not sure of the time when defendant came into said saloon, it clearly appears from the other witness that it was between 10 and 11 o'clock on the evening of October 3d. There are many other circumstances tending to prove the guilt of the defendant, none of which are contradicted or disapproved, and it is not necessary for us to relate them here. But from all of the evidence in the case, which we have carefully considered, we have no doubt of its sufficiency to sustain the verdict.

The test of the sufficiency of circumstantial evidence is, does the circumstantial evidence produced on the trial establish in the

minds of the jury a sense of conviction to the exclusion of all reasonable doubt? The convincing effect that would follow from positive evidence is not necessarily to flow from circumstantial evidence, although circumstantial evidence is often the most satisfactory and convincing that can be produced. 3 Rice on Evidence, § 343, and authorities there cited. It is a general axiom of human action that all persons act from motive, and it is always a satisfactory circumstance if a jury can feel that it is proved to their satisfaction that the defendant had a motive—a strong, impelling motive—for the act which he is charged with having committed. Id. § 344. In the case at bar it is clearly established by the evidence that the defendant had a strong impelling motive to commit the crime of which he was convicted. The ill will, hatred, and malice of the defendant toward the deceased is shown all through the evidence. That being clearly shown, and the conduct, actions, appearance, and whereabouts of the defendant, as shown by the evidence, between the hours of 7 o'clock and 10:30 o'clock on the evening of October 3, 1901, taken into consideration with all the evidence in the case, are amply sufficient to establish in the minds of the jury the guilt of the defendant to the exclusion of all reasonable doubt.

It is contended that the evidence, all taken together, is reasonably and fairly consistent with the hypothesis of the innocence of the defendant, and for that reason it is insufficient to sustain the verdict of guilty. We cannot agree with counsel in that contention, for, as we view the evidence, no other reasonable hypothesis than that of the guilt of the defendant can be drawn from it. The facts and circumstances shown by the evidence are absolutely incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis or rational conclusion other than that of the guilt of the defendant. The evidence is sufficient to establish the guilt of the accused beyond a "reasonable doubt." The term "reasonable doubt," as defined by text-writers and decisions of courts of last resort, is a "fair" doubt growing out of the testimony in the case. It is not a mere imaginary, captious, or possible doubt, but a "fair doubt," based upon reason and common sense. 3 Rice on Evidence, § 268. It would be possible to raise an imaginary or captious doubt in any case, no matter how strong, direct, and positive the evidence might be. For instance, a jury might imagine, in a case where two uncontradicted eyewitnesses to a crime testified to its commission, that such witnesses might be mistaken, and thus entertain a captious or imaginary doubt. But such a doubt is not a "reasonable doubt" within the legal definition of that phrase.



The admission of evidence to show that one of the defendant's women had the syphilis, and was for that reason unable to get a health certificate from the city physician, and prohibited from plying her vocation in Boise City, is assigned as error. It appears from the record that defendant claimed and had stated that the deceased was the cause of his having to leave the city, and, as we understand it, the evidence last referred to was introduced to show that the deceased had nothing to do with that matter, that the examination of said female was suggested to the physician by a policeman, and that deceased had nothing to do with it. Considering all the evidence in the case which shows the character and vocation of the defendant and the women with whom he was living, and which it would have been impossible to have excluded on the trial, the admission of that evidence was an immaterial error, which could not have possibly affected the verdict of the jury, and hence did not affect any substantial right of the defendant. See section 8236, Rev. St. 1887.

It is suggested that many of the witnesses for the state were from the slums of the city, and for that reason their testimony was unworthy of credence. But it must be remembered that the jurors are the judges of the weight to be given to the testimony of the witnesses, and, having seen the witnesses, and heard them testify, this court is not authorized to say that they should have rejected the testimony of any witness. If the testimony of all witnesses of the character of those referred to must be rejected on principle, many criminals would go unwhipped of justice. The rule is well established that the weight to be given to the testimony of the witnesses is the exclusive province of the jury, and in the case at bar it was for the jury to determine whether the entire evidence established the guilt of the defendant beyond a reasonable doubt. There is nothing in the record to indicate that the verdict was the result of passion or prejudice. The evidence, in our opinion, shows the guilt of the defendant beyond a reasonable doubt. In *State v. O'Brien*, 3 Idaho (Hass.) 374, 29 Pac. 38, this court said: "The jury saw all the witnesses upon the stand, and could judge of their truthfulness. They were carefully and fully instructed in the law by the court. The judge, who tried the cause also doubtless carefully noted the testimony, and certainly would not permit a judgment of this kind to stand if there was reasonable doubt of guilt." The giving of the following instruction on the court's own motion is assigned as error, to wit: "A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him, nor be used against him on the trial or proceeding." Section 8143, Rev. St. 1887, is as follows: "A de-

fendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding." That statute was enacted for the protection of the accused, and numerous authorities could be cited where causes have been reversed because of comments made by the prosecuting attorney (and some instances by the court) to the jury on the failure of the accused to testify in his own behalf. That statute provides that such failure shall not in any manner prejudice the accused, nor be used against him on the trial. The instruction complained of was given for the sole purpose of protecting the defendant, and preventing any presumption from arising in the minds of the jury because of the failure of defendant to testify in his own behalf. It would be the most natural for the jury to revert to the fact that the defendant failed to testify in his own behalf, and one can be hardly so simple as to imagine that the jurors would not comment or think of that fact had the court not given the instruction complained of. In support of said contention counsel cite *Wilson v. U. S.*, 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. That was a case where the district attorney commented on the failure of the accused to testify in his own behalf; and the same is true of *McKnight v. U. S.*, 115 Fed. 975, 54 C. C. A. 358. Numerous authorities have been cited on the proposition that the fact that the accused declined to testify in his own behalf cannot be commented on. But not one case has been called to our attention where the giving of the instruction complained of was held to be error.

The giving of several other instructions is assigned as error. After an examination of them we conclude that the instructions complained of correctly state the law, and the court did not err in giving them. It appears from the officers in charge of the jury that during the trial the jurors expressed a desire to go to the theater to witness certain plays on two evenings; that the court called respective counsels' attention to that fact, and asked the counsel in open court whether they had any objection thereto; and the attorneys assented, and the jurors attended said theater two evenings. It is shown that upon each of said occasions the jurors were taken into said theater after the rest of the audience were seated; that six of said jurors were seated in one box, and six in another, facing each other, and an officer with each six; that no other person entered either of said boxes or spoke to either of said jurors; that each of said officers were in plain sight of the entire jury; that said jurors remained in said boxes until the audience had departed, and then said jurors were taken from said boxes to the jury room; that there was nothing in either play that in any manner could affect the judgment or opinion of any member of

the jury in regard to this case. Such action of the jury is assigned as error. Counsel for defendant each made an affidavit in which they stated that they had no knowledge or recollection of the judge calling their attention to the fact that said jurors desired to attend the theater, and had not given their consent thereto. While this court does not sanction the practice of jurors attending theaters during the progress of a murder trial, we do not think a new trial should be granted on that ground, unless it is shown that some substantial right of the accused has been prejudiced thereby, which has not been done in this case. The misconduct or separation of the jury complained of in this case does not come within the provisions of section 7952, Rev. St. 1887. See, also, *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263; *People v. Bush*, 68 Cal. 623, 10 Pac. 169.

It is contended that defendant is entitled to a new trial because of the misconduct of the officers in that they were very diligent and zealous in their efforts to discover the person who committed the homicide; that a large reward was offered for the conviction of the murderer; that the officers promised to pay at least one witness \$50 in case they received the reward. That witness was the barber who shaved the accused on the night of the murder, and his testimony was corroborated by other witnesses. The fact that a reward was offered, and that some of the witnesses and officers were to receive a part of it in case of conviction, is not sufficient cause to warrant the granting of a new trial, and the court did not err in refusing to grant a new trial or the facts presented in the transcript in that regard.

Several affidavits were presented on the hearing of the motion for a new trial, in which the affiants swore that one of the jurors had before the trial said, referring to the defendant, "They have got the right man, and I believe he ought to be hung on general principles anyway," and other statements equivalent thereto, and had made remarks derogatory to the defendant. The judge, on the hearing of said motion, admitted the affidavit of the juror denying that he had ever made such statements, and also affidavits of 17 persons, neighbors and acquaintances of said juror, to the effect that they had known said juror for years, and knew his general reputation, in the vicinity in which he lived, for truth, veracity, honesty, and integrity, and that it was good. It is contended that the admission of the last-named affidavits was error, and counsel cite on that point several authorities that apply to witnesses. In the case at bar the accused did try to show that the reputation of said juror for truth and veracity was bad by attempting to show that on his *voir dire* he had sworn that he had not formed or expressed an opinion of the guilt of the defendant, when in fact he had formed, and at several different times had expressed, such opinions. The truth and

veracity of the juror was directly put in issue and directly attacked. The question of the incompetency of said juror was presented to the court or judge on motion for a new trial, and we do not think that the court erred in considering said sustaining affidavits. The judge, in his discretion, had the right to admit any evidence tending to throw any light on the question. The practice of admitting sustaining affidavits was in such cases apparently sanctioned by this court in *State v. Davis*, 6 Idaho, 159, 53 Pac. 678. Referring to that question, the court said: "While we think such action is largely a matter of discretion on the part of the trial court," etc., "it is not necessary to decide the correctness of the action of the trial court in receiving and considering such rebutting affidavits." We do not question the rule that sustaining evidence cannot be introduced to support the character of a witness for truth and veracity when his character has not been attacked. But in the case at bar the character of the juror was directly attacked.

We have examined the newly discovered evidence on which counsel for defendant relies for a new trial, and do not think it sufficient to warrant the granting of a new trial. It is shown by the affidavit of one witness that he found human blood stains on the knob of the door of one of the rooms of said lodging house and on the water pitcher in said room, but that was not sufficient evidence on which to grant a new trial.

We have examined the many errors assigned in this case, and are fully convinced that the trial court did not err in denying a new trial.

The judgment is affirmed, and the cause remanded for further proceedings herein as provided by law.

STOCKSLAGER, J., concurs. AILSHIE, J., dissenting in part and to the conclusion.

AILSHIE, J. (dissenting). I cannot agree with some of the conclusions reached by my associates in this case. I concur in the result announced as to the instructions given the jury by the trial court, and also as to the alleged separation of the jury after they had been accepted and sworn to try the case. I do not think that the mere fact of separation is sufficient to entitle a defendant to a new trial, but that he must at least show some other facts from which it would appear that he was in some manner prejudiced on account of such separation. There is a question, however, in this case, of most vital and serious import, to which I cannot give my approval. It goes to the introduction of a class of evidence given by the state's first witness, and running throughout the entire case for the prosecution. The first witness called by the prosecution was the health officer of Boise City, and, after giving some testimony concerning the inmates of houses of ill repute within the city, and the steps

being taken by the health officers to suppress disease prevailing among such persons, said, "I know a couple of women that were living with the defendant about this time." Thereupon the prosecution asked the question: "You may state whether or not about this time you examined these women, or either of them." To this question counsel for defendant objected, and the attorney for the state said, "We will connect this with subsequent evidence in the nature of threats showing a direct connection between the two," whereupon the court overruled the objection. The witness then proceeded: "I examined both of these women. I don't know their names." Counsel for defendant here interposed further objections, and was by the court overruled, and the witness continued: "The brunette, or dark-haired one, I found had syphilis, and refused to give her a certificate, and notified the police. I think this was two or three days before the Levy body was found." After the witness gave further testimony along this line, defendant's counsel moved to strike out all of the evidence on this subject, and thereupon the witness was asked: "You were acting under instructions from the police department as a member of the board of health?" To which he replied: "Yes, sir. I will explain. I think that at this particular examination one of the policemen spoke to me about it, and ordered them to come up; and I think it was Carswell." After this answer was given, the court overruled defendant's motion to strike out the evidence. Evidence to the same effect and of the same character was given on the part of the state by other witnesses.

It is argued with much force and convincing reason by counsel for defendant that this line of evidence was incompetent to prove any possible or material fact in the case against the defendant, and that it had for its object the sole tendency and purpose of prejudicing the jury against him. Of the fact that it did actually prejudice the minds of the jurors against the defendant I have no doubt. It was introduced under the pretext of showing threats, but how such evidence could possibly show, or tend to show, or be connected with any threats on the part of the defendant against the deceased, does not appear. How could the fact that these women, with whom the defendant had been associated, had a loathsome and infectious disease, possibly have any bearing on the defendant's guilt of the crime of homicide? How could such fact become a circumstance of the guilt of defendant? Is it possible that it was introduced for any purpose other than that of degrading the defendant in the minds of the jurors? Was it not an indirect attack upon the defendant's standing in the community and his general character and moral depravity? In the majority opinion, in justification of the admission of this evidence, it is said: "It appears from the record that

defendant claimed and had stated that the deceased was the cause of his having to leave the city, and, as we understand it, the evidence last referred to was introduced to show that the deceased had nothing to do with the matter; that the examination of said female was suggested to the physician by a policeman, and that deceased had nothing to do with it." What did it matter whether deceased was the cause of these women failing to get a health certificate, or the police officers of the city were the cause? What possible light could that question throw upon the guilt or innocence of the defendant? It certainly cannot be said that any motive could be shown by this class of evidence; and, if threats were the real object the state had in view, then it was certainly unnecessary to go into the physical condition and character of a couple of lewd and abandoned women in order to lay a foundation for proving so simple a fact as a threat.

In *People v. Wallace*, 89 Cal. 158, 26 Pac. 650, the Supreme Court of California had under consideration the admissibility of evidence very similar in character to that here introduced. There a witness, who had been an "actress" in a saloon or "dive," was asked: "Since you have been working at the Elite Theater, has this man Wallace [the defendant] asked you to be his girl?" That question was objected to, and the objection was overruled by the court, and upon its admission the appellate court said: "The admission of this testimony was erroneous. It was not relevant to any issue involved in the case, and was clearly calculated to present the appellant before the jury as a low and degraded character. It may be that there are those who look with some indifference upon the moral delinquencies of men in their social relation with the other sex, if such conduct is not too flagrant and notorious. But, even if this should be assumed as the fact, it would not follow that this evidence was not prejudicial, as its object, its declared purpose and effect, was to show that appellant had proposed to 'live' with this woman in a state of shameless immorality. \* \* \* The occupation of this witness, all of the surroundings and character of the so-called 'theater' in which she was employed, were fully disclosed by the evidence, and the proposition to 'live' with her, and she to become his 'girl,' looked to a relation which need not be characterized here, but which the jurors, as men of ordinary observation, must be presumed to have fully understood. But one inference could be drawn from this testimony, and that most prejudicial to the appellant, in the minds of men of average morality. The evidence having only this tendency, and being wholly irrelevant, should not have appeared in the case."

Closely connected and allied with this class of evidence, and illustrating the char-

acter of evidence introduced in this case, and the effect that the same must have had upon the minds of the jurors—presuming that they were average jurors, subject to the ordinary human prejudices and passions—was that of another witness as to the cruel character and disposition of the defendant. I quote the questions and answers as given: “Q. And you testified in regard to certain matters, threatening language and so on. I will ask you if there was any other occurrences in the nature of threatening language on the part of the defendant toward Davis Levy, the deceased. A. Yes, sir; in the latter part of November, 1900. Q. State the language and the circumstances? A. Why, he had a rabbit, and was hanging it on the fence in the back yard on Mrs. Bush's property, and was skinning it, right back of what is Maud Mudock's house now. And I was working on my house there, and I heard one of the French women holler to him, and then I heard a rabbit squeal, so then I goes out there, and I says, ‘Why don't you kill it?’ and I hit it with a stick.” At this point counsel for defendant objected to these details, and thereupon the prosecutor asked, “Now, Mr. Maley, what was said on this occasion?” to which the witness replied: “Just as I was coming to it—as I hit the rabbit over the head—he stopped, and looked up, and said, ‘I skin Levy that way.’” The witness continued in detail concerning the skinning and killing of this rabbit. The whole of this testimony was apparently given under the pretense of showing to the jury that on this occurrence, which was a year before the death of Levy, the defendant had remarked that he would “skin Levy.” It doesn't take a very critical examination of this to disclose the fact that the state introduced this evidence not so much for the purpose of showing what the defendant had said as for the purpose of getting before the jury the fact that he had skinned a live rabbit, and that he was therefore a man of a cruel and unfeeling disposition. In fact, counsel for the state, in their brief, give as a reason for sustaining the verdict of the jury, that “it is also made certain by the evidence that defendant is a cruel and vicious man.” My associates, in discussing this evidence, say, “This evidence was evidently introduced to show the malice and hatred of the defendant toward the deceased.” Is it to be seriously contended that, because a defendant was capable of skinning a live rabbit, or in fact did do so, it is a circumstance tending to show that he has murdered a human being? Or is the remark made by the defendant that he would like to skin the deceased that way, isolated from any other fact whatever, at a period a year prior to the homicide, and where they had dealt together during all the intervening time, admissible to show malice in a case of homicide? I certainly think not. This seems to me to have been an indirect

way of doing the very thing the law forbids. This was an attempt to show the bad moral traits and disposition of the accused—a thing condemned by all the text-writers and authorities on the subject. Underhill on Crim. Ev. § 85; Underhill on Civil Ev. § 10; Rice on Ev. §§ 375, 379.

In line with this evidence, two witnesses for the state were permitted to testify to certain isolated, specific acts of the defendant committed some time previous to the death of the deceased, too revolting, odious, and depraved in character to permit of recital here, but in line with the class of evidence which counsel for defendant claims had no other purpose and effect than that of prejudicing the jury against him. It is true, this evidence last referred to, was not objected to by counsel for defendant, but it was of a nature so shocking and offensive to every sense of decency and morality that the damage must have been as effectually wrought by the asking of the question as by the answer. Whether a defendant be guilty or innocent, and whatever his previous mode or condition of life may have been, he is nevertheless entitled to a fair trial. He should only be tried for the offense charged, and not upon his general moral delinquencies and turpitude. If guilty, the state should secure a conviction upon evidence, and not upon prejudice and passion; if innocent, it should not want a conviction for any consideration.

The fact that deceased came to his death by foul means is the only fact in this case proven by positive evidence. All the evidence tending to connect the defendant with the commission of the offense was purely circumstantial. A large part of the record in the case consists of the merest suspicions against the defendant, and cannot, in a legal sense, be said to even approach the dignity of circumstantial evidence. By this I do not mean to be understood as saying there are no circumstances in the case against the defendant. But I do mean that repeated examinations of this evidence have impressed me with the belief that the class of evidence above referred to must have had much to do with the conviction of the defendant, and that the verdict does not rest alone upon the legal circumstances shown against him. For these reasons I cannot agree with the conclusion of my associates wherein they hold that the admission of the class of evidence I have recited did not prejudice the rights of the defendant.

The principle of law announced in the majority opinion to the effect that, where a defendant has produced affidavits showing that a juror had previously expressed an opinion hostile to the defendant the state might introduce affidavits in rebuttal showing the good character of the juror for truth and veracity, seems to me to be in such conflict with the law of evidence in similar cases that I cannot refrain from expressing

my disapproval thereof. After a verdict had been rendered against the defendant, his counsel discovered that one of the jurors, prior to being selected as a juror in the case, had made statements that he believed the defendant ought to be hung on general principles, etc. They accordingly presented the affidavits of those who had heard the statements made on this motion for a new trial. The state secured the affidavit of the juror denying ever having made such statement, and then proceeded to secure numerous affidavits showing that the juror's reputation for truth and veracity was good. In support of the admissibility of this evidence it is announced that, "The truth and veracity of the juror was directly put in issue and directly attacked." If this position be true, then, so soon as the defendant or any of his witnesses might go upon the witness stand and directly contradict any positive fact testified to by a witness for the prosecution, the state would at once be entitled to ransack the community for evidence showing the good reputation of the contradicted witness for truth and veracity. There can be no difference in principle between the two instances. This certainly cannot be the rule as to the admission of evidence. It seems to me that the error lies in assuming that the character of the witness for truth and veracity has been attacked whenever he has been directly contradicted. It is when the general character of the witness for credibility is directly attacked, and not when the character of the testimony given in a specific instance is attacked and contradicted, that sustaining evidence may be offered. If the rule announced in this case should prevail, there would be no end to the introduction of testimony in any given case, and the result would be that every witness who testified in a case would be shown to either have a good or a bad reputation. When defendant moved for a new trial on the ground that the juror had made statements which disqualified him from trying the case, the juror did not in any sense become a defendant in that proceeding, but was a mere witness, the same as any other person; and it was no more competent for the state to produce witnesses to show his reputation for truth and veracity than it would be in any other case where a witness was contradicted. 3 Rice on Ev. § 379; People v. Hulise, 3 Hill, 309; People v. Van Houter, 38 Hun, 168; Russell v. Coffin, 8 Pick. 153; Stevenson v. Gunning's Estate, 64 Vt. 609, 25 Atl. 697; Tedens v. Schumers, 112 Ill. 266; Louisville & N. R. Co. v. McClish, 115 Fed. 268, 53 C. C. A. 60.

Upon the motion for a new trial defendant presented in his affidavit newly discovered evidence, and among other things urged that the police officers of Boise City had taken undue advantage of him, and influenced witnesses against him; and in support of that contention presented affidavits showing that

a reward of some \$3,000 had been parceled out among the police officers, and that one of the principal witnesses for the prosecution had obtained \$1,500 of the reward, and that the chief of police and one of his subordinates had signed an obligation to pay \$50 to the barber who had shaved the defendant on the night upon which it was claimed the homicide occurred, and to whose testimony considerable reference is made in the majority opinion. That document is as follows: "Boise, Idaho, Feb. 22, 1902. This is to certify that we the undersigned, agree to pay J. L. Ragland, or order, the sum of \$50.00 out of any reward we may receive from either the State of Idaho or the heir of Davis Levy." This was signed by the chief of police and his subordinate officer. It also appears that after the trial the chief of police drew warrants for fees of witnesses who had testified on the part of the state in the aggregate sum of \$591.50. He claimed, in reply to this, that he did it only as an accommodation. It is also made to appear that the inmates of the houses of ill repute in Boise City, from which class most of the witnesses against defendant were drawn, were entirely dependent upon the police officers as to whether or not they should be allowed to conduct such resorts. It is also shown that these places were closed by the police during the trial of this case and reopened as soon as the case was closed. Upon the trial of the cause the chief of police testified in relation to finding the body of the deceased: "I went into this office probably a few minutes after finding his body. There was no blood anywhere except on the face towel or gag." The witness testified to having examined the premises carefully, but made no mention of finding any blood stains anywhere in the building, and no evidence to that effect was given at the trial. Upon motion for a new trial, however, the defendant presented the affidavit of a reputable physician of Boise City stating that soon after the body of Davis Levy was found the chief of police called upon the physician, and took him to the Davis Levy lodging house. What then occurred is best shown by the language of the affidavit: "In the front room facing Main street, on the west side of the stairway leading from Main street to the second story of said building, and right across the hallway from the office or living room of Davis Levy, I found blood stains, which had the appearance of being placed upon the door leading from the room on the west side of the hallway by the fingers or hand of some one as they unlocked the catch or latch of the door, and in said room I found also blood stains on the handle of a water pitcher; that I at that time took some of the stains, and made a microscopic examination of them, and found from said examination that the stains were caused by the blood of a human being; that I did not communicate the above fact to the defendant

or either of his attorneys until after his conviction." This affidavit tends very strongly to corroborate the contention of defendant that the police officers were acting unfairly with him, and suppressing evidence which might have thrown light upon the case. If no error had been committed in the admission of evidence, the newly discovered evidence in this case, and even the showing as to the conduct of the officers, might not justify a reversal of the case, but, considered in connection with the mass of incompetent and prejudicial testimony to which I have referred, certainly presents a strong consideration for the granting of a new trial.

For the foregoing reasons I cannot agree to an affirmance of the judgment.

#### On Rehearing.

(Feb. 12, 1904.)

STOCKSLAGER, J. Counsel for appellant file their application for a rehearing in this case. The individual members of this court gave this case the most thorough investigation, and, after repeated discussion of every question involved in the record, reached the conclusion disclosed by the opinion and dissent of Mr. Justice AILSHIE. The very earnest—and, we are satisfied, sincere—manner in which counsel for appellant present this application and urge that there is error in the opinion has prompted me to again investigate the record, as well as the authorities relied upon by appellant. We fully appreciate the grave responsibility resting upon the court and each member of it. We also appreciate the serious consequences to appellant necessarily following the opinion, but these are not questions which should in any manner affect the court. The facts of the case are fully stated in the opinion, and any that were omitted there are shown in the dissenting opinion of Mr. Justice AILSHIE. This being true, it is unnecessary to review them here.

Counsel for appellant in their application start out with this statement: "The absolute conviction, in the minds of counsel for defendant, not alone that the defendant herein is absolutely innocent of the crime charged against him, but the certain knowledge that the defendant did not have a fair and impartial trial in the court below. Counsel being present at all stages of the case, were able to see and know of certain facts, incidents, and influences outside of any evidence in the case which was brought to bear and made its impression upon the jury in this action. These things, it is impossible to incorporate into the record in this court in any manner which would indicate to the court the effect they had upon the jury." This only serves to remind us of the necessity of confining ourselves to the record as it comes from the lower court. Any departure from this rule would leave us at sea for the facts in the case. It is presumed that the trial court

used every exertion to protect the appellant in his rights, and to see that he had a fair and impartial trial, and we are not authorized to take this statement from counsel as bearing upon the question under discussion. If it is true, and we know nothing about it, it might appeal with much force to another tribunal of the state; but it has no place in this court.

Counsel next urge that the introduction of the evidence "showing that one of defendant's women had syphilis was wholly immaterial, and which was introduced for the purpose, and certainly had the effect, of prejudicing the jury against the defendant." This statement is followed with a statement from the majority opinion, in which it is said: "The admission of that evidence was an immaterial error, which could not possibly have affected the verdict of the jury; hence did not affect any substantial right of the defendant." It must be remembered at all times in this case that the murder of deceased was shrouded in mystery; that he had been murdered was beyond controversy. There was no direct evidence connecting the defendant, or any one else, with the commission of the crime. It developed on the trial that ill feeling had existed between appellant and deceased for some months prior to the homicide. Threats made by appellant of various kinds had been made, or were proven on the trial. It was shown that appellant believed deceased was responsible for the examination of the women referred to and was thereby indirectly, if not directly, responsible for the order of the doctor prohibiting this one from carrying on her business. This, it was shown, enraged appellant, and in his anger he said he would fix him (meaning deceased); he would knock his d—d head off; said Levy and the policeman were making him trouble, and he would leave. Counsel for the prosecution asked the city physician this question: "You may state whether or not about this time you examined these women, or either of them." Counsel for appellant objected to this question for the reason that "it is immaterial, incompetent, and irrelevant as to what the condition of these women were. It has no connection whatever with this defendant, or with the crime charged against him. It is absolutely immaterial, and made here for the purpose of prejudicing the defendant, without connecting him in any manner with it." Counsel for the prosecution stated: "We will connect this with subsequent evidence in the nature of threats, showing a direct connection between the two." The physician answered: "The brunette, or dark one, I found had syphilis, and refused to give her a certificate, and notified the police. I think this was two or three days before the body of Levy was found." With this state of facts before the court, can it be said the evidence was immaterial, or that its admission was error? The relation between appellant and these

two women was shown. The condition of one of them was also shown to be such that she was refused a certificate by the city physician. The fact that appellant suspiciously deceased with being in some way implicated with the police force in bringing about this examination was shown to have enraged appellant to such an extent that he made threats against deceased, thus verifying the statement of the prosecution. It was not an attempt on behalf of the prosecution to connect this appellant with any other crime, or to degrade him in the minds of the jury, but was for the purpose of showing his feeling toward deceased, and upon what such feeling was based. If it had been shown that the object of the evidence was to debase appellant in the minds of the jury, or that he was an immoral man, or that it connected him with some other misdeed, the contention of appellant and his authorities would be applicable. If the evidence of the condition of this woman and the fact that appellant believed that deceased was in some way instrumental in bringing about the examination by the physician, had not been brought home to the appellant, and his threats directly connected with the result of the examination, then it would have been error to admit the evidence.

Counsel next urge that the admission of the evidence with reference to the "orange peel" was error. This testimony, as said in the opinion, as well as the dissenting opinion of Mr. Justice AILSHIE, is too revolting to find a place in a living record. Suffice it to say, however, that it is shown by the record that it was introduced for the purpose of showing the ill will and hatred of appellant for deceased, and not that he had been guilty of other crimes, or for the purpose of degrading him in the minds of the jury. Can it be seriously urged that it was possible to conduct this trial in the lower court without the relation of appellant and these two women being disclosed to the jury? All the surroundings were such that sooner or later this fact must come out. The class of witnesses on behalf of the prosecution who were residing in the "alley," with the further fact that, if the prosecution did not disclose the avocation of the witnesses who reside in the "alley," it was shown on cross-examination that the appellant resided in the "alley" with the two abandoned women, could not be kept from the jury. Can it be said that because one of the women had a loathsome disease, and this fact was brought out by the prosecution, this alone prejudiced the jury against appellant? Is it not true that, if any feeling of prejudice existed against the appellant in the minds of the jury, it was caused by his immoral conduct and manner of living? Jurors are selected with care by the defendant, and should be by the prosecution, to avoid suspicion or bias or prejudice for or against the defendant; and if, in the examination of a juror, it is shown that he has any

bias or prejudice, he is excused on that ground. It was unfortunate for appellant that his lot had been cast among the residents of the "alley," and that the evidence upon which he was convicted was mostly from his associates there. It might be said that it was unfortunate for the state that it had to resort to that class of evidence for a conviction. The prosecution was not to blame for this, however. When it was discovered that a murder had been committed, it was the duty of the officers, as well as all good citizens, to ferret out the perpetrator of the crime, and bring him to justice. A careful reading of the record in this case does not disclose any particular friendship for the deceased or ill feeling toward appellant on behalf of the witnesses who resided in the "alley." If anything can be gathered from the evidence of the witnesses from the "alley," it indicates that deceased was looked upon by them as a harsh, exacting landlord. Counsel for appellant, in their petition, say: "If the opinion of the majority of the court in this case is to be the law governing such cases in this state, then in every prosecution the doors are open for the prosecution to introduce in evidence immaterial facts and disgusting details of the moral delinquencies or bad character of a defendant in every criminal case." If the facts in the case under consideration and the opinion of the majority of the court warrant this assertion, then, indeed, it is a deplorable condition, and we should not and would not hesitate to recall the opinion, and grant the appellant a new trial.

It is further stated that the principle announced in the majority opinion herein is not only opposed by the decisions of the Supreme Court of all other states, but, if adhered to, overrules the prior decisions of this court upon which counsel for defendant relied. He cites *State v. Irwin* (Idaho) 71 Pac. 608, 80 L. R. A. 716. This was the unanimous opinion of this court, constituted of the same members as at the present time. Of this case counsel for appellant say: "This court reversed a judgment of conviction for the reason that counsel for the state in that case had asked a question of the witness which had a tendency to degrade the defendant and prejudice him in the minds of the jury. How much stronger is the case at bar than the *Irwin* Case can be seen by mere comparison of the questions asked in the *Irwin* Case and the evidence admitted in this case." In the *Irwin* Case defendant was charged with rape, alleged to have been committed on one Dora Irwin on the 4th day of July, 1902. During the trial defendant called his son, Daniel Irwin, as a witness on behalf of the defendant, and on cross-examination this question was asked: "Did you not, in the course of that conversation with Mary Phillips, say also, in substance and effect, that you suspected your father with having done the same thing with other girls, mentioning

one of your family? Did you not, in the course of that conversation with Mary Phillips, say also, in substance and effect, that your father's actions with the other girl—with the member of the family referred to—had caused your mother's death?" An objection was sustained to this question, but he was required to answer the first question, which was in the negative. Other questions of a similar nature were asked. How can it be said that this case has any application to the case at bar? Here was an attempt on the part of the prosecution to show a separate and distinct crime to the one alleged in the information; no bearing or relation whatever to the crime for which defendant was being tried; hence the only effect of the evidence was to prejudice the minds of the jury against the defendant, no difference what the object may have been.

The next case cited from this court, and upon which appellant's counsel say they rely, is *State v. Anthony*, 6 Idaho, 383, 55 Pac. 884. This was also a rape case. The defendant was convicted of the crime of rape, alleged to have been committed upon a girl 10 years of age. "The errors assigned go to the sufficiency of the evidence to sustain the verdict, and in compelling the defendant to testify in regard to an alleged criminal assault on a young girl by name of Marshal, alleged to have occurred in 1895, and in allowing witness Alfred Marshal to testify in regard to said alleged criminal assault." The court, after relating all the facts, say: "An attempt was made to discredit and impeach the defendant by contradicting him in regard to a particular wrongful act that had not the remotest connection with the crime of which the defendant stood charged and was convicted." Has this case any bearing on the case at bar? Here was a man on trial for rape, alleged to have been committed at a certain time on a certain 10 year old girl. The defendant was a witness on his own behalf, and on cross-examination was questioned by the prosecution relative to a similar offense with another girl about a year before the crime charged to him, and for which he was being tried. The court said the only effect of this evidence was to prejudice the jury, as it had no relation whatever to the crime charged to the defendant, and for which he was being tried; hence error.

Counsel for appellant says the rule laid down in these two cases is correct, and in harmony with other courts that have had this question before them. Our attention is next called to *People v. Wallace*, 89 Cal. 158, 26 Pac. 650. Mr. Justice AILSHIE, in his dissenting opinion, quotes largely from this opinion; hence unnecessary here. It will be observed that the question objected to in this case related to the proposal of defendant to one of the inmates of the theater at a time previous to the murder, and had no relation or connection in any manner whatever to the crime charged to defendant. It

was not shown that there would be any attempt to show by the evidence of the witness any threats or ill will on behalf of defendant toward the deceased by an answer to the question. The court says: "The admission of this testimony was erroneous. It was not relevant to any issue involved in the case, and was clearly calculated to present the appellant before the jury as a low and degraded character." I have no quarrel with either of these decisions. I also agree with counsel that the correct rule is pointed out in *State v. Anthony* and reiterated in *State v. Irwin*. I am in harmony with their contention that the authorities are uniform upon the question that evidence that defendant has been guilty of or committed other crimes than that with which he was charged is not admissible in evidence. When it comes to applying this law to the facts in the case at bar is where we come to the "parting of the way." As heretofore stated, the defendant was on trial charged with the murder of Davis Levy. The evidence connecting the appellant with the commission of the crime was mostly circumstantial. Before he could be convicted of the crime, it was necessary to show a chain of circumstances connecting him with it which included motive. To show his motive it was necessary to prove threats, and, as a foundation for such threats, his reasons for his ill will and hatred for deceased. This directly connects the action of the city physician in refusing a certificate of health to one of the women with whom it was shown he was living, or had been living, in the "alley," and his statement that deceased and the police were causing him trouble, and that he would have to leave the town; that he would get even with him (meaning deceased). Were all these facts permitted to go to the jury by the learned judge who tried this case in the lower court for the purpose of prejudicing the jury against appellant, or were they admitted for the purpose of establishing a motive prompting appellant to take the life of deceased? The law is not one-sided in its application. It applies to all alike. The state has rights that must be guarded as well as the defendant, and because appellant lived in a manner not commendable, and made repeated threats of his intention to do deceased bodily harm, and shortly after these threats the body of deceased was found with evidence of a murder having been committed, it will not do to say that he can screen himself from the evidence of these threats, because the very foundation of them grows out of his immoral life intimately and closely connected with his manner of living.

I have examined the authorities cited by appellant, and, so far as the admission of the evidence complained of is concerned, I have not changed my mind since concurring in the opinion of Chief Justice SUL-



LIVAN. The careful inspection I have given to the record and authorities since this petition for rehearing was filed has convinced me that there is no error in the majority opinion wherein it is stated that the introduction of certain evidence was immaterial error. I will put it stronger, and say there was no error in its admission.

Counsel for appellant says: "The court, in its majority opinion, states that the witness Ragland, who was to receive \$50 of the reward in case of conviction, is corroborated by other witnesses. This statement is not borne out by the testimony. The testimony of all other witnesses as to the time the witness Ragland went to Weil's cigar store and the time when the defendant went there do not agree. Ragland testified that defendant came in there a half hour after he did, whereas four other witnesses, who were in Weil's cigar store at the time, testified, the defendant, came in within five minutes after the time Ragland did; and yet the court in its majority opinion says it was an important fact that the defendant did not arrive at Weil's store until half an hour after Ragland did." I have read the majority opinion very carefully to find the language charged to the court in the latter part of the above statement, but am unable to find any such statement. I will state here, however, that the witness Ragland was corroborated in nearly all his statements. That appellant went to the barber shop a few minutes before 8 o'clock, and got a bath and shave, and that he did not leave there until some minutes after the blinds were drawn, was corroborated by the witness Maupin. That Ragland went from the barber shop to Weil's cigar store, and that he was at the cigar store when appellant came in, is also corroborated by Maupin, who says that Ragland came in a little after 8 o'clock and that appellant came a little afterward—10 or 15 minutes past 8. Jacob Cohn said he saw appellant at Weil's cigar store a few minutes after 8 o'clock. He remained there from 8 to 10 o'clock. "Ragland came in after 8 o'clock. It might have been half past 8 o'clock when Ragland came in. I don't know which came in first. Have no way to fix the time when either came in." Jule Weil and L. Weil fixed the time when both appellant and Ragland came to their cigar store by the time they respectively go and come from their meals, at one time saying it was before 8 o'clock when appellant came to the store; but, taking their testimony in its entirety, it is shown that they, like the witness Cohn, had no definite way of fixing the time. The witness Ragland and Maupin fixed the time by the hour the barber shop was closed, which it is shown is promptly at 8 o'clock. It is shown by the evidence of L. Weil that appellant left his place of business about 10 o'clock that night, and he fixes the time by the hour the busses go to the depot.

The careful inspection I have given to the evidence in this case, as well as the authorities cited by appellant, fails to convince me that there is any reason why the majority opinion should not stand as the judgment of the court. It is so ordered.

SULLIVAN, C. J., concurs.

AILSHIE, J. (dissenting). I am still of the opinion heretofore announced by me in this case. I utterly fail to see how, under any recognized rule as to the admission of evidence, the testimony recited in my dissenting opinion could have possibly become admissible. To say that it established a reason for the defendant's ill will and hatred of deceased does not, to my mind, answer the objection raised to its introduction.

(9 Idaho, 470)

#### MOMBERT v. BANNOCK COUNTY.

(Supreme Court of Idaho. Jan. 19, 1904.)

#### BOARD OF PRISONERS—LIABILITY OF COUNTY —LIABILITY OF SHERIFF.

1. Where the statute provides that the "sheriff must receive all persons committed to jail by competent authority, and provide them with necessary food, clothing and bedding for which he shall be allowed a reasonable compensation to be determined by the board of commissioners," and that he "shall be allowed in addition to his salary, as fixed by said board, the actual and necessary expenses for care of each prisoner confined in the county jail," it is held that an individual furnishing the sheriff with such board and supplies must look to the sheriff for his pay, and cannot maintain his action for the value thereof against the county.

2. Held, further, that where the statute provides that the officer "shall at the end of each quarter file with the clerk of the board of county commissioners a sworn statement, accompanied by proper vouchers, showing all expenses incurred and all fees received, which must be audited by the board as other accounts," a sheriff must file such vouchers before his claim therefor can be allowed.

Stockslager, J., dissenting in part.

(Syllabus by the Court.)

Appeal from District Court, Bannock County; Alfred Budge, Judge.

Action by Joseph Mombert against Bannock county. Plaintiff filed his claim with the board of commissioners of Bannock county for board furnished prisoners under contract with the sheriff, and the commissioners rejected the claim. Plaintiff appealed to the district court, where he obtained a judgment for the amount claimed. From the judgment of the district court, the county appealed. Reversed.

Atty. Gen. Bagley and J. J. Guheen, Co. Atty., for appellant. Thomas F. Terrell, for respondent.

AILSHIE, J. The question presented for determination in this case is, is the county liable to a person who furnishes board to prisoners confined in the county jail, and can such a person maintain his action against

the county for the value thereof? The respondent furnished the sheriff of Bannock county board for prisoners detained by him in the county jail during the year 1902, and about January, 1903, and, while the sheriff was indebted to respondent in the sum of \$377.10 for such board, it was discovered that the sheriff was a defaulter in a large sum; and thereupon the respondent filed his claim with the board of county commissioners for the amount due him, alleging that the same had been furnished the county at the instance and request of the sheriff. The board of commissioners rejected the claim, and the claimant appealed to the district court. The matter was there heard, and judgment was entered in favor of the plaintiff, and from such judgment the county has appealed to this court.

It is the contention of appellant that the county is liable only to the sheriff for the board of prisoners, and that any person furnishing such board at the request of the sheriff must look to him directly for his pay, and cannot maintain his action against the county. The respondent, on the other hand, insists that the sheriff is only the agent of the county for the procuring of such board, and that the county is primarily liable directly to the person furnishing the same. In support of the position of the respondent, we are cited to *Jolly v. Woodworth*, 4 Idaho, 496, 42 Pac. 512, and *Neville v. Solano County*, 29 Cal. 252. In *Jolly v. Woodworth*, the claim for which the plaintiff was seeking to recover was for the publication of the delinquent tax list, and an examination of the opinion in that case will disclose the fact that the question raised here did not arise in that case; and, indeed, it could not have arisen there, for the reason that the statutes prescribing the duties of the assessor in the publication of the delinquent tax list, and the method for the payment of the same, are entirely different from the statutes governing in this case. The provisions of the statute as quoted in that opinion show that it was not the intention of the Legislature to make the assessor liable for such publication, nor to authorize him to present a bill to the county therefor. In *Neville v. Solano County* the Supreme Court of California, in 1863, held that, under the provisions of an act of the Legislature of 1851 prescribing the duties of sheriffs, the sheriff could not maintain his action against the county for the expense of a temporary guard employed by him for the protection of the county jail, unless the claim had been duly assigned to him; and the court there decided that the sheriff was the mere agent of the county, and that the county was directly liable to the guard for his pay. An examination of the statutes under which that case was decided will reveal the fact that they are not at all similar to the statutes of this state, and that they did not provide for the collection of such expense by the sheriff, or the allowance of a claim to the sheriff for

such an expense. So far as we are able to find, that case has never been cited or referred to in California since it was announced by the court, and we conclude that it rests solely upon the peculiar statute existing in that state at the time the case arose.

In this state we find the following statutes bearing upon the duties and liability of the sheriff as to the receiving, taking care of, and providing for prisoners, and collecting pay therefor: section 8539, Rev. St. 1887, is as follows: "The sheriff must receive all persons committed to jail by competent authority, and provide them with necessary food, clothing and bedding, for which he shall be allowed a reasonable compensation to be determined by the board of commissioners, and except as provided in the next section, to be paid out of the county treasury." Section 2 of the act of February 9, 1899, concerning fees and compensation of county officers, provides, *inter alia*, that "the sheriff is allowed and may demand and receive the fees hereinafter specified: \* \* \* Twentieth. The sum of not more than one (1) dollar per day for each prisoner confined in the county jail, as remuneration in full for the board, clothing and lights of such prisoner." *Sess. Laws 1899*, pp. 117, 118. In section 3 of an act approved March 7, 1899, it is provided that "the sheriff shall receive a salary of not less than eight hundred dollars (\$800) per annum, and not to exceed two thousand dollars (\$2,000) per annum; he shall be allowed in addition to such salary as fixed by said board, the actual and necessary expenses for care of each prisoner confined in the county jail." And section 1 of the same act is as follows: "The salaries of county officers as full compensation for their services must be paid quarterly from the county treasury, upon the warrants of the county auditor, and before being paid to such officers, must be allowed and audited by the board of commissioners as other claims against the county, and no officer or deputy must retain out of any money in his hands belonging to the county, any salary, but all actual and necessary expenses incurred by any county officer or deputy in the performance of his official duty shall be a legal charge against the county, and may be retained by him out of any fees which may come into his hands. All fees which may come into his hands from whatever source, over and above his actual and necessary expenses, shall be turned into the county treasury at the end of each quarter. He shall at the end of each quarter file with the clerk of the board of county commissioners, a sworn statement, accompanied by proper vouchers, showing all expenses incurred and all fees received, which must be audited by the board as other accounts." *Sess. Laws 1899*, pp. 405, 406. The duty to provide prisoners with board devolves upon the sheriff, and that duty is an official duty, for which he is allowed compensation over and above his fixed salary.

He may furnish board himself, or he may procure it from others. In either event it seems clear to us that it was the purpose of the Legislature to make such claims and expenses payable by the county to the sheriff, and to him alone. As provided by the above statutes, "the sheriff is allowed and may demand and receive the actual and necessary expense" for the board, clothing, and lights for prisoners. The law has made this expense payable to a certain person, namely, the sheriff of the county. It has imposed upon him the duty of taking charge of the prisoners. It requires him to board such prisoners, and commands the board of commissioners to pay to him (the sheriff) the actual and necessary expense incurred "as remuneration in full for the board, clothing and lights of such prisoners," provided, however, that such expense shall not exceed \$1 per day for each prisoner. It seems to us that the purpose of the statutes is to impose these duties and liabilities upon the sheriff, and thereby relieve the county of the responsibility of dealing with any and every individual from whom the sheriff might be under the necessity of procuring board or other supplies for prisoners. The sheriff must secure these necessities, and it is to be presumed that he will do it to the very best possible advantage to the county, and he has the positive assurance of law that he will be repaid whatever sum is reasonable and necessary in the discharge of such duty. The county has no way of knowing what has been furnished, or of the contract price therefor, except through the officer whose duty it is to secure the same. It will be seen from section 1 of the act of March 7, 1899, *supra*, that all fees collected by the officer during the quarter are available at once for the payment by him of "all actual and necessary expenses incurred" by him in the performance of his official duty. At the end of the quarter he is required to "file with the clerk of the board of county commissioners a sworn statement, accompanied by proper vouchers, showing all expenses incurred," and such report must be audited by the county commissioners.

Respondent argues that, under the foregoing provisions, a voucher is "a written acquittance or receipt showing the payment of a debt," and, in the course of his argument, says: "Our conclusion is that the sheriff should never present a claim against the county for the board of prisoners, or any other legitimate expense that could be legally allowed, unless he presents to the board of commissioners his 'sworn statement, accompanied by proper vouchers,' showing that he had paid such expense. We therefore respectfully contend that the phrase 'actual expense for the care of each prisoner confined in the county jail' means the actual outlay or payment of money for benefits furnished such prisoners." This view of the statute, and interpretation of the language used, seem to us correct. We do not under-

stand how a board of commissioners could allow a sheriff for any such expenditure in the face of this statute until he has paid the same. But this argument leads us to the conclusion that the county is not liable to any one but the sheriff, rather than that it is liable to the individual with whom the sheriff may contract. The supplies are furnished, not upon the faith of the county's credit, but rather upon the credit of the sheriff, and the facts in this case are a practical illustration of the practice. The respondent had been furnishing the sheriff with board for prisoners for some years prior to the presentation of his claim in this case. He had never before presented his claim to the board of commissioners, but had always collected his pay from the sheriff. In this case the sheriff became a defaulter to the extent of nearly \$3,000, and, in the general misfortune which befell the county, the respondent seems to have suffered the loss of his claim, also. In other words, the claimant never saw fit to make a demand against the county for any of his bills until the time arrived when the county at large, as well as the respondent individually, became the victim of a misplaced confidence. In January, 1903, the sheriff presented his bill to the county for board furnished prisoners, but did not itemize the same, or accompany it with proper vouchers. The board seems to have rejected the entire claim, under the provisions of section 1771, Rev. St. 1887, which forbids the allowance of any account or the payment of any claim where an officer is in default, or neglects or refuses to pay over funds in his hands belonging to the county. There seems to be some dispute or controversy going on between the board of commissioners and the sheriff's bondsmen as to the proper action to be taken with reference to the settlement of the sheriff's claims against the county, but with that we have nothing to do in this case. It seems to us, however, only the part of common justice to suggest that, in their settlement with the board of commissioners, the bondsmen, as the representatives of the sheriff, would be entitled to the allowance of respondent's claim as an offset if they present the necessary voucher therefor, required by law to be presented by the sheriff. Respondent appears to have a valid claim against the defaulting sheriff, and the bondsmen can protect him by settling with him, and presenting the claim as an offset against the county.

As before indicated, we conclude that the county is not liable to the respondent for meals furnished the prisoners under contract with the sheriff. These views are sustained by the Supreme Court of Kansas, under statutes apparently less specific than ours, in *Hendricks v. County of Chautauqua*, 11 Pac. 450, where the court says: "The facts stated in the petition fail to show a liability of the county of Chautauqua in favor of the plaintiff. The statute provides that jails shall be

established and kept in every county, at the expense of the county, for the safe-keeping of the prisoners lawfully committed. The sheriff of the county is required to keep the jail, and is responsible for the manner in which it is kept, and is required to supply the prisoners with proper food and drink at the expense of the county. Sections 1, 3, 10, c. 53, Comp. Laws 1879. In another chapter the liability of the county for the boarding and lodging of prisoners is fixed and limited. The sheriff is allowed 40 cents per day, exclusive of fuel, lights, furniture, and bedding, where a jail is provided, and 60 cents per day where no jail is provided. Sess. Laws 1881, c. 107, § 1. The county commissioners are not compelled to allow or pay more than the fees above named for anything included within the terms 'boarding and lodging,' nor is the county liable to any other officer or person for the same than the sheriff. The duty and responsibility of keeping the jail, and supplying and caring for the prisoners, is devolved by law upon the sheriff. The care and safe-keeping of the prisoners is committed to him, and, in regard to their board and lodging, the board of county commissioners deals only with him. The only statute authorizing the payment of compensation by the county board provides that it shall be paid to the sheriff, and to him alone is the county liable for supplying board and lodging for the prisoners." See, also, *Atchinson County Com'rs v. Tomlinson*, 9 Kan. 167.

Judgment reversed, and cause dismissed. Costs awarded to appellant.

SULLIVAN, C. J., concurs.

STOCKSLAGER, J. I cannot concur with my associates in the conclusion reached in this case. It is conceded by all parties that respondent furnished the meals for which he files his bill; that the parties to whom they were furnished were county charges at the time so furnished; that the county is liable therefor. It is also conceded that the sheriff who made the contract with respondent for the meals so furnished was legally authorized to make the contract. It is also conceded that, under the statute, he could collect from the county only the actual and necessary expense of the care of the prisoners in his custody as sheriff—in other words, that the sheriff could not speculate off of this class of business. I fully agree that, under the provisions of our law cited in the opinion in this case, the sheriff is the proper party to make these contracts. The Legislature evidently had in mind the fact that the county commissioners only met in regular session four times annually for the purpose of transacting business of this character, and hence made the sheriff the agent of the county to look after such matters. It is immaterial to the county whether it pays the sheriff, or the party who actually furnishes the meals. It must recognize the fact that it is the pay-

master, and whether it pays the sheriff for the party, or the party directly, is of no importance to the county. The law requires the sheriff to file his voucher showing payment before it will settle with him, and such statements and vouchers must be filed each quarter for the quarter preceding. If the sheriff fails or refuses to file such statement and voucher, then the county can pay the party furnishing the items with safety; and, if it settles with the party who has to furnish the itemized bill either to the sheriff or the county, it has his bill on file, and, when it issues and delivers its warrants, it is an end of any question of payment to the sheriff, if the time for filing vouchers by the sheriff has elapsed. For instance, if the county had paid this bill to respondent, and thereafter the defaulting sheriff or his bondsmen should file a bill against the county covering the same items, is it possible that the county could not plead the payment in bar of a recovery by either? I think it could, and that it would be a good defense to the action. If this is true, then the sheriff is merely the agent of the county, as well as the party with whom he contracts. This seems to me to be the reasonable and fair construction of the statute. This court has repeatedly held that the sheriff was only entitled to his salary and reasonable expenses in the performance of his duties; that the salary fixed by law was all he could receive. If this is true, he had no interest in the bill of respondent, excepting to see it paid. If he failed to file the proper voucher within the prescribed time, and his bondsmen cannot do it only as they may get it from respondent, must he lose his claim against the county, or await the pleasure of the bondsmen of the defaulting sheriff to collect his money for him? They have no interest in it whatsoever. The county is certainly in a very comfortable and safe position so long as it refuses to pay respondent for the reason that the sheriff has not filed the proper voucher, has never paid the bill, and is beyond their reach. It may be that respondent could maintain an action against the sheriff or his bondsmen. I express no opinion as to this. But the county is primarily liable to respondent, and should be required to pay him. The case of *People ex rel. Caldwell v. Board of Supervisors Saratoga County* (Sup.) 60 N. Y. Supp. 1122, is very interesting on some of the questions here involved. At page 1126 it is said: "The contention of the relator is that there was no contract between himself and the board of supervisors by which he was to be paid at the rate of \$3.01 per week for each prisoner confined in jail, and he bases that contention upon the fact that, years ago, during the incumbency of another person in the office of sheriff, a resolution was passed fixing the price to be paid for the board of prisoners at \$3.01 per week, and such resolution had never been repealed, and that such

action of the board of supervisors constituted a contract between the county and the sheriff to pay him that amount. I do not think that contention can prevail. Boards of supervisors possess only limited powers. They only have such powers as are expressly conferred upon them by statute, and such implied powers as are necessary to carry into effect those powers expressly granted, or such as are necessary to enable them to discharge the duties and liabilities imposed upon them. \* \* \* The county is chargeable with, and it is the duty of the board of supervisors to audit and allow, the expenses necessarily incurred in the support of persons charged with or convicted of crime, and committed to the jail of the county. This means money actually paid out. 'Expenses' means that which is spent." It is there held that "the board of supervisors had the power to make a contract with the sheriff for the board of prisoners at a fixed sum, regardless of the expense. It is the duty of the board of county commissioners of this state to audit all bills coming before them for allowance, and, when the bill of respondent was presented, it was their duty to determine whether the items charged for had been furnished, and whether they were reasonable and necessary. No one could furnish them this information more readily or correctly than respondent, and when this fact was ascertained it was their duty to allow the bill, or reject it for some statutory reason other than that the county was indebted to the defaulting sheriff, rather than the man who had actually furnished the meals."

For the foregoing reasons, I cannot concur in the majority opinion in the entire conclusion reached.

(9 Idaho, 458)

#### COATS v. HARRIS.

(Supreme Court of Idaho. Jan. 16, 1904.)

#### RIGHT OF HEIR—DECREE OF DISTRIBUTION— DISPOSAL OF PROPERTY IN EXPECTANCY —WITNESS—QUALIFICATION OF.

1. A will giving to the wife a life estate, and the son all property after her death, empowers the son to transfer by written instrument to his mother, and her heirs and assigns, forever, property to become his after the death of the mother.

2. A decree of distribution by the probate court will not defeat an action of one who was not an heir, and was not a party to any of the proceedings in that court when it was settling the estate of a deceased person. He, not being a party to the proceedings, could not appeal from the order of that court.

3. Section 5957 of the Revised Statutes of Idaho of 1887 precludes evidence of conversations with the deceased relating to the disposition of her property.

(Syllabus by the Court.)

Appeal from District Court, Owyhee County; George H. Stewart, Judge.

Action by John C. Coats against Alvin M. Harris. Judgment for plaintiff. Defendant appeals. Affirmed.

E. & J. F. Nugent, for appellant. E. M. Wolfe and R. Cunningham, for respondent.

STOCKSLAGER, J. On or about the 2d day of April, 1895, Levi Harris died in Owyhee county, Idaho, and at the time of his death was a resident of said county. On the 24th day of June, 1895, his will was admitted to probate. After providing for the payment of the expenses of his last sickness and funeral expenses, the will follows:

"Thirdly: I give and devise all of my real estate of every name and nature whatever, together with the tenements, hereditaments and appurtenances and all of my personal estate, goods, chattels and credits and all other property of whatever name and nature owned by me at the time of my death, also including one hundred and forty head of cattle to be delivered to me by my son, Alvin Milton Harris in September, 1895, unto my wife, Nancy Harris, to have and to hold the said premises and property so long as she shall live.

"Fourthly: I devise the remainder of my property after the death of my said wife, Nancy Harris, to my said son, Alvin Milton Harris, and to his heirs and assigns forever; provided that my said son shall leave my said wife in quiet and peaceable possession of said property during her lifetime, undisturbed. But should my said son give my said wife any trouble in her possession of said property, or cause her any litigation in relation thereto, then and in that event the whole of said property to go to my said wife, Nancy Harris, and to her heirs and assigns forever.

"Fifthly: I having given unto my son, Alvin Milton Harris, in my lifetime property to the value of about six thousand dollars, it is my desire that he receive no part of or interest in my estate, except the part and in the manner and under the conditions herein above described.

"Lastly: I hereby nominate and appoint my said wife, Nancy Harris, and her daughter, Mrs. Mary Loveridge, both of Bruneau Valley, County of Owyhee, State of Idaho, the executrices of my last will and testament, without bonds."

After the will was probated, and during the administration of the estate, the mother and son, within six months after the death of the husband and father, entered into contracts by which each was to share in the estate left by Levi Harris. These contracts were executed on the 24th day of October, 1895. The first one, for a consideration of \$1, granted, bargained, sold, conveyed, remised, released, and forever quitclaimed all the right, title, and interest, estate, claim, and demand, both at law and in equity, and as well in possession as in expectancy, of Nancy Harris, to Alvin Milton Harris, to the following described land: "The N. ½ of the N. W. ¼ and N. E. ¼, section 8, and the

S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , and the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ , and the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 5, in township 7 south, of range 6 east, comprising four hundred and forty acres." The other contract, for a consideration of \$1, granted, bargained, sold, assigned, and delivered to Alvin Milton Harris, his heirs and assigns, forever, all the right, title, interest, claim, and demand, both at law and in equity, as well in possession as in expectancy, and all right, title, interest, estate, claim, and demand which she may hereafter obtain or come into the possession of, or right to the possession by inheritance from the estate of Levi Harris, by succession, will, or otherwise, of the said Nancy Harris in and to the following described property: "All the personal property belonging to the estate of Levi Harris, deceased, of every name, kind or nature, excepting and reserving unto the said Nancy Harris all monies, notes, credit and accounts of every name, kind and nature belonging to or owing to said estate, and excepting also to said Nancy Harris the one hundred and forty head of cattle which were to be delivered by Alvin M. Harris to deceased, and their proceeds, reserving also all the proceeds of the crops raised upon the real estate of said estate during the year 1895; also two certain horses, to have and to hold unto the said party of the second part, and unto his assigns forever." The conveyance from Alvin M. Harris to Nancy Harris, for a consideration of \$1 and other valuable consideration to him in hand paid, granted, bargained, sold, assigned, and delivered unto Nancy Harris, and to her heirs and assigns, forever, all the right, title, interest, claim, and demand, both in law and in equity, as well in possession as in expectancy, and all right, title, interest, estate, claim, and demand which he may hereafter obtain or come into possession of, or right to the possession of, by inheritance from the estate of Levi Harris, by succession, will, or otherwise, and all rights to remainder or reversion under the will of the said Levi Harris, of the party of the first part, in and to the following personal property, to wit: All moneys, notes, credits, and accounts, of every name, kind, and nature, belonging to or owing to the estate of Levi Harris, deceased; also the 140 head of cattle which were to be delivered by said party of the first part to said deceased; also all the proceeds of the crops raised upon the real estate of said estate during the year 1895; also two horses. These three instruments were acknowledged before W. C. Howie, a notary public residing at Mountain-home, in Elmore county. Immediately thereafter the parties took possession of the property of the estate of Levi Harris, as shown by the contracts, and remained in such possession until the demise of Nancy Harris. There can be no question of the interest of the parties to these contracts, and during the life of Nancy Harris the mother and son

lived in peace and harmony, each enjoying the proceeds of the estate of Levi Harris, not as he declared in his will, but as they mutually agreed in their contracts. It is shown by the record that Alvin M. Harris believed that the contracts he had with his mother were binding upon him after her death, which occurred on or about the 19th day of August, 1897. On the 11th day of December, 1897, he petitioned for letters of administration, and in his petition named, as the heirs of Nancy Harris, J. C. Coats, Jane Coats, David Coats, who has since died, and himself, all residents of Bruneau Valley, Owyhee county. Upon the hearing of this case in the district court the learned judge found that petitioner, John C. Coats, is a son of Nancy Harris, deceased; that Alvin M. Harris is a son of Nancy Harris, and Mary Loveridge is a daughter of said deceased, and the above-named parties are the only heirs of said Nancy Harris; that the said John C. Coats, Alvin M. Harris, and Mary Loveridge are each entitled to a one-third of the estate of Nancy Harris, deceased; that Alvin M. Harris is the duly appointed, qualified, and acting administrator of said estate; that there are no debts against said estate; that the assets of said estate in the hands of the said administrator is the sum of \$10,918.99, exclusive of real estate; that said administrator shall pay and account for interest on said sum from the 27th day of November, 1899, at the rate of 7 per cent. per annum until said estate is finally distributed; that said interest amounts to the sum of \$2,328.21, making a total of \$13,247.20 to be accounted for by said administrator, exclusive of real estate. A decree was entered in conformity with said findings.

Counsel for appellant insist that the evidence was insufficient to justify the findings and decision, and that the said findings and decision are against law; that all the said evidence proved that said petitioner, as one of the alleged heirs at law of the said Nancy Harris, deceased, or in any capacity, or for any reason or cause, was not entitled to any part or portion of said estate. This contention is ably and earnestly supported by the brief of counsel for appellant.

As we view the record before us for consideration, the important question for our determination is, could the appellant, as the sole heir of Levi Harris after the death of Nancy Harris (on certain condition named in the will of Levi Harris), in any manner transfer, incumber, or convey the property which was to become his after his mother's death? It is urged that appellant was "inhibited by the will and the law from entering into the agreement, and that it was simply an exchange made without right, and for which no money or valuable consideration ever passed." It would seem from the record that the transfers were made in good faith

and for a valuable consideration, as it is shown that the appellant immediately entered into the possession of the real estate, and continued in such possession, enjoying the benefit and proceeds thereof, until the time of the demise of his mother; and after her death, when he was appointed administrator of her estate, he named as her heirs himself and the Coats children, thereby showing his good faith in the entire transaction. In *John Smith v. Robert Bell*, 6 Pet. 68, 8 L. Ed. 322—an exhaustive and instructive opinion by Chief Justice Marshall—it is held that under bequests to the testator's wife of all his personal estate, to and for her own use, benefit, and disposal absolutely, the remainder of the said estate after her decease to be for the use of the said Jesse Goodwin, the son of the testator, the bequest to the son cut down the interest of the wife to a life estate, and the son took a vested remainder. No one will question the conclusion of this eminent jurist, in the absence of some statutory provision or some change in the law since the opinion was written. All we find in this opinion is that the will must be construed according to its solemn provisions, and this we conceive to be the law in all cases. Schouler on Wills, in sections 467, 468, 469, on the subject of construction of wills, says: "The struggle in all such cases is to accomplish the real objects of the testator so far as they may be accomplished consistently with the principles of law, but in no case to exceed his intention fairly deducible from the very words of the will." This language is an expression of Judge Story. Our attention is also called to Page on Wills, § 461, and cases cited. It is not difficult to interpret the will of Levi Harris. It is plain and unambiguous, the language is susceptible of but one construction, and that is that he intended that his wife should control the property of his estate during her life, and thereafter it was to descend to his son, the appellant, on condition that he would not contest the will, or make his mother trouble in her possession of the property. Soon after the death of Levi Harris we find the son in possession of all the real estate, with a deed from his mother, and she with a bill of sale from the son by which he sells to her all his interest, forever, and to her heirs all the moneys, notes, etc., due or owing the estate. In other words, they attempt to divide the property in such a way that each may have the benefit during the life of the mother. The son may have anticipated that his mother would live a number of years, and this may have prompted him to relinquish all his interest in the personal property enumerated in the bill of sale, in order to obtain immediate possession of the real estate. Be this as it may, the exchange was consummated, and so remained until the death of the mother. Section 2830 of our Statutes provides that "a future interest is vested when there is a person in being who

would have a right defeasible or indefeasible to the immediate possession of the property upon the ceasing of the immediate or precedent interest." Can there be any question but that the property of Levi Harris, under the terms of the will, would and did pass to appellant upon the death of his mother? We think not. Counsel for respondent very aptly says: "The title to property is always in some one, and in this case upon the death of Levi Harris it immediately vested in Alvin M. Harris, and if he had died without the transfer to his mother, his children would have inherited it. *State v. Stevenson et al.* (Idaho) 55 Pac. 886; Page on Wills, §§ 657, 658, 659, 695."

It is next urged by counsel for appellant that "on the 27th day of October, 1896, the executrices of the estate of said Levi Harris made their final account of the affairs of said estate, and prayed for a distribution of said estate in accordance with the terms of the will of said Levi Harris. In due course said petition was heard by the probate court, which duly rendered a decree as prayed for. That decree has never been appealed from or in any manner legally drawn in question until this proceeding, and then only indirectly. Upon this state of facts, we contend that the rights herein sought to be litigated were fully, fairly, and finally litigated at the time when said decree was rendered, and is no longer subject to litigation." In support of this contention they cite *In re Trescony's Estate* (Cal.) 51 Pac. 951; *Jewell v. Pierce* (Cal.) 52 Pac. 132; *Crew v. Pratt* (Cal.) 51 Pac. 41, 43; *Goldtree v. Allison* (Cal.) 51 Pac. 561; *Hill v. Lawler* (Cal.) 48 Pac. 323; *Daly v. Pennie* (Cal.) 25 Pac. 67, 21 Am. St. Rep. 61; *In re Garraud*, 36 Cal. 277; *In re Burton's Estate* (Cal.) 29 Pac. 36. A careful consideration of the above cases discloses that they deal with the question of the effect of the decree of the probate court on the final distribution of the estate of a deceased person. If respondent was claiming under the will of Levi Harris, or was attempting to set up a claim as an heir of his estate, then the law announced in the above authorities would control. The California court, in *Chever v. Ching Hong Poy*, 22 Pac. 1081, distinguishes the cases there referred to from the one at bar. The facts in this case seem to be directly in line with the contention of respondent. Mr. Justice McFarland, speaking for the court, says: "The probate court has jurisdiction to determine who are the legal heirs of a deceased person who died intestate, and who are the devisees or legatees of one who died intestate, but its determination of such matters does not create any new title. It merely declares the title which accrued under the law of descents or under the provisions of the will. The decree of distribution has nothing to do with the contracts or conveyances which may have been made by heirs, devisees, or legatees of or about their shares of the estate, either among themselves

or others. Such matters are not before the probate court, and over them it has no jurisdiction. An heir may contract about or convey the title which the law had passed upon him on the death of his ancestor, and the validity or force of such contract is not affected by the fact that a probate court afterward, by its decree of distribution, declares his asserted heirship and title to be valid." It is then held that section 1678 of the Civil Code of California does not control the case under consideration, and this is the section controlling the cases cited by appellant. In *re Burton's Estate*, 29 Pac. 36 (a California case cited by appellant), the court, referring to *Chever v. Ching Hong Poy*, say: "But that case was not a proceeding under section 1664 of the Code of Civil Procedure, nor did it involve any question as to the Constitution, or constitutionality of that section, nor is there any allusion to that section in the opinion." In *re Burdick's Estate* (Cal.) 44 Pac. 734, the same doctrine is upheld. The syllabus says: "(3) Trustees claiming part of an estate as a trust fund, but who are not named in the will, and claim no rights under it, and have presented no claim against the estate, cannot appeal from a decree of the probate court settling the final accounts of the executor and ordering distribution." In *Martinovich v. Marsicano*, 70 Pac. 459—a very recent case from California—the court reaffirms the last cases cited from that court. To the same effect, see *Dobberstein v. Murphy* (Minn.) 47 N. W. 171; *Hall v. Pierson* (Conn.) 28 Atl. 544.

It is urged by counsel for appellant that the court erred in not permitting the appellant to testify to the trust agreement between himself and his mother, by which she engaged herself to hold the property he conveyed to her, and to see that it was distributed to him in accordance with the terms of his father's will. Subdivision 3 of section 5957 of our Statutes says, in defining who shall not be witnesses, parties or assignors of parties to any action or proceeding prosecuted against an executor or an administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person. We think this provision of the statute controls, and that there was no error in the ruling of the court. *Rice et al. v. Rigley et al.* (Idaho) 61 Pac. 290.

We conclude that the transfer by appellant of the property described in the bill of sale to his mother was for a valuable consideration, made in good faith, and was binding upon appellant; that he had such interest in the property, by the terms of his father's will, as would permit him to convey as shown by the bill of sale to his mother.

The judgment of the lower court is affirmed, with costs to respondent.

SULLIVAN, C. J., and AILSHIE, J., concur.

(9 Idaho, 470)

## COATS v. HARRIS.

(Supreme Court of Idaho. Jan. 16, 1904.)

### APPEAL FROM JUDGMENT—DISMISSAL.

1. When it is shown that all the questions involved in the appeal from the judgment have been decided on an appeal from an order overruling a motion for a new trial, such appeal will be dismissed.

(Syllabus by the Court.)

Appeal from District Court, Owyhee County; George H. Stewart, Judge.

Action by John C. Coats against Alvin M. Harris. Judgment for plaintiff, and defendant appeals. Dismissed.

E. & J. F. Nugent, for appellant. E. M. Wolfe and R. Cunningham, for respondent.

STOCKSLAGER, J. This court having at present term decided a case here on appeal from an order of the district court of Owyhee county from an order overruling a motion for a new trial (75 Pac. 243), and all the questions involved in this appeal having been disposed of by the judgment in that case, the appeal herein is dismissed, with costs to respondent.

(9 Idaho, 426)

## STEIN v. MORRISON, Governor, et al.

(Supreme Court of Idaho. Jan. 13, 1904.)

CURRENT EXPENSE OF STATE—LEGISLATIVE APPROPRIATIONS—TAX LEVY—MEANS OF RAISING REVENUE—DEBT LIMITATION—CONSTITUTIONAL PROVISIONS—WRIT OF PROHIBITION—WHEN WILL ISSUE—EXECUTIVE ACTS—MINISTERIAL ACTS—TECHNICAL QUESTIONS—INTERPRETATION OF CONSTITUTIONAL AND STATUTORY PROVISIONS—JURISDICTION—JUDICIAL AND QUASI JUDICIAL ACTS.

1. Section 2 of article 7 of the Constitution recognizes other methods of raising revenue than that by a tax levy on real and personal property.

2. It must be assumed by the courts, until the contrary appears, that the Legislature, in making their biennial appropriations and tax levy to meet the same, estimated the amount of revenue the state would derive from all other sources than that of a tax levy, and that sufficient levy was made to cover the difference between the total appropriation and the amount to be received from other sources than that of a tax levy.

3. The court must take judicial notice of the constitutional and statutory methods provided for raising revenues and augmenting the public funds, but cannot take notice of the amount so raised and received; and until it is shown that the total income for the two years for which legislative appropriations are made is not sufficient to meet such appropriations the courts will assume that the Legislature has kept within the constitutional limitations.

4. Article 7 of the Constitution contemplates a complete scheme for the collection of taxes and revenue and the payment of the current expenses of the state, looking to the general purpose of ending the two years for which appropriations are made with the expenses of maintaining the state government for that period fully paid.

5. The public revenues may be appropriated by the Legislature in anticipation of their receipt, as was done by the general appropriation act of March 16, 1903 (Sess. Laws 1903, p. 308); and it is not necessary to the validity of such an



appropriation that funds should be in the treasury at the time to meet the same.

6. Such appropriations do not constitute a debt or liability against the state within the provisions of section 1, art. 8, of the Constitution, but rather operate upon the incoming revenues for the same period of time in the nature of a cash transaction, as contemplated by article 7.

7. So long as the financial system is carried out in accordance with the requirements of article 7, the current expenses of the state government cannot accumulate or ripen into a debt.

8. Petition examined, and held that it does not state facts sufficient to entitle plaintiff to the relief demanded.

9. The courts cannot disregard the provisions of the Constitution and laws, notwithstanding the fact that defenses interposed thereunder may be designated "technical."

10. Under our Constitution (article 2, § 1) and form of government, which recognizes the independence of the "three distinct departments of government," the judicial department cannot prohibit the executive department from acting within the recognized scope of that branch of the government.

11. The writ of prohibition as authorized by section 9 of article 5 of the Constitution is the writ of prohibition as known and recognized at common law.

12. Such writ does not lie to prohibit or restrain purely ministerial acts, but runs to restrain encroachment of jurisdiction assumed to be exercised of a judicial or quasi judicial function.

13. *Williams v. Lewis*, 54 Pac. 619, 6 Idaho, 184, distinguished, and expressly overruled in so far as it holds that the writ of prohibition will lie to restrain a purely ministerial act.

14. The word "jurisdiction," as used in section 4904, Rev. St. 1887, means the right to hear and determine a matter, and carries with it the idea of exercising judicial or quasi judicial functions.

15. When a statutory or constitutional provision is adopted from another state, where the courts of that state have placed a construction upon the language of such statute or Constitution, it is to be presumed that it was taken in view of such judicial interpretation, and with the purpose of adopting the language as the same had been interpreted and construed by the courts of the state from which it was taken.

(Syllabus by the Court.)

Application by Edward Stein for writ of prohibition against John T. Morrison, governor, and others. Writ denied.

The plaintiff filed his petition herein for a writ of prohibition against the Governor, Secretary of State, Attorney General, State Treasurer, and State Auditor, praying the issuance of a writ from this court prohibiting the defendants issuing and selling the bonds of the state, as authorized by certain acts of the Seventh Legislative Session of the State Legislature. The first cause of action is set out in the petition as follows:

"The petitioner and affiant, Edward Stein, being first duly sworn, on his oath deposes and says: That he is a citizen of the United States and of the state of Idaho, and that he is a taxpayer and resident of and in the state of Idaho, and beneficially interested in the above-entitled action, in the subject-matter thereof, and in the result of the same. That the defendant John T. Morrison is the duly elected, qualified, and acting Governor of the state of Idaho. That the defendant H. N. Coffin is the duly elected, qualified, and acting State Treasurer of the state of Idaho.

That defendant Will H. Gibson is the duly elected, qualified, and acting Secretary of State of the state of Idaho. That the said defendants, respectively, acting in their respective official capacities, have wrongfully, unlawfully, and without authority of law, as affiant is informed, advised, and verily believes, issued the bonds of this state, registered and caused the same to be registered in the State Auditor's office, and sold and invested the same in the public school funds held in trust by the state for school purposes, under that certain act passed or attempted to be passed by the Seventh Session of the Idaho Legislature entitled 'An act providing money to pay certain appropriations made by the Legislature, and to pay certain deficiency claims against the state of Idaho by providing for the issuance of bonds and making provision for the payment of interest thereon and creating a sinking fund,' approved March 16, 1903 [Sess. Laws 1903, p. 308], to the extent of ninety-three thousand dollars. That the said defendants, acting in their respective official capacities, will, as this affiant is informed and verily believes, wrongfully, unlawfully, and without authority of law, and contrary to the Constitution of Idaho, issue, register, and cause to be registered in the State Auditor's office of Idaho, and sell and invest in the public school funds now held in trust for school purposes by the state, the further bonds of the state, under the provisions of said entitled act, unless prohibited and restrained from so doing by the orders and process of this honorable court. The affiant is advised, informed, and verily believes that the said act of the Legislature approved March 16, 1903, known as the 'Deficiency Bond Act,' and entitled as above set forth, does not vest authority in the said defendants in their said respective official capacities or otherwise to issue or cause to be issued or registered in the said State Auditor's office, or to sell or invest in the public school fund held in trust by the state, the bonds of the state to any amount or sum whatever, and that the said act is void, and contravenes the provisions of the Constitution of Idaho in the following particulars, to wit: (1) Said act attempts to increase the expenditures and appropriations which said session of the Legislature authorized for the years of 1903 and 1904, and each of said years, in and to sums exceeding the tax levy provided for the said years and each of them; contrary to the provisions of section 11, art. 7, of the said Constitution. (2) Said act attempts to authorize expenditures and to create debts and liabilities of the state, which, added to the prior and then existing liabilities and debts of the state, exceed one and one-half per cent. of the assessed valuation of property in the state; contrary to the provisions of section 1, art. 8, of said Constitution. (3) It provides or attempts to provide by taxation money for private purposes; money to be paid out of the state treasury in bounties to the pro-

ducers of sugar in Idaho from beets grown in Idaho, to subsidize and assist the private enterprise of manufacturing sugar in the state of Idaho; contrary to the express provisions of section 2, art. 8, of the said Constitution. (4) It provides or attempts to provide money raised by general taxation for the construction of a local bridge and local road, both of which were attempted to be authorized by those certain special and local acts passed by the Seventh Session, to wit, that certain act entitled 'An act to appropriate fifteen thousand dollars as a portion of the expense of erecting a steel bridge across Snake river at a point near Weiser in the county of Washington,' approved February 27, 1903 [Sess. Laws 1903, p. 331]; and that certain other act entitled 'An act to provide for the construction of a wagon road in the counties of Boise and Idaho and creating a fund for the completion of the same and providing therefor, the sum of twenty thousand dollars and requiring a donation from citizens in order to insure the completion of the construction of said road,' approved March 11, 1903 [Sess. Laws 1903, p. 83], contrary to the provisions of section 19, art. 3, of said Constitution.

"Affiant, the plaintiff and petitioner, says: That he is informed from the records in the said State Auditor's office, and verily believes, and therefore states the fact to be, that the total assessed valuation of property in the state of Idaho, after the same had been equalized by the state board of equalization, was, at the time of the passage and approval of said acts and each of them, the sum of \$61,290,875.36, and no greater sum or valuation. That the subsequent assessment made for the year of 1903, after the same had been equalized by the state board of equalization, amounts to the sum of \$65,961,583.09, and no greater sum or valuation. That the indebtedness of the state, including outstanding warrants and bonds purchased and held with the public school and other special funds held in trust for different purposes by the state, amounted at the time of the convening of the said Seventh Session of the Legislature to the sum of \$752,619.54. That the following specific appropriations and expenditures were authorized, or attempted to be authorized, by the said session of the Legislature, to wit: For legislative expenses (Acts 1903, p. 3), \$50,000; for Academy of Idaho, deficiency (Id. p. 8), \$6,554.56; for bridge at American Falls (Id. p. 55), \$10,000; for Pure Food Commission (Id. p. 98), \$4,900; for Salmon River Bridge (Id. p. 146), \$3,000; for game and fish warden (Id. p. 20), \$2,000; general appropriation bill (Id. pp. 304 to 308), \$598,375—making the total specific appropriations in the sum of \$674,375.56, for which no bond issues were authorized, but to meet which a tax levy of \$275,000 for each of the years of 1903 and 1904, or \$550,000 for the two years, was provided. That, in addition to said specific appropriations for amounts certain, the said

Seventh Session of the Legislature assumed the authority—but without right so to do, as plaintiff is advised, informed, and verily believes—to pledge the faith and credit of the state for the payment of bounties upon sugar produced within the state during the years of 1903 and 1904 from beets grown in the state in some uncertain and unascertained amount by attempting to authorize the payment of bounty upon sugar produced as aforesaid, out of the public treasury, moneys raised and to be raised by taxation of the property of the citizens of the state, by passing that certain act entitled 'An act to provide for the encouragement of the manufacture of beet sugar within the state of Idaho and to provide a bounty for the manufacture of the same, and prescribing the manner of payment of said bounty, and providing appropriation, to carry out the provisions of this act,' approved March 11, 1903 [Sess. Laws 1903, p. 186]. Affiant says: That he is informed and verily believes that the bounty on sugar that has already been produced in the state of Idaho, and which will be produced during the years of 1903 and 1904, from beets grown within the state of Idaho, will amount to a sum of not less than \$100,000, and will probably reach the sum of \$200,000. That the Idaho Sugar Company, a corporation organized under the laws of Utah, but doing business in Idaho, has erected a large sugar manufactory near Idaho Falls, in the state of Idaho, and is now manufacturing sugar at the rate of more than 100,000 pounds daily, and have on hand large quantities of beets grown in Idaho, and have prepared to raise large quantities of beets in Idaho during the year of 1904, and have contracted with divers persons to raise other large quantities of beets in Idaho during the year of 1904. That another large sugar factory is now in process of construction in Fremont county, in this state, and others are projected, one of them to be erected at or near the town of Caldwell, in this state, by a corporation already organized, of which Frank Stunenberg is president; and that the general appropriation of one cent per pound for bounty on sugar produced in the state during the year of 1903 and one-half of one cent per pound on sugar produced in the state during the year of 1904, as promised by said Act March 11, 1903, will, if said act be held valid, result in raids upon the treasury of the state of Idaho, as affiant is informed and verily believes, in sums exceeding \$200,000. That the appropriations and expenditures made and authorized, or attempted to be made and authorized, by said Seventh Session of the Legislature for the years of 1903 and 1904 will, exclusive of the bond issues authorized and attempted to be authorized by said session, amount to more than the sum of \$774,000, and will probably reach a sum greater than \$874,000. That, in addition to the said specific appropriations above named, and the general appropriation for sugar bounties in an unnamed and un-

certain amount, and in addition to the \$163,000 bond issue attempted to be authorized by said Seventh Session, said session authorized or attempted to authorize the further issue of the bonds of this state in amounts and for purposes as follows, to wit: Idaho Industrial Reform School Bonds (Acts 1903, pp. 17, 292), \$50,000; Idaho Academy Building Fund Bonds (Acts 1903, p. 51), \$30,000; Albion Normal School Building Fund Bonds (Acts 1903, p. 209), \$12,000; University of Idaho Building Fund Bonds (Acts 1903, p. 433), \$43,000; Penitentiary Building Fund Bonds (Acts 1903, p. 440), \$20,000; for Supreme Court building at Lewiston (Acts 1903, p. 44), \$15,000—making a total of bond issues, including the issue authorized or attempted to be authorized by the act of March 16, 1903, total the sum of \$333,000. That the total expenditures which the said Seventh Session of the Legislature assumed to authorize, leaving out the unascertained amount of sugar bounties attempted to be authorized by the act of March 11, 1903, popularly known as the 'Sugar Bounty Act,' amount to the sum of \$1,007,829.56, and which, added to the outstanding indebtedness and liabilities of the state at the time of the passage and approval of all of said acts, makes the liabilities of the state assumed to be authorized by the Legislature reach the sum of \$1,760,439.10, to be increased from one to two hundred thousand dollars by said sugar bounties under said sugar bounty act, in violation of the Constitution of Idaho, art. 8, §§ 1, 2.

"The affiant says that he has no other plain, speedy, or adequate remedy to obtain the relief herein sought; that, unless speedily restrained and prohibited by orders and process of this honorable court, the said defendants, acting in their respective official capacities, will wrongfully and unlawfully issue, register, and cause to be registered in the State Auditor's office, sold, and invested in the school funds of the state, further bonds of the state, under the above-mentioned bond acts, whereby the petitioner and other taxpayers of the state of Idaho will suffer great and irreparable injury, and the good name of the state and its credit will thereby be jeopardized and impaired, to the injury and damage of the plaintiff and all of the taxpayers of the state."

The allegations of the first cause of action are made parts of the second, third, and fourth causes of action, respectively, and in addition thereto the second cause of action alleges the invalidity and unconstitutionality of an act approved February 16, 1903, and entitled "An act to establish the Idaho Industrial Reform School," etc. Sess. Laws 1903, p. 12.

The third cause of action alleges the invalidity and unconstitutionality of an act approved March 16, 1903, entitled "An act providing for issuance of state bonds for the erection and equipment of an armory and gymnasium, the equipment of the me-

chanical and electrical engineering, the equipment of the department of domestic science and for the provision of a water supply; and providing how such bonds shall be issued and how the proceeds of the sales of such bonds shall be expended." Sess. Laws 1903, p. 433.

The fourth cause of action alleges the invalidity and unconstitutionality of an act provided March 11, 1903, entitled "An act to provide for the issuance of state bonds to improve the Idaho State Penitentiary and secure and furnish water for the same." Sess. Laws 1903, p. 440.

Upon the filing of this petition the plaintiff was required to give notice to the defendants, and upon the day set for hearing the defendants filed their special demurrer, which is as follows:

"Come now the defendants above named, and demur to the affidavit and petition of the plaintiff herein, and for grounds of demurrer allege:

"(1) That the said petition fails to set forth a cause of action entitling the plaintiff to the relief prayed for in said petition, or to any relief against these defendants, or either of them, acting in their official capacities or otherwise.

"(2) Defendants demur to the first cause of action set forth in said petition on the ground that said cause of action fails to state facts constituting a cause of action, or entitling the plaintiff to the relief prayed for in said petition, or to any relief against the said defendants, or either of them, either acting in their official capacity, as set forth in said cause of action, or otherwise.

"(3) Defendants further demur to the first cause of action set forth in the said petition for the following reasons, to wit:

"(a) The said first cause of action fails to show that there will be insufficient funds derived from other sources, which, added to the general tax levy for the years 1903 and 1904, will equal all appropriations provided by the Legislature for said years, as required by section 11, art. 7, of the state Constitution; and, further, the said cause of action fails to show that there will be no other revenues provided for meeting the appropriations for said years in addition to the tax levy therefor.

"(b) The said first cause of action fails to show the outstanding bonded indebtedness of the state, 'exclusive of the debt of the territory at the date of its admission,' and exclusive of warrant indebtedness to meet which cash revenues from tax levies or from other sources have been provided; and, further, because the said cause of action fails to show that the limit of indebtedness fixed by section 1, art. 8, of the Constitution, now is, or at any time has been, exceeded.

"(c) The said first cause of action fails to show what portion, if any, of said outstanding indebtedness, to wit, the sum of seven hundred and fifty-two thousand six

hundred and nineteen and  $\frac{54}{100}$  dollars, was legally chargeable against the debt limitation contained in section 1, art. 8, of the state Constitution; and the said cause of action further fails to show that no part of said alleged indebtedness has been paid.

"(d) Defendants further specially demur to that portion of the first cause of action relating to the construction of 'a steel bridge across Snake river,' and 'the construction of a wagon road in the counties of Boise and Idaho,' and the respective acts of the Legislature relating thereto, for the reason that the said cause of action shows that the acts of the Legislature relating to said subjects, the titles to which are set forth in said cause of action, are not local or special laws within the inhibition contained in the state Constitution with reference to the enactment of local and special laws, and for the further reason that the said cause of action fails to show that said acts of the Legislature are either local or special within said constitutional inhibition.

"(e) Defendants further specially demur to that portion of the first cause of action relating to the payment of bounties upon sugar produced within the state during the years 1903 and 1904 from beets grown in the state under the provisions of the act of March 11, 1903, relating thereto, because the said cause of action fails to show that the defendants, or either of them, have either threatened to issue, or that they intend to issue and register, or cause to be registered, in the State Auditor's office, the bonds of the state for the purpose of paying said bounty provided by said act, or any part thereof; because the state and plaintiff, under the allegations of the petition, cannot be injured by the issuance of such bonds, and because the said cause of action shows upon its face that the defendants herein have no control over the investment of the school funds of the state either in said bonds or otherwise.

"(f) Defendants further demur to said cause of action because the matters of record therein relating to the bonded indebtedness and the warrant indebtedness of the state are alleged and set forth upon information and belief.

"(g) Defendants further demur to said cause of action because the same is ambiguous, uncertain, and unintelligible in this: that it fails to show upon what ground the said plaintiff petitions for a writ of mandate herein, and because the said cause of action fails to show that the indebtedness of the state at the time of the filing of the petition exceeded one and one-half per cent. of the assessed value of the taxable property in the state; and, further, defendants demur because two or more causes of action have been improperly united in said first cause of action.

"(h) Defendants further demur to said first cause of action because this court has

no jurisdiction to issue the writ herein against the said defendants, or either of them.

"(4) Defendants demur to the second cause of action set forth in said petition on the ground that said cause of action fails to state facts constituting a cause of action, or entitling the plaintiff to the relief prayed for in said petition, or to any relief against the said defendants, or either of them, either acting in their official capacity, as set forth in said cause of action, or otherwise.

"(5) Defendants further demur to the second cause of action set forth in the said petition for the following reasons, to wit:

"(a) It is impossible to determine what portion of the allegations and statements made in the first cause of action or count herein are properly applicable to this cause of action, which said allegations and statements are repeated, reiterated, and adopted as part of the said second count or cause of action.

"(b) The said second cause of action fails to show that there will be insufficient funds derived from other sources, which, added to the general tax levy for the years 1903 and 1904, will equal all appropriations provided by the Legislature for said years, as required by section 11, art. 7, of the state Constitution; and, further, the said cause of action fails to show that there will be no other revenues provided for meeting the appropriations for said years in addition to the tax levy therefor.

"(c) The said second cause of action fails to show the outstanding bonded indebtedness of the state, 'exclusive of the debt of the territory at the date of its admission,' and exclusive of warrant indebtedness to meet which cash revenues from tax levies or from other sources have been provided; and, further, because the said second cause of action fails to show that the limit of indebtedness fixed by section 1, art. 8, of the Constitution, now is, or at any time has been, exceeded.

"(d) The said second cause of action fails to show what portion, if any, of said outstanding indebtedness, to wit, the sum of seven hundred and fifty-two thousand six hundred and nineteen and  $\frac{54}{100}$  dollars, was legally chargeable against the debt limitation contained in section 1, art. 8, of the state Constitution; and the said cause of action further fails to show that no part of said alleged indebtedness has been paid.

"(e) Said cause of action fails to show that the defendants, or either of them, have either threatened to issue, register, or cause to be registered, or that they intend to issue, and register, and cause to be registered in the State Auditor's office, the bonds of the state as provided in the act entitled 'An act to establish the Idaho Industrial Reform School,' etc., and the act amendatory thereof, which said acts are specially referred to in said second cause of action; and, further, because the state or the plaintiff, under the

allegations contained in said second cause of action, cannot be injured by the issuance of such bonds, and because the said cause of action shows upon its face that the defendants herein have no control over the investment of the school funds of the state either in said bonds or otherwise.

"(f) Defendants further demur to said second cause of action because the matter of record therein relating to the bonded indebtedness and the warrant indebtedness of the state are alleged and set forth upon information and belief.

"(g) Defendants further demur to the second cause of action because this court has no jurisdiction to issue the writ herein against the defendants, or either of them.

"(6) Defendants demur to the third cause of action set forth in said petition on the ground that said cause of action fails to state facts constituting a cause of action, or entitling the plaintiff to the relief prayed for in said petition, or to any relief against the said defendants, or either of them, either acting in their official capacity, as set forth in said cause of action, or otherwise.

"(7) Defendants further demur to the third cause of action set forth in the said petition for the following reasons, to wit:

"(a) It is impossible to determine what portion of the allegations and statements made in the first cause of action or count herein are properly applicable to this cause of action, which said allegations and statements are repeated, reiterated, and adopted as part of said third count or cause of action.

"(b) The said third cause of action fails to show that there will be insufficient funds derived from other sources, which, added to the general tax levy for the years 1903 and 1904, will equal all appropriations provided for by the Legislature for said years, as required by section 11, art. 7, of the state Constitution; and, further, the said cause of action fails to show that there will be no other revenues provided for meeting the appropriations for said years in addition to the tax levy therefor.

"(c) The said third cause of action fails to show the outstanding bonded indebtedness of the state 'exclusive of the debt of the territory at the date of its admission,' and exclusive of warrant indebtedness, to meet which cash revenues from the tax levies or from other sources have been provided; and, further, because the said third cause of action fails to show that the limit of indebtedness fixed by section 1, art. 8, of the Constitution, is now, or at any time has been, exceeded.

"(d) The said third cause of action fails to show what portion, if any, of said outstanding indebtedness, to wit, the sum of seven hundred and fifty-two thousand six hundred and nineteen and  $\frac{54}{100}$  dollars, was legally chargeable against the debt limitation contained in section 1, art. 8, of the

state Constitution; and the said cause of action further fails to show that no part of said alleged indebtedness has been paid.

"(e) Said cause of action fails to show that the defendants, or either of them, have either threatened to issue, register, or cause to be registered, or that they intend to issue and register or cause to be registered, in the State Auditor's office, the bonds of the state, as provided in the act of March 16, 1903, the title of which is set forth in said third cause of action; and, further, because neither the petitioner nor the state, under the allegations contained in said third cause of action, can be injured by the issuance of such bonds, and because the said cause of action shows upon its face that the defendants herein have no control over the investment of the school funds of the state either in said bonds or otherwise.

"(f) Defendants further demur to said third cause of action because the matters of record therein relating to the bonded indebtedness and the warrant indebtedness of the state are alleged and set forth upon information and belief.

"(g) Defendants further demur to said third cause of action because this court has no jurisdiction to issue the writ herein against the said defendants, or either of them.

"(8) Defendants demur to the fourth cause of action set forth in said petition on the ground that said cause of action fails to state facts constituting a cause of action, or entitling the plaintiff to the relief prayed for in said petition, or to any relief against the said defendants, or either of them, either acting in their official capacity, as set forth in said cause of action, or otherwise.

"(9) Defendants further demur to the fourth cause of action set forth in the said petition for the following reasons, to wit:

"(a) It is impossible to determine what portion of the allegations and statements made in the first cause of action or count herein are properly applicable to this cause of action, which said allegations and statements are repeated, reiterated, and adopted as part of said fourth count or cause of action.

"(b) The said fourth cause of action fails to show that there will be insufficient funds derived from other sources, which, added to the general tax levy for the years 1903 and 1904, will equal all appropriations provided for by the Legislature for said years, as required by section 11, art. 7, of the state Constitution, and, further, the said cause of action fails to show that there will be no other revenue provided for meeting the appropriations for said years in addition to the tax levy therefor.

"(c) The said fourth cause of action fails to show the outstanding bonded indebtedness of the state 'exclusive of the debt of the territory at the date of its admission,' and exclusive of warrant indebtedness, to meet

which cash revenues from the tax levies or from other sources have been provided; and, further, because the said fourth cause of action fails to show that the limit of indebtedness fixed by section 1, art. 8, of the Constitution, is now, or at any time has been, exceeded.

"(d) That said fourth cause of action fails to show what portion, if any, of said outstanding indebtedness, to wit, the sum of seven hundred and fifty-two thousand six hundred and nineteen and  $\frac{54}{100}$  dollars, was legally chargeable against the debt limitation contained in section 1, art. 8, of the state Constitution; and the said cause of action further fails to show that no part of said alleged indebtedness has been paid.

"(e) Said cause of action fails to show that the defendants, or either of them, have either threatened to issue, register, or cause to be registered, or that they intend to issue and register and cause to be registered, in the State Auditor's office, the bonds of the state, as provided in the act of March 11, 1903, the title of which is set forth in said fourth cause of action; and, further, because neither the petitioner nor the state, under the allegations contained in said fourth cause of action, can be injured by the issuance of such bonds, and because the said cause of action shows upon its face that the defendants herein have no control over the investment of the school funds of the state either in said bonds or otherwise.

"(f) Defendants further demur to said fourth cause of action because the matters of record therein relating to the bonded indebtedness and the warrant indebtedness of the state are alleged and set forth upon information and belief.

"(g) Defendants further demur to said fourth cause of action because this court has no jurisdiction to issue the writ herein against the said defendants, or either of them.

"(10) Defendants further demur generally to said petition, and the whole thereof, because the same is unintelligible and uncertain, in this: that it raises the question of the validity of several legislative acts providing for bond issues and several legislative acts carrying appropriations, and does not properly set forth the outstanding indebtedness of the state, does not show which particular act providing for said bond issues is in excess of the debt limitation fixed by the Constitution, neither does said petition show what particular act carrying an appropriation is in excess of the appropriation limit fixed by section 11, art. 7, of the state Constitution.

"(11) Defendants generally demur to said petition because this court has no jurisdiction to issue the writ of prohibition herein.

"Wherefore, defendants pray that plaintiff's writ may be denied, that the petition herein may be dismissed, and for their costs herein."

Upon the issues thus made the arguments were heard on the part of the respective parties.

Ralph P. Quarles, for plaintiff. Atty. Gen. Bagley and Wood & Willson, for defendants.

AILSHIE, J. (after making the statement). It is insisted on the part of the plaintiff in this case that the Legislature has violated the provisions of section 11, art. 7, of the Constitution, in that they have made appropriations for the years 1903 and 1904 in excess of the tax levy which they provided for those years. Section 11, art. 7, of the Constitution, is as follows: "No appropriation shall be made, nor any expenditure authorized by the Legislature, whereby the expenditure of the state during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation or expenditure, unless the Legislature making such appropriation shall provide for levying a sufficient tax, not exceeding the rates allowed in section nine (9) of this article, to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war." An examination of the appropriation acts shows that the total appropriation made by the Seventh Biennial Legislative Session was \$674,375.56, and that the tax levy provided to cover the same period of time, namely, 1903 and 1904, is \$550,000. The question arises, is this appropriation contrary to the provisions of section 11, above quoted? Article 7 was entitled by the framers of the Constitution as follows, "Finance and Revenue," and section 2 thereof recognizes three distinct methods of raising tax, namely, a property tax, a license tax, and a per capita tax; and hence it appears that the framers of the Constitution contemplated other means of raising revenue than by the levy of a tax. It will also be seen from an examination of section 19, art. 4, of the Constitution, that the framers of that instrument acknowledged a still further means of securing to the state treasury public funds. That section provides, among other things, that "no officer named in this section shall receive for the performance of any official duty, any fee for his own use; but all fees fixed by law for the performance by either of them, of any official duty, shall be collected in advance, and deposited with the State Treasurer quarterly to the credit of the state." The Constitution therefore recognizes three separate and distinct methods by which the state acquires revenue other than by the levy of a property tax. It is not to be presumed that these funds are intended to be hoarded away in the state treasury, but must have been intended to be used in defraying the general expenses of the government. It does not appear from the petition

in this case how much of such fund, if any, was in the state treasury, nor how much will come into the state treasury during the two years for which the Legislature has made its appropriation. It is fair to assume that in making their appropriations they estimated the amount of revenue the state would derive from all other sources than that of a tax levy, and that they made their tax levy sufficient to cover the difference. Until the contrary is shown, we must presume that the Legislature kept within the constitutional limitation in this respect. The courts must take judicial knowledge of one provision of the Constitution as well as another, and likewise of the statutes of the state, and by this means knowing judicially that revenues come into the treasury from other sources than by a tax levy, we cannot say that the Legislature have made appropriations in excess of the constitutional limitation.

It is next urged that the appropriations made and the expenditures authorized by the Seventh Biennial Legislative Session, added to the prior and then existing liabilities and debts of the state, make a total exceeding  $1\frac{1}{2}$  per centum of the total assessed valuation of the property in the state, contrary to the provisions of section 1, art. 8, of the Constitution. That section provides as follows: "The Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate, exclusive of the debt of the territory at the date of its admission as a state, exceed the sum of one and one-half per centum upon the assessed value of the taxable property of the state, except in case of war, to repel an invasion or suppress insurrection," etc. The principal question discussed on this point is as to whether or not the appropriations made for the two years succeeding the adjournment of the session became a debt within the meaning of section 1, art. 8. It is urged by the plaintiff that these appropriations became debts or liabilities against the state, and must be added to the bonded and other indebtedness of the state in ascertaining whether or not the constitutional limitation has been exceeded. Defendants take the position that under the general scheme of finance and revenue provided for in article 7 the business of the state is placed upon a cash basis, and that the ordinary expense of maintaining and carrying on the state government is provided for from year to year as the expense is incurred, and that in contemplation of the Constitution the money is in the treasury to meet the bills as soon as they are audited and allowed, and that the auditor's warrant on the treasurer is simply the constitutional method of taking the money from the state treasury and applying it to the payment of such bill. Upon this point plaintiff relies on *People v. Johnson*, 6 Cal. 499, and *Nougues v. Douglas*, 7 Cal. 65. In these authorities it seems that the Supreme Court of California took

the position that under the provisions of article 8 of the Constitution of that state, which contains substantially the same provision as section 1 of our article 8, the appropriations for the current expense of the state government were a debt, and should be computed in ascertaining whether the Legislature had exceeded the constitutional limitation. An examination of the later authorities of that state shows, however, that the court soon departed from the rules announced in the two former decisions upon this particular point, and in *State v. McCauley*, 15 Cal. 430, Chief Justice Field said: "The eighth article was intended to prevent the state from running into debt, and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt as effectually as when actually in the treasury. The appropriations of the moneys, when received, meet the services as they are rendered; thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. The appropriation accompanying the services operates in fact in the nature of a cash payment." This last case was followed and approved by the same distinguished jurist in *McCauley v. Brooks*, 16 Cal. 24, and *Koppikus v. State Capitol Com'rs*, 16 Cal. 249. These authorities were in turn approved by Mr. Justice Sawyer in the able and well-considered case of *People v. Pacheco*, 27 Cal. 176. The same position was sustained and the latter authorities approved in *McBean v. Fresno*, 112 Cal. 167, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191. It is worthy of observation that nowhere is there to be found in the Constitution of California, either as adopted in 1849 or as amended in 1862, any provision corresponding to our section 11, art. 7. There was no provision in the California Constitution requiring the business of the state to be conducted upon a cash basis, or prohibiting the Legislature from making any appropriation unless they first provided for the raising of sufficient revenue to meet the same. A careful examination of articles 7 and 8 of our Constitution discloses two separate and distinct purposes had in view in the adoption of the two articles. Article 7 defines the fiscal year, provides methods for raising revenue, exempts certain classes of property from taxation, provides for uniformity of taxation, fixes a maximum rate of taxation upon real and personal property that shall never be exceeded, provides for appropriations for current expenses, for a board of equalization, and for a system of county finances. The complete plan outlined in this article provides for the raising of revenue to meet the current expenditures. When legislative appropriations are made, they are made for the future, and to extend over a period of two years. During the time for which the expenditures are being made the revenue is being collected, and, even though claims may be presented and allowed before suffi-

cient revenue has been collected to meet the same, the complete scheme for the collection of taxes and revenue and the payment of the current expenses of the state looks to one general purpose of ending the two years for which appropriations are made with the expenses of maintaining the state government for that period paid. On the other hand, article 8 contemplates the contracting of indebtedness, the issuance of state bonds, prohibits the loaning of the state's credit to individuals and corporations, etc. This article, differing from the other, was entitled by the framers of the Constitution thus: "Public Indebtedness and Subsidies." Between the two extremes, the one meeting the expenditure for maintenance of the state government, and the other meeting expenses in case of war, to repel invasion, or suppress insurrection, the Constitution has anticipated a necessity which must arise of making public improvements, erecting public buildings, educational, penal, and reformatory institutions, and that for the construction of the same the state would necessarily be obliged to incur indebtedness. It authorizes the Legislature to create debts not to exceed  $1\frac{1}{2}$  per centum upon the assessed valuation of the taxable property therein. In *State v. Medbery*, 7 Ohio St. 522, Mr. Justice Swan, in discussing provisions found in the Constitution of Ohio to the same effect as those contained in our Constitution, said: "The General Assembly usually, however, provide for the current expenses for a period not exceeding two years out of the incoming revenues, by making appropriations of a sufficient amount of money to pay the expenses during that period, and provide by law for the raising of revenue sufficient to meet the appropriations. The discretion of each General Assembly for the period of two years in respect to the amount of expenditures, except in some special cases relating to salaries, is without limit and without control; but each must provide revenue and set apart sufficient by a law operative within the same two years to pay all expenses and claims. This is the general system provided by the Constitution. Article 2, § 22; article 12, § 4. Under it all the claims which are authorized, or which can accrue within each of the two years and their payment, formed one governmental and financial transaction; so that at the end of each of the two fiscal years the expenditures authorized and liabilities incurred have been provided for by revenue, adjusted by the executive officers, and, out of the revenue previously set apart and appropriated, are paid. So long as this financial system is carried out in accordance with the requirements of the Constitution, unless there is a failure or deficit of revenue, or the General Assembly have failed for some cause to provide revenue sufficient to meet the claims against the state, they do not and cannot accumulate into a debt. Under this system of prompt payment of expenses and claims as they accrue there

is, undoubtedly, after the accruing of the claim, and before its actual presentation and payment, a period of time intervening in which the claim exists unpaid; but to hold that for this reason a debt is created would be the misapplication of the term 'debt,' and substituting for the fiscal period a point of time between the accruing of a claim and its payment for the purpose of finding a debt; but, appropriations having been previously made and revenue provided for payment as prescribed by the Constitution, such debts, if they may be so called, are in fact, in respect to the fiscal year, provided for, with a view to immediate adjustment and payment. Such financial transactions are not, therefore, to be deemed debts." The same conclusion is reached by the Supreme Court of Nevada in *Ash v. Parkinson*, 5 Nev. 15. It seems to us that the provisions of articles 7 and 8 of the Constitution in this respect are clear and explicit. The appropriations for current expenses and the raising of revenue to meet those appropriations have been treated by the people in framing and adopting the organic law as a cash transaction. Based upon the plaintiff's showing of the assessed valuation of the state, it would authorize a state indebtedness exceeding \$900,000 as permitted by article 8. Deducting the biennial appropriation provided by the Legislature for the current expenses of the state from the total as set forth by the plaintiff in his petition, and the balance falls short of the debt limit prescribed by the Constitution. A large portion of the remaining indebtedness, however, is not an obligation against the state to be met by taxation or any other method of raising revenue, but is payable out of the interest from permanent funds derived from donations made by the general government upon our admission as a state. For the foregoing reasons it will be seen that the petition herein does not state facts sufficient to entitle the plaintiff to the relief prayed for. In *Re Francis*, 7 Idaho, 98, 60 Pac. 561, this court said: "Upon application for a writ of prohibition the petition must show all facts necessary to entitle a petitioner to a writ, and, if it does not, the writ will be denied."

We cannot dispose of this case without a consideration of the question of jurisdiction raised by the demurrer and argued at length in the briefs. This has been characterized as "technical," and may, therefore, upon that assumption, be said to belong to that large class of defenses so generally designated by defeated litigants as technical; but it has been our uniform observation, however, that this oft-dubbed fragile hope and defenseless defense is seized alike by all with an astonishing facility when it becomes available to them in the course of litigation. It is not out of place here to observe that the courts cannot disregard the provisions of the Constitution and statutes, no matter what the character of the defense may be. It is urged that this court has no jurisdic-



tion to issue the writ of prohibition prayed for in this case, and that the issuance of the same would be an invasion by judicial writ of another and independent branch of the state government, and an attempt to control executive and administrative power and authority. In the course of argument upon this position the Attorney General contends that the writ of prohibition will not lie to the chief executive for the reason that the judicial department cannot control or assume to control his acts, and that an attempt to do so would be futile, for the reason that, if the Governor should refuse to obey the writ from the court, there would be no way to enforce a compliance therewith. He suggests that under the Constitution the Governor is commander in chief of the militia of the state, and that in case of a conflict between the authority vested in the judicial department and that vested in the executive department the courts are left under the Constitution without authority to enforce such writs, and that, therefore, it must be presumed that no such power and authority is vested in the judiciary. Upon this particular question there seems to have been considerable said by the courts and text-writers. In 16 Ency. P. & P. p. 1108, the author says: "The three branches of government are independent and co-ordinate, and the courts have no authority to send the writ of prohibition to other branches than the judicial. It will therefore be refused where its object is to restrain the action of legislative bodies or executive officers." High, in his work on *Extraordinary Legal Remedies* (2d Ed.), at section 783, says: "Prohibition will not lie against the Governor of the state to restrain him from granting a commission to a person claiming to be duly elected to a public office. The grounds on which the relief is refused in such a case are that the judiciary have no power to invade the province of the executive, the three departments of government under our system being distinct and independent; and that prohibition is in no event the fit remedy to restrain the head of the executive department in the execution of his duties." To the same effect is Shortt on *Extraordinary Remedies*, at page 491, where he says: "The proceedings to be prohibited must be of a judicial character. A prohibition would not be granted in respect of any proceeding belonging to the executive government of the country." To this general effect we find much authority. It seems to us that to keep within the spirit of our Constitution (article 2, § 1) and form of government, which recognizes the independence and specific character of the "three distinct departments" of government, that the judicial department could not attempt to prohibit either of the other departments from acting within the recognized scope of their respective branches of the government, but that, on the other hand, the legal effect of such

action after it has been taken may be inquired into by the court.

In this connection the question has been directly and specifically raised as to whether or not under the Constitution and laws of this state the writ of prohibition will issue to enjoin the commission of ministerial and administrative acts. In support of the position that the writ will issue in such case we are cited to *Williams v. Lewis*, 6 Idaho, 184, 54 Pac. 619, where this court said: "The writ of prohibition, under the statutes of Idaho, will lie to restrain the action of a ministerial officer when it appears that such action is illegal, and beyond his jurisdiction." Counsel for defendant contend that this case is contrary to the great weight of authority announced in nearly every other state in the Union, and ask us to overrule it in so far as it announces the doctrine above quoted. After careful examination of that case and the pleadings which were before the court, it seems to us that the doctrine announced to the effect that the writ would lie to restrain the action of ministerial officers was unnecessary to a determination of the issues involved, and to that extent is dictum. The question there involved was the filing and certifying by the Secretary of State two separate tickets presented to him by two distinct political organizations, each representing itself to be the "People's Party." Under the law the secretary could not file and certify but one ticket in the name of any one political party. He was therefore in that case called upon to exercise quasi judicial functions, and determine which of the two tickets was the ticket nominated by the real, genuine, accepted "People's Party." When we call to mind the distinguished and able judges who constituted the court when *Williams v. Lewis* was decided, we feel some reticence in a re-examination of the question there discussed; but the conclusion announced as to the office of the writ as contemplated under the Constitution is in such apparent conflict with the great weight of authority that we have deemed ourselves justified in making an original investigation of that question. Section 9, art. 5, of the Constitution, provides that: "The Supreme Court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition and habeas corpus." This provision seems to have been taken literally from section 4 of article 6 of the Constitution of California. The same provision was contained in the Constitution of California as adopted in 1849, and again as adopted in 1862, and was finally readopted in the Constitution of 1879. The Legislature of California, in defining the writ of prohibition at section 1102, Code Civ. Proc., used the identical language which was copied by our Legislature and adopted as section 4904 of our Revised Statutes of 1887. The Supreme Court of California, in

considering the extent and scope of the writ as used in the Constitution and statutes of that state, held uniformly that the common-law writ was meant. In *Maurer v. Mitchell*, 53 Cal. 289, the court considered the statutory definition of the writ and the language used in that connection, and construed it in such a clear and convincing way that we quote at length from that opinion. It says: "Giving the words of the last clause of the section their natural construction in view of the law when the section was adopted, there would be no difficulty in holding that the 'corporation, board, or person' mentioned was a corporation, board, or person clothed with limited judicial powers which had been exceeded. The word 'jurisdiction,' when used in connection with 'prohibition,' would be at once understood as being employed in the sense of the legal power or authority 'to hear and determine causes.' It is said, however, that the first clause of the section can only be given effect by extending prohibition so as to arrest every unauthorized act of an officer or person clothed with authority, as mandamus may be employed to compel the performance of any act enjoined by law, with the condition in each case that the party has no other plain, speedy, and adequate remedy. But that prohibition as a remedy is not in every respect the exact converse of mandamus is made apparent by the words of the second clause of the same section, which declare that prohibition arrests proceedings which are without or in excess of the jurisdiction. In prohibition it must be shown to the court that the inferior court or person has exceeded the powers conferred by law, and the court intervenes to prevent further proceedings without or in excess of such power. Mandamus may be resorted to whenever an officer or person refuses to perform a duty enjoined by law, although the act may have been an isolated one, disconnected with any proceedings leading up to that which the recalcitrant official or individual refused to perform. In what sense, then, is the word 'counterpart' employed in the first clause of the section? As it cannot be given the meaning of the exact reverse or opposite without doing away with the limitation contained in the second clause, whereby prohibition is confined to the cases in which the court, corporation, officer, or person has already exceeded the powers conferred by law, it must have been used in the more general sense that prohibition is the opposite, in that it arrests, while mandamus commands, action. The word 'counterpart,' as employed in the statute, is designed to illustrate the operation of the writ of prohibition when issued in a proper case, but it is not intended to enlarge or add to the class of cases in which it may be resorted to." In defining the writ at section 4904, Rev. St. 1887, it is said that "it arrests the proceedings" when they are "without or in

excess of the jurisdiction" of the tribunal, corporation, board, or person about to exercise the jurisdiction. "Jurisdiction," as used in the law, is the right to hear and determine a matter, and carries with it the idea of exercising judicial or quasi judicial functions. See "Jurisdiction," Black's Law Dict., Bouvier's Law Dict., and authorities there cited. The word "proceedings," as here used, cannot reasonably be said to apply or have reference to the doing of a purely ministerial act. In 1881, and after the decisions reported in 52 and 53 Cal. had been announced, the Legislature of California amended section 1102 of their Code of Civil Procedure by adding thereto the words "whether exercising functions judicial or ministerial." In *Camron v. Kenfield*, 57 Cal. 550, the court held that the amendment was unconstitutional, for the reason that the word "prohibition" had been used in the Constitution in the common-law sense of that term, and that it was beyond the power of the Legislature to extend the scope of the writ by legislative definition. This last case seems to have become the settled doctrine in that state, and has been repeatedly cited with approval, not only by the courts of that state, but by the highest courts of other states; and it is clear to us that the reasoning of the case and the principle there announced was misapprehended and misapplied in *Williams v. Lewis*. In the *Williams Case* the court seems to have taken the view that under sections 4904, 4905, Rev. St. 1887, the territorial Legislature had extended the scope and province of the writ, and in support of that position cite section 1866 of the Revised Statutes of the United States, which provided that the original and appellate jurisdiction of the territorial courts should be limited by law. When the act of Congress provided that the jurisdiction of the territorial courts should be limited by law, it was certainly not the intention to authorize the extension of the use of the writ of prohibition within the territorial jurisdiction beyond and in excess of the scope and power of the writ as uniformly recognized by the federal courts. At common law the writ of prohibition was issued on the suggestion that the cause originally, or some collateral matter arising therein, did not belong to the inferior jurisdiction, but to the cognizance of some other court. "It was an original remedial writ, provided as a remedy for encroachment of jurisdiction. Its office was to restrain subordinate courts and inferior judicial tribunals from extending their jurisdiction." 3 Shars. Blackst. Com. 112; *Quimbo Appo v. People*, 20 N. Y. 540; *Thomas v. Mead*, 36 Mo. 232; *Spring Valley W. W. v. San Francisco*, 52 Cal. 117; *Maurer v. Mitchell*, 53 Cal. 291.

Now, the question arises: With the federal courts using the writ in its common-law sense and the Supreme Court of Cal-

fornia holding that the word "prohibition," as used in the Constitution and statutes of California, had been used in the common-law sense, in what sense shall we conclude that the framers of the Idaho Constitution used the word "prohibition" when incorporating the same into the organic law of this state? When a statutory or constitutional provision is adopted from another state, where the courts of that state have placed a construction upon the language of such statute or constitution, it is to be presumed that it was taken in view of such judicial interpretation, and with the purpose of adopting the language as the same had been interpreted and construed by the courts of the state from which it was taken. We therefore arrive at the contrary conclusion from that reached in *Williams v. Lewis*, and are of the opinion that the writ of prohibition as authorized by the Constitution is the common-law writ, and that the same will not issue to restrain purely ministerial acts. The case of *Williams v. Lewis* is therefore expressly overruled in so far as it holds that the writ of prohibition will lie to restrain ministerial acts.

For the foregoing reasons the writ applied for will be denied, and the petition dismissed. No costs to be taxed in this case.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

(9 Idaho, 686)

#### STATE v. IRELAND.

(Supreme Court of Idaho. Feb. 20, 1904.)

LARCENY—INFORMATION—VARIANCE—PROOF—MISTAKE—ERROR—EVIDENCE—UNEXPLAINED POSSESSION—DEPOSITION.

1. Where the information avers the title to stolen property in B., and the evidence shows that B. and J. are the owners thereof, the variance between the averment and proof is not fatal; overruling *People v. Frank*, 1 Idaho, 200, on that point.

2. Under the provisions of section 8236, Rev. St. 1887, no error or mistake in an information renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right.

3. Held, the evidence shows that the stolen property was taken without the consent of the owner.

4. The weight to be given to the explanation by the defendant of his possession of recently stolen property is exclusively for the jury; and held, in this case, that such evidence was not sufficient to raise reasonable doubt of his guilt.

5. A deposition taken under the provisions of section 7588, Rev. St. 1887, may be introduced on the trial on behalf of the state if it is first shown that due diligence has been exercised to procure the attendance of the witness, and has failed to procure it.

(Syllabus by the Court.)

Appeal from District Court, Custer County; J. M. Stevens, Judge.

Fletcher Ireland was convicted of grand larceny, and appeals. Affirmed.

Chalmers & Jones and W. J. Lamme, for appellant. John A. Bagley, Atty. Gen., and N. H. Clark, for the State.

SULLIVAN, C. J. The defendant was convicted of the crime of grand larceny at the August term of the district court in Custer county, and was sentenced to confinement in the penitentiary for three years. By information of the county attorney, defendant was charged with having stolen a black horse, the property of one Bybee. The appeal is from an order denying a new trial, and from a judgment. Counsel for appellant assign 37 errors as the basis for reversal of the judgment.

It is contended by counsel for appellant that in the information the title to said horse is alleged to be in said Bybee, and that on the trial it was proved to be in the firm of Bybee & Jones, and that this is a fatal variance. A deposition of said Bybee was introduced in evidence on the trial, and in that said Bybee testified that he was the owner of said horse. Thereafter one Jones testified as a witness for the state that he was a partner of said Bybee, and that they jointly owned the horse. During the trial a written bill of sale from said Jones to Bybee of said horse, dated June 12, 1903, was introduced in evidence. It was a question for the jury to determine as to who was the owner of said horse, and, even if the evidence shows that said animal belonged to the partnership of Bybee & Jones, and not to Bybee, as alleged in the information, we think the variance was not fatal. This court held in *State v. Farris*, 5 Idaho, 666, 51 Pac. 772, that where the information alleged one O. to be the owner of the stolen property, and the proof showed that he was in possession of the property as the agent of the real owner, with full power to sell or otherwise dispose of the same, variance was not fatal. And in *State v. Rathbone*, 67 Pac. 186, where the title to the stolen property was alleged in the information to be in George M. Brown, and the proof showed that it was the property of George M. Brown and R. L. Brown, this court held that the variance between the allegation and the proof was not fatal. In the territorial days of our Supreme Court, it was held in *People v. Frank*, 1 Idaho, 200, that in an indictment for larceny, where the property is alleged to be that of W., and on the trial it is proved to be that of W. & Co., the variance is fatal. We are not inclined to follow the technical rule there laid down, and, as to that point, overrule that decision. See *People v. Clark*, 106 Cal. 32, 39 Pac. 53; *Henry v. State*, 45 Tex. 84. Section 8236, Rev. St. 1887, provides as follows: "Sec. 8236. Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to

¶ 1. See *Larceny*, vol. 32, Cent. Dig. § 122.

a substantial right." Could it possibly prejudice any substantial right of the defendant whether the stolen animal belonged to Bybee alone, or to Bybee & Jones as partners? We think not. Bybee certainly had an interest in it, if he was only half owner thereof. In the Texas case above cited the defendant was indicted for the theft of "two certain oxen, of the value of \$20 each, and both of the value of \$40, the property of Mrs. Mary Cobb." Upon the trial it was shown that the oxen belonged to Mrs. Mary Cobb and others. It was held that the variance between the proof and the averment in the indictment was not fatal. However, we think, from the evidence, that the animal stolen was the property of Bybee.

The second contention of counsel for respondent is that there was an utter failure of proof of want of consent to the taking of said property. We have examined the evidence on this point, and it clearly shows that the taking thereof was without the consent of the owner. It also shows that, if the animal belonged to Bybee & Jones, the taking was without the consent of both or either.

The admission of the deposition of the witness Bybee on behalf of the state is assigned as error. In *State v. Potter*, 6 Idaho, 584, 57 Pac. 431, this court had under consideration the question whether it was error to admit on the trial of the case a deposition taken on the preliminary examination, and it was there held that it was error to admit such deposition. That was the only question before the court in that case. If there is any language used there that would indicate that a deposition taken under the provisions of section 7588 of our Revised Statutes of 1887 could not be used by the state on the trial of the case, such language was mere dictum, and was not necessary to the decision of that case, and is overruled. In the case of *State v. White*, 7 Idaho, 150, 61 Pac. 517, this court held that it was not error to admit in evidence a deposition taken under the provisions of said section 7588 of the Revised Statutes. Under the provisions of that section, a witness, under certain circumstances, may be conditionally examined. And it is evident that, in the enactment of said section and the three sections immediately preceding it, it was intended that such deposition might be used by either the state or the defendant on the trial of the case. The deposition objected to was taken in accordance with the provisions of said section 7588; and, as the record shows that the witness could not be produced, after reasonable diligence, to testify on the trial, the admission of said deposition was not error. Before the state can use a deposition taken under the provisions of said section, it must be shown that the state has used reasonable diligence to procure the attendance of such witness, and has been unable to do so.

It is contended that the evidence is insufficient to sustain the verdict, as there is no

evidence whatever to contradict the explanation of defendant of his possession of the stolen horse. We cannot agree with this contention. We think his explanation of his possession was a strong circumstance tending to show his guilt. It was not sufficient to create any doubt of his guilt. The common defense in such cases is the purchase of the property stolen from an unknown person, and the jury are the judges of the weight to be given to such evidence, and we think they gave it in this case the full weight it deserved.

We have examined all of the errors assigned by counsel for the appellant, and conclude that it is not necessary for us, in this opinion, to refer particularly to each assignment, but it is sufficient to say that we find no error in the record, and for that reason the judgment of the trial court is affirmed.

STOCKSLAGER and AILSHIE, JJ., concur.

(9 Idaho, 582)

#### STATE v. ADAMS.

(Supreme Court of Idaho. Feb. 8, 1904.)

CRIMINAL LAW—REVIEW—EVIDENCE—FRAUDULENT CLAIMS.

1. A judgment will be reversed in a criminal case where the evidence fails to connect the defendant with the crime charged.

(Syllabus by the Court.)

Appeal from District Court, Fremont County; James M. Stevens, Judge.

R. D. R. Adams was convicted of felony, and appeals. Reversed.

Hamer & McConnell and Chalmers & Jones, for appellant. John A. Bagley, Atty. Gen., for the State.

STOCKSLAGER, J. This is an appeal from the judgment and an order overruling a motion for a new trial. The prosecution was based on section 6385, Rev. St. 1887, which provides that "every person who, with intent to defraud, presents for allowance or for payment to any territorial board or officer, or to any county, town, city, ward, or village board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of a felony." The charging part of the information is as follows, to wit: "That said R. D. R. Adams on or about the 13th day of June, A. D. 1902, at the county of Fremont, state of Idaho, did willfully, unlawfully, and feloniously, with intent to defraud Fremont county, state of Idaho, present for allowance to the board of county commissioners of said Fremont county, state of Idaho, who were authorized to allow the same if genuine, a false and fraudulent claim, a statement in writing duly verified by him, on the bounty fund of Fremont county, state of Idaho, for the sum of two hundred thirty-seven dollars, purporting to be for 158 coyote

scalps, contrary to the form, force, and effect of the statute in such cases made and provided, and against the power, force, and dignity of the state of Idaho." Defendant demurred to this information, which was overruled by the court, and which is as follows, to wit: "(1) That the said information does not substantially or otherwise conform to the requirements of sections 7677, 7678, and 7679 of the Revised Statutes of 1887, or either or any of said sections. (2) That the facts stated in said information do not constitute a public offense." Counsel for appellant urge in this court that it was error in the lower court to overrule this demurrer. We do not think so. The information, as we read it, is in substantial compliance with the statute, and charges a crime under the provisions of section 6385 of the statute.

The defendant was tried and convicted of the crime charged in the information, and, after overruling a motion for a new trial, he was sentenced to serve a term of one year in the penitentiary in this state. It is earnestly urged by counsel for appellant that the evidence was insufficient to support the verdict of the jury and the judgment of the court. As we read the record in this case, this is the serious question for our determination.

The bill of exceptions contains the evidence upon which the conviction was had. The first witness for the state was J. W. Ayers, a justice of the peace residing at Market Lake, Fremont county, who testified as follows, to wit: "I am acquainted with the defendant, Adams, and he has resided there since I became acquainted with him, in 1889. I am his brother-in-law. Saw him on the 12th day of June, 1902, at my residence, about four miles south of Market Lake, in the presence of my wife. He came there to turn in some coyote scalps before me, as a justice of the peace." Witness identified paper marked "Plaintiff's Exhibit A," being a claim for 158 coyote scalps, at \$1.50 each, and in the usual form; stated that he saw it on that day, and that the jurat bears his signature and the claim of the defendant, R. D. R. Adams; and he swore the defendant to the bill. "Defendant there had a cigar box containing coyote ears, scalps, tips of ears; the box being of the capacity of fifty cigars, but I do not know the kind of box or brand. The cover was tacked down. I counted the ears out of the box, and the number agreed with the number of ears mentioned in the claim." Witness was unable to identify the box or the ears contained in the box. Testifies: "After I counted the ears, I placed them in the box, and nailed it up, gave them to Mr. Adams, with the bill, and he left my place." Next saw the bill in probate court at St. Anthony at the preliminary examination. I told the defendant to send the bill to the clerk of the court, with the ears." On cross-examination he said: "I do not know who wrote the address on the cigar

box marked 'Plaintiff's Exhibit B,' addressing said box to A. M. Carter, St. Anthony, Idaho. I do not know who wrote any of the words, figures, or letters on said box. I did not write any of them."

Charles R. Harwood testified: "Am in the mercantile business at Market Lake. Was postmaster at that place in June and July, 1902, and was in the post office during those months. The cigar box marked 'Plaintiff's Exhibit B' was brought to me to be registered. I wrapped it up, and addressed it from J. W. Ayers, Market Lake, to A. M. Carter, St. Anthony, Idaho, and registered it accordingly. The handwriting on the package is mine. I addressed it as from J. W. Ayers, from Market Lake, Idaho, because I was told to do so, but do not know who delivered it to me. It is my custom always to put on the package who it is from and who it is to, with the numbers; this being registered No. 52. There were no other marks on the package. It was registered June 12, 1902. I do not remember whether I was told what was the contents, or not, and don't think I looked into the box at all. I registered a good many packages previous to that time and thereafter, I guess, to A. M. Carter, at St. Anthony, almost all of them being from J. W. Ayers, justice of the peace, but I don't think I received this box from J. W. Ayers, and don't remember from whom I did receive it."

A. M. Carter testified: "In June and July, 1902, I was clerk of the board of county commissioners and auditor and recorder of Fremont county." He identified the bill, and says he first saw it on June 13, 1902, in his office. When he received it, he put it in the bill files with others. It was afterward presented to the board of county commissioners for allowance. That he received the cigar box, Plaintiff's Exhibit B. That he received it by registered mail June 13, 1902, at his office, when he marked it with the name of Adams, and put it in the vault with other coyote-scalp claims, in a department set apart for them; there being a whole lot of them. On cross-examination he said the box was brought from the post office by the janitor, who received all the mail, and receipted for registered packages. It was his custom, upon receipt of such packages, to unwrap them and count the contents, and then put them back, where they remained in the vault, which was open during office hours. The general public, or anybody that wanted to, whether connected with the office or not, had access to the records in the vault, but not to the scalp department, although they could have gone in there if they wanted to. Not everybody was permitted to go in the vault. "Sometimes I refused admission. Not more than ten or twelve people in the county ever went into the vault. They were mostly officers around the courthouse—a few attorneys and abstractors." On redirect examination he said: "I don't remember ever having al-

lowed any one to handle the coyote scalps or ears received and placed in the vault while I was in the office. People might have gone into the vault during office hours without my knowledge." Witness could not identify the cigar box, Plaintiff's Exhibit B, and would not say the contents were the same at the time of the trial as when received.

Victor Hegsted testified that he succeeded A. M. Carter as clerk of the court, auditor, etc., and the box and contents were received by him, and thereafter kept in the vault.

Mr. Sheley testified for the state, and related a conversation between himself, defendant, and one Short. Says they talked about a partnership for the purpose of trapping coyotes. Said Short proposed to go into the business of manufacturing coyote ears, but that he and defendant informed him they would not enter into any such business. Says Mr. Adams said, if they could not make a living out of it without making the ears, he would not have anything to do with it.

A. M. Carter, recalled, testified that he had such experience that he could identify the genuine ear. The ears contained in the cigar box, Plaintiff's Exhibit B, are not genuine.

J. W. Ayers, recalled, said: "When defendant brought a box of coyote ears, on or about June 12, 1902, I counted the ears, and surely thought they were genuine at that time, or I would not have received them. Made the necessary examination of the ears, and saw nothing wrong with them, and they were genuine, to the best of my knowledge. I am familiar with genuine ears."

Mrs. J. W. Ayers testified: "Was at home on the 12th day of June, 1902, when defendant came there. I saw the box of ears purporting to be coyote ears at that time in his possession, but did not examine them. Had the box in my hands, but did not look at the ears." Exhibit B (cigar box) was shown witness, and she testified it was not the box defendant brought to the justice's office June 12, 1902. Said the box defendant brought had the picture of a lady's head, whilst Exhibit B had the picture of a man's head.

This seems to be all the evidence introduced on behalf of the state, whereupon counsel for appellant moved for a peremptory instruction on the ground that the state had failed to prove its case, the evidence being wholly insufficient to justify the conviction of the defendant; that the court is without jurisdiction to try the cause, for the reason that the offense committed by the defendant, if any there be, is a misdemeanor, and not a felony; that there is a variance in the allegations of the information and the proof, in that the allegations charged the defendant with presenting for allowance to the board of county commissioners a false and fraudulent claim for bounty on 158 coyote scalps, and

the evidence showed that coyote ears were presented, instead of scalps.

We have quoted the evidence in this case almost in its entirety, as it appears from the bill of exceptions. We have done so for the reason that, by reason of the conclusion we have reached, we feel that the evidence should be shown in the opinion. It is not a question of conflict in the evidence we are called upon to determine in this case. It is simply the question of the sufficiency of the evidence to support the verdict of the jury and the judgment of the court. It would seem to us that the state succeeded in surrounding the defendant with very serious doubts of his guilt in its attempt to establish guilt. From the testimony of Mr. Ayers, the justice of the peace before whom the affidavit of claim was prepared, it is shown that the ears contained in the box were genuine; that he counted them, replaced them in the box, and nailed them up. By the testimony of witness Sheley it is shown that in a certain conversation with defendant and one Short, in which conversation the question of spurious ears was mentioned by Short, defendant said, if he could not make a living out of the business without manufacturing ears, he would not engage in it. By the testimony of witness Carter it is shown that the vault in which all bounty scalps and ears were kept was open, and that others than himself had access to it. It is established by the evidence of Mrs. Ayers, wife of Justice of the Peace Ayers, that, on the day the claim was sworn to before her husband, she was present, and had the cigar box containing the scalps in her hands; that she noticed the box, and that it contained the picture of a woman's head; also that Plaintiff's Exhibit B, containing the spurious ears, was not the same box, it containing the head of a man. It was not shown that defendant delivered the box to the postmaster at Market Lake to be sent to St. Anthony by registered mail. The only evidence connecting the defendant in any way with the transaction is that of the justice of the peace, and that is certainly in his favor, rather than in any way against him. We think the case is too much surrounded with doubt, owing to the fact that there were too many opportunities for others to perpetrate the fraud, to warrant us in saying that this defendant should serve a term in the penitentiary of the state for the crime charged to him.

Other questions are raised by counsel for appellant, but, in our view of the case, it is unnecessary for us to pass upon them.

The judgment is reversed, and cause remanded for further proceedings in harmony with the views herein expressed.

SULLIVAN, C. J., and AILSHIE, J., concur.

(9 Idaho, 525)

RYAN v. WOODIN et al.

(Supreme Court of Idaho. Jan. 25, 1904.)

**SETTING ASIDE JUDGMENT—COMPLAINT—DEMURRER—DELAY IN BRINGING ACTION—RELIEF IN EQUITY—LACHES—STATUTE OF LIMITATIONS.**

1. When an action to set aside a judgment, and have a sheriff's deed based thereon set aside, is not brought within five years after the execution of such deed, the complaint must contain allegations showing that reasonable diligence has been exercised in the discovery of the acts complained of.

2. Courts of equity do not favor antiquated or stale demands, and refuse to interfere where there has been gross laches in commencing the proper action, or long acquiescence in the assertion of adverse rights.

3. A party cannot defer the running of the statute of limitations by his own negligence.

4. *Held*, under the facts of this case, that this action is barred by the provision of section 4037, Rev. St. 1887.

(Syllabus by the Court.)

Appeal from District Court, Bingham County; Joseph C. Rich, Judge.

Action by A. T. Ryan, administrator, against W. A. Woodin and others, to set aside judgment and sheriff's deed. Judgment for defendants, and plaintiff appeals. Affirmed.

E. E. Chalmers and W. T. Reeves, for appellant. F. S. Deitrich, J. M. Stevens, and Sample H. Orr, for respondents.

SULLIVAN, C. J. This action was brought to procure the cancellation of a judgment and sheriff's deed, resulting from a sale of certain real estate under execution, based on the judgment in the case of Orr & Orr against Daniel Ollis in the district court of Bingham county. The complaint contains allegations of defects, irregularities, and omissions in the service of summons and other proceedings prior to the judgment. It appears from the amended complaint that Daniel Ollis died on April 14, 1894, and that the appellant, Ryan, was appointed administrator of his estate March 4, 1899, and this suit was brought by said administrator; that Sample Orr, one of the plaintiffs in said action, died intestate on the 7th of April, 1894, and that the respondent Woodin was duly appointed as administrator of his estate on the 30th day of December, 1899, and that the wife of said deceased (Orr) died intestate on the 22d day of April, 1899, and that the defendant Gagon was duly appointed administrator of her estate; that said Ollis in his lifetime was the owner of about 160 acres of land situated in Bingham county, state of Idaho; that on October 7, 1892, Sample Orr, now deceased, and Sample H. Orr were engaged as partners in the practice of law in said Bingham county, and on the latter date they commenced an action against said Ollis in the district court in and for said county to recover judgment for \$345 alleged to be due them from said Ollis

for legal services. Summons was duly issued and returned not served, the defendant not being found in said county. Thereafter proceedings were had whereby service of the summons was sought to be made by publication, on which service said judgment was entered in said action in favor of Orr & Orr and against said Ollis. That during the period of publication of said summons an attachment was issued in said suit, and levied upon said tract of land; that after the judgment was entered an execution was issued, and said land was sold thereunder to said Sample Orr to satisfy said judgment; that after the time for redemption had expired, and on the 22d day of December, 1894, the sheriff executed a deed for the said land to said Orr. A general demurrer was filed to the complaint, and also the complaint was demurred to on the ground that the action was barred by the statute of limitation. The demurrer was sustained by the court, and the plaintiff declined to further amend his complaint, and judgment of dismissal was entered. The appeal is from the judgment.

The action of the court in sustaining said demurrer is assigned as error. The questions for decision are: (1) Does the complaint state a cause of action? And (2) if so, is such action barred by the statute of limitations?

The complaint contains no allegation showing who has been in the possession of said real estate since the execution of said sheriff's deed, dated December 22, 1894. But we think the presumption from the whole record is that the said Sample Orr, now deceased, and his heirs, have been in possession thereof from that date. If that presumption be correct, said Orr and his heirs have been in the peaceable possession of said land from that date until the commencement of this action on the 14th day of May, 1900, a period of about five years and five months. The complaint contains no sufficient allegation of any reason or excuse for this long delay in bringing this action. It is alleged on information and belief that none of the heirs of the intestate, Ollis, ever had a notice or knowledge of the existence of any judgment against said Ollis, or of the sale of said land under execution, until about the 1st day of November, 1897. That is not a sufficient allegation of reasonable diligence or of any diligence on the part of the said Ollis, his heirs or representatives, to excuse the delay in bringing this action. Said judgment was a matter of record in the district court in the county where said land was situated, and, with reasonable diligence, could and would have been discovered. A party is presumed to know what with reasonable diligence he might have discovered, especially in regard to the title of the land which he claims to own. It is not even alleged that the heirs of Ollis or their representative ever paid any taxes on said land, or ever gave it any attention whatever until this action was commenced. There

¶ 2. See Limitation of Actions, vol. 33, Cent. Dig. §§ 474, 490.

is no excuse alleged for this long delay, during which both Ollis and Orr have died.

The complaint fails to state a cause of action, in that no sufficient reason is alleged for the long delay in bringing this action. But it is contended that the statute of limitation does not begin to run until after the appointment of an administrator, and since the appointment of one the limitation provided by statute has not expired. Wood on Limitation of Actions, § 117, is cited on that point, and in support of the text the author cites *Hobart v. Connecticut Turnpike Co.*, 15 Conn. 145, and *Lee v. Gause*, 24 N. C. 440. The first case cited was brought to recover dividends on capital stock of defendant which had accrued to the estate of the deceased person subsequent to her death, and the question there was whether the plaintiff's claim was barred by the statute of limitations; and the court held that it was not, and that the statute did not begin to run until there was a person in existence capable of suing. That rule was applicable to the facts of that case, but is not applicable to the facts of this case. That rule must be taken in connection with the other rule that where there is long delay or failure to procure administration, and real estate claimed by heirs is in the adverse possession of another, who claims to be the owner thereof, the complaint in an action to quiet title to such real estate must contain allegations showing a reasonable excuse for the delay, especially where the period for bringing such suit is prescribed by the statute of limitation, and has expired. In the case at bar it is not shown but that all of the heirs of the Ollis estate were of age, and that there was no necessity for administration on his estate. Where there is necessity of administration, the creditors or the heirs should see that an administrator is appointed within at least a reasonable time after the death of the intestate. The complaint contains no allegations of any reasonable cause whatever for the delay in having an administrator appointed. The complaint in this case should have alleged the cause of the delay in bringing this action. It fails to do that, and hence fails to state a cause of action. It is a well-established rule that courts of equity, even where no statute of limitations governs the case, often act upon their own inherent doctrine of discouraging antiquated or stale demands, by refusing to interfere where there has been gross laches in prosecuting a claim, or long acquiescence in the assertion of adverse rights; and especially is that so where the parties to the transaction have died. Diligence must be shown in the discovery of the acts complained of. In *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, it is held in such cases as that at bar that "the circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the req-

uisite diligence." Courts of equity discourage antiquated demands by refusing to interfere where there has been gross laches in prosecuting a claim, or long acquiescence in the assertion of adverse rights. *Godden v. Kimmell*, Adm'x, 99 U. S. 201, 25 L. Ed. 431; *Badger v. Badger*, 69 U. S. 87, 17 L. Ed. 836. It is well settled that a party cannot by his own negligence defer the running of the statute. *Williams v. Bergin* (Cal.) 47 Pac. 877. This cause of action is barred by the provisions of section 4037, Rev. St. 1887; it not being alleged that the intestate of appellant administrator, or his ancestors, predecessors, or grantors, were seised or possessed of the premises in question within five years before the commencement of the acts in respect to which this action is prosecuted.

The court did not err in sustaining said demurrer and entering a judgment of dismissal. The judgment is affirmed, with costs in favor of respondent.

STOCKSLAGER and AILSHIE, JJ., concur.

(9 Idaho, 532)

#### MORETON v. VILLAGE OF ST. ANTHONY.

(Supreme Court of Idaho. Jan. 26, 1904.)

#### CITIES AND VILLAGES—DEFECTIVE STREETS—LIABILITY FOR DAMAGES.

1. Cities and villages incorporated under the general laws of Idaho are liable in damages for negligent discharge of the duty of keeping the streets thereof in a reasonably safe condition for use by travelers in the usual modes.

2. Where they are organized under the general laws, and not by special charter, no distinction is made between cities and villages as to liability for negligent care of their streets.

3. *Carson v. City of Genesee*, 74 Pac. 862, approved and followed.

(Syllabus by the Court.)

Appeal from District Court, Fremont County; J. M. Stevens, Judge.

Action by Cureton B. Moreton against the village of St. Anthony. Judgment for plaintiff, and defendant appeals. Affirmed.

Caleb Jones and F. S. Deltrich, for appellant. J. R. King, King & Milsaps, and E. E. Chalmers, for respondent.

AILSHIE, J. This was an action by the plaintiff against the defendant for damages received while traveling on a public street within the corporate limits of the defendant. The defendant is a municipal corporation organized and existing under the general laws of this state. The only question presented upon this appeal is that of the liability of a municipal corporation of this state, organized under the general laws, for damages sustained by reason of the negligence of such municipality in the care and keeping of its streets. The question here raised was fully considered by this court in *Carson v. City of Genesee*, 74 Pac. 862, and the conclusion there reached disposes of this case adverse-



ly to the appellant. We are satisfied with the principles announced in that case, and reaffirm them here.

It was urged upon the oral arguments that a distinction should be made between the liability of cities and the liability of villages. We see no reason for making any such distinction. Where they are organized under the general laws, and not by special charter, there can be no reason for making any distinction between them as to liability for negligence in the care of their streets.

It has also been suggested that the matters complained of in this case, as shown by the evidence, do not constitute negligence on the part of the village. This appeal is from the judgment only, and the record does not contain the evidence; and we cannot, therefore, consider its sufficiency.

It seems proper to say here that a municipality is not guilty of negligence for every act or omission which would constitute negligence on the part of an individual. Much discretion is vested in such bodies. For instance, the corporation is not guilty of negligence for a failure to build sidewalks on all of its streets, but, when it has constructed a walk, it must keep it in a reasonably safe condition.

Judgment affirmed, with costs to respondent.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

(9 Idaho, 535)

SMITH v. KRALL et al.

(Supreme Court of Idaho. Jan. 28, 1904.)

CONTRACT TO CONVEY REAL ESTATE—WHEN MAY BE ENFORCED.

1. Where A. enters into a written contract to convey certain real estate to B. on the payment of certain promissory notes, and the contract provides that the failure of B. to comply with the terms of the contract forfeits all rights he may have by virtue thereof, and he does so fail to meet the payments after repeated demands for payment, a court of equity will not declare a specific performance on his showing that A. had also violated the contract. Under the facts of this case, *held*, that neither party has complied with the terms of the contract sued on, and a court of equity will place the parties as nearly in statu quo as possible.

(Syllabus by the Court.)

Appeal from District Court, Ada County; Geo. H. Stewart, Judge.

Action by O. W. Smith against John Krall and others. Judgment for defendants, and plaintiff appeals. Modified.

Richards & Haga, for appellant. Wood & Wilson, for respondent Krall. W. E. Borah, for respondents Gwinn.

STOCKSLAGER, J. It appears from the record that on the 29th day of March, 1900, appellant entered into an oral agreement to

purchase two lots in Boise from defendant Krall for the sum of \$850. Negotiations were made through W. S. Walker, agent for Krall. Appellant at said time paid to said defendant, through his agent, Walker, \$20. On the 2d day of April following, a formal written agreement was prepared and signed, and on the same day, before any further money was paid, an additional agreement was executed; and on April 3d, following the execution of both agreements, appellant paid to defendant Krall the further sum of \$130, and gave him two promissory notes, of \$350 each, for the balance of the purchase money, due in one and two years, respectively, and bearing interest at 8 per cent. per annum. The first agreement, after stating the necessary facts of purchase and sale, has the following clause:

"And the said party of the second part agrees to pay all State, City, School and County taxes, or assessments of whatsoever nature, which are or may become due on the premises above described.

"In the event of failure to comply with the terms hereof, by the said party of the second part, the said party of the first part shall be released from all obligation in law or equity to convey said property, and the said party of the second part shall forfeit all right thereto, and all payments made on said property. And the said party of the first part on receiving the payments hereinbefore specified, at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient warranty deed to said premises, free from all encumbrances, and it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties."

The second contract is as follows:

"On or before four months after this agreement, John Krall, party of the first part, agrees to remove from lots No. 1 and 2 in Block No. 1 of Krall's Addition, the buildings thereon. O. W. Smith, party of the second part, agrees to build on lots No. 3 & 4 in same block and Addition, a residence that will cost not less than \$2,000. The removal of said buildings herein stated is a part of the consideration for the purchase of lots No. 3 & 4 in the said block No. 1 from John Krall."

These agreements were acknowledged.

The eleventh paragraph of the complaint is that the said defendant Krall refused and neglected to remove the said apple buildings from the said lots, and did not remove the same until some time in the month of July, 1901, by reason of which the plaintiff was prevented from constructing the said house upon the said lots as required by the terms of the said contract.

The twelfth paragraph alleges that by reason of defendant John Krall's failure to carry out his said agreement, and by reason of his failure to remove the said apple house, out-

¶ 1. See *Specific Performance*, vol. 44, Cent. Dig. § 236.

houses, barns, etc., from the lots purchased by this plaintiff, and from the lots numbered 1 and 2 of said block 1, until July, 1901, in violation of his said agreement as above set forth, this plaintiff was damaged in various and large sums of money, to wit: By increase in cost of building material between August 2, 1900, and July, 1901, \$700; by extra cost incurred in moving plaintiff's barn, \$150; by loss of use of said lots 3 and 4, block 1, \$300.

\* The thirteenth paragraph alleges, among other things, that on or about the 10th day of August, 1901, defendant Krall called upon plaintiff for the payment of the first note, whereupon plaintiff offered to pay said defendant both of the notes, together with the interest thereon, except the interest on the first note from the termination of the said four months, for the reason that the plaintiff had been deprived of the use of said lots in the construction and operation of said building thereon, and being injured and damaged as above set forth by reason of the breach of said contract on the part of said defendant, whereupon said defendant notified plaintiff that he would not accept any money upon said notes, or either of them, except the principal on both notes, together with the interest from date to said 10th day of August, 1901.

The fourteenth paragraph states that "plaintiff is informed and believes," etc., "and therefore alleges the fact to be, that on the 10th day of August, 1901, defendant Krall was not financially able to respond in damages to this plaintiff for the injury sustained, \* \* \* and that a judgment against said Krall for the damages sustained would have been uncollectible and worthless; and this plaintiff ever since the offer aforesaid has at all times been ready and willing to pay defendant Krall the total amount due under the contract, in gold coin, aforesaid, less the interest due on the first note from the termination of said four months, and has always been, and now is, ready and willing to receive a conveyance of said premises, and pay defendant Krall the amount due under the contract, less the damages sustained by this plaintiff by reason of the failure of said defendant Krall to carry out his said agreement under the terms of his said contract." By amendment permitted by the court, following this paragraph, plaintiff says: "And on or about the 4th day of August, 1902, this plaintiff tendered to the defendant John Krall the full amount due on said notes, and each of them, including interest thereon at the rate provided for from the date of said notes to the day of such tender, but that said Krall declined and refused to execute a deed, and still so refuses," etc.

The seventeenth paragraph alleges that Della Gwinn, wife of Montie B. Gwinn, claims to have purchased these lots on or about the 22d day of April, 1902, from defendant Krall.

Defendant Krall, answering for himself, admits the first and second paragraphs of the complaint—that is, the ownership of the property, and the agreement to sell to plaintiff—but denies the third paragraph, which alleges that the removal of said buildings from lots 1 and 2 aforesaid is a part of the consideration for the purchase of lots 3 and 4, block 1, or that he ever signed such agreement. Denies that he refused or neglected to remove said buildings until the month of July, 1901. Admits that a portion of said buildings, for reasons beyond the control of this defendant, were not removed from lots 1 and 2 of said block 1, but says that a portion of said buildings were almost immediately moved, and the buildings permitted by defendant to remain thereon in no way prevented the plaintiff from constructing his house, or from keeping and performing each and all of the promises and agreements contained in the said written agreement, and by him (plaintiff) promised to be kept and performed. Denies that plaintiff was damaged in any sum by reason of defendant not carrying out his agreement, or not removing the buildings. Admits that on or about the 10th day of August, 1901, and at divers and sundry times, he called upon plaintiff for the payment of the first note, and for the payment of both notes. Admits that he notified plaintiff, or caused plaintiff to be notified, that he would not accept any money upon said notes, except the principal on both, together with the interest thereon, without deduction from any cause whatever. Alleges that he was at all times ready and willing and prepared to accept any payment upon said notes offered or tendered by plaintiff, provided the same was made unconditionally, and uncompromised by a demand for a reduction of said interest account. Denies that August 10, 1901, or at any time prior thereto, he was not financially able to respond to any judgment plaintiff might recover against him for damages, or that a judgment against him would have been uncollectible or worthless. Denies the damage of \$1,150 set out in the complaint.

Further answering, defendant Krall alleges: "(1) That plaintiff is not entitled to the relief prayed, for the reason that the said plaintiff has at all times since making the agreement failed and refused to keep and perform his promises and agreements set forth in the written agreement; that prior to the 22d day of April, 1902, and almost constantly between the 2d day of April, 1901, and the 22d day of April, 1902, he demanded the money due on the notes, but plaintiff refused to pay any part thereof, except upon terms involving a modification of the contract and agreement; that by such refusals he forfeited all rights under the contract, etc.; that April 22, 1902, defendant conveyed the lots in dispute to Della Gwinn; that long before the commencement of this suit plaintiff knew defendant had sold and conveyed the lots to Della Gwinn, and that defendant had no

power or control over said premises, and for that reason knew this defendant was unable to convey said premises, or any part thereof, to plaintiff."

Defendants Gwinn answer for themselves, setting up title to the lots in dispute by virtue of a warranty deed executed by defendant Krall to Della Gwinn on the 22d day of April, 1902. There seems to be no dispute as to the conveyance by defendant Krall to Della Gwinn at the time and in the manner alleged.

After hearing all the evidence offered and received by all the parties to the action, the court made its findings of fact and conclusions of law, and ordered judgment accordingly. The court finds: (1) That on or prior to April 2, 1900, defendant Krall was seised in fee simple of the lots in dispute, and that on said day plaintiff and defendant Krall entered into the written contract set out in the complaint; (2) that plaintiff has not paid the promissory notes, with the interest, as agreed, or at all, etc.; (3) that John Krall did not remove the buildings upon lots 1 and 2 in Krall's Addition, as mentioned in the agreement of April 2, 1900, until about July 1, 1901, and that O. W. Smith has not built or constructed any residence of any nature or kind upon lots 3 and 4, described in the contract; (4) that plaintiff never at any time prior to the sale of the property covered by said contract of April 2, 1900, to Della Gwinn, tendered to John Krall the amount due under said contract, but at all times neglected and refused to pay the full amount due according to the terms of said contract, and that O. W. Smith paid the taxes upon said property after the execution of said contract. The fifth finding is that on April 22, 1902, Krall sold and conveyed to Della Gwinn the lots in controversy, and that the consideration was \$807; that plaintiff had knowledge of said sale not later than April 24, 1902; that the notes above referred to were returned to plaintiff, and he was notified that he had forfeited his right under the contract above referred to; that, at the time of the said sale above referred to, plaintiff had not paid or tendered the amount due under the contract referred to in paragraph 2 of plaintiff's complaint, although the plaintiff had been requested to make such payments and to comply with said contract by defendant Krall. The sixth finding is that on or about the 2d day of August, 1902, the plaintiff stated to defendant Krall that he was ready to pay the amounts due under said contract, including principal and interest, and exhibited a roll of money at said time, without counting the same out to the defendant; that Krall notified plaintiff at said time that he had sold said property, and had nothing further to do with the same.

As conclusions of law, the court finds that the plaintiff failed to comply with the terms of the agreement set forth in plaintiff's com-

plaint, and had forfeited his right to conveyance under said contract, and is not entitled to the specific performance of the same.

Counsel for appellant insist that the evidence was insufficient to sustain the findings and decision of the court. We find a very complete record in the case, and the attorneys have favored the court with exhaustive briefs on all the issues involved. There seems to be no dispute as to most of the facts. The contract for the sale of the lots by Krall to Smith, date, amount, terms, and conditions, are all shown by the record. The second contract entered into is somewhat in dispute, Krall testifying that he has no recollection of the clause therein providing that the removing of the buildings should be a part of the consideration for the sale of the lots, but he does not dispute the fact that he did enter into the two contracts. It is also beyond dispute that respondent Krall did not move the buildings from the lots as contemplated by the contract until about 11 months after he should have done so. It is further shown that he ignored repeated requests from appellant to comply with the contract by the removal of the buildings, but finally, about July 1, 1901, he did remove the buildings. It is disclosed by the record that neither party to this transaction acted in good faith toward the other; respondent insisting on appellant paying the notes, with interest, when due, notwithstanding he had failed to comply with the clause in the contract for the removal of the buildings. On the other hand, appellant seeks to constitute himself the arbitrator of the shortcomings of respondent, and refuses to pay the notes, with the interest, as provided for in the notes and contract. The two contracts are not difficult of construction. Appellant agreed to pay a fixed consideration for this property, and paid \$150 at the time of the execution and delivery of the contract and notes, and also agreed to pay all taxes that might be assessed against the property until he got his deed. This he did, but, because respondent Krall did not remove the buildings as per his agreement, appellant refuses to comply with his contract, and only proposes to pay such amount on the notes as, in his judgment, he should pay. Thus we find them contending up until after the second note fell due, and soon thereafter, respondent Krall says, after making another demand for payment from appellant, and being refused, he executed the deed to Della Gwinn. Appellant cites a long list of authorities holding that either party to a contract of the character before us, before forfeiture, should give reasonable notice; also to the effect that the party first at fault should not be heard to complain of the laches of the other party. This is unquestionably the rule, but do the facts in this case bring it within the rule contended for? Courts of equity do not make contracts for parties, but merely construe them; and, as we construe

the contract in this case, time was of the essence of the contract, and both parties could be held to a strict performance of it. If Mr. Krall was here asking the court to assist him in requiring the plaintiff, Smith, to comply with the contract, the authorities cited by appellant would apply, and we certainly would say to him, "The trial court, by its findings, says you have also violated the contract, and hence cannot be heard to complain here, and you must first make the plaintiff whole in any damage he may have sustained by reason of your failure in the performance of your contract." In this case Mr. Krall is not in court asking any assistance from it. He stands on his contract, and insists that he only did what the contract authorized him to do when he sold the lots to Della Gwinn. This fact is conceded by appellant. He admits that he never made a tender to respondent until after he knew the lots had been sold and conveyed to another party. In equity, the party asking relief must come into court with clean hands and good faith; and, as we view it, neither party to this contract would have any standing in court, asking its assistance in the enforcement of this contract. We cannot refrain, however, from saying that good faith and honest dealing would have prompted Mr. Krall to have tendered back the payment of \$150 on the contract, as well as the taxes on the property theretofore paid by appellant, amounting to \$48. This is based on the statement of appellant that he had been greatly damaged by the failure of respondent to remove the buildings, and which he assigns as his reasons for not tendering to respondent Krall the payments as they fell due. This, however, did not excuse him from a compliance with his contract. He had entered into a solemn obligation to meet the payments as they fell due, and, before he can be heard in equity, he must show that he is not at fault in any of his obligations. In other words, he cannot plead the laches of Krall in justification of his own shortcomings. We think we are justified in this conclusion by all the modern authorities to which our attention has been called. We have carefully examined all the questions raised by appellant, and, whilst we have not taken them up in the order named in the brief and record, we do not find any error that would warrant a reversal of the judgment. We conclude that this judgment should be modified to the extent that the respondent Krall should be required to pay appellant Smith the amount of taxes paid on the property, together with the \$150 paid to Krall at date of contract.

The judgment is modified as above indicated—each party to pay their own costs—and cause remanded for further proceedings in harmony with this opinion.

SULLIVAN, C. J., and AILSHIE, J., concur.

(9 Idaho, 548)

### HENRY v. HERSCHEY.

(Supreme Court of Idaho. Jan. 30, 1904.)

#### WRITTEN INSTRUMENT—PAROL EVIDENCE—WHEN ADMISSIBLE.

1. Under the facts and circumstances of this case, *held*, that parol evidence is admissible to show that at the time of the execution of the written instrument one of the conditions specified therein had been previously complied with and fully satisfied.

2. Further *held* that the admission of extrinsic evidence showing that a condition named in the written instrument had been met by the party upon whom such condition was imposed is not a violation of the general rule which excludes parol evidence tending to vary or contradict the terms of a written contract.

(Syllabus by the Court.)

Appeal from District Court, Bingham County; Joseph C. Rich, Judge.

Action by E. P. Henry against Frank Herschey to recover a balance on the purchase price of 400 tons of hay. Judgment was entered in favor of plaintiff, and defendant appealed. Affirmed.

Reeves & Boyd, for appellant. F. S. Deltrich, for respondent.

AILSHIE, J. The facts of this case as disclosed by the record are substantially as follows: In the fall of 1897 the plaintiff had several stacks of lucerne hay in his field near Idaho Falls, in Bingham county, and, being desirous of selling the same, approached the defendant, who was at the time feeding a large number of sheep in that county, and proposed to sell him this hay. After some conversation over the matter they drove out to the field, and the defendant made an examination of the hay and expressed himself as being satisfied with the quality and condition, and offered the plaintiff \$2.50 per ton for the same, which proposition was thereupon accepted by the plaintiff. They estimated the hay at 400 tons. At that time the plaintiff also told the defendant that there was a good feeding ground near by where he could keep his sheep during the winter and feed them. After an examination of the location defendant concluded that it was a desirable place, and it was agreed that the hay as hauled from the stacks to the proposed feedyards should be weighed at what was known in the community as "Tautphaus' Scales," located on the road between the haystacks and feeding grounds. After this agreement the defendant went away, and while no one is positive, yet it seems that within two days thereafter he returned and found the plaintiff at one of the hotels at Idaho Falls, and offered him \$20 to release him from the contract. Plaintiff refused to do so, and thereupon defendant paid him \$200 on the hay previously purchased, which payment was made upon the basis of an estimate of 400 tons. After making this payment the defendant took a blank

¶ 2 See Evidence, vol. 20, Cent. Dig. § 2147.

form from his pocket and inserted some words and erased others, saying to plaintiff, "Now, I don't want to enter into any iron-clad contract in the sale of this hay," and asked him to sign the memorandum or receipt he had just filled out. Plaintiff thereupon signed the same, which is as follows: "Hay Contract. Idaho Falls, Idaho, Oct. 14, 1897. I hereby contract and agree to sell to Frank Herschey four hundred tons lucerne hay at \$2.50 per ton and agree to weigh the same at Tautphaus' scales; said Frank Herschey as follows will move said hay or have it moved, between November 30th and February 1st; said hay to be of good, merchantable quality; payment to be made as follows: On demand, after weighing, and I hereby acknowledge the receipt of two hundred dollars, the same being 50 cents per ton on the above contract. E. P. Henry." Plaintiff testified at the trial that he understood this document as a mere receipt for the money paid, and that it was signed by him merely as an acknowledgment of part payment on the hay, and that no contract was discussed at that time, and no other contract was made or entered into, and that this payment was made in part performance of the contract made at the time the hay was examined by defendant. There is no substantial difference or dispute as to the facts and circumstances of the execution of this instrument. A few days later the defendant sold and assigned his interest in the contract to one Wright, who thereafter took possession of the hay and tore down all the stacks, baled a portion of it, and caused a part, if not all, of the remainder to be hauled away. At any rate, all of the hay was either removed or destroyed, and the plaintiff took no further notice of it. No further payment was ever made to plaintiff on account of this contract, notwithstanding the fact that he repeatedly called upon Herschey, the defendant, to pay the balance. Herschey always insisted on referring the plaintiff to his assignee, Wright, while the plaintiff insisted that he had nothing to do with Wright, but, rather, looked to the defendant, with whom he had contracted. The matter ran along for some time in this condition, and finally this present action was instituted in the district court to recover the balance due in the sum of \$800, together with \$260 interest.

Upon the trial the plaintiff testified to the facts as above set out. The defendant interposed objections to any parol evidence as to what the contract had been, or any of the conditions or circumstances under which it was entered into, for the reason that the same had been reduced to writing. At the time the objection was made no written contract was produced, and the plaintiff, although cross-examined at that time concerning any written contract, stated that all the writing which he had seen was merely a receipt for the money paid, and that the receipt might pos-

sibly contain some memoranda made at the time, but that he had not seen the same since he signed it. The court overruled the objections and admitted the evidence. On cross-examination of the plaintiff he identified the instrument above set out, and it was thereupon introduced by the defendant.

The principal objection raised by the appellant upon this appeal, and the only one of importance, is the action of the court in admitting parol evidence as to the terms, conditions, and circumstances of this contract. This objection really reduces itself still further, as it appears from the record that the only purpose of urging it was to prevent evidence showing that the particular and specific hay bought was that then stacked in plaintiff's fields and examined by defendant. Defendant insists that under the terms of this written instrument he was entitled to "good, merchantable" hay, and that it was afterward discovered that the hay which plaintiff had shown defendant was not such a class and quality of hay. Plaintiff, on the other hand, contends that he sold defendant this specific hay, and that defendant examined the same and was satisfied to accept it, and that the contract was made concerning this particular and identical property, and that the same was "good, merchantable" hay at the time the contract was made, and that no further question upon that point could thereafter arise as between the parties to the contract. It has been very ably argued here by counsel for appellant that the instrument admitted in evidence is a complete contract within itself, and that the parol evidence tended to vary or contradict the terms of the written instrument, and that, therefore, the court erred in the admission of such parol evidence. In the first place, we think that, under the facts and circumstances as disclosed in this case, the instrument introduced is more in the nature of a receipt and memorandum—made after the contract had been completed, and subject to enforcement—than a complete contract between the parties. We are also of the opinion that the parol evidence so admitted cannot reasonably be said to vary or contradict the written instrument, but, on the other hand, showed that one of the conditions named in the written instrument had been satisfied by the plaintiff prior to the signing of the same. The evidence in the case fully convinces us that the contract was made with reference to the particular hay examined by the defendant upon the day of their first conversation, and that he was then satisfied with it, and contracted with direct reference to that specific property. It appears that the plaintiff was not a hay merchant, and was not in the business of buying and selling hay, but was merely seeking a market for the production from his own ranch. The defendant knew that fact, and had no reason to believe or expect that the plaintiff would go into the market and buy any other or dif-

ferent class or quality of hay to fill this contract. For these reasons we think the evidence was clearly admissible for the purpose of showing that the requirement for "good, merchantable" hay named in the written instrument had been satisfied and complied with prior to the signing of that instrument.

The evidence in this case does not fall within the general rule excluding parol evidence varying or contradicting a written contract. While we have not been cited to any adjudicated case where the facts were the same as in the case at bar, still the principle governing the admissibility of evidence under very similar circumstances has often been recognized by the authorities. See *Bulkley v. Devine*, 127 Ill. 407, 20 N. E. 16, 3 L. R. A. 330; *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 109; *Allen v. Tacoma Mill Co.* (Wash.) 51 Pac. 372; *Barghoorn v. Moore*, 6 Idaho, 531, 57 Pac. 265; 2 Pars. Contracts, 550.

There are other reasons why the appellant could not prevail in this case. He and his assignee, Wright, used and destroyed, or permitted to be used and destroyed, all the hay which plaintiff claims to have sold him. Defendant made no complaint as to the quality of the hay; gave plaintiff no notice of the alleged damaged condition of the hay; never offered to make any further payment; and, after using and wasting all this property, he is in no position to be heard to complain, at this late date, when he is called upon to pay for the property so received or destroyed.

For the foregoing reasons, the judgment of the lower court is affirmed, with costs to the respondent.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

(9 Idaho, 642)

#### In re KINYON.

(Supreme Court of Idaho. Feb. 17, 1904.)

#### INTERSTATE COMMERCE—LICENSE TAX ON SOLICITORS—RESTRAINT OF TRADE AND COMMERCE.

1. A law requiring solicitors taking orders for goods and merchandise to obtain a license and pay a tax therefor is in violation of the third clause of section 8, art. 1, of the Constitution of the United States, when applied to persons acting as agents and solicitors for citizens of other states in the sale of property not at the time within this state.

2. A manufacturer of goods, who carries on his business of manufacturing in another state, may send his agents into this state to solicit orders for the products of his manufactory, without paying to the state a license tax therefor, and he is protected in so doing by the federal Constitution.

3. Act March 16, 1901 (Sess. Laws 1901, p. 155), providing for licensing of peddlers, hawkers, and solicitors taking orders for goods, is unconstitutional, and an unwarranted interference with interstate commerce in so far as it

attempts to impose such burden upon the authorized solicitors and agents of citizens of other states trying to introduce and sell their goods in this state.

4. Where the property prior to the sale has been transported to this state, and becomes subject to the jurisdiction thereof, a contract concerning the same does not look to interstate transportation for its consummation, and is subject to state regulations and control.

(Syllabus by the Court.)

Application of Irven Kinyon for writ of habeas corpus. Writ waived, and petitioner discharged.

Forney & Moore, for petitioner. John A. Bagley, Atty. Gen., and W. E. Stillinger, Pros. Atty., for the State.

AILSHIE, J. The petitioner has made an original application in this court for a writ of habeas corpus, and alleges that he is illegally and wrongfully imprisoned and detained under a charge of soliciting orders within this state for wrought-iron ranges manufactured by the Wrought Iron Range Company of St. Louis, Mo., to be shipped into this state under such orders and contracts. It appears that the petitioner, a resident of the state of Washington, was soliciting orders from a price list and by sample carried with him by horse and cart, and that he had no interest in the goods for which he was soliciting orders, but that the same are manufactured and kept in the state of Missouri, and that upon the forwarding of such orders the goods are thereupon shipped to the agent for delivery. No license was ever secured for this purpose, as required by the act of March 16, 1901 (Sess. Laws 1901, p. 155), and the petitioner was accordingly arrested for a violation of that act in that he solicited orders without first procuring a license as required by law. The provisions of the act involved in this case are as follows:

"Sec. 4. License. Each peddler or solicitor taking orders for groceries, clothing, hardware, or other mercantile establishments shall pay a license of not less than seventy-five (\$75.00) dollars nor more than one hundred and twenty-five (\$125.00) dollars per year."

"Sec. 8. Applicable when. The provisions of this act shall not be considered to apply to runners traveling for wholesale houses and taking orders from merchants only, nor to peddlers or hawkers in farm products."

Section 9 of the act makes its violation a misdemeanor, and punishable by fine, or imprisonment in case of failure to pay such fine. The prisoner was tried and convicted in the justice's court in and for Latah county, and a fine was thereupon imposed, and on failure to pay the same he was committed to the custody of the sheriff of Latah county. Upon the trial in the justice's court the prosecuting attorney for Latah county and the attorneys for the prisoner entered into an agreed statement of facts, which purports to embody all the material facts in the case, and is as follows:

¶ 1 See Commerce, vol. 10, Cent. Dig. § 111.

"The Wrought Iron Range Company is a corporation duly organized and existing under the laws of the state of Missouri, and are manufacturers and wholesale dealers in stoves and ranges in the city of St. Louis, in the said state of Missouri, and with no place of business in the state of Idaho. That the defendant herein is the duly authorized soliciting agent of the said Wrought Iron Range Company for the sale of stoves and ranges in the state of Idaho, and that, as such agent and solicitor, the defendant herein has engaged in the business of selling and offering to sell stoves and ranges in the said state of Idaho by sample and by list. That on the 2d day of February, A. D. 1904, the defendant, as such agent, solicitor, and representative of the said Wrought Iron Range Company, sold, by sample and by list, a certain stove and range of the said Wrought Iron Range Company to one E. C. Lloyd, in said county of Latah, state of Idaho. That neither the defendant nor the said Wrought Iron Range Company paid any tax or procured a license from the county auditor of Latah county before engaging in said business and making said sale, as required by the act of March 16, 1901 (6th Session Laws, p. 155). That prior to the commencement of this action the board of county commissioners of Latah county fixed the license under the act hereinbefore referred to as follows: Peddler or hawker on foot, \$25 per year; peddler or hawker with wagon, \$50 per year; peddler or solicitor taking orders for groceries, clothing, hardware, or other merchandise, \$100 per year."

By agreement of the respective counsel for the petitioner and the state, two questions have been submitted to the court as the leading and controlling questions which determine the issue as to whether or not the petitioner is entitled to his discharge. They are: "First. Is the act of March 16, 1901 (6th Session Laws, p. 155), providing for the licensing of peddlers, hawkers, and solicitors, in contravention of section 8, art. 1, of the Constitution of the United States? Second. Is section 8 of the said act of March 16, 1901, unconstitutional and void in this: that it is not uniform, and discriminates unjustly against this defendant?"

The controlling question in this case is: Does the act of March 16, 1901, conflict with section 8, art. 1, of the federal Constitution, in that it affects or interferes with interstate commerce? It appears to us that this act in no way interferes with the interstate commerce provisions of the Constitution, unless it be in so far as it has the effect of imposing a license tax upon agents or solicitors who obtain orders within this state for goods manufactured and owned by citizens of other states. This question has been so repeatedly discussed and passed upon by the Supreme Court of the United States that any discussion thereof by us is entirely obviated, and we will therefore content ourselves with

a review of some of the leading authorities from that court in order that we may arrive at their ultimate conclusion in the premises. *Robbins v. Taxing District of Shelby County*, 120 U. S. 497, 7 Sup. Ct. 592, 30 L. Ed. 697, is one of the leading authorities on this question, and has perhaps been cited more frequently than any other case on the particular question here involved. That was a prosecution against Robbins for drumming or soliciting orders by samples within the taxing district of Shelby county, Tenn., for a firm doing business in Cincinnati, Ohio, without having procured a license for carrying on such business or trade, as required by a statute of the state of Tennessee imposing a license on drummers and other persons selling goods by sample or otherwise for carrying on such business or occupation. The court, in discussing the purpose and object of such a statute, and the power and authority of the state to enact and enforce such a law, said: "This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it. If the selling of goods by sample and the employment of drummers for that purpose injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it, for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject would be but a repetition of the disorder which prevailed under the Articles of Confederation." This case was cited as a controlling authority in *Asher v. State of Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368, the syllabus to which says: "The law of Texas requiring every commercial traveler or drummer to obtain a license and to pay a tax therefor is unconstitutional and void when applied to citizens of other states soliciting trade in Texas." In *Lyng v. Michigan*, 135 U. S. 161, 166, 10 Sup. Ct. 725, 34 L. Ed. 150, 153, it is observed: "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the

transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." Again, in *McCall v. People of the State of California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 392, Mr. Justice Lamar reviewed the previous authorities on the question, and approved the doctrine announced in the principal cases. In *Brennen v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719, the plaintiff in error was convicted of a violation of an ordinance of the city of Titusville, Pa., requiring all persons canvassing or soliciting orders for any goods within the city to first obtain a license therefor. Mr. Justice Brewer there reviewed the authorities again on the question, and said: "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and, if a state may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And, notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the state is enabled to say that it shall not be carried on in this way, and to that extent to regulate it." In 1902 this same question again came before the Supreme Court of the United States in *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785, upon a writ of error to the Supreme Court of Tennessee, and the authorities were there reviewed by Mr. Justice Peckham, and special stress was laid upon the *Robbins* and *Brennen* Cases, supra, and the writer of the opinion concludes as follows: "Although the state has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the state. We regard this case as within the *Robbins* and other similar cases above referred to, and it follows that the judgment of the Supreme Court of Tennessee, holding the complainants liable to pay the tax demanded, was erroneous." There is an interesting and exhaustive note to this last-cited case in book 46, page 785, L. Ed. of Supreme Court Reports, where the numerous authorities both from the federal and the state courts are collated and digested; and, while there appears to be much diversity of opinion among the several state courts, there is a uniformity of decision in the federal courts on this question. The *Robbins*, *Asher*, *Lyng*, *Brennen*, and *Stockard* Cases are referred to and approved by Mr. Justice Shiras in *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336. *Norfolk & W. R. Co. v. Sims*, 24 Sup. Ct. 151, 48 L. Ed. —, decided by the

United States Supreme Court in December, 1903, seems to be the last expression of that court upon this subject, and there again all the principal cases are cited with approval.

The only question with us is to ascertain whether or not the Idaho statute above cited falls within the rule and principle announced in this long and uniform line of authorities. It is conceded that the petitioner was not the owner of the goods for which he was soliciting orders, and that such goods were at the time the manufacture and property of a citizen of another state—that is to say, the property of the Wrought Iron Range Company—and that he was exhibiting a sample, and taking orders for property to be shipped into this state. We think this case, as here presented, falls clearly within the rule announced by the highest judicial authority in the land, and that, as there construed, our statute has the effect of attempting to regulate or interfere with interstate commerce, and in that respect is in violation of the third clause of section 8, art. 1, of the Constitution of the United States.

It should be observed, however, that a distinction has been made where the goods or property at the time of the sale are within the state, and under the control and care of the agent or solicitor. In such cases it is said that both the property and the business or occupation are within the jurisdiction of the state, and therefore subject to its regulation and control, and that any transaction with reference thereto does not look to interstate commerce for the carrying out and execution of the same. This principle was announced and distinction made in *Emert v. State of Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430, where Mr. Justice Gray says: "The defendant's occupation was offering for sale and selling sewing machines by going from place to place in the state of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one state to another, and were neither interstate commerce in themselves nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power and to the police power of the state. \* \* \* The necessary conclusion, upon authority as well as upon principle, is that the statute of Missouri now in question is no wise repugnant to the power of Congress to regulate commerce among the several states, but is a valid exercise of the power of the state over persons and business within its borders." This distinction seems



to have worried the state courts more than any other one thing arising out of such legislation. Much confusion and uncertainty exist among the courts of last resort of the several states as to just when such state legislation ceases to be a valid and proper exercise of the authority of the state and becomes obnoxious to the federal Constitution and power of Congress to regulate commerce among the states. This feeling of uncertainty has been very forcibly expressed by Judge Elliott of the Supreme Court of Indiana in *McLaughlin v. City of South Bend*, 126 Ind. 471, 26 N. E. 185, 10 L. R. A. 357, where he says: "The current of opinion in the federal courts runs far in the direction of the utter annihilation of state power in matters bearing upon commerce between the states, and, although there may be some police power remaining in the states enabling them to legislate concerning matters of interstate commerce, its nature is very shadowy, and its extent narrowly circumscribed."

We have no desire or inclination to run counter to the principles and authority announced by the supreme judicial authority of this country, vested with paramount jurisdiction in the interpretation and construction of the fundamental law of the land. Being thus convinced that the statute here in question falls clearly within the rule announced, and that the petitioner has been unlawfully restrained of his liberty, we must order his discharge. It is therefore ordered that the petitioner be released from custody and restored to his liberty.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

(9 Idaho, 608)

#### STATE v. COLLETT et al.

(Supreme Court of Idaho. Feb. 11, 1904.)

LARCENY—INFORMATION—DESCRIPTION OF PROPERTY—WHEN SUFFICIENT—CONFLICTING INSTRUCTIONS—NEW TRIAL.

1. An information that charges the larceny of one horse is not repugnant to section 7679 of the Revised Statutes of 1887 for want of sufficient description.

2. An instruction charging that the possession of recently stolen property is in law a strong criminating circumstance tending to show guilt, unless the evidence and the facts and circumstances proved show that they may have come honestly into possession of the same, is not error, neither is it in conflict with a charge that possession of stolen property recently after the theft, if unexplained, is a circumstance tending to show the guilt of the possessor. Still, in this case, if the jury believe from the evidence that the defendants were placed in possession of the property by others, and were honestly employed to deliver said property into the possession of another, and were at the time of their arrest openly and publicly carrying out the conditions of their employment, this is a satisfactory account of the possession of the animal in question.

3. Where there is a substantial conflict in the evidence on the material issues involved, a new trial will not be granted.

(Syllabus by the Court.)

Appeal from District Court, Fremont County; James M. Stevens, Judge.

Samuel L. Collett and Samuel Ireland were convicted of grand larceny, and appeal. Affirmed.

Briggs & McCutcheon and Chalmers & Jones, for appellants. John A. Bagley, Atty. Gen., for the State.

STOCKSLAGER, J. The defendants were jointly charged with a felony; they were convicted, and each sentenced to serve a term of three years in the State Penitentiary. A motion for a new trial was made, which was overruled by the court, from which order defendants appeal; they also appeal from the judgment.

The information, after the preliminary statement, charges: "That Samuel L. Collett and Samuel Ireland, on or about the 13th day of June, A. D. 1903, at the county of Fremont, in the state of Idaho, did commit the crime of grand larceny, committed as follows, to wit, did willfully, unlawfully, and feloniously steal, take, lead, drive, and carry away one horse, then and there being the personal property of S. H. Davis, contrary to the form, force, and effect of the statute in such case made and provided, and against the power, force, and dignity of the state of Idaho." Then follows the allegation that defendants had an examination before an officer authorized to hold such examinations, and were held to answer. To this information a demurrer was interposed by the defendants: "(1) That the information does not state facts sufficient to constitute a public offense. (2) That the information does not substantially conform to the requirements of section 7679 of the Revised Statutes 1887 of Idaho, in this: that the information is not direct and certain as to the particular circumstances of the offense charged, and that no description of the property alleged to have been stolen by the defendants is given in the information by which the said property could be identified." This demurrer was overruled by the court, which is assigned as error.

The information charges that the defendants, naming them, on or about a certain date, did willfully, unlawfully, and feloniously steal, take, etc., one horse, the property of S. H. Davis. We think this language is sufficient to charge a public offense, and the demurrer, so far as this ground was concerned, was properly overruled. Counsel for appellant in their brief and also in the oral argument insist that the description of the property is insufficient as contained in the information, and that for that reason the demurrer should have been sustained. A large number of authorities are cited by appellant in support of this contention, and we have examined them with interest and care. It is insisted that the information does not comply with the provisions of sections 7677 and 7679 of the Revised Statutes of 1887. Section 7677 says: "The indictment must contain:

(1) The title of the action specifying the name of the court to which the indictment is presented, and the names of the parties; (2) a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Section 7679 says: "It must be direct and certain as it regards: (1) The party charged; (2) the offense charged; (3) the particular circumstances of the offense charged, when they are necessary to constitute a complete offense." We think a careful reading of the information will disclose that every provision of these two sections were complied with. The defendants were notified that they were charged with the larceny of one horse, the property of S. H. Davis; that said charge is lodged in the district court of Fremont county, and on or about the time the larceny was committed. As we view it, all the elements of the crime are charged to these defendants, and hence the information was a statutory charge of larceny. In *Territory v. Shiply*, 4 Mont. 486, 2 Pac. 313, it is said: "Where in an indictment the stolen property is described as sundry bank bills issued on the authority of the United States, usually known as 'greenbacks,' amounting in all to the sum of \$589, such description is not sufficient to support the indictment or enable the jury to determine that the stolen chattels were the same referred to in the indictment. The number, kind, and denomination of the bills ought to be given, or a good and sufficient excuse for not doing so set forth in the indictment." *People v. Ellenwood*, 119 Cal. 260, 51 Pac. 553, was an indictment charging the defendant with making and passing a fictitious check. *People v. Ward*, 110 Cal. 369, 42 Pac. 894, was an indictment charging the defendant with the crime of bribery. It was held that an indictment which charged that defendant did "give a bribe" to a certain supervisor, with intent to corruptly influence him in a certain matter was not sufficient. *U. S. v. Cruikshank et al.*, 92 U. S. 542, 23 L. Ed. 588, was an indictment which in general language charged the defendant with an intent to hinder and prevent citizens of the United States of African descent, therein named, in the free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them, respectively, as citizens of the United States and of the state of Louisiana, because they were persons of African descent, and with the intent to hinder and prevent them in the several and free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the Constitution and laws of the United States, but did not specify any particular right the enjoyment of which the conspirators intended to hinder or prevent, was too vague and general, lacked the certainty and precision required by the established rules of criminal

pleading, and was therefore not good and sufficient in law. *State v. Dawes*, 75 Me. 51, says: "An indictment for larceny which describes the property stolen as 'one case of merchandise of the value of six dollars,' and contained no excuse for the want of a more full and definite description, is not sufficient." *Mervin v. People*, 26 Mich. 298, 12 Am. Rep. 314, says: "Information for larceny of one hundred and thirty-five dollars of the property, goods, and chattels of C." Held bad for uncertainty. In *Stollenwerk v. The State*, 55 Ala. 142, it is held that "'a yearling of the value of six dollars,' without the addition of any other descriptive words, is not a sufficient description of the animal stolen, in an indictment for grand larceny under the act approved February 20, 1875 [Acts 1874-75, p. 260]." The above is the language of the syllabus. Mr. Justice Stone, speaking for the court, says: "Any animal in the second year of its growth is a yearling. The description in the present indictment is too indefinite. It may include many animals for the stealing of which the act approved February 20, 1875, does not provide. If the indictment had charged that the animal stolen, describing it, was an animal of the cow kind, it would have been sufficient." In *State v. Brookhouse*, 10 Wash. 87, 38 Pac. 862, that court held an information which charges that defendant did feloniously take, steal, drive, or lead away 25 head of cattle is not defective because of the disjunctive conjunction. An information which charges that defendant stole 25 head of cattle is defective for uncertainty of description of the property. As to the latter proposition, Justices Hoyt and Scott dissent. The opinion was written by Justice Stiles, concurred in by Dunbar, C. J., and Andrews, J. *State v. Morey*, 2 Wis. 494, 60 Am. Dec. 439. The court held that an indictment charging stealing of meat is bad for vagueness and uncertainty. The term applies not only to the flesh of animals used for food, but in a general sense to all kinds of provisions. The Supreme Court of North Carolina, in *State v. Patrick*, 79 N. C. 655, 28 Am. Rep. 340, quotes with approval the Wisconsin case. This case involved the theft of one pound of meat, valued at five cents. Mr. Justice Faircloth, speaking for the court, says: "Such articles have more specific names in commerce and in the country which ought to be employed in criminal proceedings." In *Potter v. State*, 39 Tex. 388, the syllabus says: "An indictment charging theft of one certain trunk or chest containing various articles of clothing, jewelry, etc., is bad for uncertainty in description of the property stolen. The words 'trunk' and 'chest' are not synonymous, and the indictment, being in the alternative, is bad for want of certainty." It will be observed that, of all these cases cited by counsel for appellants in support of their contention that the demurrer should have been sustained, but three of them contained a charge of the larceny of live stock of any character, and the descrip-

tion in neither of them can be compared with the information in the case at bar, which distinctly charges the defendant with the larceny of a horse. In the case of *State v. Rathbone*, reported in the 67 Pac. 186, this court held that an information charging the larceny of two mares, without further description, was sufficient. The Attorney General cites a large number of cases, among them *People v. Freeman*, 1 Idaho, 322; 12 Ency. P. & P. 983, cases cited; *Perry v. State*, 37 Ark. 54; *People v. Stanford*, 64 Cal. 227, 28 Pac. 106; *State v. Gooch*, 60 Ark. 218, 29 S. W. 640; 12 A. & E. P. & P. 986; *People v. Pico*, 62 Cal. 50; *People v. Montieth*, 73 Cal. 7, 14 Pac. 373. Many other authorities are cited by the Attorney General in support of the position that the information in this case sufficiently describes the property alleged to have been stolen, and an examination of them discloses that the courts have almost unanimously held that a description of the character before us for consideration has been held to be sufficient. After a careful review of all the authorities cited, we are of the opinion there was no error in overruling the demurrer.

Counsel for appellants urge that the evidence was insufficient to justify the verdict or warrant the judgment. He says: "There is no direct or positive evidence whatever even tending to contradict the explanation by defendants of their possession of the stolen horse. The mere statements of defendants explanatory of their possession, if reasonable and not improbable, is sometimes sufficient." This is true, and should appeal to the justice and reason of the jury in their deliberations; indeed that, with other questions of fact, are the things the jury are called upon to determine. In the case at bar it is evident the jury was not satisfied with the explanation. When the possession is admitted, and it is shown that the property was stolen, it becomes the peculiar province of the jury to determine the fact as to whether or not the explanation is satisfactory. This finding of the jury will not be set at naught by this court, unless it is shown by the evidence that such finding is erroneous and unwarranted, which does not appear from a careful reading of the evidence in this case, taken in connection with the circumstances connecting the defendants with the possession of the horse, their statement to the officer, after their arrest, to the effect that they took the horse because they were "hard up" and wanted to go to Canada to start anew, and the statement of defendant Collett to witness Secrist that "he was going to Canada this fall after delivering the stock to Potter, and he was coming back this fall, and then was going to Canada and meet Potter there, and there would be a whack-up between them." Hyrum Dudley testifies that Collett told him that he was taking the horses to Monida to turn over to the "M-Y" and Mr. Jenkins. Samuel Har-

rop, the sheriff of Fremont county, testified that Collett said, in his presence and in the presence of Mr. Soule, the county attorney, Ed. Little, and Dick Costell, that they received the horses from Walt Lewis, and were hired to drive them to the other side of Virginia City and turn them over to Perry Potter; that they were received by them at the stockyards at St. Anthony, and that Lewis hired them to drive them out there. Collett said he thought the whole thing was rotten, and he thought it was Walt Lewis' fault. Many of these statements are disputed by the defendants. If the evidence on behalf of the prosecution was accepted by the jury as truthful, then the defendants, and especially Collett, made contradictory statements, and the jury was at liberty to say that the possession of the horse was not satisfactorily explained. It will not do to say that, when the defendants make statements that if true would show that their possession was rightful, the jury must accept such statements as conclusive until the prosecution overcomes them by evidence of same character. Men engaged in the commission of crime, and especially larceny, are not very liberal advertisers of their acts, and the prosecution would certainly be hampered beyond help if it had to overcome every statement of the defendant as to how he came into the possession of the property alleged to have been stolen. The jurors, in passing upon the question of the possession of the property, were at liberty to consider everything said by the defendants either before or after the arrest, and if, after hearing all the evidence, they were satisfied beyond a reasonable doubt that the possession was obtained otherwise than as stated, and was wrongful and felonious, this court should certainly not disturb their verdict. What we have said on this feature of the case applies with equal force to the question of the sufficiency of the evidence to sustain the verdict of the jury. A careful investigation of the evidence does not convince us that the jury was unwarranted in the verdict.

Counsel for appellant call our attention to the case of *State v. Seymour*, reported in 61 Pac. 1033, and insist that under the rule laid down in that case these defendants should be granted a new trial. In that case it is stated that: "The defendant explained his possession of said animal by his own testimony and that of the witness Bruce, and if the facts as stated by himself and the witness Bruce are true the defendant is not guilty of the crime of which he was convicted. The evidence is not contradicted in a single particular, and neither the defendant nor Bruce was impeached." That is not true in the case at bar. The defendants contradicted themselves as to how they came into the possession of the horse or horses at St. Anthony. It is true they say they were brought to the corral and delivered to them, but tell different stories as to who brought

them there; and in their various conversations they mention three different parties as the one who brought the horses to the corral. It is not probable this court will ever extend the rule established in the Seymour Case; but, construing that authority in the most favorable light for the defendants, they are not entitled to a new trial on the ground that they accounted for their possession of the horse.

At the request of the defendants the court gave this instruction: "While possession of stolen property recently after the theft, if unexplained, is a circumstance tending to show the guilt of the possessor, still in this case, if the jury believes from the evidence that the defendants were placed in possession of the property by others, and were honestly employed to deliver said property into the possession of Perry Potter, and were at the time of their arrest openly and publicly carrying out the conditions of their employment, this is a satisfactory account of the possession of the animal in question, and removes every presumption of guilt growing out of such possession, and the jury should acquit the defendants." The court gave nineteen instructions at the request of defendants, which cover every question, and are certainly favorable to them, or they would not have been requested.

It is insisted by counsel for appellants that instruction 3 given by the court at the request of the prosecution is in conflict with instruction No. 1 given at the request of defendants. This instruction is as follows: "In this case, if the jury believe from the evidence, beyond a reasonable doubt, that the horse described in the information was stolen, and that the defendants were found in the possession of the horse soon after it was stolen, then such possession is, in law, a strong criminalizing circumstance tending to show the guilt of the defendants, unless the evidence and the facts and circumstances proved show that they may have come honestly into possession of the same." We can see no conflict in defendant's request No. 1 and the state's request No. 3. From an examination of all the instructions given by the court, we think they fairly state the law, and the defendants have no cause for complaint.

Counsel for appellants insist that, even though this court finds that Collett was properly convicted, there was no evidence on behalf of the prosecution connecting Ireland with the crime, hence a new trial must be granted to both defendants. We cannot give our assent to this contention. Whilst the evidence connecting Collett with the crime is much stronger than against Ireland, yet the jury was not satisfied with Ireland's explanation of his relations with Collett, and evidently believed they were jointly interested in the crime. We think they were justified in this conclusion.

Whenever the plural is used in this opin-

ion in referring to any statements made by the defendants, it is intended to refer to defendant Collett, who, it is shown by the record, did all the talking, but generally in the presence of defendant Ireland.

We find no error in the record, and the judgment is affirmed.

SULLIVAN, C. J., concurs. AILSHIE, J., concurs in affirmance of the judgment as to the defendant Collett, but as to the sufficiency of the evidence to sustain the verdict and judgment against defendant Ireland he expresses no opinion.

(9 Idaho, 673)

## STATE v. CHAMBERS.

(Supreme Court of Idaho. Feb. 19, 1904.)

CRIMINAL LAW—READING INFORMATION AND STATING PLEA TO JURY—URGING JURY TO AGREE—PREJUDICIAL ERROR.

1. Under section 7855, Rev. St. 1887, which provides that where the indictment or information charges a felony "the clerk must read it and state the plea of the defendant to the jury," a failure to read the indictment or information and state the plea by the clerk or any officer of the court is reversible error.

2. On a trial of a felony case, the jury, after having deliberated for considerable time, returned into court for further instructions, and thereupon the court gave them some directions and sent them back to the jury room. On the following day they came into court and announced that they could not agree, whereupon the court reminded them of the great expense of such a trial to the county, and admonished them to meet in a proper spirit of inquiry and investigation, and try to get together, and not to have too much pride in their individual opinions, and that it did not seem to him that the case involved a great deal of difficulty, and then sent them back to the jury room. After again remaining out for some time, they returned into court, and announced that they could not agree, whereupon the court again admonished them, and reiterated practically all he had before said to them, and told them that they should accommodate themselves to the condition of affairs and come to an agreement, and that the administration of justice demanded it, and thereafter the jury returned and brought in a verdict of guilty. *Held*, that such instructions, admonitions, and urging by the judge were reversible error.

3. *Held*, further, that a verdict returned under such circumstances does not represent the fair and deliberate judgment of the jury.

(Syllabus by the Court.)

Appeal from District Court, Elmore County; Lyttleton Price, Judge.

Arthur Chambers was convicted of the crime of forgery, and from the judgment and an order denying his motion for a new trial he appeals. Reversed.

El. M. Wolfe, for appellant. Atty. Gen. Bagley and Daniel McLaughlin, Co. Atty., for the State.

STOCKSLAGER, J. The defendant in this case was convicted in the district court in and for Elmore county upon the charge of forgery, and has appealed from the judg-

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 2069.

ment and from an order denying his motion for a new trial.

The first error complained of is founded upon the following statement contained in the bill of exceptions: "Before the taking of testimony neither the clerk nor any other officer of the court read the information to the jury or informed it of the plea of defendant thereto, and the same was not done at any time." It is contended by counsel for defendant that under the provisions of section 7855, Rev. St. 1887, a failure to read the information to the jury and state the plea of the defendant before proceeding to the introduction of evidence was error. It is insisted that a failure to read to the jury the complaint or information made by the state against the defendant, and the defendant's answer or reply thereto, which is designated by the statute the "plea," left the jury without any issue to try, and that a verdict returned under those conditions should be set aside. Section 7855 provides as follows:

"Sec. 7855. The jury having been impaneled and sworn, the trial must proceed in the following order: (1) If the indictment is for a felony, the clerk must read it and state the plea of the defendant to the jury. In all other cases this formality may be dispensed with."

It will be observed that the foregoing statute provides that in felony cases this procedure must be followed, and that in all other cases—that is, misdemeanor cases—it may be dispensed with. The Attorney General argues on behalf of the state that a failure to comply with this statute in such cases is a mere irregularity which will not warrant the granting of a new trial, and in support thereof cites *Territory v. Hargrave* (Ariz.) 25 Pac. 475, *Osgood v. State*, 64 Wis. 472, 25 N. W. 520, and *People v. Sprague*, 53 Cal. 491.

We do not think the Arizona case is in point, for the reason that the record was there silent as to whether or not the information had been read and the plea stated to the jury. The court disposed of that point by saying: "In the absence of such statement, the presumption is that the indictment was read to the jury in the ordinary way. Legal presumption is always in favor of judicial proceedings until the contrary appears."

The Wisconsin case seems to support the position of the Attorney General, but the question is summarily disposed of by the court without giving any reason for the ruling, and without citing the statute upon which the contention was based. We are therefore unable to ascertain whether that decision rested upon a statute similar to ours.

The California case does not seem to support the position of the Attorney General, for the reason that it appeared by the record there that the jury were repeatedly informed of the substance of the indictment

and the plea of the defendant in the course of impaneling the jury and the progress of the trial, as well as in the opening statement of the district attorney. The court there said: "It appears from the bill of exceptions, however, that during the impaneling of the jury the substance of the indictment and plea were many times repeated; that in opening the case to the jury the district attorney stated the substance of the indictment and also defendant's plea thereto; that in the charge of the court the substance of the indictment and plea were again mentioned; and that the defendant made no objection to proceeding with the trial by reason of the failure of the clerk to read the indictment or to state the plea, nor in any way referred to the omission until after the verdict had been received and entered on the minutes, and the jury polled at defendant's request."

The identical question here presented was before the Court of Appeals of the state of Kentucky twice during the year 1901—*Farris v. Commonwealth*, 63 S. W. 615, and *Hendrickson v. Commonwealth*, 64 S. W. 954. In the former case the court said: "The bill of exceptions shows that the case was called for trial, and commonwealth and defendant announced 'Ready.' Then the jury was impaneled and sworn. The indictment was not read by the commonwealth's attorney, or the clerk of the court, or any one else, before the trial began, or at any time during its progress. It is insisted that the case should be reversed for this reason. Section 219, Cr. Code Prac., reads as follows: 'The clerk, or commonwealth's attorney, shall then read to the jury the indictment, and state the defendant's plea.' This section refers to what shall next be done after the jury is sworn to well and truly try the issue. The indictment was not read, as we have said, and neither the clerk nor the commonwealth's attorney stated the plea of the defendant. This provision of the Code is mandatory. This court in *Galloway v. Com.*, 4 Ky. Law Rep. 720, held that the requirement of the Criminal Code that the clerk or the commonwealth's attorney shall read the indictment and state the plea of the defendant to the jury next in order after they are sworn to try the issue is mandatory, and no party can be legally convicted unless it is substantially complied with. It also held that where the duty was performed before the close of the evidence for the prosecution, while it was still within the power of the court to recall the witnesses, the substantial rights of the defendant were not prejudiced. Nor was the mere fact that the indictment was read by the attorney employed to prosecute, instead of the commonwealth's attorney, a ground for a reversal, it having been done at the request of the latter officer, in the presence of the court and the defendant, without objection at the time. But in this case, as we have said, it was not read at any time by any one, and for that rea-

son the case is reversed for proceedings consistent with this opinion." It will be observed from the foregoing that the Kentucky statute on this question is practically the same as ours.

It has been repeatedly held by the courts that a verdict of conviction will be set aside where the defendant has never been arraigned and no plea has been entered. *People v. Corbett*, 28 Cal. 328; *People v. Monaghan*, 102 Cal. 233, 36 Pac. 511; *Craln v. United States*, 162 U. S. 640, 16 Sup. Ct. 952, 40 L. Ed. 1097; *Pate v. State*, 21 Tex. App. 198, 17 S. W. 461; *People v. Gaines*, 52 Cal. 479. The courts hold to this theory upon the ground that there is no issue joined which the jury can try unless the defendant be informed of the charge and his plea be entered. If it be necessary to take the plea in order to have an issue to try, it seems to us that it must logically and necessarily follow that the jury should be informed as to what the charge against the defendant is and the nature of his plea thereto. Under section 7780, Rev. St. 1887, an issue of fact arises in a criminal case upon the defendant entering any one of three separate and distinct pleas. It would therefore seem to reasonably follow that the jury should be informed both of the charge made against the defendant and the nature and character of the plea entered by him. But whatever the reason may be, the question is fully answered by the statute. The Legislature have seen fit to say that the indictment must be read and the plea stated to the jury, and in the face of this declaration by the lawmakers we are not prepared to say that its violation is immaterial and can be disregarded. While we do not think it would make any material difference as to whether the information was read and the plea stated by the clerk or some other officer of the court, we do think that under the express terms of the statute it must be done by some one.

The next error assigned by appellant is the action of the trial judge in urging the jury to bring in a verdict and instructing them as to their general duties as jurors after they had returned into court and announced that they could not agree. This objection is best illustrated by here repeating the history of all the proceedings from the time the evidence was closed by both sides until the verdict was finally returned as shown by the record. It is as follows:

"After argument by respective counsel, the court instructed the jury in writing, and the case was submitted to the jury, and they were sent out in charge of a bailiff, duly sworn and cautioned. Thereafter, about 9 o'clock p. m. of the same day, the jury was brought into court, and the defendant and his counsel being present, and the county attorney and other officers of the court, except the stenographer, who was absent, the court asked the jury if they had agreed upon a verdict. Their foreman answered that they had not; that they wished certain instructions

read to them, which being done, they retired with the officer. Thereafter, on the evening of the same day, the jury asked leave to come into court. They were brought in, the defendant and his counsel being present, also the officers of the court. The jury asked to have certain evidence read to them, which was done by the stenographer, after which the court, among other directions, gave the following orally, in substance, which were not taken down by the stenographer, and without consent of defendant: 'The court will not receive a verdict after 12 o'clock. It is not my own inconvenience so much as the fact that all the attorneys and officers must be awakened up and brought into court.' The jury then retired with the officer, having been duly cautioned.

"On the next day, the 9th, about 9:30 a. m., the jury asked permission to come into court. They were brought in, the defendant and his counsel and the officer of court being present. The jury, being asked if they had agreed upon a verdict, answered that they had not, and had practically agreed to disagree, and the following occurred: The court, addressing Mr. Warrick, said: 'Do you think that this jury could agree or that further consideration would bring the jury together?' Warrick: 'I hardly think so.' Court: 'Have you made a strong effort to reach a conclusion, all of you?' Warrick: 'There has been a good deal of trying.' Court: 'Do you think, Mr. Brown, that there has been a willingness on the part of the jury to decide this case according to the testimony and the instructions of the court?' Brown: 'Yes, sir; I think that there has been an honest effort made to get the different factions together. From my observations, I do not believe the jury could come together.' Court: 'I do not suppose that the matter of expense ought to enter into your consideration; but you are aware, of course, all of you, that these things are very expensive to the county. You have now been out in the neighborhood of about 20 hours—23 hours. I do not believe, gentlemen, that it is consistent with my duty to relieve you from your duty at this stage of the proceedings. I recommend you to meet in a proper spirit of inquiry, investigation, and discussion, and see if you cannot get together, and avoid, in the meantime, too much pride in your own opinions. As stated this morning, it does not seem to me that this case involves a great deal of difficulty. If all the jurors, in the consideration of a question of this kind, should get in a condition of mind where they would not agree, we could never get anything done. Courts would be a travesty, and no business would be accomplished, rights of the state and rights of the individual would never be enforced. I think I will require you to return to your jury room again, and let you make another effort, and see if you cannot get together. You may retire with the bailiff.' (Given orally without defendant's consent.)

"About 5 o'clock of the same day the jury was called into court by the judge, and asked if they had agreed upon a verdict; replied that they had not; whereupon the judge said: 'I beg to call your attention to the fact that when a jury is called to try a case it is not a matter in which there is to be any partisanship for one party or for the other; and there seems to be no good reason why you could not agree in a case like this. You are here to perform a public duty. It is a criminal case in which the public is very much interested, to protect the public against malefactors and for the protection of the defendant against unjust prosecution, and it seems to me that you should accommodate yourselves to the condition of affairs, and meet upon a plane where you can dispassionately discuss the question involved and come to some conclusion. The administration of justice in this state demands it. These trials are expensive. Not only that, but they are inconvenient to men engaged in business who have to be taken from their homes and occupations and brought into court to devote their time to business for a while for a compensation which does not compensate them, and the court feels it its duty to facilitate the public business as much as possible, and I shall require you to give this matter some further consideration, and see if you cannot agree.'"

Counsel for appellant says: "This instruction could have but one effect—a verdict of guilty. Nothing is at stake but the public good; the great expense; the protection from malefactors and inconvenience to business men. I submit that these are not matters to load upon a jury's mind in the consideration of an important case."

It will be seen from the remarks made by the trial judge that he recognized the impropriety of the jury considering the public expense incurred by reason of the trial; but, notwithstanding this fact, on two occasions he reminded them that the trial was being had at a great public expense. He also intimated to them very strongly that he did not consider they had been dispassionately discussing the question involved; and, again, told them that it did not seem to him that the case involved a great deal of difficulty; and further along said: "It is not a matter in which there is to be any partisanship for one party or the other, and there seems to be no good reason why you could not agree in a case like this."

Jurors should be allowed to pass on these cases without having any other consideration pressed upon them except the evidence introduced in the case and the instructions of law governing the same. The question of expense is a matter to be looked after by the court and its officers, and with that the jury have absolutely nothing to do. After the jury have returned into court and informed the court that they cannot agree in such a case, it is evident that some of them are for conviction and others for acquittal. They must

also know, as men of common understanding, that it was the duty of the trial judge to advise them to acquit if he did not think the evidence sufficient to warrant a conviction, and when he did not so instruct them, and yet told them that it was a simple matter, about which there should be no difficulty or dispute, it must have been apparent at once that the court was of the opinion that there should be no difficulty in convicting the defendant. We do not think it is proper for the trial judge to advise a jury, after they have announced that they cannot agree, that it is their duty to yield up their personal views, and not to have too much pride in their individual opinions. Such advice, if given along with the general instructions to the jury prior to their retiring to deliberate upon the matter, would not have the same effect as it must necessarily have after the jury have returned and reported that they cannot agree, for the reason that when the instructions are first given the jury have not yet heard the law in the case, and are not presumed to have formed any definite or fixed opinion as to the guilt or innocence of the defendant; but it is certain, when they report that they cannot agree, that they have all formed quite fixed and definite opinions on the matter. The court erred in the course of his discussion with the jury upon their repeated returns into court; and while we are not inclined to single out any particular expression which, standing alone, we should say is cause of reversal, taking the whole of these remarks together, and the circumstances and conditions as illustrated by this record, we have no doubt of its effect upon the jury. It is safe to say, with reasonable certainty, that this particular jury would never have returned a verdict in the case except for the repeated admonitions given them by the court. We do not think, under such conditions and circumstances, that the verdict returned represents the fair and deliberate judgment of the jury.

A great many authorities have been cited by the respective counsel in this case, and there is considerable discussion among the courts as to just when such remarks become prejudicial. It should be observed, however, that in many of the authorities cited by the Attorney General on this point the instructions as to the duty of jurors was given by the court in the first instance in the body of the general charges. It is true that in some of the cases the instructions were given after the jury had returned into court for further instructions. One of the best discussions on this particular question to which our attention has been called is found in *State v. Bybee*, 17 Kan. 462, where Mr. Justice Brewer, speaking for the Kansas Supreme Court, said:

"It seems to us, under these circumstances, that the remarks of the learned court were calculated to exert too strong a pressure upon the jury in favor of the agree-

ment. It may not, perhaps, be possible to single out any particular sentence, and say that this is, strictly speaking, and taken by itself, erroneous, and sufficient to justify a reversal, though there are some that seem to trespass a good deal on the right and duty of each juror to the free exercise of his individual judgment. Yet the general impression of these instructions, as we read them, and, as it seems to us, must have been received by the jury, is that the jury ought, by compromise and surrender of individual convictions, if necessary, to come to an agreement, and that a failure to do so would be an imputation upon both jury and court. Now, while a court may properly call the attention of the jury to many matters which increase the desirability of an agreement, such as the time already taken, the improbability of securing additional testimony, the general public benefit in a speedy close of a litigation, and, at least in cases where the matters at stake are of minor importance, the question of expense to the parties and the public, yet no juror should be influenced to a verdict by a fear of personal disgrace or pecuniary injury. No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence or his integrity. Personal consideration should never be permitted to influence his conclusions, and the thought of them should never be presented to him as a motive for action. Nor do we think the illustration given by the learned judge a happy one. A verdict is the expression of the concurrence of individual judgments, rather than the product of mixed thoughts. It is not the theory of jury trials that the individual conclusions of the jurors should be added up, the sum divided by twelve, and the quotient declared the verdict, but that from the testimony each individual juror should be led to the same conclusion; and this unanimous conclusion of twelve different minds is the certainty of fact sought in the law. Especially is this true in criminal trials. Here should no thought of compromise be tolerated. Before the state can fairly demand the conviction and punishment of an alleged criminal, the twelve jurors should each be led from the testimony to a clear conviction of his guilt."

The same question was considered in *State v. Ivanhoe* (Or.) 57 Pac. 317, where many of the authorities are reviewed.

In *Randolph v. Lampkin*, 90 Ky. 552, 14 S. W. 539, 10 L. R. A. 87, it was said: "And as the actual finding shows evidence of a compromise of opinion, and yielding by some of the jury of their previous announced unalterable conviction, we think the verdict cannot be recorded as the result of deliberate judgment, and was brought about by the supposed paramount duty of the jury to agree upon a verdict, rather than by free, unbiased conviction of what their verdict should be;

and, whenever the interference of the court seems to have had such effect upon the jury, the verdict ought to be set aside."

In *State v. Fisher* (Mont.) 59 Pac. 919, the Supreme Court of Montana, in considering this question, announced their opinion as follows: "The judge should not have addressed the jury as he did. It was improper for him to direct the attention of the jury to the expense incident to a new trial as a reason why they should reach a verdict. Whether this, of itself, requires a reversal, we do not decide. The more serious error lies in the intimation that the judge believed the defendant guilty. If he believed that the evidence was not of sufficient weight to sustain a verdict, the manifest duty of the court was to advise an acquittal; in other words, if the judge was of the opinion that the defendant, if convicted, should be granted a new trial because of the insufficiency of the evidence, the jury should have been advised to return a verdict of not guilty. \* \* \* If, in the opinion of the judge, the evidence was sufficient to warrant the submission of the case to the jury, the weight of the evidence was not for him to determine. It seems clear, also, that by the impromptu oral charge and comments the jury were given to understand that the judge entertained no doubt of the verdict which ought to be rendered, and the trend of his remarks was certainly calculated to impress the jury that, in his opinion, the verdict should be one of guilty. His opinion upon the weight of the evidence and the guilt of the defendant was not expressed in direct language, but it was implied."

To the same effect are *People v. Kindelberger* (Cal.) 34 Pac. 852, and *People v. Sheldon*, 156 N. Y. 268, 50 N. E. 840, 41 L. R. A. 644, 66 Am. St. Rep. 564.

The question is also presented as to the propriety of the trial court in giving these last instructions or directions to the jury orally, but, since that question will probably not arise upon another trial of this cause, we express no opinion as to that point.

For the foregoing reasons, the judgment must be reversed, and it is so ordered, and a new trial granted.

SULLIVAN, C. J., and AILSHIE, J., concur.

(13 Okl. 549)

In re FRENCH & HOLMES.  
TIMKEN ROLLER BEARING AXLE CO.  
v. WALTON.

(Supreme Court of Oklahoma. Jan. 13, 1904.)

APPEAL—RECORD—REVIEW—EVIDENCE—  
BANKRUPTCY.

1. Where the record in this court in a case on appeal does not show that it contains all the evidence presented at the hearing below, it presents no error that can be reviewed by this court, arising upon a question of evidence.



2. Evidence taken at the hearing of a cause before a referee in bankruptcy, in order to be made a part of the record on appeal, must be included in the record certified to the district court, and the certificate of the referee must be such as to show to the court on appeal that it is the evidence so taken before him.

3. Where the certificate of the referee in a cause in bankruptcy, certified to the district court, is silent as regards any evidence taken before him, and in fact the record does not include any evidence, and where a subsequent certificate attached to certain evidence shows that the evidence sought to be made a part of the record was not certified to the district court until six days after the district court had affirmed the findings and judgment of the referee, such evidence is not properly in the record of the cause on appeal from the district court to this court. The record therefore presents no question for review, arising on the evidence.

(Syllabus by the Court.)

Error from District Court; before Justice Beauchamp.

In the matter of French & Holmes, bankrupts. The Timken Roller Bearing Axle Company filed a claim with Tell W. Walton, trustee in bankruptcy. From a judgment for the trustee, the claimant brings error. Affirmed.

A. M. McCarty, J. W. Bird, and W. H. O. Taylor, for plaintiff in error. Mackey & Simons and E. S. Ellis, for defendant in error.

PANCOAST, J. This was a proceeding in bankruptcy. On July 21, 1902, a petition in bankruptcy was filed against French & Holmes, who were doing a mercantile business at Pond Creek, Okl. Thereafter French & Holmes were duly adjudged bankrupts, and the case was referred to Hon. C. H. Parker, referee in bankruptcy. On August 21, 1902, the appellant, the Timken Roller Bearing Axle Company, filed its proof of claim with the referee, consisting of two notes, amounting to \$743.54, which had been given by French & Holmes to the Timken Carriage Company, and which, by the proof, were shown to have been sold and assigned to the appellant. Tell W. Walton was appointed trustee of the estate, and on October 3, 1902, filed with the referee his objection to the claim of the appellant. The issues being formed, a trial was had, and after hearing the evidence the referee found that the Timken Carriage Company, to whom the notes were originally given, had received certain preferences by way of payments made by the bankrupts, and that the notes, having been transferred by assignment only, were subject to any equities that might be set up against them; that W. R. Timken, who was treasurer of the Timken Carriage Company, was also vice president of the Timken Roller Bearing Axle Company, and through him, as such officer, the appellant received notice of the outstanding equities against these notes, in the nature of preferential payments.

We are met at the outset with a motion to expunge from the record certain evidence contained therein, appearing on pages 17 to 21, inclusive, because such evidence is not

properly a part of the record in this case. It seems, from an examination of the record, that certain evidence was taken before the referee in bankruptcy, but that this evidence was not made a part of the certified record of the referee to the district court, and was not before the court, and not considered, when the case was before the court for determination. This is made very clear from an examination of the certificate of the referee in bankruptcy, which follows directly after the evidence contained in the record, and shows that the certificate was not made until the 13th day of March, 1903, while the certificate of the referee, certifying the cause to the district court, is dated February 9, 1903, and the journal entry of the court affirming the action of the referee is dated the 7th day of March, 1903—six days prior to the date of the certificate certifying the evidence contained in the record. It is quite clear, therefore, that the evidence in this case is not properly in the record, and was no part of the record when the case was heard by the court; and, not being a part of the record then, it cannot now be considered by this court on appeal. Upon this record, then, we must take the findings of fact as a verity, for no presumption can be considered against them. Upon the other hand, every presumption is in favor of their correctness. This practically disposes of this case, as all the propositions argued and contended for in the appellant's brief require an examination of the evidence taken before the referee, to properly decide them; but, even though the evidence could be considered as a part of the record in this case, still this court cannot tell whether it is all the evidence that was taken at the trial, or not, as the record nowhere shows it to have been all of the evidence introduced.

Some argument is indulged in to the effect that certain rules of equity practice with regard to making records on appeal should control in bankruptcy proceedings; but, whatever rule applies—whether it is of equity or of statute—the record must in some form show that it includes the entire evidence, or at least the entire evidence on a given proposition, which the court is asked to consider. If this is not shown in some form, this court will not presume that the entire evidence is included in the record, and will not reverse a case because a finding of fact is not, seemingly, supported by the evidence.

The referee found that the notes in controversy were two of a series of five given by the bankrupts to the Timken Carriage Company, and assigned to the Timken Roller Bearing Axle Company; that, within four months from the time of the adjudication in bankruptcy, payments were made by the bankrupts to the Timken Carriage Company, which were held to be a preference. This court must presume that sufficient evidence was introduced to warrant this finding, and

also the further finding that, at the time the payments were made, the bankrupts were insolvent. It may be conceded that the rule laid down in *Re Wyly*, 8 Am. Bankr. R. 604 (D. C.) 116 Fed. 38, is correct; that is, that "the rights of a purchaser or holder of a negotiable instrument, who has taken it for a valuable consideration, in the ordinary course of business, before due, and without notice, are not affected by the equities existing between the antecedent parties, nor are they altered by the terms of the bankruptcy act." And the rule is equally well settled that a negotiable note transferred by delivery or assignment, merely, is, notwithstanding such transfer, subject to any existing equities between the antecedent parties. The first rule laid down is in cases where the transfer is made, without notice, by indorsement, in the usual course of business, while the second is in cases where the transfer is by mere assignment or delivery, and in such a case the same rule applies as in the transfer of an open account; that is, that it is transferred subject to any existing equities between the parties, and the purchaser must be prepared to meet all defenses against the account that could be urged against it in the hands of the original holder. It may be said that the indorsements on the back of these notes, as shown by the record, are sufficient to show that they were indorsed in the ordinary course of business; and, while this is some evidence of that fact, yet one cannot say that it is all of the evidence, and the proof of claim filed shows the notes to have been assigned, and nowhere alleges they were indorsed or transferred before maturity, in the ordinary course of business.

All errors complained of are those arising on questions of evidence, and, the record not containing all the evidence, it presents no question for review arising on the evidence. The judgment of the court below must therefore be affirmed. All the Justices concurring, except BEAUCHAMP, J., who tried the case below, not sitting.

(13 Okl. 554)

#### BRUCE v. CASEY-SWASEY CO.

(Supreme Court of Oklahoma. Jan. 13, 1904.)

#### APPEAL—TRANSCRIPT—CERTIFICATE—BILL OF EXCEPTIONS—FILING—AFFIDAVITS.

1. Where a case is presented to the Supreme Court on appeal upon a transcript of the record of the court below, the certificate thereto must be full and complete, and specifically show that the record contains a full, true, and complete transcript of the record.

2. A bill of exceptions never becomes a part of a record until it is filed in the trial court, and, unless filed, it cannot be copied into a transcript, and presents no error to this court.

3. A reference in a bill of exceptions to an affidavit as "Exhibit A," and not otherwise incorporated, is not sufficient to make it a part of the bill of exceptions. It must be annexed to the bill, and be embodied in it, in order to be a part of it.

4. Affidavits used on a motion, to become a part of the record in such a way as to enable the Supreme Court to review the same, must be made part of the record by bill of exceptions or incorporated into the case-made.

(Syllabus by the Court.)

Error from Probate Court, Kiowa County; Harris Finley, Judge.

Action by the Casey-Swasey Company against William E. Bruce. Judgment for plaintiff. Defendant brings error. Affirmed.

Madaris & McKeene, for plaintiff in error.

PANCOAST, J. As shown by the plaintiff's brief, this was an action brought in the probate court of Kiowa county. The original action was brought by the defendant in error, the Casey-Swasey Company, against D. C. Bruce, to recover the sum of \$412. An attachment was issued and levied upon certain personal property, which was claimed by the plaintiff in error as his property. The defendant, D. C. Bruce, allowed the action to go by default. The plaintiff in error made a motion to discharge the attached property from the writ, alleging as grounds therefor that he was the owner thereof.

The case is brought to this court upon what purports to be a transcript of the record. There is attached to this record what seems to have been intended as a bill of exceptions, together with what purports to be copies of other papers, including motions, pleadings, affidavits, judgments, etc. That part of the record intended for the bill of exceptions contains the oral evidence which seems to have been introduced on the trial. Other evidence, in the form of affidavits, is referred to as exhibits, but not included in the bill of exceptions. Nowhere in the record is the purported bill of exceptions shown to have been filed in the probate court. If there ever was a bill of exceptions allowed, signed, and filed, there is no transcript of the same brought to this court. The paper purporting to be a bill of exceptions, instead of being a transcript, is, if anything, what was intended as the original bill of exceptions allowed by the probate court, with his seal attached, but never filed so as to make it a part of the record. The certificate of the probate judge attached at the end of the record is sufficient in form for a certificate to a transcript, but, the record containing matters that can only be preserved and brought to this court by bill of exceptions or case-made, such matters must be excluded, and cannot be considered by this court. This leaves the transcript as containing only the journal entries of orders made by the court, and the interplea. This incomplete and insufficient record presents no error to this court for review. A bill of exceptions never becomes a part of a record until duly filed, and unless filed it presents no error to

¶ 4. See Appeal and Error, vol. 3, Cent. Dig. § 2374.

this court. *Brown v. Rhodes*, 1 Kan. 364; *State v. Bohan*, 19 Kan. 28; *State v. Schoenewald*, 26 Kan. 288.

After a bill of exceptions is signed, filed, and made a part of the record of an action, it can then be presented to the Supreme Court in a transcript of the case. *Shumaker v. O'Brien*, 19 Kan. 476.

Where a party desires to use that part of a record embraced in a bill of exceptions in proceedings in error, he must obtain a certified transcript. He will not be allowed to use the original of a bill which was never filed, and therefore not a part of the record. *Jackson v. Stoner*, 17 Kan. 605.

A reference to an affidavit as "Exhibit A," not otherwise incorporated in the bill of exceptions, is not sufficient to make it a part of the record. It must be annexed to the bill, and be embodied in it, in order to be made a part of it. *A. & N. Ry. Co. v. Wagner*, 19 Kan. 335.

Affidavits used on a motion, to become a part of the record in such a way as to enable the Supreme Court to review the same, must be included in the bill of exceptions or case-made. *Backus v. Clark*, 1 Kan. 303, 83 Am. Dec. 437; *Altschiel v. Smith*, 9 Kan. 90; *Jenks v. School District*, 18 Kan. 356.

The citation of authorities sustaining the above propositions might be multiplied almost without number. There are no exceptions whatever to the rule laid down. Other defects appear in the record that it is deemed unnecessary to notice here. There is no record here that will enable the court to review the action of the court below. The record presenting no error to this court for review, the judgment of the court below is affirmed. All the Justices concurring.

(13 Okl. 479)

# SCHOOL DIST. NO. 42 v. PENINSULAR TRUST CO.

(Supreme Court of Oklahoma. Jan. 12, 1904.)

## TRUSTEE—ACTION BY—PETITION.

1. Where a plaintiff brings an action in a representative capacity as trustee or mortgagee, the petition should set out the nature and extent of the plaintiff's interest with such certainty as will enable the court to determine the plaintiff's power to act.

2. A petition which shows from the title that the plaintiff is suing in a representative capacity, as trustee, and fails to show what his powers as trustee are, and, in the body of the petition, alleges that the plaintiff is the "owner and holder" of the instrument, is bad upon demurrer.

(Syllabus by the Court.)

Error from District Court, Garfield County; before Justice McAtee.

Action by the Peninsular Trust Company, trustee, against School District No. 42 (formerly School District No. 1), Garfield county. Judgment for plaintiff, and defendant brings error. Reversed.

On the 20th day of September, 1894, School District No. 1 of O county, Okl., entered

into a written contract with the Grand Rapids Seating Company, of Grand Rapids, Mich., a corporation organized under the laws of the state of Michigan, and doing business at the city of Grand Rapids, in said state, for the purchase of school furniture for said district, and at the date of this contract an order was given by the officers of said school district to said company for various items, amounting to the sum of \$858.25.

On the 1st day of October following, the persons composing the said school board executed and delivered to said company a note in the following form:

"Territory of Oklahoma, School District Number One (1), O County. North Enid, O. T., October 1, 1894. Two years after date we promise to pay and hereby order the Treasurer of said School District to pay, to the order of the Grand Rapids Seating Company, of Grand Rapids, Michigan, the sum of nine hundred and ninety & <sup>25</sup>/<sub>100</sub> dollars with interest thereon from date until paid, at the rate of eight per cent. per annum.

"For School furniture and school supplies.

"By order of the Board of School District Number 1 (1) of O county, Oklahoma Territory. H. F. Best, Director. G. S. Stein, Treasurer. W. P. Little, Clerk."

What, if anything, went to make up the amount of this note, besides the order already mentioned, is nowhere disclosed by the evidence; nor is any complaint made in the proceedings that the said note was in any manner, or to any amount, fraudulent.

On the 5th day of April, 1897, the said school district issued to said Grand Rapids Seating Company its four several warrants, each for the sum of \$200, which warrants are in the following form, to wit:

"No. 308. Office of School District Clerk. \$200.00. North Enid, Oklahoma Territory, Apr. 5, 1897. Treasurer School District No. 1, County of Garfield: Pay to Grand Rapids Seating Co. or order the sum of Two Hundred no/100 dollars for to cancel note given Oct. 1, 1894, for school furniture, out of any fund in your possession raised or appropriated for such purpose. W. R. Swarthout, District Clerk. Alice N. Sale, Director. To D. C. Rounds, Treasurer."

These warrants were each presented to the treasurer of said school district, and by him indorsed as follows:

"Presented & not paid for want of funds this 5th day of April, 1897. D. C. Rounds, School District Treasurer."

The said Grand Rapids Seating Company, having become involved and unable to meet its obligations to its several creditors, on the 6th day of July, 1897, executed to the Peninsular Trust Company, of Grand Rapids, Mich., its trust mortgage, for the purpose of securing the payment of its said indebtedness and obligations, therein and thereby transferring to said Peninsular Trust Company all its property, of every kind and nature, including the said four several warrants given by the

said school district to the said Grand Rapids Seating Company. Prior to the commencement of this action the name of O county had been changed to Garfield county, and the number of said school district from No. 1 to No. 42.

On the 3d day of May, 1898, this action was commenced in the probate court of Garfield county by filing a petition, of which the following is the first cause of action:

"The Peninsular Trust Company, a Corporation, v. School District No. 42, Formerly School District No. 1, Garfield County, Territory of Oklahoma. Petition. Comes now the plaintiff, and says that it is a corporation duly organized and incorporated and doing business under and by virtue of the laws of the state of Michigan; that the defendant herein was at all times hereinafter mentioned or referred to, and now is, a corporation duly organized and existing under and by virtue of the laws of the territory of Oklahoma, as one of the school districts of Garfield county, in said territory, with authority to become indebted in the manner hereinafter stated, and to sue and be sued under the name and style of School District No. 42, Garfield county, territory of Oklahoma, and, for first cause of action, says that prior to April 5, 1897, the defendant herein became indebted to the Grand Rapids Seating Company, for value received, in the sum of two hundred dollars; that on the 5th day of April, 1897, the said defendant caused to be issued by its proper officers, in consideration of said indebtedness, its warrant No. 308, in words and figures as follows, viz.: 'No. 308. Office of School District Clerk. \$200.00. North Enid, Oklahoma Territory, April 5, 1897. Treasurer School District No. 1, County of Garfield: Pay to Grand Rapids Seating Co. or order the sum of Two Hundred & no/100 dollars for to cancel note given Oct. 1, 1894, for school furniture, out of any fund in your possession raised or appropriated for such purpose. W. R. Swarthout, District Clerk. Alice N. Sale, Director. To D. C. Rounds, Treasurer. P. O. Address, North Enid, O. T.'—and delivered the same to the Grand Rapids Seating Company, and the said the Grand Rapids Seating Company did thereafter present said warrant to the treasurer of the said school district for payment, which was refused for want of funds, and thereupon the said treasurer indorsed upon the back of said warrant as follows, viz.: 'Presented and not paid for want of funds this 5th day of April, 1897. Registered No. 57, New Series. D. C. Rounds, School District Treasurer'—a copy of which warrant, with all indorsements thereon, is attached hereto, marked 'Exhibit A,' and made a part hereof; that said warrant, nor any part thereof, has never been paid, although plaintiff says that there have been funds in the hands of the county treasurer of said Garfield county which should have been applied to the payment thereof; that payment thereof

has been demanded of the treasurer of said county, and refused; that said plaintiff is now the owner and holder of said warrant; and that the same is long past due. Wherefore plaintiff asks judgment for the sum of two hundred dollars, with interest from the 5th day of April, 1897, at the rate of 6% per annum, and costs of this action."

Exhibit A, attached to said petition, is as follows:

"No. 308. Office of School District Clerk. \$200.00. North Enid, Oklahoma Territory, April 5, 1897. Treasurer School District No. 1, County of Garfield: Pay to Grand Rapids Seating Co. or order the sum of Two Hundred & no/100 Dollars for to cancel notes given Oct. 1, 1894, for school furniture, out of any fund in your possession raised and appropriated for such purpose. W. R. Swarthout, District Clerk. Alice N. Sale, Director. To D. C. Rounds, Treasurer. P. O. Address: North Enid, O. T."

Indorsed:

"Grand Rapids Seating Co., Peninsular Trust Co., Trustee, by Geo. F. Whitworth, Secretary. Presented and not paid for want of funds, this 5th day of April, 1897. Registered No. 57, New Series. D. C. Rounds, School Dist. Treasurer."

The petition contains three other causes of action, with Exhibits B, C, and D, which are in the same form with the cause of action above set forth.

The defendant school district answered, setting up, first, a general denial; second, that the execution of the warrant sued on represented an indebtedness in excess of 4 per cent. of the assessed valuation of the school district; and, third, that the Grand Rapids Seating Company, at the time of the creation of the debt represented by the said school warrants, was a foreign corporation, not created for religious or charitable purposes, and that the plaintiff was a like corporation, and that neither of them had filed with the Secretary of this territory a copy of its articles of incorporation; and that the business of the Grand Rapids Seating Company in this territory was done through a resident agent.

The case was tried in the probate court July 18, 1898, resulting in a judgment for plaintiff, and afterwards, in due time, appealed to the district court. Afterwards, on March 1, 1899, plaintiff moved the district court for leave to amend the petition by substituting the name "Peninsular Trust Company, Trustee," as plaintiff, and supported the same by an affidavit of plaintiff's attorney which showed that he was mistaken in bringing the action in the name of the Peninsular Trust Company, and that it should have been brought in the name of the Peninsular Trust Company as trustee, which motion was by the court allowed, over the objections of the defendant, and the title to the cause was accordingly amended. The body of the peti-

tion was not changed in any way, and the defendants then filed a demurrer to the same, which is in the following words:

"In the District Court of Garfield County, O. T. Peninsular Trust Company, Trustee, Plaintiff, v. School District No. 42, Garfield County, O. T., Defendant. Comes now the defendant, and demurs to plaintiff's petition herein, for the reason that the same does not state facts sufficient to constitute a cause of action. O. D. Hubbell, Anderson & Rush, Attys. for Deft."

Afterwards, on the 28th of March, 1899, said demurrer was presented to the court and overruled, and exception taken and allowed. On the 27th of November, 1900, the cause was tried by the court and a jury, the defendant objecting to the introduction of any testimony in support of the allegations of the petition; resulting in a verdict for the plaintiff in the sum of \$974.99. Motion for a new trial was by the court considered and overruled, and the defendant school district brings the case to this court for review.

Rush & Steen and O. D. Hubbell, for plaintiff in error. Percy Glaze and C. H. Parker, for defendant in error.

GILLETTE, J. (after stating the facts). In the consideration of this case, we are met at the outset with a question of practice which challenges the attention of this court. It will be observed that the petition upon which the case was tried was the Peninsular Trust Company, trustee, without stating who or what it was trustee for. The word "Trustee," in the title of the cause, was added, by permission of the district court, after the case had been tried in the probate court, without amending any of the allegations of the original petition, which alleged that the plaintiff was the owner and holder of the instrument sued on. The petition does not state who the plaintiff was trustee for, how or where it was appointed trustee, or what the nature or extent of its trust was, nor does it indicate when or by what means it became possessed of the instrument sued on, except to declare "it was" the owner and holder of the same; and the record nowhere discloses the nature of plaintiff's right and interest, until we come to examine the testimony introduced on the trial, where it for the first time appears that the plaintiff was a mortgagee of all the property and assets of the Grand Rapids Seating Company, under and by virtue of a certain trust mortgage which conveys to the plaintiff all the property of the Grand Rapids Seating Company, including the school warrants sued on herein, which said mortgage, in the body thereof, and by way of a grant to the plaintiff, uses the following language: "To have and to hold the property above mortgaged and conveyed to said party of the second part and to its successors forever, in trust however and by way of mortgage security only, and upon the terms

and conditions herein provided." Then follow the terms and conditions, one of which is that, if the indebtedness of the Grand Rapids Seating Company is paid by that company within three months from the date of said mortgage, the obligation should be void. Otherwise, and in case of default in any of the conditions by the mortgagor, or in case the mortgagor should sell or attempt to sell, or in case the said mortgagee, as trustee, should deem the security inadequate, the mortgagee was empowered to take possession of all the property, and sell the same at public or private sale, and to sue for and recover the bills receivable and accounts conveyed by the mortgagee, and, after satisfying the debts and expenses out of the same, to return any surplus that might remain to the Grand Rapids Seating Company. When the petition was amended by adding the word "Trustee" after the name of the plaintiff, it became manifest that the plaintiff was not suing in its own right, but in a representative capacity, and therefore the allegation of the petition that plaintiff is the owner and holder of the warrants sued on was not true. The attention of the trial court was called to the fact that there was an irreconcilable conflict between the allegations in the body of the petition and the title of the cause, for, if it was a trustee for some other party, then it was not itself the owner of the warrants sued on. Who was the real party in interest, then, becomes an all-important question to the defendant. The defendant surely had a right to know who it was being sued by. Without setting out in its petition who it represented, the real party in interest was not disclosed, and without such disclosure the petition did not state facts sufficient to constitute a cause of action, unless, as a matter of fact, it was suing as the owner and holder of the notes; and this was denied, not only by the amended title, but also by the motion for leave to amend, which states that leave to amend is asked "for the reason that said Peninsular Trust Company, as trustee, instead of in its individual capacity, was the right and real party in interest." The motion for leave to amend the pleading by adding the word "Trustee" was supported by an affidavit showing that the plaintiff was the trustee of the Grand Rapids Seating Company, and that its right to bring the action was in that representative capacity. This affidavit in support of the motion is the first and only information brought to the attention of the court (aside from the evidence) indicating to the court and defendant the plaintiff's title and right to maintain the action, which information is in direct conflict with the language of the petition, alleging that plaintiff was the "owner and holder." The demurrer of defendant to the petition was filed when this status of the case was made apparent to the court, and was considered by the court below, after the amendment was made, which added to the petition simply the word "Trustee," to the ti-

tle of the cause. Was the addition of the word "Trustee" to the title of the cause a sufficient amendment to the petition to enable the plaintiff to proceed in its representative capacity? is therefore a question fairly presented to the court by the demurrer, and by the defendant's objection to the introduction of testimony showing what its representative capacity was. We think not. It was competent, we think, for the plaintiff to amend the petition, in accordance with the motion asking leave of the court to amend, so as to show that it appeared in a representative capacity; but we think the amendment made was insufficient for this purpose, if in fact it was sufficient to amend even the title. In the judgment of this court, the title of the cause, when amended, should have shown that the plaintiff sued as trustee for the Grand Rapids Seating Company, and the body of the petition should have been amended so as to show by what authority and in what manner the plaintiff acquired the right to represent the Grand Rapids Seating Company. Without such amendment in the body of the petition, a cause of action was not stated in favor of the plaintiff as trustee. In the 22d Encyclopædia of Pleading & Practice, p. 125, the author lays down the rule as follows: "The bill, petition or complaint must distinctly aver every fact necessary to entitle the complainant to the relief sought. The plaintiff must recover, if at all, upon the theory upon which the bill is framed," and on page 126, with reference to averments of existence or creation of trusts, the author lays down the rule as follows: "All the facts or circumstances relied upon to show the creation or existence of a trust in favor of the plaintiff must be distinctly alleged." Averments of this kind or character are wholly wanting in the petition under consideration. The addition of the word "Trustee" gives no information whatever which tends to show the creation or existence of a trust, and discloses no "fact which would be necessary to entitle the complainant to the relief sought." On the contrary, the allegation remaining in the petition that the plaintiff is the "owner and holder" amounts to a denial that the plaintiff is proceeding in a representative capacity—an inconsistency which cannot be reconciled, and is not permissible in an action either at law or in equity. Here the plaintiff is seeking to recover in a representative capacity, and has pleaded a cause in its personal favor as owner. If, as stated by the author of Pleading & Practice, above quoted, "the plaintiff must recover, if at all, upon the theory upon which the bill is framed," it could only recover in this action as owner of the instruments sued on. This was not thought of or pretended by the amended petition, as was understood by all of the parties when defendant's demurrer to the petition was by the court overruled, and later when the court permitted, over the objection of defendant, the introduction of testimony show-

ing plaintiff's representative capacity, in support of the petition, which showed an altogether different cause. The statutes of Oklahoma provide (St. 1893, § 26, art. 4, c. 66), "Every action must be prosecuted in the name of the real party interested;" and this requirement is not modified, except that section 28 of the same chapter provides that in actions brought in a representative capacity by a representative, he need not join with him the person for whose benefit it is prosecuted. It follows, almost as a logical sequence, that the representative capacity of the plaintiff must be set out; and, since the statement of the names of the parties to a suit in the margin of a complaint is a part of the complaint, a complaint which describes the plaintiff, in the margin as trustee, is a sufficient averment to inform the court of the fact that the plaintiff is prosecuting in a representative capacity, and a petition following which does not show what his representative capacity is, is bad upon demurrer. The demurrer should have been sustained.

Numerous assignments of error are pointed out in the motion for a new trial and petition in error which relate to the introduction of testimony, but they are unnecessary to consider at this time, as the conclusion we have here reached requires a reversal of the judgment in the court below, and a retrial of the case.

Judgment reversed, and cause remanded to the district court of Garfield county, with instructions to sustain the demurrer to the amended petition, and for such further proceedings therein as may be determined by that court. All the Justices concurring.

(13 Okl. 491)

#### STILL v. CANNON.

(Supreme Court of Oklahoma. Jan. 12, 1904.)

##### SALE—WHAT CONSTITUTES.

1. Sale of a chattel is a contract, and subject to all the general principles of law relating to contracts. The mere transfer of possession of a chattel is not a sale, nor is a contract to transfer possession a sale.

2. To constitute a sale, the general property in the thing is transferred, rather than the thing itself, and is transferred for a consideration moving from the purchaser to the seller.

(Syllabus by the Court.)

Error from District Court, Canadian County; before Justice C. F. Irwin.

Action by George A. Still against John M. Cannon. Judgment for defendant, and plaintiff brings error. Affirmed.

The agreed statement of facts contained in the record in this case, taking, as it does, the place of a finding of facts by the trial court, leaves for this court only the duty of applying the law to the facts thus determined. This statement of facts, in so far as it relates to the questions in controversy, reads as follows: "That, for a long time prior to the order of attachment upon the property involved in this action, the said property had

been in the care and possession of one A. Lee, a liveryman who kept a boarding stable in the city of El Reno, in said county and territory; that, a short time prior to the service of the said order of attachment upon the property involved herein, and the taking of the same under the said order, and while the property was in the possession of the said liveryman, Mrs. B. F. Still, the wife of B. F. Still, the attachment defendant hereinabove mentioned, acting as the agent of B. F. Still in the control of the said property, telephoned to the said A. Lee, and asked the said A. Lee to turn the said property involved herein over to the plaintiff herein, George A. Still, and to let the said George A. Still have it when he called for it, and that the said A. Lee answered to the said Mrs. B. F. Still that he would do so; that thereafter, and until the said property was attached, the said property, to wit, one gray horse, one set of harness, and one surrey carriage, all of the actual value of \$106, remained in the possession of the said A. Lee under exactly the same circumstances as before the said telephone message was received, and without any actual or apparent change of location, position, possession, or control, except as above stated; that, at the time of the service of the attachment order herein, the said B. F. Still was indebted to the said George A. Still in the sum of \$200 or more; that some six months before the service of the said order of attachment, and while the said indebtedness existed, it had been agreed by the said B. F. Still and George A. Still that the property involved herein should be turned over to the said plaintiff herein on the said indebtedness; that, just prior to the service of the said order of attachment, the said George A. Still went to the said A. Lee, and told him (the said Lee) that the property involved herein had been turned over to him, and for the said Lee to hold the same for him, and charge the keeping of the same to him, which the said Lee agreed to do, and from that time the said keeping of the said property was charged to the said George A. Still, and feed bills paid for by him; that demand was made for the possession of the said property before the filing of this replevin action for the recovery of the property involved herein."

W. L. Baxter, for plaintiff in error. Blake, Blake & Beeks and John Livingston, for defendant in error.

GILLETTE, J. (after stating the facts). Under this statement of facts, but one question is presented to this court: To whom did the horse, carriage, and harness belong at the time of the seizure thereof by the sheriff under the writ of attachment? No question of fraud or fraudulent purpose, or lack of good faith in any respect, or of the agency of Mrs. Still, is raised or presented in the case. Did the agreement between B. F. Still

and George A. Still, and the subsequent statement and direction of George A. Still to Lee, and his acquiescence therein, constitute a change of ownership, as against an attaching creditor of B. F. Still? This question must be answered in the negative.

The theory upon which the case is presented to this court by the plaintiff in error is that there had been a sale and delivery of the property in question by B. F. Still to George A. Still before the levy of the attachment writ. Our attention is therefore invited to the doctrine of sale of personal property. The only language in the agreed statement of facts bearing on this question is found in the following clause, viz.: "That, at the time of the service of the attachment ordered herein, the said B. F. Still was indebted to the said George A. Still in the sum of \$200 or more; that some six months before the service of the said order of attachment, and while the said indebtedness existed, it had been agreed by the said B. F. Still and George A. Still that the property involved herein should be turned over to the said plaintiff herein on the said indebtedness."

In a late and eminent work on Sales it is said: "In the first place, a sale is a contract, and therefore subject to all the general principles of law relating to contracts. The mere transfer of a chattel is not a sale, nor is a contract to transfer a chattel a sale. To constitute a sale, the general property in the thing is transferred, rather than the thing itself, and it is transferred for a price measured in money or money's worth, as a sum. A sale implies a price in a sum of money; a measure of value. Again, a contract to sell (that is, in future) is no more a sale than a contract to marry is a marriage." *Burdick's Elements of Sale*, § 1. "A price is one of the essential elements of the contract of sale. And the price must be certain, or capable of being made certain. If left to be fixed by the vendor or vendee, the sale is void." *Hilliard on Sales*, p. 169.

Nowhere in the record is there any intimation of the price George A. Still was to allow B. F. Still for the property in question. When it is said it "should be turned over to plaintiff herein on the said indebtedness," the inference is irresistible that it did not, and was not intended to, extinguish the debt. If it did not, then how much of it was paid or satisfied? Manifestly, this is left wholly to conjecture.

But a more serious phase of this part of the transaction between B. F. Still and George A. Still is encountered in the utter silence of the record as to whether any credit was ever at any time given by George A. upon the indebtedness. For aught that appears, that account yet stands just as it did before the conversation about turning over the property on that indebtedness; and, if this is so, then one element of a sale is wholly lacking, for, as stated, no contract of sale

can exist without a "price in a sum of money; a measure of value." It is to be presumed that the agreed statement of facts contains all that transpired between B. F. and George A. Still in reference to the transfer of the property to George A., and from this it appears that six months before the levy of the attachment it was agreed between them that the property should be turned over to George A. on the indebtedness of B. F. Still to him. This, it must be conceded, was merely an executory agreement, which was lacking in many of the essential elements of a sale of the property, and conveyed no title to George A. Still. George A. Still could not take possession of it by force of the agreement, and did not attempt to do so for a period of six months, and until about the hour of the attachment levy, when, under authority of Mrs. Still, wife and agent of B. F. Still, and with no agreement as to price, so far as the record discloses, he notified the bailee, Mr. Lee, that thenceforth he (Lee) should hold said property for him, and charge the keeping to him. This, we think, cannot be held to be a sale or transfer in good faith sufficient to avoid the rights of attaching creditors, as it is wholly lacking in one of the essential elements—that of an agreed consideration. Let it be admitted that the property was in the possession of George A. Still at the time of the attachment levy, yet that possession, obtained as disclosed by this record, did not carry with it the title to the property, so as to protect it from the claims of a creditor of B. F. Still.

The judgment of the district court will be affirmed. All the Justices concurring, except IRWIN, J., who tried the case in the court below, not sitting.

(13 Okl. 541)

#### ECKLES v. RAY & LAWYER.

(Supreme Court of Oklahoma. Jan. 13, 1904.)  
CHattel Mortgage—Crops to be Grown—Rights of Subtenant.

1. Under the provisions of section 8, art. 1, c. 48, St. 1893, which provides, "An agreement may be made to create a lien on property not yet acquired by the party agreeing to give the lien, or not yet in existence," a mortgage may be given and lien created upon crops to be planted and grown, the planting and growing of which are provided and stipulated for in such mortgage.

2. Where the lessee of real estate for cash rent gives a mortgage upon crops to be planted and grown on the leased premises as security for the contracted rental value, which mortgage is duly executed and filed of record, a sublessee is bound by the terms and conditions of such mortgage, and the crops grown by such subtenant, as well as the tenant, are liable for the rent of said premises.

(Syllabus by the Court.)

Error from Probate Court, Oklahoma County; Wm. P. Harper, Judge.

Action by Ray & Lawyer against W. A. Eckles. Judgment for plaintiffs. Defendant brings error. Affirmed.

¶ 1. See Chattel Mortgages, vol. 9, Cent. Dig. § 60.

In October, 1901, one Haug was the owner of a certain farm in Oklahoma county, and one Cole was his agent therefor. In the same month this Cole, for Haug, rented this farm to one Adamson, for the crop year 1902, for the cash rent of \$140; and the said tenant executed to Cole his note for the amount of said rent, falling due in the fall of 1902, and secured the payment thereof by a chattel mortgage on the crops to be grown on the land during the year 1902, and on certain stock. The lease was filed and indexed as a chattel mortgage, and the chattel mortgage was duly filed in October, 1901, and indexed in the office of the register of deeds as required by law. In the spring of 1902 the said Adamson, by the verbal consent of Cole, sublet to plaintiff in error 35 acres of said land. When Cole gave his consent, he verbally stated that "he had no objection to the subleasing, provided it did not affect his rights." Cole also verbally employed the plaintiff to break out 3 acres of new land on said farm, and, as compensation therefor, agreed to let plaintiff have the use of the said 3 acres so broken out, and 3 acres in addition, free of rent. The plaintiff planted this 6 acres in cotton, and thereon was grown the cotton mentioned in this action. For the rental of said 35 acres, the plaintiff herein agreed to pay to Adamson the sum of \$55 cash, and cultivated said 35 acres in corn, and the corn so grown is the corn in controversy in this action. Adamson raised little on his part of the land, and about August, 1902, abandoned his family and left the country. Soon thereafter plaintiff in error was garnished before a justice of the peace as a creditor of Adamson, and, on order of the court, paid said rent money (\$55) into court, and it was applied on Adamson's debt to one Arbuckle. Thereafter the plaintiff in error gathered and cribbed his corn (200 bushels), on the land where raised, and was in the act of gathering the cotton, when Cole, in November, 1902, commenced proceedings to foreclose this chattel mortgage given by Adamson as security for rent, and posted notices of sale, and, at the time and place set, proceeded to sell this corn and cotton of plaintiff in error to satisfy the notes of Adamson given for rent. Plaintiff in error, at that place, and before the sale, gave notice to defendants in error not to buy his corn and cotton, and of his rights therein, but, notwithstanding said notice, Cole proceeded with the said sale, and sold his corn and cotton, along with that of Adamson, to the defendants, Ray and Lawyer. They demanded from plaintiff the possession of this corn and cotton, as owners thereof, and he refused it. They then brought this action of replevin in the probate court, and seized said property. The plaintiff gave a redelivery bond, and retained the possession of the property. On the trial the probate court made a finding of facts, as above set out, and, on these facts so found, held, as matter of law, that the lien



of the chattel mortgage so given by Adamson to secure the payment of the rent on the whole 160 acres did not attach to plaintiff in error's cotton, because it was grown on the six acres, which he (plaintiff in error) was to have rent free, for breaking done, and awarded the possession of the cotton to this plaintiff. As to the corn, the probate court held, as a matter of law, under the facts found, that the said chattel mortgage became and was a lien on the corn so raised by plaintiff in error, to the extent and amount of the rent which plaintiff in error had agreed to pay as rental to Adamson, and that Cole had the right of law to sell said corn at said chattel mortgage sale to that amount for such rent, and therefore the defendants became and were the owners of the corn, and entitled to the possession thereof, and found that the corn had been sold for \$50, and was of the value of \$100, and adjudged the possession thereof to defendants, and, in the event of nondelivery, that they recover \$100 and costs. To these conclusions of law, on the facts found, the plaintiff in error (defendant below) excepted, and also excepted to the judgment, and duly filed a motion for a new trial, which was overruled, to which he excepted.

James L. Brown, for plaintiff in error.  
Grant Stanley, for defendants in error.

GILLETTE, J. (after stating the facts). Two questions are presented by the plaintiff in error for determination by this court: First. Did the chattel mortgage made by Adamson to Cole as agent for Haug attach to, and become a lien on, the crops subsequently raised upon the premises by the plaintiff in error? Second. If it did so attach, then for what amount, and how should that lien have been enforced?

It is urged by the plaintiff in error that the mortgage from Adamson to Cole was not valid, because given on crops that were non-existent at the date of the mortgage, and that Adamson never owned and never had any interest in the crop afterwards grown by the plaintiff in error. The question as to whether or not a mortgage upon unplanted crops, or upon property not in esse, is valid, has often been before the courts, and the conclusions reached are not altogether in harmony. We think, however, that it is unnecessary to attempt to point out the distinctions that have been drawn in determining matters of this kind, because the statutes of Oklahoma have settled that proposition. Section 8, art. 1, c. 48, St. 1893, provides as follows: "An agreement may be made to create a lien on property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." The mortgage from Adamson to Cole was an agreement for a lien upon crops to be planted and

grown during the year 1902 upon the land leased to Adamson, and was, by force of the statute above quoted, a lien on such crops when they came into existence.

It is urged by plaintiff in error that he was never indebted to the owner of the land, that his debt was direct to Adamson, and that that debt he fully paid in the garnishment proceedings. This statement overlooks the contract under which he entered into possession of the land, which was an agreement between the plaintiff in error and both Adamson and Cole, by the terms whereof he was permitted to occupy a portion of the land; such occupancy not to affect the rights of the landowner. Now, what were the rights of the landowner? Such rights were enumerated and stipulated for in the mortgage given by Adamson to Cole to secure \$140, the consideration for the lease. In this, while he was not a signer of the Adamson note and mortgage, he nevertheless stipulated that his rights under his contract of sublease should be subject to the landlord's rights under the mortgage, of which he had notice from the record, and further notice by reason of the fact that, when he applied to Adamson to sublet a portion of the land, he was informed that this could not be done, except with the landlord's consent, which consent was afterwards procured and accepted with the understanding that such subletting should not affect the landlord's rights.

In the consideration of this question, counsel for plaintiff in error stop to inquire what would be his rights if plaintiff in error had entered upon this land without the consent of the landlord, and urge that he could not in such case be made liable under the mortgage, but would have had his day in court touching the rental value of the ground by him occupied after raising a crop thereon. This proposition or phase of the case is not before the court. It is sufficient to say that it is not the transaction upon which the rights of the parties are here founded. The statute provides (sections 11, 12, c. 17, pp. 142, 143, of the Laws of 1901), that no tenant shall assign or transfer his term or interest, or any part thereof, to another, without the written consent of the landlord, and, if any tenant does so, the landlord, upon 10 days' notice, shall have the right to re-enter the premises and dispossess both the tenant and subtenant. The statute then furnishes the reason for an agreement between the landlord and Adamson, the tenant, and Eckles, the plaintiff in error, as subtenant, which agreement made the rights of the plaintiff in error subject to the terms of the mortgage.

It is urged by the plaintiff in error that, under the provisions of the statute of Oklahoma, a chattel mortgage must be in writing, signed by the party to be charged thereby, and that the plaintiff in error, in accepting a right to occupy a portion of the land as sublessee with consent of the landlord, under his verbal declaration "that it would be all right

with him if he sublet a portion of the premises from Adamson, with the understanding that his [landlord's] rights in the premises were not altered," would not make the crops raised by him subject to the terms of the chattel mortgage. The statement of the landlord to plaintiff in error, above quoted, and the assent thereto, followed by taking possession of the premises by the sublessee, was not, in and of itself, a mortgage; but it did amount to a contract, by the terms whereof the crops raised by plaintiff in error as sublessee, if he went into possession thereunder, should be held liable for the discharge of the conditions of the mortgage given by Adamson. It was an agreement to be performed within a year, and therefore not necessary to be in writing. The crops to be raised upon the leased premises were already covered by, and embraced in the terms of, the mortgage then existing, made and executed by Adamson; and when plaintiff in error took a portion of the leased premises, with full notice and knowledge of this mortgage, he took it precisely as he would take any other property already covered by a chattel mortgage, whether he took as purchaser, lessee, bailee, or otherwise; and the right thus secured remained subject to the mortgage, and to the terms and conditions thereof, liable to foreclosure in the hands of the purchaser or bailee, the same as though possession remained in the mortgagor. It is true that in such a case the property mortgaged was not in esse when the mortgage was given, but the purchaser, hirer, or bailee, with knowledge of the mortgage, could not destroy the mortgage lien by adding to the value of the property by improvement and great increase of value. The mortgage right in such case would remain the same, and the property subject to foreclosure, notwithstanding the increased valuation. Without possession of the original mortgaged property, this increase of valuation could not have been made. The contract of purchase or bailment gave the opportunity. So in the case before us a right of possession to property was acquired, and the right, through such possession, to produce a crop of value; and it is this crop, and the right to produce it, which was mortgaged by Adamson. The plaintiff took possession, and undertook to produce a crop, subject to the terms of the mortgage, which were that the property so produced should stand liable for the rental value of the entire tract, and he is liable under the terms of his contract. That it is a hardship, no one will deny. The court in all such instances would be pleased to give relief, where relief can be granted without violating the terms and conditions of the contract which the parties have made; but it is the province of the court to interpret and construe, but they may not change, the agreement of the parties, and this notwithstanding the fact that unforeseen conditions have arisen since making the same which work a hardship.

In this case all of the crops produced by the tenant and subtenant were sold under the chattel mortgage of Adamson for a sum less than the amount the subtenant (plaintiff in error) agreed to pay, and no complaint is made that the procedure in selling was not in strict accord with the terms of the mortgage. It is therefore useless to consider the question as to whether or not the crops of the subtenant and the tenant should have been sold separately.

The judgment of the court below must be affirmed, with costs. All the Justices concurring.

(13 Okl. 496)

### CITY OF GUTHRIE v. FINCH

(Supreme Court of Oklahoma. Jan. 12, 1904.)

PLEADING — OBJECTIONS — AMENDMENT — INSTRUCTION — DEFECTIVE STREETS — CONTRIBUTORY NEGLIGENCE.

1. It is too late to object for the first time upon the trial of a cause to the insufficiency of a petition upon mere technical grounds, or any amendment or amendments thereto which have been fully answered, and issues joined thereon.

2. Where issues have been joined in an action against the city to recover damages resulting from a defective sidewalk, and an objection is made upon the trial of the cause to the introduction of evidence on the part of the plaintiff, on the ground that the petition did not show where the injury complained of occurred, and it appears from the petition that the action was against the city of Guthrie, and charged that the accident occurred on North Fifth street, between Warner and Mansur streets, without stating the name of the city, *held*, that it was not error for the trial judge, at the time of said objection, to permit plaintiff to add the words, by way of amendment, "in the city of Guthrie, Logan County, O. T."

3. It is a sufficient allegation of facts if a petition sets forth such facts as are probative with reference to the issue sought to be established, and it is not necessary to set out such facts as are evidentiary, although on the trial of the case such evidentiary facts are necessary to be shown, to sustain the action.

A petition which charges that the defendant, a city, negligently permitted a sidewalk to become broken and out of repair, so as to be unsafe and dangerous, and which said sidewalk the city negligently permitted to remain in such unsafe and dangerous condition, and which petition is answered by a denial of the facts so stated, *held*, that the necessary probative fact has been by such pleading put in issue, and it is not error, upon the trial of such issue, to permit the plaintiff to prove either that the defendant city had actual notice of such defective sidewalk, or that it had been out of repair for such length of time as to impute notice to the city.

4. When, upon the trial of a cause, it is necessary to introduce in evidence proof of the existence of facts which are evidentiary, it is not error for the trial court to instruct the jury as to the effect the establishment of such fact has upon the rights of the parties.

5. It is not necessarily negligence for a person to pass over a defective sidewalk merely because it is defective, and the party knew of its defective condition.

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Burford.

¶ 5. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1677.

Action by Lydia Finch against the city of Guthrie. Judgment for plaintiff. Defendant brings error. Affirmed.

This action was brought in the court below by the defendant in error, Lydia Finch, against the city of Guthrie, to recover damages for alleged personal injuries sustained by her, caused by a fall on a sidewalk which she alleged was defective. At the time of the accident complained of, the plaintiff was living on North Fifth street, in the city of Guthrie; and on the evening of January 2, 1901, she, with her husband and sister-in-law, were passing over the walk in question, between Warner and Mansur streets, to make an evening call at the home of her father-in-law, distant a little over two blocks from her own home. At this time she had been married a little over one year, and was pregnant—about five months advanced. She had been living where she then did, on the corner of Mansur and Fifth streets, for a period of about four months, and had frequently passed over the walk on which she was then walking, and knew the walk was out of repair, but testified that she did not know it was dangerous to pass over. In passing over the walk on this occasion, plaintiff tripped on a loose board, and fell forward on her hands and knees; the fall wrenching her back severely, from which she became immediately sick and in great pains, which continued until her delivery, three or four days later; its result of broken health and inability to perform any labor continuing even to the time of trial, more than a year after her injury. The evidence shows the walk in question to have been greatly out of repair, having been in use six or seven years or more without any repairs being made; that the stringers were decayed, the boards rotted and broken, and many of them loose from the stringers, and some gone entirely. And this condition of the walk was personally known to some of the city officials for a considerable time before the accident. The case was tried to a jury, which returned a verdict in favor of the plaintiff for \$2,500, which being deemed by the court excessive, the sum of \$500 was by the plaintiff remitted, and judgment was entered for the balance, to wit, \$2,000. And from this judgment, and the order of the court overruling a motion for a new trial, the cause is brought to this court on error.

James Hepburn and Lawrence & Huston, for plaintiff in error. Thomas S. Jones and Cotteral & Hornor, for defendant in error.

GILLETTE, J. (after stating the facts). Seven assignments of error are made by the plaintiff, but we think they may all be discussed under two heads.

First, the sufficiency of the petition is questioned. It is sufficient to say as to this that the defendant answered both the original and amended petitions, and proceeded to tri-

al, without making objection thereto by way of motion or demurrer, except to ask for a physical examination by competent physicians of the person of the plaintiff, for the purpose of discovering and determining the extent of her injuries. It is too late upon the trial of a cause to then complain for the first time of any mere technical insufficiency in the allegations of the petition, or amendment thereto, when the same have been fully answered, and issues joined thereby, and no further time or application for continuance has been asked for.

It is further contended that the petition was defective in not alleging that the defective condition of the sidewalk where the injury occurred had, prior to the accident, been made known to any of the city officials, or had been in a broken, dilapidated, or dangerous condition for such a length of time as would reasonably impart notice to the city authorities. The fourth clause of the petition states "that on the said 2d day of January the plaintiff was lawfully walking along the said sidewalk at the place above set out and described, at which place the defendant corporation had negligently permitted the planks of which said sidewalk was constructed to become broken and unfastened from their lateral support, and to become unsafe and dangerous for the passage of persons using said sidewalk, and which said sidewalk the defendant corporation negligently allowed to remain in such dangerous and unsafe condition." To this clause of the petition defendant answered "that on the 2d day of January defendant did not negligently allow the sidewalk on North Fifth street, between Warner and Mansur streets, to become out of repair and unsafe, but that defendant on said date and at all other times maintained said sidewalk in a safe condition," etc. There was thus a square issue presented as to the condition of the sidewalk in question. This was one of the ultimate probative facts to be determined.

Objection is also made to the action of the trial court in permitting the plaintiff, on the trial of said cause, to amend the petition by interlining after the allegation "that on the 2d day of January the defendant negligently allowed the sidewalk on North Fifth street, between Warner and Mansur streets," the words "in said city of Guthrie, Logan county, O. T." Defendant objected to the introduction of evidence on the part of the plaintiff on the ground that the petition did not show where the injury complained of occurred, and in answer to this objection the trial court permitted the plaintiff to make this amendment. It was certainly within the discretion of the court, and clearly in furtherance of justice.

The plaintiff in error complains that there was not a sufficient allegation to authorize proof in the trial of the cause showing that the city had actual notice of said sidewalk's defective condition, or that it had remained

out of repair for such a length of time as to impart notice. It is a general rule that the liability of a city for damages occasioned by a defective sidewalk arises only upon notice of such defect, either express or implied, and that proof of such notice must appear before such liability is established. But is it necessary in pleading a liability for negligence, after setting up that the injuries resulted "solely by reason of the negligence of the defendant corporation in allowing said sidewalk to remain in an unsafe condition," to plead farther the particular notice that the city had of the fact? The issuable fact is here pleaded, to wit, that the city negligently permitted the sidewalk to be and remain out of repair; and this fact could be established by proof that actual notice was carried home to the corporation, or that it had been permitted to remain in such condition for such a length of time as that notice of its condition would be presumed. Such notice would therefore be an evidentiary fact of the negligence. The evidentiary fact that this condition of the walk was known to defendant could have been established either by showing that actual notice of its condition had been given to the city officials, or by showing that it had been in a dilapidated and dangerous condition for such length of time as would impart notice to the city officials. Nothing is better established than that evidentiary facts do not need to be alleged in pleading, and, while the plaintiff was called upon to bring home to the city authorities knowledge of the condition of the sidewalk, she was at liberty to do this in either of the ways above indicated, or by both, and the defendant was called upon to meet either or both these lines of evidence. This question has been before the Supreme Court of the state of Kansas in numerous cases. First, in the case of *Topeka v. Tuttle*, 5 Kan. 313, where the court says: "It seems to us that a petition that states with circumstantial particularity that the city of Topeka, an incorporated city of the second class, negligently left one of its streets out of repair, by reason whereof the plaintiff, without fault on his part, was injured, states facts sufficient to constitute a good cause of action." Later, in *Jansen v. City of Atchison*, 16 Kan. 381, Justice Brewer, speaking for the court, cites this case of *Topeka v. Tuttle*, and there reaffirms the decision in that case holding the petition sufficient; and numerous other Kansas cases are referred to. We are of the opinion that, where the issues are fully made up without challenging the sufficiency of the petition in this respect by motion, it is too late to raise the question by objection to the introduction of testimony, and therefore think the petition in this case sufficient to authorize the evidence introduced to show the liability of the city.

Complaint is also made that instruction No. 8 given by the court to the jury was entirely wrong, not because it did not cor-

rectly express the law, but because it was not founded upon any distinct averment of the pleadings. Instruction No. 8, complained of, is as follows: "If you find from the evidence that the plaintiff did meet with the accident complained of, and that the sidewalk was out of repair and defective, but that the city authorities had no knowledge of such defective or dangerous condition, then she is not entitled to recover; but if you further find that such defective condition of the sidewalk had existed for such a length of time as that, by the exercise of ordinary care and diligence, the city would have known of the same, or that the sidewalk inspector employed by the city was actually informed of said defective condition prior to the time of the alleged accident, then it would be your duty to find that the city had notice of the defective condition of the sidewalk." This instruction was based upon the evidence of nearly every witness who testified in the case, including those of the defendant city. Holding, as we do, that the petition was sufficient to authorize the proof introduced, and as the instruction correctly states the law applicable to the facts shown by the testimony, there was no error in giving this instruction.

The second ground of complaint relied upon by plaintiff in error raises the question of contributory negligence, and the facts upon which this claim is based are that the plaintiff had passed over the walk many times during the three months preceding her injury, and knew that it was out of repair; and, these facts appearing from the testimony of the plaintiff, it is contended the court should have determined the question of contributory negligence, and taken the case from the jury. Many cases are cited by counsel upon this proposition, but we do not think any of them will support the claim made for them, when applied to the facts in this case. That the plaintiff was injured, and that the injury resulted from a defective sidewalk, is unquestioned. In the case of *Maultby v. City of Leavenworth*, 28 Kan. 745, Justice Brewer, after stating the facts in a case very similar to the one before us, says: "And upon this we remark, in the first place, that the mere fact that the plaintiff knew the sidewalk was defective did not prevent him from using it. The logic of a converse proposition would be this: That if all the sidewalks in a city are defective, and all the citizens are aware of it, no one could use a sidewalk, except at his own peril. The city would then absolve itself from all liability by making known its own omission of duty. This is not the law. A city must discharge its duty of making its streets and sidewalks reasonably safe for public travel, and it does not release itself from liabilities to a traveler injured thereon by mere proof that such traveler knew the condition of the street or sidewalk." In a note to the same case it is said: "A mu-

municipal corporation which has charge of the streets and sidewalks, and power to compel repairs to the same, is bound to keep them in good repair and safe condition, and is liable in damages to any person who, without fault or negligence, is injured by reason of such defects in same, when the authorities of the city knew, or had notice, actual or constructive, of the existence of such defect." Citing a long list of authorities. In *Munger v. City of Marshalltown* (Iowa) 13 N. W. 642, it is held: "A city is required to repair its sidewalks, whatever may have been the cause of an injury thereto." "If a party has knowledge that a sidewalk is out of repair, he is still entitled to recover for an injury sustained by reason of such want of repair, if he exercised proper care while walking thereon." Without citing endless authorities, it is sufficient to say that negligence is now so universally regarded as a question of fact for the jury, that it is only when its presence or absence is so clearly established that no reasonable person could be left in doubt, that a court would be justified in taking it from the consideration of the jury. In this case no circumstance or act of negligence on the part of the defendant in error is shown or claimed, beyond the mere fact of passing over a defective sidewalk in the nighttime, with knowledge of its defective condition. Neither upon reason nor authority can this be held to be contributory negligence. If a sidewalk is desirable at any time, it is more needed in the nighttime than in the light of day. Negligence in walking upon a defective sidewalk consists of a careless and negligent manner of so walking, having no proper regard for the condition of the walk, and does not consist of the mere fact of "walking thereon."

Special question No. 2 submitted to the jury, as follows, "Was the plaintiff familiar with the sidewalk and its general condition at the time of the alleged injury?" was answered by the jury in the affirmative. Counsel for the city argues that this answer should control the verdict in favor of the city. This could not be held, under the authorities above cited, unless such walking upon the sidewalk was such contributory negligence as to bar the right of recovery. We cannot assent to this proposition. Beside, the jury have found, in answer to special question No. 4, that the plaintiff at the time of the alleged injury did not know that the sidewalk was in a dangerous condition. There was therefore no error in the court's refusal to render judgment for the defendant upon the special findings of fact.

The record in this case presenting no reversible error, the judgment of the court below must be affirmed, with costs. All the justices concurring, except BURFORD, C. J., who presided in the court below, not sitting.

(13 Okl. 512)

## HERD et al. v. UNITED STATES.

(Supreme Court of Oklahoma. Jan. 12, 1904.)  
COURTS—JURISDICTION—INDIAN RESERVATION  
—EXCEPTIONS—LARCENY—INDICTMENT.

1. The district courts of the territory of Oklahoma, when sitting with and exercising the powers and jurisdiction of a United States court, have exclusive jurisdiction of all crimes punishable by the laws of the United States, when committed by persons other than Indians upon an Indian reservation occupied by Indian tribes, and to which reservation the Indian title has not been extinguished.

2. Where the indictment charges larceny committed within an Indian reservation in the territory of Oklahoma, it is not necessary to charge in the indictment that the defendant is not an Indian, where it is not sought to convict him under the act of Congress approved March 3, 1885, c. 341, § 9, 23 Stat. 385.

(Syllabus by the Court.)

Error from District Court, Pawnee County; before Justice Burwell.

Daniel Herd and others were convicted on the 22d day of November, 1900, in the district court of Pawnee county, for the larceny of a brown mare. Said larceny is charged to have been committed in the Osage Nation, attached to Pawnee county for judicial purposes. Trial was had, and the defendants were convicted, and sentenced to imprisonment in the federal jail for one year. Necessary exceptions were saved, and the case brought here on error. Affirmed.

Buckner & Sons, for plaintiffs in error.  
Horace Speed, U. S. Atty.

IRWIN, J. The first error assigned is that the United States court, or the district court of Pawnee county, sitting with the powers of a district court of the United States, and the powers of a circuit court of the United States, had no jurisdiction of the case. In support of this contention, the first authority cited by the defendants' counsel is the case of *United States v. Pridgeon*, 153 U. S. 51, 14 Sup. Ct. 746, 38 L. Ed. 631. We think the first assumption of the plaintiffs in error, to wit, "The Pridgeon Case arose in the Otoe Reservation in the territory of Oklahoma," is erroneous, as, by an examination of the case in 153 U. S., 14 Sup. Ct., 38 L. Ed., and the decision of the court, it will be seen that the Supreme Court of the United States there held that the indictment charged that the offense was committed in the Cherokee Strip, which at that time was not included in Oklahoma. The effect of that decision was that horse stealing, when committed in an Indian country, within the boundaries of Oklahoma Territory, was not a crime against the United States, punishable under the act of Congress passed February 15, 1888, c. 10, 25 Stat. 33, against horse stealing in the Indian Territory. There the question under consideration was whether the offense, as charged in the indictment, was charged to have been committed in that portion of the Indian country embraced within the territory of Oklahoma,

or that portion outside of the territory of Oklahoma, to wit, the Cherokee Strip. The court there says: "Assuming that the first question certified [that is, the question was horse stealing on November 2, 1890, in the Indian country, within the boundaries of Oklahoma Territory, as defined by the act of Congress passed May 2, 1890, c. 182, 26 Stat. 81, a crime against the United States, and punishable under the act of Congress passed February 15, 1888, c. 10, 25 Stat. 33, against horse stealing in the Indian Territory] has reference to such parts of the Indian country as were embraced within the boundaries of Oklahoma Territory, and formed a part thereof, as defined and established by the act of May 2, 1890, c. 182, 26 Stat. 81, it admits of little or no doubt that this question must be answered in the negative." This construction is, no doubt, correct, as the act under which that prosecution was conducted was an act which limited the offense charged in the indictment to the Indian Territory. Now, if this country in which this act was committed was not in the Indian Territory, but in the territory of Oklahoma, then it would not come within the provisions of this act. We think that no stronger argument can be made, in refuting the contention of plaintiffs in error's counsel as to the application of the Pidgeon Case, than that used by this court in the case of *Goodson v. United States*, 7 Okl. 117, 54 Pac. 423. This court in that case laid down what we believe to be the correct doctrine: "The district courts of the territory of Oklahoma, when sitting with, and exercising the powers and jurisdiction of, a United States court, have exclusive jurisdiction of all crimes punishable by the laws of the United States, when committed by persons other than Indians, upon an Indian reservation occupied by Indian tribes, and to which reservation the Indian title has not been extinguished." This court in that decision cites as authority therefor the case *Ex parte Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513, which is a decision by Justice Brewer. That portion of the opinion which relates to the question here under consideration, we think, is applicable to the case at bar, and will bear a repetition in this case. It is as follows: "The necessary effect of this legislative recognition was to confirm the executive order, and establish beyond challenge the Indian title to this reservation. Indeed, the fact that this is an Indian reservation is not contested by the petitioner, but, rather, assumed by him in his argument. His proposition is that Congress, by act approved March 3, 1885, c. 341, § 9, 23 Stat. 385, conferred upon the territory and her courts full jurisdiction of the offense of murder when committed on an Indian reservation by an Indian. *Ex parte Gon-shay-ee*, 130 U. S. 343, 9 Sup. Ct. 542 [32 L. Ed. 973]. This offense had heretofore, when committed in such place by others than an Indian, been cognizable by the courts of the United States,

under Rev. St. § 2145. The petitioner believes that the United States, by yielding up a part of her jurisdiction over the offense of murder when committed on an Indian reservation, lost all; that is, that her jurisdiction of the offense in the particular place must be 'sole and exclusive,' or will not exist at all; that it cannot be that there shall be one law and one mode of trial for a murder in a particular place if committed by an Indian, and another law and mode of trial for the identical offense in the same place committed by a white man or a negro. We are unable to yield our assent to this argument. The question is one of statutory construction. The jurisdiction of the United States over these reservations, and the power of Congress to provide for the punishment of all offenses committed therein, by whomsoever committed, are not open questions. *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109 [30 L. Ed. 228]. And this power being a general one, Congress may provide for the punishment of one class of offenses in one court, and another class in a different court. There is no necessity for, and no constitutional provision compelling, full and exclusive jurisdiction in one tribunal; and the policy of congress for a long time has been to give only a limited jurisdiction to United States courts. Section 2145 extends to the Indian country the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except as to crimes the punishment of which is otherwise expressly provided for. This Indian reservation is a part of the Indian country, within the meaning of that section. *Bates v. Clark*, 95 U. S. 204 [24 L. Ed. 471]; *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. 396 [27 L. Ed. 1030]. But this extension of the criminal laws of the United States over the Indian country is limited by the section immediately succeeding (2146) as follows: "The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." So that before the act of 1885 the jurisdiction of the United States courts was not sole and exclusive over all offenses committed within the limits of an Indian reservation. The words 'sole and exclusive,' in section 2145, do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it. The effect of the act of 1885 was not to transfer to territorial courts a part of the sole and exclusive jurisdiction of United States courts, but only a part of the limited jurisdiction then exercised by such courts, together with jurisdiction over offenses not theretofore vest-

ed therein. The argument of the petitioner therefore fails. There has been no transfer of part of a sole and exclusive jurisdiction, carrying by implication, even in the absence of express language, a transfer of all jurisdiction, but only a transfer of part of an already limited jurisdiction, and neither by language nor implication transferring that theretofore vested, and not in terms transferred. We may here, in passing, notice that the distinction between district courts when sitting as courts of the territory and when sitting as courts of the United States was fully developed and explained in the case of *Ex parte Gon-shay-ee*, supra; that by section 629 of the Revised Statutes the Circuit Courts of the United States are given jurisdiction of crimes and offenses cognizable under the authority of the United States; and that by the act organizing the territory of New Mexico, of September 9, 1850, c. 49, 9 Stat. 446, and the subsequent act of February 24, 1863, c. 56, 12 Stat. 664, organizing the territory of Arizona, the district courts of the latter territory were given the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States. It follows that as the Circuit Courts of the United States have jurisdiction over the crime of murder committed within any fort, arsenal, or other place within the exclusive jurisdiction of the United States, so, prior to 1885, the district courts of a territory had jurisdiction over the crime of murder committed by any person other than an Indian upon an Indian reservation within its territorial limits, and that such jurisdiction has not been taken away by the legislation of that year. The first contention of petitioner, therefore, cannot be sustained." And we also hereby reiterate the reasons so cogently advanced by the court in the opinion in the Goodson Case, showing that the case of *United States v. Pridgeon* is not in conflict with that decision. Now, it is not contended in this case by the counsel for plaintiff in error that this is not Indian country; that is, that the Osage Nation is not Indian country. In fact, it is claimed by counsel for plaintiffs in error in the brief that it is Indian country. There is no claim that it is not occupied by Indian tribes, and there is no claim that the Indian title has been extinguished. Then, if this offense was committed in an Indian country occupied by Indian tribes, and where the title of the Indian has not been extinguished, under the express terms of the decisions of this court in the Goodson Case, the district court of Pawnee county, to which that reservation was attached for judicial purposes, had jurisdiction of the case.

The next contention on the part of the plaintiff in error in this case is that the indictment is insufficient because it fails to recite that the defendants were not Indians, and they cite the cases of *Ex parte Gon-shay-ee*, 130 U. S. 343, 9 Sup. Ct. 542, 32 L.

Ed. 973; *U. S. v. Logan* (C. C.) 105 Fed. 240. In the case of *Ex parte Gon-shay-ee* the validity of the indictment was in no way under consideration by the court, and the court gives no light upon the point. In fact, the indictment is in no way discussed. So we are unable to say that this case is of any weight in deciding the proposition advanced by counsel for plaintiffs in error. And in the last case cited on this proposition, to wit, *United States v. Logan*, it is there held by the court that in order to bring the defendant within the act approved March 3, 1885, the indictment must allege that he is not an Indian. This does not prove the proposition that where it is not claimed that the defendant charged with the crime is within the provisions of that particular act, and where the prosecution is not based on that act, it is necessary that the pleader, in drawing the indictment, should put in the negative proposition that the defendant is not an Indian. Proof of that fact would only be necessary where it was sought by the prosecution to bring the defendant within the provisions of that act, or where it is sought on the part of the defendant to bring him within the exceptions of that act. We do not think it is at all necessary, in an indictment brought under another section, and which has no reference to the act of March 3, 1885, which relates to Indians, that the indictment should charge that the defendant was not an Indian.

The next error complained of is that the record fails to show that the defendants were present at every step of the trial, and plaintiffs in error call our attention to the record (pages 6, 7, 8, 9, 10, 11, 12, 14, and 15) to show that two of the defendants (Joe Brown and Daniel Brown) were not present. We think this position is not maintained and borne out by the record. Page 6 of the record is that portion of the record which relates to the fixing of bail, and it shows in express terms that Joe Brown, — Brown, Dan Herd, and Pearl Rogers, all of the defendants named in the indictment, were present in open court. Page 7 seems to be the same as page 6, page 6 of the record having been also marked page 7. On the pages marked 8 and 9 of the record, which show the proceedings on the 24th of May, 1900, and are that part of the record which shows an application of the defendants for a continuance, it is expressly shown by the record that all of the defendants were present in open court. Page 11, which is that portion of the record which shows an application on the part of the defendants for a change of judge, also shows all of the defendants present. On page 12, which is that portion of the record which shows the setting of the case for trial, the showing is that Dan Herd et al. were present. Page 14 of the record, as to the presence of the defendants, shows that Dan Herd et al. were present. This record shows that the only thing done in the case was that defendants' counsel appeared

and asked for orders for witnesses to be allowed at the expense of the United States; and page 15, which shows, as to the presence of the defendants, that Dan Herd et al. were present, and that the only proceeding taking place in the case, as shown by this record, is the granting of orders for witnesses for the defendants at the costs of the United States. Now, the only pages of the record that do not show affirmatively that these defendants were present were these last pages mentioned, which show, as to the presence of the defendants, that Dan Herd et al. were present; and the record discloses that the only action taken at this time was the fixing of the date for trial, and the granting of the request on the part of the defendants for witnesses at the cost of the United States, which certainly could not be in any way prejudicial to the interests of the defendants.

The next error as contended for by the counsel for the plaintiffs in error is that the record fails to show the entering of the plea to the indictment, and the arraignment of the defendants Joe Brown and Dan Brown. We find a page of the record which does not seem to be numbered, but comes just the page ahead of page 10, and after page 7, and is that part of the record which shows that the defendants, Joe Brown, — Brown, Dan Herd, and Pearl Rogers, all appeared in their own proper persons in open court, and the court, after advising the defendants of their rights to have counsel before being arraigned, ask the defendants if they have counsel, and said defendants, each for himself, answers "No," and waives the right to have counsel. Being asked by the court if Joe Brown, — Brown, and Dan Herd, and Pearl Rogers are their true names, answer each for themselves, as their name is called, "Yes," and — Brown announces his name to be Bert Brown. The record further discloses: "And now comes the defendants, Joe Brown, Bert Brown, Dan Herd, and Pearl Rogers, and announce to the court that they are ready at this time to plead to the indictment, and waive their one day allowed them by law in which to plead. And being asked by the court what is their plea to said indictment, the defendants, each for himself, answers, 'Not guilty.' And thereupon the clerk at once makes the following entry on the minutes of the court, to wit: 'The defendants each pleads that they are not guilty as charged in the indictment.'" This page of the record not being numbered, but on the back of the page we find the certificate of the clerk of the district court that the same is a true and correct copy of the original arraignment and plea on file and of record in his office, at Pawnee, Okla., signed by the clerk, and attested with the seal of the court. Therefore we think that there is no doubt but the last two assignments of error on the part of the plaintiffs in error are not borne out by the record.

For the reasons herein stated, the action of

the district court of Pawnee county is affirmed, at the costs of the plaintiffs in error. All of the Justices concurring, except Justice BURWELL, who, having tried the cause in the court below, took no part in this decision.

(13 Okl. 506)

COOK et al. v. McCORD et al.

(Supreme Court of Oklahoma. Jan. 12, 1904.)  
TOWN-SITE CONTEST—OCCUPYING CLAIMANT'S LAW.

1. An unsuccessful contestant for a town site lot, who, during the pendency of the contest, has made valuable and lasting improvements, in good faith, thereon, and who, at the termination of the contest, is in possession of the lot, is not entitled to hold possession thereof until his improvements are appraised and paid for under the occupying claimant's law of Oklahoma, as the enforcement of such law in such a case would be an interference with the primary disposal of the soil, and therefore in conflict with the organic act of the territory of Oklahoma.

Pancoast, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Logan County; before Chief Justice Jno. H. Burford.

Action by Emma D. McCord and others against Jonas H. Cook and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Geo. W. Buckner and Cottrell & Hornor, for plaintiffs in error. Dale & Bierer, for defendants in error.

BURWELL, J. Jonas H. Cook and Bennett & Pitts were adverse claimants for lot 40 in block 55 in the city of Guthrie. Subsequently Bennett & Pitts conveyed their interest (if any they had) in the lot to Rush A. McKay. A hearing was had between Mr. Cook and Rush A. McKay before the town-site board and the interior department, and the lot finally awarded to Mr. Cook, and the contest case was closed. Meanwhile Rush A. McKay had deeded the lot to one Nix, who, on September 27, 1893, conveyed it to Emma D. McCord, and she, on May 19, 1896, commenced an action in the district court of Logan county praying that Cook be decreed to hold the legal title to this lot for her use and benefit. On the trial the judgment was in her favor. An appeal was taken therefrom to this court, where the judgment of the lower court was reversed and the case remanded. When the mandate reached the district court, counsel for Mr. Cook filed a motion that judgment be rendered in conformity with the mandate of the Supreme Court, and the attorneys for Emma D. McCord filed an application praying that they be granted the benefit of the occupying claimant's act of the territory of Oklahoma; and upon the hearing of these two applications the court rendered judgment adjudging Cook to be entitled to the possession of the land, but also adjudging Emma D. McCord to be entitled to the benefit of the occupying claim-



ant's act; and directed that no process issue evicting Emma D. McCord from the lot until after the plaintiff had paid her the full value of all lasting and valuable improvements made thereon by her, or by the person or persons under whom she held the said property.

This record presents the one question: Is an adverse claimant for a town lot who is unsuccessful, and who, pending the contest, has made valuable and lasting improvements on such lot, entitled to the benefit of the occupying claimant's law of this territory? A careful review of the law pertaining to the matter compels us to decide the question in the negative. It is true that Congress in 1874 enacted a law (Act June 1, 1874, c. 200, 18 Stat. 50 [U. S. Comp. St. 1901, p. 581]) to the effect that when an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled, in the federal courts, to all of the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the state or territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after such improvements were made; and it is contended that the Territorial Legislature, in 1890, enacted an occupying claimant's law (Stat. 1890, p. 928, c. 70, art. 42), which gives to one who, under color of title, has made valuable and lasting improvements on land, in good faith, and is in possession of such land, the right to occupy the same until his improvements are assessed and paid for. Conceding this all to be true, such an one must fail, because the law would be void in so far as it applies to improvements made upon town lots or government land while in contest before the town-site board or the interior department; for the act of 1874 is in conflict with the organic act of the territory of Oklahoma, which provides (section 6) "that the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; but no law shall be passed interfering with the primary disposition of the soil." And, the act of 1874 being in conflict with the organic act of the territory, it is, not merely by implication, but expressly, repealed.

Section 28 of our Organic Act provides: "That the Constitution and all the laws of the United States not locally inapplicable shall, except so far as modified by this act, have the same force and effect as elsewhere within the United States; and all acts and parts of acts in conflict with the provisions of this act are as to their effect in said territory of Oklahoma hereby repealed: provided, that section 1850 of the Revised Statutes of the United States shall not apply to the Territory of Oklahoma." Now, if the

act of 1874 be construed as applicable in this territory; then the Legislature can, as to improvements on government land, interfere with the primary disposal of the soil, and the contention of counsel for appellee, that the occupying claimant's act of this territory is not an interference with the primary disposal of the soil, because it is not sought to be enforced until after the title has passed from the government, although ingenious, is not in harmony with the spirit of section 6 of our organic act. Congress intended that the Legislature should not in any way interfere with the primary disposition of the soil, and has so said in no uncertain terms, and has expressly repealed the act of 1874, so far as this territory is concerned; and it cannot be argued that the right of an occupying claimant to remain on land after the government has deeded it to one entitled thereto, and exact from him payment for his improvements, is not an interference with the disposal of the soil by the general government. The one who has earned the legal title has also acquired the legal right to possession. The government, by its conveyance of the legal title, also conveys the right of occupancy, and he who makes improvements upon government land or a town lot, pending a contest over the same, does so at his peril. The doctrine here announced is supported by the authorities.

In the case of *Chavez v. Chavez De Sanchez* (N. M.) 32 Pac. 146, the Supreme Court of New Mexico said: "There remains then for our consideration the fifth assignment of error, which is that the court erred in excluding tendered proof of the value of the land in controversy and the improvements made thereon by the plaintiffs in error. It is urged that under section 2581, Comp. Laws N. M., plaintiffs in error have a right to recover the value of the improvements made by them upon the land, and have a lien upon the land for the same. We think not. So far as this case is concerned, the land embraced in the homestead patent must be regarded as being part of the public domain at the time the homestead entry was made. There could be no rightful possession in plaintiffs in error, and the law was not intended to be available in behalf of a person wrongfully in possession; nor does this statute apply to this case for the further reason that such a lien would interfere with the disposition of the public lands of the United States. 'The power of Congress in the disposal of the public domain cannot be interfered with or its exercise embarrassed by any state (or territorial) Legislature, nor can such legislation deprive the grantees of the possession and enjoyment of the property granted.' *Gibson v. Chouteau*, 13 Wall. 92 [20 L. Ed. 534]; *King v. Thomas* (Mont.) 12 Pac. 865."

The case of *Gibson v. Chouteau*, 13 Wall. 92, 20 L. Ed. 534, lays down the same rule. In that case the unsuccessful litigant for public lands commenced suit for the posses-

sion thereof, and his adversary interposed the statutes of limitation of Missouri (10 years) as a defense, he having occupied the land for that length of time prior to the commencement of the suit. The court said: "The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States also forbids any legislation depriving the grantees of the United States of the possession or the enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. \* \* \* With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of the title, could be forfeited because they were not asserted before that title was issued."

This court held, in *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 357, and *Calhoun v. McCornack*, 7 Okl. 349, 54 Pac. 493, that an unsuccessful contestant for a homestead could not take advantage of the occupying claimant's act when an action was commenced for his removal from the land, expressly holding that to give force to our occupying claimant's law, as applied to such a case, would be an interference with the primary disposal of the soil. It seems to us that the law upon this question is plain; and it is also the settled law of the territory that improvements made upon a town lot while it is in contest are improvements upon government land, and before its primary disposal. *McDaid v. Oklahoma*, 150 U. S. 218, 14 Sup. Ct. 59, 37 L. Ed. 1055; *Bockfinger v. Foster* (Okl.) 62 Pac. 799.

A number of other cases have been cited by counsel for the respective parties, and we have examined them, but do not care to comment upon them further. The general principles announced in them support the position here taken. It is true that the act of 1874 and the organic act of the territory are both acts of Congress, and it might be said that they should both be given force and effect, which, if done, the occupying claimant's law of the territory would not be in conflict with any of the laws of the United States. A careful analysis of the organic act, however, will show that it not only repeals all acts of Congress which are in conflict with it, but also prohibits the Territorial Legislature from passing any law which will interfere with the primary disposal of the soil. The law cannot be enforced in this kind of a case.

For the reasons herein stated, the judgment of the lower court is hereby reversed, in so far as it gives the defendants in error any right under the occupying claimant's law of the territory; and the case is hereby remanded, with directions to the lower court to proceed in conformity with the views herein expressed, and in conformity with the for-

mer judgment of this court in this case, at the cost of the defendants in error. All of the Justices concurring, except BURFORD, C. J., who presided at the trial below, not sitting, and PANCOAST, J., dissenting.

(141 Cal. 574)

**WHITE SEWING MACH. CO. v. COURTNEY et al. (S. F. 2,722.)**

(Supreme Court of California. Jan. 18, 1904.)

**SURETY—BOND—REVOCATION—FUTURE OBLIGATION.**

1. Under Civ. Code, § 2814, defining a continuing guaranty as one relating to a future liability of the principal, under successive transactions; section 2844, providing that a surety has all the rights of a guarantor; and section 2815, providing that a continuing guaranty may be revoked at any time by the guarantor as to future transactions—a bond, conditioned to be void if an agent pay all obligations existing or to arise to his principal, may be revoked, as to future transactions, at the will of the surety executing it.

2. The demand by a surety for his release from liability on a revocable bond, and consent thereto by the obligee's agent, who executed a release in writing, was a revocation, though the agent's authority was not in writing, no formal release being necessary.

3. Where an agent, whose liability to his principal was secured by a bond, had goods of the principal in his possession for sale when the surety revoked the bond, and the principal thereafter sold the goods to the agent, taking his note therefor, the obligation on the note is a new one, for which the surety is not liable.

Department 1. Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Action by the White Sewing Machine Company against William P. Courtney and another. From a judgment in favor of defendant Brown, plaintiff appeals. Affirmed.

Morrison & Cope, for appellant. Parcells & Brown and Mullany, Grant & Cushing, for respondents.

**SHAW, J.** This is a suit on a bond of the defendants to the plaintiff, dated January 27, 1895, in the penal sum of \$1,000. The condition of the bond in substance was that if Courtney should pay to the plaintiff all indebtedness then existing, or that he might thereafter in any way incur, the bond should be void. Courtney was at that time about to become or had been appointed agent of the plaintiff for the sale of its machines, and as a part of the transaction a written agreement was made between the company and Courtney, providing for the consignment of sewing machines to the latter, to be sold on commission at prices designated, under which agreement consignments were made. About the 1st of August of the same year, Courtney having become insolvent and being about to institute proceedings in insolvency for his discharge, the defendant Brown demanded of the plaintiff's Pacific Coast manager, one

¶ 1. See *Principal and Surety*, vol. 40, Cent. Dig. § 98.

Forden, to be released from the bond; and thereupon, with the consent of Courtney and by direction of Forden, who had authority in that behalf, a release was executed in the name of the plaintiff by its attorney, Creely. The court finds that this release was afterwards ratified by the plaintiff. A small balance at this time due the plaintiff was afterwards paid. Under a subsequent agreement between the plaintiff and Courtney, dated April 11, 1898, to which Brown was not privy, some machines were sold to Courtney and his notes taken for the purchase money in the aggregate sum of \$993, for which and interest this suit is brought.

The above facts appear from the findings of the court, and are fully supported by the evidence, except that the authority of Forden to execute releases was not in writing. Judgment was entered against the defendant Courtney, but in favor of the defendant Brown. The appeal is from the latter judgment.

The plaintiff's contention is based on the assumption that Brown, as surety, had no right to revoke the contract of suretyship, nor to demand and receive a release as surety as to future transactions between Courtney and the plaintiff, but that he was bound to continue responsible upon the bond for all time, and for all future transactions, so long as the plaintiff chose to continue dealings with Courtney. But such is not the effect of the transaction. It may be conceded that if the bond had recited that Courtney was appointed agent of the plaintiff for a definite time, and the obligation of Brown was to stand as his surety during that time, he could neither revoke the contract, nor would he be entitled to a release without consent of the plaintiff. And the same would be true with respect to a contract to become surety for the performance of any definite contract, such as the erection of a building or the administration of an estate. But this was a contract to become surety for any liability which might thereafter in any manner exist or be incurred on the part of Courtney to the plaintiff. Although technically a contract of suretyship, it is governed by the same rule as a continuing contract of guaranty under section 2815 of the Civil Code. That section provides as follows: "A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce." A continuing guaranty is defined to be "a guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied." Civ. Code, § 2814. This is an exact description of the legal effect of the contract here in question, although nom-

inally a contract of suretyship. The reason of the rule is the same in one case as in the other, and it applies equally to both. The Code itself provides that "a surety has all the rights of a guarantor." Civ. Code, § 2844. Therefore, as a surety upon a contract contemplating a future liability of the principal under successive transactions, he had a right at any time to revoke the contract with respect to liability upon any transaction which was not at that time begun. The provision relating to the renunciation of any continuing consideration has no application because there was no consideration at all as to Brown, and as to Courtney the consideration was not continuing as to future independent transactions such as this in question. The consideration for the notes was the machines sold to Courtney at the time the notes were given, and that was the only consideration upon which Brown, if he had not previously revoked, could have been held liable as surety with respect to that particular transaction. The demand for a release, and the consent thereto by the plaintiff's agent, followed by the execution of the release, was certainly the equivalent of, and in substance was, a revocation of the contract by the surety, Brown. The fact that the authority of Forden was not in writing is immaterial, because no formal release was necessary in order to terminate the contract.

Some attempt is made to show that some of the machines for which the notes sued on were given were in the possession of Courtney at the time the demand for release was made by Brown, and that, therefore, the liability sued on was one existing at the time of the revocation, and consequently was not affected thereby. This cannot be the case. Under the terms of the contract between Courtney and the plaintiff the machines in Courtney's possession at the time Brown demanded the release were not the property of Courtney, but the property of the plaintiff. The only liability of Brown at that time with respect to those machines was for the return of the machines to the plaintiff in good order and condition if unsold, or for the proceeds thereof if Courtney should sell them as agent for the plaintiff under the contract then existing. This liability, however, is not the one here sued on, and it was extinguished by the sale of the machines to Courtney. This sale was a future transaction, with relation to which the contract of suretyship was revoked, and for which Brown could not be held responsible. After such revocation the plaintiff had no right to make an absolute sale of the machines on hand to Courtney, and hold Brown liable on the bond for the price.

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

(141 Cal. 667)

**MEETZ v. MOHR et al. (S. F. 2,840.)**

(Supreme Court of California. Jan. 18, 1904.)

**TRUST DEED—RIGHT TO FORECLOSE—TEMPORARY INJUNCTION—DISSOLUTION.**

1. Under a trust deed and a transfer of personal property to the trustee to secure an indebtedness, and also to protect the creditor from liability on his indorsement of notes for the debtor, the creditor was not required to wait until the notes he had indorsed were all paid by the makers, or by himself, before he could realize on the security he held for the money actually advanced by him.

2. On a motion to dissolve a temporary injunction against the foreclosure of a trust deed, it was contended that defendants had no right to sell because the answer did not allege a demand in writing; but it did allege a demand, and also alleged that defendants duly performed all the requirements of the deed and the agreement on their part to be performed as a condition precedent to the sale. *Held*, that this was sufficient, in view of Code Civ. Proc. § 437, providing that, in pleading performance of conditions precedent in a contract, it is unnecessary to state the facts showing the same, but it may be stated generally that the party duly performed all the conditions on his part.

3. Where, on the hearing of a motion to dissolve a temporary injunction against the foreclosure of a trust deed, it appears that plaintiff did not make any tender, nor meet an offer on the hearing to accept a part of the amount admitted to be due and discontinue the foreclosure proceedings, the injunction was properly dissolved.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Injunction by Mathilde Meetz, executrix of Theodor Meetz, deceased, against Tillie Mohr and others. From an order dissolving a temporary injunction, plaintiff appeals. Affirmed.

T. M. Osmont, for appellant. Mullany, Grant & Cushing, for respondents.

**VAN DYKE, J.** Following the complaint in this case, temporary injunction was issued, and the defendants thereafter, upon notice and supported by affidavit and answer to the complaint, moved the court to dissolve the same, which was granted, and the appeal is taken from such order dissolving the injunction.

The complaint stated substantially the following facts: That plaintiff's testator, Theodor Meetz, on the 12th day of February, 1897, made and delivered to defendant M. J. Rudolph Mohr a promissory note for \$1,600, and at the same time conveyed to Emil Mohr, as trustee, a deed of certain real estate in Kern county, also transferred to said Emil Mohr certain personal property, all as security for the payment of the said \$1,600, and also to secure said Rudolph against any liability that might arise against him out of the indorsement of certain promissory notes for said Meetz, and any indebtedness that might be due to said Rudolph on open account. It was provided that in the case of default in the payment of said indebtedness the trustee should proceed to sell said prop-

erty, and out of the proceeds of sale discharge said indebtedness, and render the surplus to said Theodor Meetz, and it was also provided that upon the payment of said indebtedness or the release of said Rudolph from the said indorsement upon said notes all the property referred to in said deed of trust and agreement should be reconveyed by the trustee to said Theodor Meetz. Thereafter, and prior to the commencement of the action, it was averred that Theodor Meetz died testate, in the county of Alameda, the place of his residence, and that by his will plaintiff was named as executrix, and thereafter the will was duly probated, and she was appointed as such executrix of the will. It is further averred that the defendants Tillie Mohr and William F. Hoelscher, trustees, have advertised for sale said lands for payment of the indebtedness alleged to be due and owing from said Theodor Meetz to the defendant Rudolph Mohr, which is claimed by said Rudolph to be the sum of \$12,000, being the full amount of all the promissory notes mentioned, those that he had indorsed as well as the notes payable to him, but that, as plaintiff is informed and believes, the said estate is not indebted to said Rudolph Mohr in the sum of \$12,000, or in any sum in excess of \$2,000, on said notes, exclusive of interest, and that the entire indebtedness now due or owing from said estate to said Rudolph does not exceed the sum of \$6,000, and that the said Rudolph never paid any of said notes which he indorsed, except a note of \$1,000 to M. Kane, and that whether he is liable for the payment of the remainder of said notes the plaintiff is not advised and is unable to state. It is also alleged that the defendants, as trustees, have advertised for sale at the same time certain certificates of capital stock of the Bayerque Land Company, a corporation, to wit: Six shares of the capital stock of the corporation. It is further averred that plaintiff is ignorant as to whether the first trustee, Emil Mohr, ever conveyed the property to the defendants Tillie Mohr and William F. Hoelscher, but is informed and believes that said defendants Tillie Mohr and Hoelscher claim the said conveyance has been made, and that they are the successors in trust of the said Emil Mohr. It is further averred that in February, 1900, the plaintiff tendered to Rudolph Mohr the sum of \$7,000 towards the payment and satisfaction of said indebtedness of the estate of Meetz, deceased, promising to pay the balance of said indebtedness later; that said sum so tendered was more than sufficient to pay and discharge all of said indebtedness; but that said Rudolph did not accept said money, but he assured plaintiff that he would take the matter into consideration, claiming that the entire amount of \$12,000 was then due and owing as aforesaid. It is further averred that the defendant trustees intend to proceed with the sale of said property, unless restrained by order of court, and the title of the plaintiff to said

estate will be clouded, embarrassed, and prejudiced.

On the hearing of the motion dissolving the injunction it was shown by the answer of defendants and their affidavits that no tender of any sum of money whatever was ever made to said Rudolph in payment or satisfaction of the indebtedness mentioned in the complaint; that personal property pledged to secure said indebtedness was sold by the defendants before the issuance of the injunction; that the same was purchased by said Rudolph for \$2,500, which sum, together with certain earnings of the stock, was credited by him to said estate, leaving a balance due from said estate of \$3,759.75; that said Rudolph was willing to receive said sum in full payment of his claim, except his liability as indorser of said notes, and to continue to hold said deed of trust and the property thereby conveyed as the security to protect him against any liability on said notes indorsed by him, and not sell said property. Further, at said hearing of the motion, said Rudolph offered to accept said sum of \$3,759.75 in full payment of his claim, except on account of his liability as indorser of said other notes, and to discontinue the sale and publication of notice of sale of said land and premises; but plaintiff did not accept said offer, and did not pay said sum or any part thereof. Thereupon plaintiff moved to amend her complaint. The material averments in said amended complaint being that defendant Tillie Mohr was, and still is, the wife of the codefendant, M. J. Rudolph, and that said Rudolph claims a right under said deed of trust to appoint new trustees in place of said Emil Mohr, and, claiming such power, selected his wife, the said Tillie Mohr, together with the defendant William F. Hoelscher, to act as trustees; and it is averred upon information and belief that said Hoelscher was formerly a clerk or bookkeeper of said Rudolph Mohr, and that neither of said trustees have pecuniary means sufficient to respond to plaintiff for the proceeds of said trust property. It is further averred in said amendment to the complaint that by the deed of trust it is provided that the advertisement of sale of said property shall be made at least twice a week for three weeks in some newspaper published in the city and county of San Francisco, whereas the publication and notice in this case was made in a newspaper known as a Journal of Commerce, published in said city and county, and that said Journal of Commerce is not a paper devoted to general news, and does not circulate among people generally, but that it is devoted to special subjects, and circulates among a comparatively small class of people only. The court denied the plaintiff's application to file the amendment to the complaint, and it can therefore only be considered in the light of a counter affidavit, and not as a part of the showing on which the temporary injunction was granted.

It was claimed on the part of the appellant that it would be improper for the trustees to sell the land and hold the proceeds to protect Rudolph from his liability as indorser, but it is shown by the answer and affidavits that the defendants propose to sell the property only for the purpose of paying the amount due to Rudolph under said deed of trust, with the proper costs and expenses of sale, and that they did not propose to sell said land or any part thereof for the purpose of paying to said Rudolph any amount for which he is liable by reason of his indorsement on said notes, save and except such amount as he had already paid at the time of the sale. It is conceded that the deed of trust was given as security, not only for the note of Meetz, but also for the repayment of moneys advanced by Rudolph, and to protect him from liability as indorser of Meetz's notes. Rudolph was not required, as contended by appellant, to wait until the notes he had indorsed were all paid by the makers or by himself before he could realize on the security he held for the money actually advanced by him. It is also contended that it was not shown that the defendant trustees were properly substituted in place of Emil Mohr, the original trustee. The complaint on which the temporary injunction was issued described the defendants Tillie Mohr and Hoelscher as trustees, and the answer alleges the substitution of trustees, showing that such substitution was made pursuant to the terms of the deed of trust.

The alleged insufficiency of the advertising is first mentioned in the amendment which the court refused to have filed. No question of that kind was raised in the complaint on which the temporary injunction was granted, and it appeared on the showing on behalf of the defendants at the hearing of the motion to dissolve the injunction that they not only postponed the sale twice at the request of the appellant after they began to advertise it, but advertised the sale twice a week for a period of eight weeks, instead of three weeks, prior to the issuance of the injunction.

Appellant suggests that defendants have no right to sell, because the answer does not allege a demand in writing; but the answer does allege a demand, and also alleges that the defendants have duly performed all the requirements of said deed of trust and said agreement on their part to be performed as a condition precedent to the sale of the land, and this is sufficient. Code Civ. Proc. § 457; Bradford Investment Co. v. Joost, 117 Cal. 204, 48 Pac. 1083.

The plaintiff did not make any tender, nor meet defendants' offer to accept a part of the amount claimed to be due, as already stated. Under these circumstances the court was clearly right in dissolving the injunction. "A sale under a trust deed will not be enjoined when it appears by complainant's own showing that no sale would be made if he should pay what he admits to be due and what he

avers his ability and willingness to pay." High on Injunctions, § 452.

From the showing made in the court below it clearly appears that all appellant had to do to prevent the threatened sale was to pay the testator's debt, then overdue, to the defendant Rudolph Mohr, and which sale in case of nonpayment was authorized by the deed of trust. There is no claim on the part of appellant that she has been prejudiced by the substitution of trustees, or on account of the sale not having been otherwise advertised.

One who seeks equity must do equity, and the plaintiff in this case did not do so before bringing the action, and further failed and refused to do equity when an opportunity was offered at the hearing of the motion. The order of the court below, therefore, dissolving the injunction, under the circumstances was right and proper.

Order affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(141 Cal. 722)

HAY et al. v. MASON. (L. A. 1,403.)

(Supreme Court of California. Jan. 21, 1904.)

CONTRACT—OPTION TO EXCHANGE REAL ESTATE—REVOCATION—FINDING—EVIDENCE—SUFFICIENCY.

1. In an action for breach of contract to convey real estate under an option irrevocable for 15 days, and good thereafter until withdrawn, evidence considered, and held to sustain a finding that the option was revoked by defendant after the irrevocable period thereof and prior to tender of the consideration for the conveyance.

2. The terms of an option as to the period of its validity are binding on the parties.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by W. H. Hay and another against John A. Mason. From a judgment for defendant and an order denying a motion for new trial, plaintiffs appeal. Affirmed.

R. H. Horton, for appellants. Johnstone Jones, for respondent.

COOPER, C. This action was brought to recover damages for breach of contract to convey real estate. The case was tried before the court, findings filed, and judgment entered for defendant. This appeal is from the judgment and the order denying plaintiff's motion for a new trial.

On November 19, 1901, defendant executed and delivered to plaintiffs a writing, of which the following is a copy to wit: "Option to Trade. For value received I hereby agree to sell and convey to Hay & Van Vranken, or his assigns, by a good and sufficient deed of grant, bargain and sale, with the usual covenants free and clear of all liens and incumbrances, all of the following described property, to wit: being lot ten (10) of Embody and Lacy's Sub., of block nine (9) of East Los Angeles, as per map recorded in Book Five (5), page 586, Miscellaneous Rec-

ords of said County and State. \* \* \* This option to be irrevocable for fifteen (15) days and good thereafter until withdrawn. In witness whereof I have hereunto set my hand and seal this 19th day of November, 1901. [Signed] John A. Mason. Witness to signature: John F. White."

No money was paid to defendant, and no price in money was to be paid, but there was an oral agreement that the lot described in said writing should be conveyed to plaintiffs in exchange for a lot fronting 70 feet on the west side of Main street and 148 feet deep, just north of Thirtieth street, the same being in the city of Los Angeles.

On January 4, 1902, the plaintiffs tendered to defendant a good and sufficient deed of grant, bargain, and sale, describing the lot so orally agreed to be conveyed, and at the same time demanded of the defendant a proper conveyance of the property described in said writing, but defendant refused to accept the deed so tendered him or to convey the property described in the writing to the plaintiffs or to either of them.

If the option or offer to convey by defendant had been for a price named, although unilateral and signed by defendant only, it would have been binding upon him, if subsequently, and prior to its withdrawal by defendant, plaintiffs acted upon it, and tendered the price to be paid. In such case the contract or offer, although not mutual when first signed by defendant, would have become so by the price being paid or tendered. Here, however, the consideration to be paid by plaintiffs was not money, but an exchange of lands. There was no agreement or memorandum of any kind signed by plaintiffs as to the land to be by them conveyed to the defendant. It is therefore evident that at no time prior to the making and tender of the deed by plaintiffs could either party have enforced specific performance of the contract. It may be conceded, for the purposes of this case, without deciding, that where the consideration for a unilateral agreement in writing to convey land is the oral agreement to convey land in exchange the same rule would apply after a tender of a deed to the land so orally agreed to be conveyed as in cases where the consideration is money. If we give the plaintiffs the full benefit of the rule, yet they cannot recover in this case. The option was by its terms irrevocable for 15 days, and good thereafter until withdrawn. The 15 days expired on the 4th day of December, 1901. No deed was tendered during this time, nor till January 4, 1902. The court found that defendant had, prior to that time, withdrawn his offer. The findings on this point are as follows: "That the defendant about the middle of December, 1901, informed the plaintiffs that he would not carry out the deal and withdrew and revoked said option of November 19th; such withdrawal and revocation being after the expiration of fif-

teen days from said November 19th, and prior to the tender made by plaintiffs on January 4, 1902; that early in December, 1901, the defendant gave notice to said John A. White that he refused to carry out the deal and withdrew the option, and said White notified the plaintiff Hay of defendant's refusal."

Plaintiffs contend that the above findings are not supported by the evidence, but we do not think the contention can be maintained. Defendant testified: "I had a conversation about this deal in the first part or the middle of December. It was in front of their offices. Mr. Hay and Mr. White were present, and Van Vranken came in afterwards. I told them I didn't think the deal would go. I called it all off. \* \* \* I made an examination of the Main street property with Mr. Cal. Hunter. It was a week or two after the option was signed we examined the property. It was after that that I notified Hay and Van Vranken that I wouldn't sign the deed." The witness White testified: "He [defendant] told me he didn't want to make the deal on the basis he signed up on it. Didn't want to assume the mortgage. \* \* \* I remember he told me that he called it off; \* \* \* and after John [defendant] told me that he called off the deal, I communicated that fact to Hay and Van Vranken, and told them his reason for it was on account of the mortgage." The witness Hunter testified: "I went into Mr. Hay's office one day after Mason had declared the deal off, and he told me I had knocked him out of making a trade. That was about the 7th or 8th of December, I think." The above testimony is sufficient to support the findings.

It is claimed that plaintiffs, being only agents for one Mullin in the exchange of the lands, and not being owners of the lands which were described in the deed afterwards tendered to defendant, cannot maintain the action for the purpose of getting their commission. It is unnecessary to decide this question. As the judgment must be affirmed, it becomes immaterial.

We advise that the judgment and order be affirmed.

We concur: GRAY, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

(141 Cal. 648)

In re LEVY'S ESTATE (two cases). (S. F. 3,555, 3,565.)

(Supreme Court of California. Jan. 16, 1904.)  
ADMINISTRATION OF ESTATE—PROBATE HOMESTEAD—APPEAL FROM ORDER SETTING ASIDE—PARTIES AGGRIEVED.

1. Where an order is made setting aside a homestead for the use of the widow pending

administration, the executors are "parties aggrieved," within the meaning of the law relative to the right of appeal.

2. The devisees are parties specially aggrieved by reason of the fact that under the law (Code Civ. Proc. § 1468) the effect of the order is to remove the premises set apart from the disposition of the will, and to vest title thereto, subject to the order, in the heirs of the deceased, as distinguished from the devisees.

3. A testator at the time of his death occupied as his home the third floor of a three-story building, which was subdivided into flats of one floor each, suitably arranged to be rented separately, the flat in which he lived being more valuable for rental purposes than the others. *Held*, that the building and the lot on which it was located could have been selected as a homestead under Civ. Code, § 1237, defining the same as "the dwelling house in which the claimant resides, and the land on which the same is situated"; and hence, apart from the question of its value, it was properly set aside as a homestead for the widow pending administration.

4. Where the only premises suitable for probate homestead purposes are indivisible, the fact that they are valued at \$17,500, and constitute in value nearly one-half of the estate, does not impair the homestead right, in the absence of a statutory limitation as to value.

Department 1. Appeals from Superior Court, City and County of San Francisco; J. M. Troutt, Judge.

In the matter of the estate of Henry Levy, deceased. From an order setting apart a homestead for the use of the widow during administration, the executors and others appeal. Affirmed.

T. E. Pawlicki and Otto Irving Wise, for appellants in No. 3,555. Arthur J. Dannenbaum, for appellants in No. 3,565. W. T. Kearney, Arthur J. Dannenbaum, and Hugo D. Newhouse, for respondents in No. 3,555. T. E. Pawlicki, Otto Irving Wise, Wm. T. Kearney, and Hugo D. Newhouse, for respondents in No. 3,565.

ANGELLOTTI, J. These are appeals from an order setting apart from the property of the estate of deceased a homestead for the use of the surviving wife for and during the period of administration of said estate and until its final distribution. One appeal is taken by the executors of the will of deceased, and the other by certain devisees and legatees under his will. It cannot be held that the executors are not "parties aggrieved" by such an order within the meaning of those words as used in the law relative to the right of appeal. In re Heydenfeldt, 117 Cal. 551, 49 Pac. 713. The devisees appealing are specially aggrieved by the order by reason of the fact that under the settled law in this state the effect of the homestead order is to remove the premises set apart from the disposition of the will, and to vest title thereto, subject to the order, in the heirs of the deceased, as distinguished from the devisees. Code Civ. Proc. § 1468; Estate of Walkerly, 108 Cal. 627, 655, 41 Pac. 772, 49 Am. St. Rep. 97; Estate of Matheny, 121 Cal. 267, 53 Pac. 800. While all such devisees are heirs of the deceased, they will not, as heirs,

receive as large shares of the property as they would have received as devisees.

It is contended by appellants that the property set apart should not have been set apart for two reasons, which are, substantially, first, that the property was of such a character that it was not capable of being selected as a homestead; and, second, that the homestead set apart is excessive in value, considering the value and condition of the estate.

The property set apart consisted of a lot of land in the city and county of San Francisco, with a frontage of 25 feet on Ellis street, and a depth of 137½ feet, with the frame building thereon. This building was three stories in height, and was subdivided into three flats, of one floor each, each flat having a separate street entrance door on Ellis street, and being separate and distinct from the remaining flats, except that all of them were connected by a stairway which ran from the ground in the rear of the building, and connected with the kitchen doors of all of said flats. The top flat, which the testimony showed was more valuable than either of the other flats for rental purposes, was occupied by respondent and deceased as their home prior to and up to the time of the death of deceased, and has been so occupied by respondent ever since the death of her husband.

The lot was appraised at the sum of \$7,000, and the building thereon at \$10,500. The only other real property of the estate, except a cemetery lot, was a lot on McAllister street, in said city, 55 by 137½ feet, appraised at \$15,000, with improvements thereon consisting of a three-story frame building, containing a store and two upper floors, appraised at \$3,500, and another two-story frame building, the character of which does not appear, appraised at \$1,200, all of the same being incumbered by mortgage for \$10,000. The whole estate was appraised at \$41,419.25, and was found to be solvent. So far as appears, there was no creditor other than the holder of the mortgage above referred to, and no property suitable for homestead purposes other than the property set apart.

1. Admittedly the court in probate proceedings has the power to set apart premises as a homestead if they be suitable and proper for residence purposes, and could have been legally selected as a homestead during the continuance of the marriage if the parties then actually resided thereon. There is no question as to the suitability of the building here involved for residence purposes, and, leaving out of consideration the question of value, we are satisfied that, under the provisions of our statute and the numerous decisions of this court in regard thereto, the premises set apart could have been legally selected as a homestead during the continuance of the marriage.

Section 1237 of the Civil Code provides that "the homestead consists of the dwelling

house in which the claimant resides, and the land on which the same is situated, selected as in this title provided." Appellant's claim appears to be that there were, in fact, three dwelling houses upon the land; that a court may set apart only one dwelling house; and that as the land is an ingredient part of the homestead, and a separation of the land and one dwelling house from the other two dwelling houses is impossible owing to the manner of construction, no homestead at all can be set apart.

When the statute speaks of the "dwelling house" it means the "building" which is occupied as a dwelling house by the family, and not such portion of the building as may be actually used by the family for residence purposes. It is well settled, as was said by this court in *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404, that "using a building partly, or even chiefly, for business purposes, or renting part of it, is not inconsistent with the right of homestead, provided it is, and continues to be, the bona fide residence of the family." In that case the homestead claimant built a large addition to his family home for hotel purposes, and leased the house, reserving a few rooms for the use of himself and family, in which they continued to live. Under these circumstances, he executed his declaration of homestead. It was held that the homestead claim was valid. In *Skinner v. Hall*, 69 Cal. 195, 10 Pac. 406, the whole house, with the exception of the room in which the claimant resided, was, at the time of the filing of the declaration, rented to and occupied by another. The homestead was upheld. In *Estate of Ogburn*, 105 Cal. 95, 38 Pac. 498, the building was divided into two nearly equal parts, one being used by the claimant as a tin shop, and the other used partly for the millinery business of the wife and partly by the family as their home. The whole building was held to be subject to selection by the claimant as a homestead, and properly set apart as such by the probate court. See, also, *In re Lahiff*, 86 Cal. 151, 24 Pac. 850; *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516. These cases are all authority for the proposition that, if a building is the actual bona fide residence of a party, he may legally select it and the land on which it is situated as a homestead, even though, incidentally, a part thereof, no matter how large, may be used by him for other purposes than those of family residence. There is no decision of this court in conflict with this view. The cases cited above are clearly distinguishable from another line of cases laying down an equally well-settled doctrine, viz., that the use of the property is an important element to be considered, and that, where the building is occupied by the claimant primarily for other purposes than those of residence, the occupancy of a portion thereof by him and his family being for the purpose of conducting a business therein and but incidental to the business, the property



cannot be legally selected as a homestead. *Laughlin v. Wright*, 63 Cal. 113; *McDowell v. His Creditors*, 103 Cal. 264, 35 Pac. 1031, 42 Am. St. Rep. 114; *Beronio v. Ventura Co. Lumber Co.*, 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118. See, however, *Gaylord v. Place*, 98 Cal. 472, 33 Pac. 484. In no case has it been decided that where a portion of a building is dedicated to residence purposes, and is actually occupied by the claimant as the home of himself and his family, and such occupation is not merely incidental to the carrying on of some business in other parts of the building, the building and the land on which it is situated cannot be legally selected as a homestead. In *Estate of Noah*, 73 Cal. 590, 15 Pac. 290, 2 Am. St. Rep. 834, the property which it was sought to have set apart consisted of a four-story brick building of the value of \$25,000, which had been erected and occupied exclusively for business purposes.

Appellants rely also on a line of cases where it is held that where two or more buildings suitable for dwelling house purposes, belonging to the claimant, are situated upon the same parcel of land, and the claimant resides in one, he can legally select but one as a homestead. In *re Ligget*, 117 Cal. 352, 49 Pac. 211, 59 Am. St. Rep. 190; *Tiernan v. His Creditors*, 62 Cal. 286; *Maloney v. Hefer*, 75 Cal. 422, 17 Pac. 539, 7 Am. St. Rep. 180; *Lubbock v. McMann*, 82 Cal. 226, 22 Pac. 1145, 16 Am. St. Rep. 108; In *re Allen*, 78 Cal. 203, 20 Pac. 679. The distinction between these cases and the case of a single building is obvious. Under the express terms of the statute, the homestead "consists of the dwelling house in which the claimant resides and the land on which the same is situated." While this definition may include not only the land on which the dwelling house stands, and of which it has become a part, but also such other land as may be necessary to its convenient use and occupation, it does not, when fairly construed with a view to the objects of the homestead law, include such other land as has resting thereon, as a part thereof, a building or buildings devoted to other purposes than those of a family home.

In the case at bar one floor of a three-story residence building was actually occupied as the family home, the occupation being solely for the purposes of such a home, and not merely incidental to some other purpose. The place so occupied was an integral part of the land on which the building stood. The fact that the building contained two other stories, so constructed that they were more adapted for renting purposes by being built with separate street entrances, could not impair the right of the claimant to select as a homestead the building and all of the land on which it stood. While those floors may have constituted separate dwelling places, there was but one building, incapable of division, and the form of construction of

the building is immaterial. The case comes fairly within the doctrine of *Heathman v. Holmes*, supra, and we have no doubt that the property could have been legally selected as a homestead during the life of the husband. As has been frequently said, the homestead statute is a remedial measure, and should be liberally construed. Being suitable for residence purposes at the time of its selection by the court, and of such a character that it could have been legally selected during the life of the husband, it was capable of selection by the court.

2. It is settled that there is no specified limitation of value in the case of a probate homestead, the rule being that the court may set apart such property as, regardless of its value, in view of the value and condition of the estate, may seem just and proper. *Estate of Walkerly*, 81 Cal. 579, 22 Pac. 888; In *re Smith*, 99 Cal. 449, 34 Pac. 77. It has been held that where an estate is insolvent the court must take into account the rights of creditors, and, as the Legislature has fixed the sum of \$5,000 as the limit in value which the debtor may claim for his homestead against the demands of his creditors, "a wise exercise of judicial discretion would limit the homestead to be so set apart to this amount in value in the case of an insolvent estate, where a homestead of this value can be divided from the remainder of the estate, or where the property sought to be set apart is capable of such admeasurement." *Estate of Adams*, 128 Cal. 380, 384, 57 Pac. 569, 60 Pac. 965.

While the rights of creditors are not to be disregarded in setting apart a homestead, they "are subordinate to the right of the family to a home" (*Estate of Adams*, 128 Cal. 383, 57 Pac. 569, 60 Pac. 965); and if, in order to set apart such a home, it be necessary to take the entire estate of the deceased, the creditors' rights must yield (*Keyes v. Cyrus*, 100 Cal. 322, 34 Pac. 722, 38 Am. St. Rep. 296). Heirs, devisees, and legatees occupy, at best, no more advantageous position than creditors. *Sulzbürger v. Sulzbürger*, 50 Cal. 385; In *re Davis*, 69 Cal. 458, 10 Pac. 671; *Estate of Lahiff*, 86 Cal. 151, 24 Pac. 850. While they have rights which should be considered, the family is first entitled to a home, if there be property capable of being set apart as such; and where the only premises suitable for homestead purposes are indivisible, and no homestead can be given to the family unless the whole of such premises is given, the fact that such premises are valued at \$17,500, and constitute in value nearly one-half of the estate, does not impair the homestead right, in the absence of a statutory limitation as to value.

As before stated, there is here no question as to the right of any creditor, and, so far as the record goes, it shows that the only other premises were appraised at a higher sum, and fails to indicate that the same, or any portion thereof, was of such a character that it could be set apart as a homestead.

In view of the peculiar condition of this estate, the action of the court below was just and proper. Being unable to divide the only property suitable for homestead purposes, it was necessary to set aside the whole of such property; but it was set apart for the most limited period—the period of administration of the estate—and it was further provided that the family allowance theretofore granted should cease and determine. Thus the rights of all others interested in the estate were preserved so far as was practicable.

The order is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

(141 Cal. 686)

PEOPLE v. KEITH. (Cr. 1,026.)

(Supreme Court of California. Jan. 19, 1904.)

RAPE—INSTRUCTIONS—WEIGHT OF EVIDENCE—PROMPT COMPLAINT—ADMISSIBILITY OF EVIDENCE—REMARK OF COURT.

1. In a prosecution for rape, an instruction that "the fact that the prosecutrix made prompt and early complaint of the wrong \* \* \* committed upon her person \* \* \* is independent and original evidence, \* \* \* and may be \* \* \* considered \* \* \* in corroboration of her other testimony," etc., is not objectionable as telling the jury that prosecutrix did in fact make prompt and early complaint.

2. In a prosecution for rape, it is proper to instruct that the fact that prosecutrix made prompt complaint is independent and original evidence, and may be considered in corroboration of her other testimony.

3. The fact that prosecutrix failed to make prompt complaint of an alleged rape is not conclusive of defendant's innocence.

4. In a prosecution for rape, an instruction that it is the jury's province to determine the weight and credibility of prosecutrix's testimony as of any other witness testifying in the case, and if such testimony creates in their minds a satisfactory conviction and belief beyond a reasonable doubt of defendant's guilt it is sufficient of itself, without corroboration, to justify a verdict of guilty, is not objectionable as telling the jury that if they believe the prosecutrix they must find the defendant guilty.

5. Where, in a prosecution for rape, the evidence admits of no doubt as to the sexual intercourse, and there is no evidence tending to reduce the offense, it is not error to refuse to charge on assault with intent to commit rape and other lesser offenses.

6. In a prosecution for rape, defendant requested instructions that he was a competent witness, and the jury were as much bound to consider his evidence as that of any other witness, and to give it all the weight they believed it entitled to; and also that if from all the testimony, including defendant's, there remained a probability of his innocence, it was sufficient to raise a reasonable doubt, and entitled him to an acquittal. *Held*, that as these instructions singled out the testimony of a particular witness for comment it was not error to refuse them.

7. The fact that the court indorsed on these instructions that they were refused because the defendant did not testify, when in fact he did testify, did not make their refusal erroneous.

8. In a prosecution for rape, an instruction that prosecutrix's prompt complaint of the wrong is original evidence, and may be considered in corroboration of her other testimony, is not objectionable as singling out the testimony of a particular witness for comment.

9. In a prosecution for rape, prosecutrix's testimony as to her physical condition at the time she complained to her mother shortly after the assault, and as to certain treatment by her mother to relieve such condition, is admissible.

10. On the retrial of a criminal case after reversal, in sustaining defendant's objection to certain questions, the court remarked, "I do not propose to have this case go up there and be reversed again if I can help it." *Held* not ground for reversal, as indicating to the jury that the court expected or wanted a verdict of guilty.

Commissioners' Decision. Department 1. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

William Keith was convicted of rape, and appeals. Affirmed.

See 68 Pac. 816.

William S. Wall, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

CHIPMAN, C. This is an appeal from the second judgment of conviction of defendant for the crime of rape. The verdict of guilty is not called in question otherwise than through alleged errors of law occurring at the trial.

1. The court instructed the jury as follows: "Upon the trial of a defendant accused of the crime of rape the fact that the prosecutrix made prompt and early complaint of the wrong and injury committed upon her person, and to her character and chastity, is independent and original evidence, and is admissible and may be received and considered by the jury in corroboration of her other testimony given in the case." The objections urged are (1) that the court "tells the jury that it is a fact that the prosecution made prompt and early complaint"; (2) that the court by the instruction "distinguishes between one part of her testimony and the other" by stating that it was a fact that she made prompt and early complaint; (3) also that the court told the jury that her testimony was "independent and original evidence"; (4) that the instruction points out as the fact that "her chastity and character has received a wrong and an injury." The instruction states a well-recognized rule of evidence in this class of cases as applicable generally "upon the trial of a defendant." It in no sense can be held to be equivalent to saying, "the fact as testified to by the prosecutrix that she made prompt complaint," etc., or that "it is a fact that the prosecutrix made prompt and early complaint." The evidence is uncontradicted that she did make such complaint, but we do not think the instruction informs the jury that the fact was as she testified. That the instruction is a correct statement of the law is held in *People v. Lambert*, 120 Cal. 170, 52 Pac. 307, and in *People v. Wilmot* (Cal.) 72 Pac. 838, and we can see no error in so informing the jury.

2. The court instructed the jury that it is their province to determine the weight and credibility "to be given the testimony of a

female upon whom it is alleged in an information that a rape has been committed, and who testifies to the facts and circumstances of such rape as of any other witness testifying in the case. And, if such testimony creates in the mind of the jury a satisfactory conviction and belief beyond a reasonable doubt of the defendant's guilt, it is sufficient of itself, without other corroborating circumstances or evidence, to justify a verdict of guilty of rape upon the trial of the case." The objection urged is that the court singles out the testimony of the prosecutrix, and tells the jury how much weight they are to attach to it, and that under this instruction the jury might have found the defendant guilty though the prosecutrix never made complaint to any person. So far as making seasonable complaint to some relative or friend is concerned, it is not necessary to a legal conviction. This is but a circumstance in the case, and is received as corroborative of the testimony of the prosecutrix as to the criminal act itself. Failure to make prompt complaint might be in some cases a strong circumstance, if unexplained, contradictory of the prosecutrix, but not necessarily conclusive. The remaining objection is based upon the decision of this court in *People v. Johnson*, 106 Cal. 294, 39 Pac. 622, and *People v. Barker*, 137 Cal. 557, 70 Pac. 617. In those cases the instruction was as follows: "While it is the law that the testimony of the prosecutrix should be carefully scanned, still this does not mean that such evidence is never sufficient to convict; if you believe the prosecutrix, it is your duty to render a verdict accordingly." The chief objection to this instruction made by the court was that it took from the jury the question of the intent with which the acts of the defendant were committed; that it might be true that defendant did all the acts testified to and not have intended to commit rape, and yet the jury were not at liberty under the instruction to so find. Both these cases were assaults with intent to commit rape. In the instruction now before us the jury are first told that it is within their province to determine the weight and credibility to be given the testimony of the prosecutrix who testifies to the facts as of any other witness, and in the second place that if her testimony creates in the minds of the jury a satisfactory conviction beyond a reasonable doubt of defendant's guilt it is sufficient without other corroborating circumstances. This is very far from telling the jury if they believe the prosecutrix they must find the defendant guilty. The jury is told that they must be convinced of defendant's guilt beyond a reasonable doubt, while in the cases cited the jury were told to convict whether the facts constituted guilt or not. Here the jury were fully instructed as to what must be proved and how proved before there could be a conviction, and if defendant's guilt was thus established beyond a reasonable doubt by the testimony

of the prosecutrix it would be sufficient. The instruction complained of is not open to the objections made to the instruction in the cases last above cited.

3. It is complained that the court refused to instruct that the jury might find the defendant guilty of rape, assault with intent to commit rape, attempt to commit rape, battery and assault, and in fact instructed only as to the crime charged. The evidence in the case admitted of no doubt as to the sexual intercourse. If it was with the consent of the prosecutrix, there was no offense at all included in the crime charged; if it was without her consent and under the circumstances, it could have been nothing but rape. It was one thing or the other, and there was no evidence tending to reduce the offense. The court did not err. *People v. Chavez*, 103 Cal. 407, 37 Pac. 389; *People v. Lopez*, 135 Cal. 23, 66 Pac. 965; *People v. Swist*, 136 Cal. 520, 69 Pac. 223.

4. Defendant's instructions marked 11 and 12 were refused, and this is claimed to be error. In the first of these the court was asked to instruct the jury that the defendant was a competent witness, and that the jury "are as much bound to consider the evidence given by the defendant in the case as that of any other witness, and to give it all the weight you believe it entitled to." The instruction was indorsed, "Refused because the defendant did not testify." The second of these instructions was that "if from all the testimony in the case, that of defendant included, there remains a probability of defendant's innocence, it is sufficient to raise a reasonable doubt of his guilt and to entitle him to a verdict of not guilty." Marked refused for the same reason as stated above. The defendant testified in the case, and the court no doubt inadvertently stated the ground of its refusal as it did. It is not material for what reason the instructions were refused; they did not go to the jury nor did the court's reasons indorse thereon. This court has held it not error to refuse an instruction which singled out the testimony of a particular witness for comment. *People v. Patterson*, 124 Cal. 102, 56 Pac. 882; *Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315; *People v. Arlington*, 131 Cal. 231, 63 Pac. 347; *People v. Lonnen* (Cal.) 73 Pac. 586. Instruction 20 was general, and applied to all witnesses, including defendant, and covered the point that the jury should "give such credit to each witness as, under all the circumstances, such witness seems to be entitled to." The case of *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228, cited by appellant, does not sustain him. There the objectionable clause, stricken out by the court before the instruction was given, was in substance embodied in the instruction asked in this case. The instruction given as to the testimony of the prosecutrix (people's instruction numbered 19), first above noticed, involves an entirely different question than the one now before us, and was not amena-

ble to the objection that it singled out a particular witness. As to the instruction marked 12, the court instructed the jury with clearness and repeatedly to the same effect as asked by defendant, and hence defendant was not injured. That instructions given in substance need not be repeated has often been held here.

5. Error is claimed on the alleged ground that the court permitted the prosecutrix "to tell about the facts of the complaint." The testimony complained of did not relate to the particulars of the alleged rape or of the complaint made, but related to the physical condition of the prosecutrix at the time she complained to her mother shortly after the assault, and also related to certain treatment by her mother to relieve the condition in which the prosecutrix then was. We cannot see but that she was as competent a witness upon these facts as her mother or other person cognizant of them.

6. In sustaining defendant's objection to certain questions put to the prosecutrix by the district attorney, and referring to the decision of this court upon a point arising at the former trial, the court remarked: "I don't propose to have this case go up there and be reversed again if I can help it." It is contended that "by this remark the court plainly told the jury that the court fully expected their verdict to be that of guilty," and "that the court wanted the defendant convicted." If such an inference could reasonably have been drawn by the jury from the remarks of the court, we might well presume that they were prejudicial, and therefore error; but we think counsel attribute unwarranted importance to this remark. Trial judges should always endeavor to so rule as to avoid reversal, for presumably they thus avoid error, and error is always to be avoided. A more reasonable inference to be drawn from the remarks is that the court desired only to be right in his ruling, and meant no more than if it had said to counsel, "I wish to avoid making a mistake in my ruling and will sustain the objection." The remarks were unnecessary, but we can discover no prejudicial error in them.

It is advised that the judgment and order be affirmed.

We concur: HAYNES, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

(141 Cal. 628)

PEOPLE v. WARD. (Cr. 946.)

(Supreme Court of California. Jan. 16, 1904.)

JUDGMENTS—CRIMINAL—CORRECTION BY  
COURT—EXTRANEOUS EVIDENCE  
—NECESSITY.

1. The power of a court to cause its acts and proceedings to be correctly set forth in its rec-

ords, and to correct its records in accordance with the facts, extends to criminal as well as civil cases.

2. The power of a court to correct its records is not lost by mere lapse of time, and the rule as to the effect of the adjournment of the term has become obsolete.

3. When the record of a judgment itself affords satisfactory evidence, not only of a mistake therein, but also of what the order of judgment really was, it may be corrected without any further extraneous proof.

4. A record recited a conviction of embezzlement and an order that defendant "be punished by imprisonment in the State at F. for the term of seven years," and concluded with a statement that defendant was to be delivered to the proper officers of "said State Prison at F." The only sentence that can be imposed for embezzlement is incarceration in the state prison, and there is a state prison at F. *Held*, that the record was sufficient to authorize its correction so as to recite an order that defendant be "punished by imprisonment in the state prison at F. for the term of seven years."

Department 1. Appeal from Superior Court, City and County of San Francisco; F. H. Dunne, Judge.

Bernard Ward was convicted of embezzlement, and appeals from an order directing the entry of a judgment *nunc pro tunc*. Affirmed.

See 66 Pac. 372; 72 Pac. 343.

George D. Collins, for appellant. J. J. Lermen, W. W. Foote, U. S. Webb, Atty. Gen., E. B. Power, Dep. Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

ANGELLOTTI, J. The defendant was convicted of embezzlement in the superior court of the city and county of San Francisco on November 14, 1899, and judgment was rendered by the court, Hon. F. H. Dunne, judge presiding, on December 2, 1899. Defendant appealed to this court from the judgment, the record on such appeal showing a judgment regular on its face, and on October 11, 1901, the judgment was affirmed. 134 Cal. 301, 66 Pac. 372. It was subsequently discovered that the only minute entry of a judgment in the superior court was the following, viz.: "Saturday, December 2, 1899. The People of the State of California v. Bernard Ward.—No. 12847. The District Attorney with the defendant and his counsel F. McGowan, Esq., came into Court, by the Court of the information duly presented on the 11th day of April 1899 by the District Attorney of the City and County of San Francisco charging said defendant with the crime of felony to-wit: embezzlement of his arraign and plea of 'Nt Gly' as charged on said Information"; on the 29th day of April, 1899, of his trial and the verdict of the jury on the 14th day of November, 1899, Guilty as charged. The defendant show why judgment should not be against him through his counsel moved the court for a new trial upon all the statutory grounds on the 18th day of November, 1899, which motion was taken under advisement by the Court, and now this day

¶ 2. See Courts, vol. 13, Cent. Dig. § 372.

by the Court ordered denied. And no sufficient cause being shown or to the Court hereupon the Court renders its. That Bernard Ward having been duly convicted in his Court of the crime of felony, to wit: embezzlement, it is therefore ordered, that the said Bernard Ward be punished by imprisonment in the State at Folsom for the term of seven (7) years. The defendant was then of the said City and County to be by him delivered into the custody of the proper officers of said State Prison at Folsom, California." The district attorney thereupon moved, on notice, for an order correcting said minute entry so as to make it conform to and be a correct record of the judgment, stating in his notice that the motion would be based on the minutes and records of the court, and the knowledge of Hon. Frank H. Dunne, the judge who rendered said judgment. This motion came on for hearing before the court on November 19, 1901, Judge Dunne presiding. The district attorney introduced in evidence the notice of motion, and the minute entry hereinbefore quoted was received in evidence by consent. The court then stated that the minute entry was not a true record of the judgment, and that judgment had been rendered by said court on December 2, 1899, and that the judgment so rendered was correctly set forth in a proposed order, which was then shown to defendant. Defendant was then asked if he had any evidence to offer to show that the judgment alleged to have been rendered was not in fact rendered, and he offered no evidence. The court then made an order reciting the rendition of judgment on December 2, 1899, the adjudging part of which judgment was as follows: "It was therefore ordered, adjudged and decreed that the said Bernard Ward be punished by imprisonment in the State Prison of the State of California at Folsom for the term of seven years," and reciting the failure of the clerk to enter said judgment except as hereinbefore set forth, and declaring the judgment rendered to be the true judgment, and directing the entry thereof nunc pro tunc as of December 2, 1899. The defendant appeals from this order.

The inherent right and power of a court to cause its acts and proceedings to be correctly set forth in its records, and, where the record made by its clerk does not correctly show the order of direction in fact made by the court, to cause the record to be corrected in accordance with the facts, is not denied by the appellant. This matter is elaborately discussed, and the California authorities cited, in the opinion of this court in *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139. There can be no doubt that the power exists in criminal cases as well as in civil cases, as is clearly recognized by the decisions rendered in the matter of settling this defendant's bill of exceptions on appeal from the order here assailed. See *Ward v. Dunne*, Judge, 136 Cal. 19, 68 Pac. 105, and *People v. Ward*, 138 Cal. 684, 72 Pac. 343.

It is also now well settled that the power of the court to make such corrections is not lost by mere lapse of time, and in this respect the rule as to the effect of the adjournment of the term has become obsolete. *Kaufman v. Shain*, 111 Cal. 23, 43 Pac. 393, 52 Am. St. Rep. 139, and cases there cited; *Freeman on Judgments*, § 71; *Black on Judgments*, §§ 155, 157, 158, 162. Mr. Black says: "The power of courts to amend judgments after the close of the term extends to all omissions to enter the judgments pronounced by the court, and to clerical errors in the form of the entry, whether by introducing a fact which ought to appear on the record, or by striking out a statement of a fact improperly produced, and when the record affords sufficient evidence." *Black on Judgments*, § 158.

It is contended that there was not, upon the hearing of the motion in the trial court, any showing that the judgment as entered originally in the minutes was not the judgment rendered, and that there was no showing, other than the minutes containing the defective entry, as to what judgment actually was rendered. There may be some question as to the character of evidence competent to show an error in the recorded judgment, and as to the right to resort to the recollection of the judge, who rendered the judgment, after such a lapse of time. It was said, however, in *Kaufman v. Shain*, supra, that the question as to whether the clerk has correctly recorded an order is to be determined by the court in which the motion is made, and that the evidence offered in support of the motion "must be satisfactory to the judge of that court." It was further intimated that in some cases the judge's own memory might be sufficient. In that case the affidavit of the shorthand reporter was considered, together with the calendar and notebook kept by the judge. See, also, *Morrison v. McCue*, 45 Cal. 118, 119. These questions are, however, immaterial on this appeal, for it is universally established that, if the record itself furnishes the means of correction, the court may order the amendment without further proof. This is admitted by counsel for appellant. We are satisfied that the defective minute entry itself affords sufficient evidence to justify the court in making the order in question. It has never been held, as contended by appellant, that to justify such a correction there must be proof outside of and extrinsic to the contents of the entry sought to be corrected. In many cases it is doubtless true that the alleged defect is of such a nature that the contents of the entry do not afford satisfactory evidence of the mistake and of the order made or judgment rendered. In such cases, proof outside of and extrinsic to such entry is of course necessary, if the recollection of the judge cannot be invoked. The record entry may, on the other hand, be such as to afford to any reasonable mind satisfactory evidence, not only of the mistake, but also of what the order or judgment in reality was.

If it does afford such satisfactory evidence, it is sufficient to justify the order of correction. The minute entry in this case showed upon its face that it had been made with extreme and inexcusable carelessness, and that it was incomplete. The abbreviations and omissions were of such a nature as to practically demonstrate this. While there were many apparent omissions in the minute entry, the only one as to which it could be contended that there was any substantial uncertainty was that relating to the place of imprisonment. Mr. Freeman says: "There are many cases in which it so clearly appears that the judgment as entered is not the sentence which the law ought to have pronounced upon the facts, as established by the record, that the court acts upon the presumption that the error is a clerical misprision rather than a judicial blunder, and sets the judgment, or rather the judgment entry, right by an amendment *nunc pro tunc*." Freeman on Judgments, § 70. This rule is applicable in this case. The record here showed that the defendant had been convicted of felony embezzlement, an offense punishable only by imprisonment in a state prison. No judgment other than one of imprisonment in a state prison could lawfully be pronounced. A judgment that he be simply imprisoned in the state, even though Folsom be designated as the particular locality of the state in which the imprisonment should be had, would be absurd. When we take into consideration the fact that one of our two state prisons is located at Folsom, and that the minute entry showed that there was to be a delivery "into the custody of the proper officers of said State Prison at Folsom, California," it satisfactorily appears that the omission was due to the neglect of the clerk, and that the place of imprisonment designated by the court in rendering judgment was the State Prison at Folsom. The record was definite and certain to the effect that a judgment upon a conviction of felony embezzlement was rendered against the defendant, and that the term of imprisonment imposed was seven years. It afforded sufficient evidence to sustain the finding of the trial court that the place of imprisonment designated by the court was the State Prison at Folsom, and that the judgment rendered was in all respects as stated in the order of amendment. To hold otherwise would be to surrender substance to form, common sense to the most extreme technicality.

The order is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

(142 Cal. 17)

PEOPLE v. LINARES. (Cr. 1,009.)

(Supreme Court of California. Jan. 26, 1904.)

CRIMINAL LAW—ROBBERY—EVIDENCE—PREVIOUS OCCURRENCE—WITNESSES—EXAMINATION—INSTRUCTIONS—MODIFICATION.

1. In a prosecution for robbery, the modification of an instruction that the law presumes the

defendant innocent; that the presumption attends him throughout the entire case; that such presumption might be sufficient to acquit the defendant, and was sufficient unless the jury was satisfied beyond a reasonable doubt, from the evidence, that defendant was guilty of the crime charged—by omitting the words "such presumption is to be considered as a matter of evidence in favor of defendant," was not error.

2. In a prosecution for robbery, evidence of occurrences transpiring within a very few hours before the robbery, and so intimately connected with it that a substantial statement of the facts constituting the robbery could not have been made without reference to such preceding circumstances, was admissible.

3. Where, in a prosecution for robbery, it had been clearly shown that, before its commission, prosecutor had considerable money in his pocket when he was in his wagon and about to leave the town, and from that time until after the robbery he had not been out of the wagon, evidence that thereafter, and while prosecutor was still in the wagon, he had no money in his pocket, was admissible.

4. Where accused had been permitted to cross-examine a witness at great length, it was not error to refuse to permit questions which were mere repetitions of previous questions.

Department 2. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Beito Linares was convicted of robbery, and he appeals. Affirmed.

W. H. Shinn and C. L. Shinn, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

McFARLAND, J. This is an appeal by defendant from a judgment and order denying a motion for a new trial in a case where he was convicted of robbery.

Appellant makes the formal contention that the information "does not state facts sufficient to constitute a public offense," but very little argument is presented on the point, and it is enough to say that, in our opinion, the information is sufficient.

The contention that the evidence was not sufficient to warrant the verdict cannot be maintained. There was certainly some substantial evidence to the point of appellant's guilt. The prosecution's witness Fisher testified directly and distinctly to the facts constituting the robbery, and there was also corroborating evidence. The evidence of appellant was, no doubt, conflicting with that of the prosecution; but, taking it altogether, it fairly presented a case for the exercise of the judgment of the jury.

Only one point is made as to instructions to the jury. Appellant asked an instruction which the court did not give as presented, but did give in the following form: "The court instructs the jury that the law presumes the defendant innocent, and such presumption attends the defendant throughout the entire case, and you should consider it together with the other evidence in arriving at your verdict; and such presumption may be sufficient to acquit the defendant, and is sufficient unless you are satisfied beyond a reasonable doubt, from the evidence, that the defendant is guilty of the crime charged in

the information." The instruction as given was in the exact language of the one asked, except that it omitted these words, "such presumption is to be considered by you as a matter of evidence in favor of defendant." This omission furnished no ground for a reversal. Whether or not it would be correct, as a mere question of judicial literature, to call the presumption of innocence "evidence," the law on the subject is satisfied when the jury are clearly told that the defendant must be treated as innocent throughout the entire case until his guilt has been proved beyond a reasonable doubt, and they were so told in the case at bar. The defendant could not possibly have been prejudiced by the omission, and, indeed, the instruction as given does refer to a presumption of innocence as evidence. See *Agnew v. United States*, 165 U. S. 51, 17 Sup. Ct. 235, 41 L. Ed. 624.

There are some exceptions to the rulings of the court as to admissibility of evidence. It is contended that the court erroneously allowed evidence of some occurrences which took place before the particular moment of the alleged robbery. In the afternoon of the day of the alleged robbery, Fisher, the person alleged to have been robbed, went, together with three other men, in a wagon to a saloon at the town of Los Nietos, some 18 miles south of the city of Los Angeles. They had dinner in the kitchen adjoining the main room of the saloon. The barkeeper, Feeley, says that it was about 4 o'clock when they arrived. Some of the witnesses put the time a little earlier, but, as these persons cooked their own dinner, it must have been quite late in the afternoon when they finished eating their dinner and went back into the main saloon; and the evidence objected to was as to facts which occurred after they had finished their dinner and gone into the saloon. What occurred before that was of no consequence. The appellant was there in the saloon, and had been for a considerable time before that. Now, the evidence objected to was mainly as to these facts: When Fisher went back into the saloon, either in paying for the dinner, or in treating the crowd, he took out from his pocket a purse which was seen to contain a considerable amount of money in gold coin. Immediately afterwards he purchased some barrels and cans from Feeley, and paid him for them, and again exhibited his purse and money, and he testified that the appellant put his hand on the purse and said, "Look at that damn Jew, how much money he has got!" He put these purchased articles in his wagon, which was in front of the saloon. He then started with his wagon, but after going a very short distance he discovered that one of the three men was not with him, and returned to the saloon to get him. Some of the persons present took a part of the barrels and cans out of the wagon, and returned them to the saloon. The appellant took one of the barrels from the wagon into the

saloon, and there was immediately afterwards a scuffle between Fisher and appellant over the barrel, in which appellant struck Fisher very violently about the face, causing the blood to flow quite freely. In the scuffle, appellant's coat was ripped on a corkscrew fastened to the bar. Shortly after this, Fisher started off again in his wagon, but the appellant immediately mounted a saddle horse and pursued him. He overtook Fisher at a distance of from a quarter to a half a mile from the saloon, and, at the point of a pistol, compelled Fisher to turn his team and return to the saloon, when appellant tied the horses to a hitching place in front of it. It was then about dark, and it was then that, according to Fisher's testimony, the robbery took place. Fisher testified that at this time, while he was in the wagon, appellant struck him with his fist, and with a stone, and knocked him helpless down into or across the wagon, and robbed him of his purse and money. We think that this series of events occurring so shortly before the very moment of the alleged robbery, and leading so continuously up to it, was admissible as part of the transaction; and these facts were not inadmissible, because they happened to include the assault and battery in the saloon. Indeed, it is difficult to imagine how an intelligible statement of the facts constituting the alleged robbery could have been made without reference to these preceding circumstances objected to. No matter at what point the narrative had been commenced, it, in the end, would almost necessarily have reached these connecting facts.

Exception is also taken to certain evidence given by Nicholson, a witness for the prosecution. After Fisher had been struck by appellant in the wagon, and, as he testified, robbed, he laid in the wagon helpless and unable to get out, and did not get out of the wagon until about 9 o'clock that night, when Nicholson started to drive him home to Los Angeles. Nicholson testified that on the way Fisher turned all his pockets "wrong side out," and that there was no money in them. To this testimony appellant objected. The allowance of the testimony was not error. It had been clearly shown that before the time of the alleged robbery Fisher had considerable money in his pockets, and from that time he had not been out of the wagon. It was proper, therefore, for the prosecution to show that afterwards he had no money, and the fact that he had no money in any of his pockets was some evidence to that point. Counsel say that he might have removed his money from his person, and, of course, that is so. But that suggestion goes only to the weight of the evidence objected to, and not to its relevancy.

Appellant contends that the court erred in not allowing him to further cross-examine the witness O'Connell. But it appears from the record that appellant had already cross-examined the witness at great length, and

the court simply prevented frequent repetitions of the same questions. Appellant was not prevented from asking new questions. A court, for the purpose of the orderly conduct of a trial, necessarily has authority to control the examination of the witnesses within reasonable limits, and we do not think that in this instance there was any abuse of discretion.

There are no other contentions in the case which are maintainable or which call for special notice. There are, no doubt, some features of the case which would warrant a strong argument against the appellant's guilt, and such argument was, no doubt, made to the jury; but there are no features of the case which would warrant this court in disturbing the verdict on the ground of want of evidence.

The judgment and orders appealed from are affirmed

We concur: LORIGAN, J.; HENSHAW, J.

(141 Cal. 728)

AMES v. SOUTHERN PAC. CO. (S. F. 2,613.)\*

(Supreme Court of California. Jan. 21, 1904.)

CARRIERS—RAILROAD TICKETS—RECEIPT—  
LIMITATIONS—CONDITIONS—COMPLIANCE—PAROL EVIDENCE.

1. A railroad passenger ticket is not a contract expressing all the conditions and limitations usually contained in a written agreement, and hence parol evidence is admissible to show the limitations and conditions on which a ticket was sold.

2. Defendant operated a special train known as "The Owl," which ran on a special schedule, with a limited number of sleepers, with no accommodations for passengers except those having berths. Plaintiff applied for a ticket on this train, and was informed that such ticket would not be good unless he had a berth. Plaintiff bought a ticket which recited that it was good only on train "No. — The Owl," but contained no reference to the berth requirements. He applied for a berth, and was informed that they had all been sold, and on his attempting to board the train he was also informed that his ticket was not good on that train unless he had a berth. He boarded the train without a berth, and the conductor refused to permit him to ride, informing him that he would have to get off at P., and could there take the next regular train, which would not arrive at his destination until several hours later than "The Owl." This plaintiff refused to do. *Held*, that the ticket did not entitle plaintiff to ride on "The Owl" except on his compliance with the berth regulations, and he was therefore not entitled to recover for his ejection.

Shaw, J., and Beatty, C. J., dissenting.

In Banc. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Worthington Ames against the Southern Pacific Company. From an order granting plaintiff's motion for a new trial after judgment in favor of defendant, it appeals. Reversed.

P. F. Dunne, for appellant. Geo. B. Merrill, for respondent.

VAN DYKE, J. This is an appeal from an order granting the plaintiff's motion for a new trial. The action is for damages on account of being put off from one of defendant's trains.

The evidence shows that the plaintiff went to defendant's ticket office at the foot of Market street, in San Francisco, a little before 5 o'clock, in November, 1899, being a very short time before the boat left that crosses the bay, in connection with the train for Los Angeles. He asked the defendant's ticket seller for a ticket for "The Owl" train, and was immediately asked if he had a berth in the sleeper. Plaintiff informed the defendant's agent who sold the tickets that he had not, and was then told he would have to get a sleeping berth across the bay or his ticket would not be good on "The Owl." He, however, requested the ticket, and paid for and purchased one, which, as far as material here, reads as follows: "Special limited; good for one continuous first-class passage, San Francisco to Los Angeles, 9:26 m. Good only by Martinez route by train No. —." On the ticket in the blank space after No. was stamped the words "The Owl." This ticket was sold at the same price as a regular first-class ticket. On crossing the bay to connect with "The Owl" train plaintiff went to the Pullman conductor and asked for a berth. He was told that the berths had all been sold, and that his ticket would not be good on that train, as no berths could be procured. He was again told the same thing on the steps of the train before he got aboard. Notwithstanding this, however, he boarded the train, and took a seat in the day coach, which was not a sleeper, and ran only as far as Bakersfield. Defendant at the time was running two regular daily trains from San Francisco to Los Angeles, one leaving in the morning at 9 o'clock, the other leaving in the evening at half past 5, and in addition thereto, to accommodate persons desiring to make the trip quickly, it was running a special limited train called "The Owl," which ran at night only, at a special rate, upon a special schedule, with a limited number of Pullman sleepers, containing no accommodations for passengers except those who had berths. This was known to the plaintiff, as, in addition to being informed of the same, he had previously traveled on that train three or four times between San Francisco and Los Angeles. Upon presenting his ticket to the conductor he was told his ticket was not good on the train unless he had a sleeping berth, and that he would have to get off at Port Costa, and could there take the next regular Los Angeles train, which would be along in 40 minutes, and would reach Los Angeles at 1 o'clock on the following day, instead of eight o'clock in the morning, that being the schedule time for

\*Rehearing denied February 20, 1904.



"The Owl." This the plaintiff refused to do, and said he would return to San Francisco and bring suit against the company for damages, which he did.

The case was tried before a jury, resulting in a verdict for the defendant. The court in granting plaintiff's motion for a new trial said: "The same is granted upon the ground that the evidence does not support the verdict, in this: that the notification to the plaintiff by the ticket seller, when he purchased the railroad ticket in question, that such ticket would not be good upon 'The Owl' train unless he secured a berth, cannot and did not control or affect the obligation of the company, as evidenced by the ticket."

The question to be considered on this appeal, therefore, is whether the court below, in granting the new trial, correctly stated the law governing the case. The theory on which the order seems to have been made is that the ticket is a contract, expressing all of its terms, and that the purchaser is not bound by any rules or regulations of the carrier other than those expressed on the ticket. We do not think such a contention can be maintained. Defendant had a right to run a special limited train for those only who could secure sleeping accommodations, and to make it a condition as to the purchase of the ticket that the passenger should procure a sleeping berth before it could give him the benefit of the special train. The ticket stated on its face that it was a special limited ticket, good for one continuous first-class passage "San Francisco to Los Angeles." The evidence shows that the ticket was good for any other train on the date stamped upon it. The words cannot be held to be a contract that the purchaser could ride upon "The Owl" except upon compliance with the regulations of the defendant as to securing a berth. According to the letter of the ticket the plaintiff was entitled to take "The Owl" train at San Francisco instead of at Oakland. Yet he knew when he purchased it that he could not take that train at San Francisco, but must cross by ferry boat from San Francisco to the Oakland side of the bay, and take it there, and that was therefore the contract or agreement, notwithstanding the reading of the ticket to the contrary. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civ. Code, § 1636. "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." Id. § 1647. "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Id. § 1648. "Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected." Id. § 1653.

But a railroad ticket is not a contract expressing all the conditions and limitations usually contained in a written agreement. It is more in the nature of a receipt given by the railroad company as evidence that the passenger has paid his fare for a certain kind of passage on the proper trains of the company, as limited and regulated by its rules. The fact that the words "The Owl" were stamped on the ticket entitled the plaintiff to ride upon that train if he had complied with the conditions of securing a berth thereon, which he failed to do. It is said in Elliott on Railroads, § 1593: "According to the generally accepted doctrine a ticket in the ordinary form is a voucher, token, or receipt rather than a contract, adopted for convenience, to show that the passenger has paid his fare from the place or station named therein as the place of departure to the place or station named therein as the place of destination. \* \* \* A ticket is evidence of a contract to carry and the right to passage, but the contract itself is implied by law except in so far as it is expressed in the ticket. Upon the theory that it is not itself the written contract, parol evidence has been held admissible to prove the terms of the contract in fact entered into between the company and the passenger, or the representations made by the agent, at the time the ticket was purchased, as to stop-over privileges or the like." In conformity with the foregoing our Code provides: "A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them if they are lawful, public, uniform in their application, and reasonable." Civ. Code, § 2186. "A passenger who refuses to pay his fare or to conform to any lawful regulation of the carrier may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and at any usual stopping place or near some dwelling house." Id. § 2188. In Dietrich v. Penn. R. R. Co., 71 Pa. 436, 10 Am. Rep. 711, in speaking of railroad tickets, it is said: "So far as they are expressed, the terms are binding of course; but such tickets are not the whole contract, which must be gathered, so far as not expressed, from the rules and regulations of the company in running its trains. \* \* \* The authorities as well as the reason of the thing show that the company must make its own regulations, and that passengers purchase their tickets subject to these rules, and that it does not lie on the company to bring home notice of them in order to establish the terms of the contract of carriage." This case was approved in a later one (Lakeshore & Mich. So. Ry. Co. v. Rosenzweig, 113 Pa. 536, 6 Atl. 547), in which it was said: "The plaintiff's ticket was evidence of the payment of his fare, and of his right to be carried according to its terms. It did not express the whole contract. What it does not set forth may be ascertained from the rea-

sonable rules and regulations of the defendant, and the holder of the ticket is bound to inform himself of such regulations respecting the conduct of trains and the right of passengers." In *C. & A. R. R. Co. v. Randolph*, 53 Ill. 515, 5 Am. Rep. 60, the court said: "When a traveler obtains such a ticket, he should inform himself as to the usual mode of travel on the road, and so far as the customary mode of carrying passengers is reasonable he should conform to it. \* \* \*

The requisite information can always be had from the agent where the ticket is procured, and it is but reasonable to require passengers to obtain the information and act upon it." See, also, *Peck v. N. Y. C. & H. H. R. R. Co.*, 70 N. Y. 587; *McRae v. R. R. Co.*, 88 N. C. 532, 43 Am. Rep. 745; *Wright v. Cal. Cent. Ry. Co.*, 78 Cal. 360, 20 Pac. 740. As stated in the foregoing, a ticket seldom expresses all the conditions of the contract between the carrier and the passenger. The liability of the carrier, the conditions implied by law, and the conditions upon which the passenger may use the ticket are seldom expressed therein. In such case parol evidence is admissible to show the elements of the contract, if not in conflict with its express terms. *Fetter on Carriage of Passengers*, vol. 1, § 275; *Burnham v. G. T. Ry. Co.*, 63 Me. 301, 18 Am. Rep. 220; *Peterson v. The Chicago R. I. & P. Ry. Co.*, 80 Iowa, 98, 45 N. W. 573. The rule as herein laid down worked no injustice to the plaintiff. He was distinctly told when he purchased the ticket, and subsequent thereto, that he could not use it on "The Owl" without a berth in the sleeper, and his ticket was good on a regular train following it in less than half an hour at the point where he left "The Owl," which would have carried him to the same destination a few hours later than the schedule time of "The Owl." While it is the duty of railroad companies carrying passengers to use all reasonable protection for their safety, comfort, and convenience, it is also the duty of passengers to comply with reasonable rules and regulations of the company.

The court below erred in holding that the notification to the plaintiff that his ticket in question would not be good upon "The Owl" train unless he secured a sleeping berth could not control or affect the obligation of the company as evidenced by the ticket. As this appears to be the only ground upon which the motion for a new trial was granted, the order granting the same is reversed.

We concur: *McFARLAND, J.*; *LORIGAN, J.*; *HENSHAW, J.*

*SHAW, J.* I dissent. I take it that no proposition is more fully settled than this: that parol evidence cannot be admitted or used to vary or contradict the effect of a written contract. In this state this rule has the express force of statute law. "The execution of a contract in writing, whether the

law requires it to be written or not, supercedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Civ. Code, § 1625. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible." Id. § 1639. "The language of a contract is to govern its interpretation, if the language is clear and explicit." Id. § 1638. And the previous decisions of this court are in full accord with these principles. "The law deems all such stipulations merged in the writing, which is treated as the exclusive medium of ascertaining the agreement to which the parties bound themselves." *Goldman v. Davis*, 23 Cal. 256; *Guy v. Bibend*, 41 Cal. 322; *Ward v. McNaughton*, 43 Cal. 159; *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101. Parol evidence is inadmissible to prove that an unconditional written obligation is not to be performed except upon a contingency not stated in the writing. *San Jose Sav. Bank v. Stone*, 59 Cal. 187; *Long v. Saufley*, 89 Cal. 439, 26 Pac. 902; *Bradford Inv. Co. v. Joost*, 117 Cal. 210, 48 Pac. 1083; *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283; *Dexter v. Ohlander*, 89 Ala. 262, 7 South. 115. The majority opinion holds that this case is an exception to the rule.

The reason first given is that the ticket in question, notwithstanding its terms, is subject to the rules and regulations of the defendant company contrary thereto. I concede that proof of such regulations or of other explanatory facts, coupled with proof of knowledge thereof by the parties, is competent to help out a contract where it is uncertain, or to supply anything omitted therefrom. It would have been proper, for illustration, to show in the case at hand what was meant by the "Martinez Route" and by "The Owl" train; for this would explain what would otherwise be an ambiguity in the terms of the contract. But here the effect of the regulation is to contradict the contract, to destroy altogether the undertaking of the defendant therein set forth, except upon a condition not therein expressed, and to require the payment of an additional consideration for an additional accommodation as a condition precedent to the existence of any obligation on the part of the carrier. The proposition that such regulations control, instead of the contract, is certainly a startling one. There is a well-known principle to the effect that a contract must be interpreted according to the law or usage of the place where it is to be performed. Civ. Code, § 1646. It has been said that such laws are a part of the contract. 9 Cyc. of Law & Proc. § 582. But even this doctrine is confined to such terms as are omitted from the contract and which the law supplies. Where the contract is contrary to the law, it does not have the effect of adding a term to the contract, and thus making an agreement to which the parties have not

consented, but of making the contract to that extent invalid. I think it has never before been decided that the rules and regulations of a railroad company are of greater potency than the law of the land, and when inconsistent with and contrary to a written contract into which the company has entered are paramount thereto, and furnish the legal measure of the rights of the parties instead of the contract itself. Not even a general usage or custom of trade, much less a mere business regulation of one of the parties, can be proven to relieve a party from his express stipulation, or to vary a written contract which is certain in its terms. Code Civ. Proc. § 1870, subd. 12; *Holloway v. McNear*, 81 Cal. 156, 22 Pac. 514; *Burns v. Sennett*, 99 Cal. 371, 33 Pac. 916; *Milwaukee Co. v. Palatine*, 128 Cal. 74, 60 Pac. 518; *Ah Tong v. Earle Fruit Co.*, 112 Cal. 681, 45 Pac. 7.

The other reason given for the prevailing opinion is that "a railroad ticket is not a contract expressing all the conditions and limitations usually contained in a written agreement," but "is more in the nature of a receipt given by the railroad company as evidence that the passenger has paid his fare for a certain kind of passage on the proper trains of the company, as limited and regulated by its rules." Of course, railroad tickets do not always express the whole contract; in fact, they seldom do. But this is beside the question. We are not here concerned with some term of the actual agreement that was omitted from the writing, but with a term which was inserted, and which defendant seeks to nullify by proof of a parol contract of a different effect. With singular inconsistency the majority opinion quotes in its support a passage from *Dietrich v. Penn. R. R. Co.*, 71 Pa. 436, 10 Am. Rep. 711, the very first words whereof are, "So far as they are expressed the terms are binding of course." I concede that where a railroad ticket is unsigned, and is a mere memorandum expressing in part an agreement for the carriage of the passenger, it is proper to supplement it, or even contradict it, by proof of additional parol conditions and stipulations inconsistent with the printed memorandum. Many of the decided cases are thus explainable. But it cannot be successfully contended that the ticket here in question was not a contract intended to be binding on the parties so far as it expressed the terms thereof. This is best shown by the contract itself. It was regularly signed by the plaintiff and indorsed by the defendant, and was as follows: "Special limited ticket good for one continuous first class passage, San Francisco to Los Angeles, 9:26 m. Good only by Martinez route, by train No. — 'The Owl,' subject to the following contract: In consideration of this ticket being sold at a rate less than the regular first class rate, I, the purchaser, hereby agree that it shall not be good for passage after the date indicated by the agent's punch marks in the margin

(Nov. 12, 1899), and that it will be good only for a continuous trip to destination by the proper train and its connecting trains. That it is not transferable and shall be void after the date of expiration. And that failing to accept and comply with this agreement, the conductor will refuse to accept this ticket, and demand the full regulation fare, which I agree to pay. No stop-over privileges will be given on this ticket. Baggage must not be checked hereon to or from intermediate or way stations. Liability for damage limited to \$100. Agent will in no case extend time on this ticket. If more than one date be punched, it shall not be received for passage by conductor. [Signed] W. Ames. [Endorsed by stamp] Southern Pacific Company, November 11, 1899."

The defendant must certainly have intended to exact from the plaintiff the execution of this ticket as a contract, and one that would be binding on him for all the conditions expressed therein. The cases involving tickets not signed, or terms not covered by the contract therein expressed, have no application here. It is from such cases alone that the prevailing opinion finds support. If the evidence offered had been of some agreement not contradictory of the agreement expressed in the ticket, it would, of course, have been admissible, but this cannot be contended. The ticket in question was a clear undertaking on the part of the defendant to carry the plaintiff upon a continuous trip with first-class accommodations on "The Owl" train from San Francisco to Los Angeles by the Martinez route. No conditions were expressed requiring the purchase of any berth upon the sleeping car. By the parol evidence introduced the defendant endeavored to prove that, notwithstanding this agreement, there was a contract that the defendant should be under no obligation to carry the plaintiff upon that particular train, unless, in addition to the price of the ticket which he paid, he should succeed in purchasing from another company a berth in a sleeping car and pay an additional price therefor. This was making a contract inconsistent with the written contract, and is contrary to all the principles laid down in our codes, and contrary to the rules expressed in the authorities cited in the prevailing opinion itself. I can see no reason why a railroad company is not as much bound by such a contract for the carriage of a passenger as it is by the terms and conditions of an ordinary bill of lading for the carriage of freight. The signature to a ticket is required because the railroad company intends that the passenger shall be bound. It is an unvarying rule that contracts are mutual, and if one party is bound by its terms both must be.

There is no element of hardship in the case which requires any relaxation of the rule. The defendant was entitled to the benefit of the evidence which it introduced, not for the

purpose of varying or changing the contract in the least, but for an entirely different purpose. The question of damages was a material one in the case, and it was proper for the defendant to prove that the plaintiff had been informed before he entered upon his journey that he would not be allowed to ride upon that train unless he obtained a sleeping car berth. If he was thus warned of the consequences he could not claim so much damages as he might well do if he had been taken by surprise and ejected from the train without previous notice. The testimony was therefore admissible in mitigation of damages, and would be of much weight for that purpose, but it should not be used to vary the contract expressed in the ticket.

I concur: BEATTY, C. J.

(142 Cal. 8)

PEOPLE v. BRITTAIN et al. (Cr. 1,071.)  
(Supreme Court of California. Jan. 22, 1904.)

BURGLARY — NONFELONIOUS ENTRY — STATEMENTS BY ATTORNEY — MISCONDUCT — EVIDENCE — HARMLESS ERROR.

1. Under a statute providing that every person who "enters" any house, room, or store with intent to commit grand or petit larceny or any felony is guilty of burglary, where defendants entered a store with intent to commit larceny therein, it was immaterial that the act of entering was not of itself a trespass, but was during business hours, and while the store entered was open to the public.

2. Where, in a criminal prosecution, after an objection to a question asked by the district attorney had been sustained, the district attorney, in an undertone addressed to defendants' attorney, which was heard by one jurymen, stated, "That's getting on dangerous grounds, isn't it?" while erroneous, was not prejudicial, the court having immediately directed the jury to pay no attention to the statements made by the attorneys.

3. In a prosecution for burglarizing a store prosecutor testified that one of the defendants came into the store and said to witness' son that he wanted to look at an eight or ten dollar suit. Witness was then asked if he heard defendant say that, and answered that he did not, but he saw his son showing the suits; after which he was asked, "Then, as a matter of fact, what you testified to was what some one else told you?" to which question an objection was sustained, after which witness immediately stated that he did not hear defendant ask for the eight or ten dollar suit, but saw the clothes he was looking at. Held that, though the objection to the question should have been overruled, the error was harmless.

Commissioners' Decision. Department 1.  
Appeal from Superior Court, Sonoma County; Carroll Cook, Judge.

Frank Brittain and another were convicted of burglary and a prior conviction of petit larceny, and they appeal. Affirmed.

Ross Campbell, for appellant. U. S. Webb, Atty. Gen., J. O. Daly, Dep. Atty. Gen., and C. H. Pond, Dist. Atty., for the People.

CHIPMAN, C. Information charging defendants with the crime of burglary and a prior conviction of petit larceny. They

were tried together, and found guilty. They appeal from the judgment of conviction and from the order denying their motion for a new trial. The Attorney General makes the point that the appeal from the order cannot be considered, and that the only questions that can be reviewed arise on the appeal from the judgment as shown in the bill of exceptions.

1. We are disposed to treat the motion for a new trial as properly before us, and so will determine the principal point raised by the appeal. The point is that the evidence does not sustain the charge of burglary, and this rests upon a statement taken from the dissenting opinion in *People v. Barry*, 94 Cal. 481, 29 Pac. 1026, namely, that, "in order to constitute a burglarious entry, the act of entering must itself be a trespass—an entry without the consent of the owner." The evidence was sufficient to warrant the jury in finding that both defendants entered a certain store in Santa Rosa in the nighttime, with intent to commit larceny. The entry was, however, during business hours, and while the store was open to the public. The precise question arose in *People v. Barry*, supra, and was fully discussed in the majority opinion. The statute reads: "Every person who enters any house, room, store, \* \* \* with intent to commit grand or petit larceny, or any felony, is guilty of burglary." Commenting upon this statute the court said: "As to the acts which shall constitute the crime of burglary, that is a matter left entirely to the policy of the Legislature within its constitutional powers; and when that body has said that every person who enters a store with the intent to commit larceny is guilty of a burglary, the language is so plain and simple that rules of statutory construction are not required to be consulted. The meaning is patent upon the face of the statute. No words are found in the statute qualifying the character, kind, time, or manner of the entry, save that such entry must be accompanied with a certain intent; and it would be judicial legislation for this court to interpolate other conditions into the section of the Code." We have not the Montana criminal practice act at hand, but in *State v. Green*, 15 Mont. 424, 39 Pac. 322, sections 73 and 74, are referred to, and in the opinion it is said: "Burglary is defined by the statute to be the entering of any house, room, \* \* \* store, \* \* \* with intent to commit grand or petit larceny, or any felony." In *State v. Carroll*, 13 Mont. 246, 33 Pac. 688, the court said: "To constitute burglary, there must be the entry with the intent to commit grand or petit larceny or any felony." Cr. Prac. Act. § 73. "The entering and such intent are two elements going to constitute the offense of burglary." See the interpretation given of the Nevada statute by Beatty, J., in *State v. Watkins*, 11 Nev. 80. These Montana and Nevada cases are cited in Am. & Eng. Ency. (2d

Ed.) vol. 5, p. 43, as holding that a breaking is not essential. Under the earlier statutes defining burglary defendants' contention might have been upheld. But as the law now stands it cannot be without overruling *People v. Barry*, which has governed the practice in this state since 1892, and has not been questioned, so far as we know, in any subsequent decision. Besides, in our opinion, that case was correctly decided, and ought not to be overruled.

It would be an impeachment of the common sense of mankind to say that a thief who enters a store with intent to steal does so with the owner's consent or upon his invitation. It is true the thief must have clothes and food, and may enter a store to procure them; and if, after he enters, he changes his mind, and concludes to steal, and not purchase, his supplies, it would be larceny. But if it be proven that he entered with intent to steal, the law will not, in the face of such proof, shield him from punishment as a burglar on the assumption that he has the consent and invitation of the proprietor to so enter. Our statute has swept away many of the technical requisites of burglary under the common law.

2. It is claimed that the conduct of the District Attorney in his cross-examination of defendant Johnson while a witness in his own behalf was prejudicial. A question put by the District Attorney was objected to, and the objection was sustained: "Mr. Thompson (prosecuting attorney, in undertone addressed to Mr. Campbell, attorney for defendants, which was heard by one jurymen): That's getting on dangerous ground, isn't it? Mr. Campbell: We take an exception to the remarks of the District Attorney. The Court: The jury will pay no attention to the statements made by the attorneys. We are trying this case on the evidence, and not on the statements of any one else." The question objected to was whether the witness was with his codefendant, Brittain, at Stockton, where, it is admitted, both of them were convicted of larceny in the same court on the same day. The question was immaterial and the remark of the District Attorney uncalled for, but was not prejudicial.

3. The only remaining error complained of occurred while the witness Rosenberg, proprietor of the burglarized store, was being cross-examined by defendants' attorney. He had testified that Johnson came into the store and said to witness' son that he wanted to look at an eight or ten dollar suit. He was asked, "Did you hear him say that?" and answered, "No, sir; I did not; but I saw him showing him the suits." Then following the question to which an objection was sustained, "Then, as a matter of fact, what you testified to was what some one else told you?" He, however, immediately resumed his testimony, and said, "I did not hear Johnson ask for the eight or ten dollars suit,

but I saw the clothes he was looking at." Conceding that the objection should have been overruled, the defendants were not prejudiced by the ruling. The witness showed that the particular fact testified to by him was not within his own knowledge. Besides, the fact fully appeared in the testimony of other witnesses, and substantially by the testimony of defendant Brittain also.

It is advised that the judgment and order should be affirmed.

We concur: SMITH, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

(131 Cal. 653)

**HIBERNIA SAVINGS & LOAN SOC. v.  
COCHRAN et al. (S. F. 2,853).\***

(Supreme Court of California. Jan. 18, 1904.)

**MORTGAGE FORECLOSURE—NECESSARY PARTIES—JURISDICTION OF COURT—SERVICE OF SUMMONS—VOLUNTARY APPEARANCE.**

1. That the plaintiff in a foreclosure action, with knowledge that the mortgagor had conveyed the property, procured him to enter an appearance without having been served with the summons, does not affect the jurisdiction of the court to enforce the mortgage as to those holding under the mortgagor.

2. Under the express provisions of Code Civ. Proc. § 726, one holding a conveyance from the mortgagor which is not of record when a foreclosure action was commenced need not be made a party, and the judgment is as conclusive against him as if he were a party.

3. A foreclosure action having been commenced against the necessary parties, and lis pendens recorded, the court obtains jurisdiction to enforce the mortgage as to all persons claiming under the mortgagor by obtaining jurisdiction of the original defendants, though after the commencement of the action plaintiff receives notice that the mortgagor has conveyed the property to another, either before or after the commencement of the action.

4. Under Code Civ. Proc. §§ 416, 581, providing that jurisdiction of the person may be acquired by an appearance by the defendant within three years of the commencement of the action where there was no personal service of the summons and complaint, the court has the same jurisdiction to enforce a mortgage against persons acquiring an interest in the property after commencement of the foreclosure action, on voluntary appearance of the mortgagor two years after commencement of the action, as if he had then been served with summons.

5. Though Code Civ. Proc. § 408, provides that a clerk cannot issue an alias summons more than a year after the commencement of the action, the original summons may be served at any time within three years, or the court may issue a new summons.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Hibernia Savings & Loan Society against Leon H. Cochran and another. From an order denying his motion to

\*Rehearing denied February 15, 1904.

† 2. See Mortgages, vol. 35, Cent. Dig. § 1233.

vacate the judgment in favor of plaintiff, to set aside the default and appearance of defendant Cochran, and to dismiss the action, Frank C. Clark appeals. Affirmed.

For former opinion, see 66 Pac. 732.

A. Boyer, for appellant. Tobin & Tobin, for respondent.

ANGELLOTTI, J. This is an appeal by one Frank C. Clark from an order denying his motion to vacate the judgment entered in favor of plaintiff in the above-entitled action, to set aside the default and appearance of defendant Cochran, and to dismiss the action. The action was instituted by plaintiff on November 19, 1898, to foreclose the lien of two mortgages executed to it by defendant Cochran, against Cochran and defendant Metzger, a junior mortgagee. Notice of lis pendens was regularly recorded on the same day. Cochran had on September 1, 1898, conveyed the property covered by the mortgages to one Schnaittacher, but the deed to him was not placed of record until June 14, 1900, and, so far as appears, the fact of such conveyance was unknown to plaintiff. On June 14, 1900, Schnaittacher conveyed the property to appellant, who placed his deed of record on the same day. Neither Schnaittacher nor appellant was ever made a party to the action or applied to be made such. Summons was duly issued in the action, and on November 22, 1898, returned, unserved, on Cochran. No alias summons was issued, but on July 23, 1900, Cochran voluntarily filed his written appearance. Thereupon, on August 29, 1900, appellant appeared specially, for the purpose of moving to set aside such appearance of Cochran and for a dismissal of the action, which motion was on November 30, 1900, denied. On January 17, 1901, the default of Cochran was regularly entered, and upon his default and the answer and cross-complaint of defendant Metzger judgment of foreclosure was entered February 2, 1901, as prayed for in the complaint and cross-complaint. On March 12, 1901, appellant gave notice of the motion, from the order denying which this appeal is taken.

The grounds upon which this motion would be made, as well as the motion made prior to judgment, as specified in the respective notices, were substantially that Cochran was never served with summons, that he did not appear in the action until after he had parted with all his interest therein, and that such appearance was made at a time when he could not have been served with a valid summons under the provisions of sections 408 and 581 of the Code of Civil Procedure, or at all; the claim in this connection being that he could not, under such circumstances, by a voluntary appearance give the court jurisdiction to enforce the lien of the mortgages against property in which he no longer had any interest.

There is not the slightest pretense that appellant, as the successor in interest of the

mortgagor to the mortgaged property, had any defense, legal or equitable, to urge against the enforcement of the mortgage liens, or that plaintiff obtained anything by the foreclosure decree to which it was not justly entitled upon its mortgages. Something is said about plaintiff having itself procured the appearance of Cochran at a time when it had knowledge of the deed executed by him, but, conceding this to be true, we deem it entirely immaterial to the determination of the question presented by this appeal.

Schnaittacher, the grantee by deed made prior to the commencement of the action, was not a necessary party defendant, for his deed had not been recorded when the action was commenced, and the plaintiff had no actual notice of such conveyance. The statute relating to actions for the foreclosure of mortgages expressly provides that such a grantee need not be made a party, and that the judgment in such an action is "as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action." Section 726, Code Civ. Proc.

So far as the records showed, Cochran and Metzger were the only proper parties defendant. An action to foreclose a mortgage having been regularly commenced against all necessary parties, and notice of lis pendens recorded, the court obtains complete jurisdiction to enforce the mortgage lien against the mortgaged property, so far as all persons claiming under the mortgagor are concerned, by obtaining jurisdiction of the persons of the original defendants. It can make no difference, in this connection, that subsequent to the commencement of the action it comes to the knowledge of the plaintiff that the mortgagor, prior or subsequent to the commencement of the action, conveyed the mortgaged property to another. The person who purchases prior to the action, subject to the mortgage, and who fails to record his deed prior to the commencement of the action, and of whose interest the mortgagee has no notice at the time he commences his action, never can become a necessary party, in the sense that it is necessary to bring him in in order that a foreclosure decree, effectual against him, may be rendered. The situation as to him, in this regard, is determined by the condition of affairs at the time of the institution of the action. For all purposes of obtaining jurisdiction, the mortgagor fully represents him. Those who acquire the property subsequent to the commencement of the action, in the face of the recorded lis pendens or with actual notice of the suit, are, of course, not necessary parties. *Hib. Sav. & Loan Soc. v. Lewis*, 117 Cal. 577, 580, 47 Pac. 602, 49 Pac. 714.

Jurisdiction of the persons of the original defendants may be acquired by service of summons, or by their voluntary appearance at any time within three years of the commencement of the action. Sections 416, 581,

Code Civ. Proc. It appears to be conceded that, if summons had been regularly served upon Cochran, there would be no question as to the jurisdiction of the court. It is urged, however, that a defendant who has parted with his interest in the property cannot give an appearance that will bind his successor in interest, without the consent of such successor. But "the voluntary appearance of any defendant is equivalent to personal service of the summons and copy of the complaint upon him." Section 416. Whatever jurisdiction is acquired by service is therefore acquired by a voluntary appearance. It was expressly held by this court in *Hibernia Savings & Loan Soc. v. Lewis et al.*, supra, against a purchaser pendente lite, that the court acquired jurisdiction of a mortgagor by reason of his voluntary appearance made nearly three years after the commencement of the action, and at a time when he had conveyed the mortgaged property to the appellant. In that case, as in this, the time for the issuance of an alias summons by the clerk had expired before the appearance, and practically the same contention was there made by the purchaser pendente lite as is here made for the purchaser pendente lite from the purchaser ante litem. That case fully answers the contention of appellant upon the question of jurisdiction.

It is urged that such an appearance will not be effectual if made at a time when the court could not acquire jurisdiction over the defendant by service of process, and that the original summons having been returned, and no alias summons issued by the clerk within a year (section 408, Code Civ. Proc.), the defendant could not longer be legally served. The weakness of appellant's contention in this behalf lies in the fact that the summons could be served at any time within three years from the commencement of the action, and that, notwithstanding the fact that an alias summons could not be issued by the clerk (section 408), it was within the power of the court either to order the summons that had been returned to be served upon Cochran or to issue a new summons for that purpose. *Rue v. Quinn*, 137 Cal. 651, 657, 66 Pac. 216, 70 Pac. 732. It is therefore unnecessary to determine what the situation would have been if jurisdiction could not at the time of the appearance have been acquired by service of process.

We have examined the various cases cited by appellant, and find that they in no degree sustain his contention. It is not to be doubted that a purchaser pendente lite is entitled to be heard, if he so desires, in order that he may protect the property he has acquired against any improper claim, and doubtless any stipulation in fraud of his rights entered into by his grantor and the other parties to the action, or any judgment obtained by fraud, could be successfully attacked by him. It may be assumed that the purchaser ante litem, whose conveyance was not of record,

has the same rights that one who acquires pendente lite possesses. In a foreclosure proceeding, such purchasers could probably, on their application, be made parties defendant, and thus be enabled to fully protect their interests. These, however, are not matters going to the jurisdiction of the court to render a valid foreclosure decree, and are in no way involved in this case.

No application was ever made by appellant to be made a party, or to be allowed to in any way participate in the action. With full actual knowledge of the proceeding, shown by his special appearance therein before judgment for the purpose of obtaining a dismissal, and with full opportunity to protect his interests, he has never intimated that plaintiff did not have a valid lien upon the property for the full amount claimed by its complaint, or that his interest in the property is not subject to plaintiff's claim. Appearing specially before judgment for the sole purpose of moving to set aside the appearance of Cochran and for a dismissal of the action, he, in effect, declined to be made a party. His motion made at that time was entirely without merit, and his subsequent motion to set aside the judgment and dismiss the action, made upon the grounds urged on the previous motion, was properly denied.

The order is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

(141 Cal. 639)

In re LEVY'S ESTATE. (S. F. 3,553.)\*

(Supreme Court of California. Jan. 16, 1904.)

EXECUTORS—SALE OF REAL ESTATE—PETITION—DEFECTS—DEMURRER—OBJECTIONS ON APPEAL.

1. Where, in a proceeding for the sale of testator's real estate, the widow filed only a general demurrer to the petition, an appeal from an order overruling the same and authorizing the sale should be treated as though no demurrer had been filed.

2. Defects of form or uncertainty or want of fullness of statement in the petition for the sale of testator's real estate can be taken advantage of only by special demurrer in the trial court.

3. Where a petition for the sale of testator's real estate stated that the value thereof, required to be averred by Code Civ. Proc. § 1537, was set forth in a schedule attached to the petition, an objection that the values so set forth were the appraised values, and not the present values, was not available on general demurrer.

4. Where a petition for the sale of testator's real estate alleged that two parcels to be sold were improved, that one had been set apart to the widow as a homestead, and that the other was subject to mortgage, it sufficiently stated the condition of such real estate, required to be averred in the petition by Code Civ. Proc. § 1537, as against an objection on such ground first made on appeal.

5. Where a sale of testator's real estate was not ordered to pay a family allowance, the failure of the petition for such sale to state the amount due or to become due for such allowance, as required by Code Civ. Proc. § 1537, did not render the petition objectionable on

\*Rehearing denied February 15, 1904.

appeal, since in such case it would be presumed that there was nothing due on such allowance.

6. Failure of a petition for the sale of testator's real estate to allege that the persons named as devisees and legatees therein were the only heirs, as required by Code Civ. Proc. § 1537, which statement appeared from the order of sale, did not render the order fatally defective.

Department 1. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Proceeding by the executors of the estate of Henry Levy, deceased, for the sale of real estate. From an order authorizing the sale, Pauline Levy appeals. Affirmed.

W. T. Kearney, for appellant. Arthur J. Dannenbaum, T. E. Pawlicki, Otto I. Wise, and Hugo D. Newhouse, for respondent.

ANGELLOTTI, J. This is an appeal by Pauline Levy, the surviving wife of deceased, who is also a devisee and legatee under his will, from an order of the superior court, made in the administration of his estate, authorizing the executors of his will to sell a parcel of real property belonging to his estate. It is claimed by appellant that the petition of the executors for the order of sale, and upon which the order is based, did not substantially comply with the requirements of section 1537, Code Civ. Proc., and that the court erred in making an order of sale thereon. Her general demurrer to the petition on this ground was overruled in the court below.

It is contended that the petition was defective, in that it contained no sufficient statement of the condition or value of the real estate of the deceased, and no statement at all as to the names of his heirs, or as to family allowance. There was no statement in the petition as to want of knowledge on the part of the executors as to any of these matters. The only statements in the petition as to the condition and value of the real estate of decedent were as follows, viz.: The petition alleged that the full description of the real estate "and the condition and value of the respective portions and lots of said real estate are set forth in the schedule marked 'D,' hereto annexed, and made a part of this petition." Schedule D contained descriptions, by metes and bounds, of two city lots in the city and county of San Francisco. The first description ends as follows, viz.: "With the improvements thereon. The appraised value of said lot and improvements, according to the inventory, is \$17,500.00. This property has been set aside to the widow as a homestead until the final distribution of the estate; however, both the executors and the other heirs are at present perfecting an appeal to the Supreme Court, appealing from the order of this court, setting aside this property to the widow as a homestead for this period." The second description commences as follows, viz.: "Other property of the estate consists of all that land with the

improvements thereon, situated," etc.; and ends as follows, viz.: "This lot and the improvements thereon according to the inventory is appraised at \$19,700.00. Upon this property there is a mortgage of ten thousand (\$10,000.00) dollars, bearing interest at the rate of 6 per cent. per annum, held by the Hibernia Savings and Loan Society of the City and County of San Francisco." The petition did not purport to state the names of the heirs, but did contain a statement as to who were the devisees and legatees. The order of sale contains a statement of the names of the heirs, and it appears that they were all legatees or devisees, and named in the petition as such.

The petition contains no statement whatever as to any amount that is due or will become due upon the family allowance, nor any statement indicating that anything was so due or to become due thereon, except that it did state that there was an insufficiency of personal estate to pay, among other things, "the allowance of the family." The payment of family allowance was not, however, one of the purposes for which the sale was ordered by the court to be made. The order of sale authorized the sale of the parcel mortgaged to the Hibernia Savings & Loan Society. Section 1537, Code Civ. Proc., requires the applicant for an order for the sale of real property "to present a verified petition" setting forth, among other things, "the amount due upon the family allowance, or that will be due after the same has been in force for one year; \* \* \* a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; \* \* \* the names of the legatees and devisees, if any, and the heirs of the deceased, so far as known to the petitioner"; and further provides that "if any of the matters here enumerated cannot be ascertained it must be so stated in the petition; but a failure to set forth facts hereinbefore enumerated will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts, showing that such sale is necessary. \* \* \* be stated in the decree."

So far as the question of insufficiency of the petition is concerned, appellant occupies no more advantageous position by reason of the filing of her general demurrer than she would have occupied had she presented no demurrer, and simply appealed from the order of sale. In either event the question for determination is as to whether or not the petition is substantially defective in any of the requirements of section 1537, Code Civ. Proc. A substantial compliance with the provisions of that section is, of course, essential to the validity of the order on direct appeal. In re Byrne, 112 Cal. 176, 44 Pac. 467; Estate of Cook, 137 Cal. 184, 69 Pac. 968. As was held, however, in Estate of



Heydenfeldt, 127 Cal. 456, 59 Pac. 839, which was an appeal from an order of sale, "the point that a statement is insufficient which is easily understood as an attempted statement of a particular fact, and is merely shadowed by some uncertainty or want of fullness or aptness of expression, can be reached only by a special demurrer or objection in the court below." See, also, *Estate of Devincenzi*, 119 Cal. 498, 500, 51 Pac. 845; *Silverman v. Gundelfinger*, 82 Cal. 548, 23 Pac. 12. There can be no good reason why parties who have been duly notified of the proceeding for a sale should not be required to make objections of such a nature in the lower court, or be deemed to have waived them, just as in the ordinary civil action they are deemed to have waived them unless they make them by special demurrer. This is especially true of such statements as do not go to the real merits of the question before the court, viz., the question as to the necessity for a sale of realty of the deceased. If the commissioners' opinion in *Estate of Cook*, 137 Cal. 184, 69 Pac. 968, which was a case where there was no attempt in the petition to state the value of the land, is at all at variance with these views, it may properly be said that such opinion is signed by only two justices of this court, and Mr. Justice McFarland concurred solely on the ground that the court, in its decree, did not find the value of the property. Tested by the rule stated in *Estate of Heydenfeldt*, supra, we are of the opinion that, in the absence of special demurrer or objection, the petition was sufficient.

The schedules attached to the petition constituted a part thereof. In the body of the petition it was stated that the values and condition of the realty are set forth in Schedule D, and the only values there set forth are the appraised values. This was a sufficient statement as to present value in the absence of special objection. As was said in *Silverman v. Gundelfinger*, 82 Cal. 548, 23 Pac. 12, such an averment in the body of the petition may fairly be taken as an averment that the amount named in the schedule is the present value of the property, and fully and fairly answers the purposes of the Code.

The most serious point is as to the sufficiency of the statement as to the condition of the property. It does appear from the schedule that each of the two parcels was improved, that one had been set apart as a homestead for the period of administration, and that the other was incumbered by a mortgage for \$10,000. This was not a very full statement of the condition of two city lots. The case of *Richardson v. Butler*, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101, holding that the designation of a city lot as "unimproved" is a sufficient description of its "condition," is hardly authority for the proposition that the designation of a city lot as "improved" would be sufficient, for the difference in this regard between an improved

and an unimproved city lot is manifest. As was said by this court in *Estate of Smith*, 51 Cal. 563: "The court should be informed by the petition of the condition of the property; that is, whether the property is improved or unimproved, productive or unproductive, occupied or vacant, and the like." This is for the purpose of enabling the court to intelligently exercise its judgment in the selection of the property of the estate which can be most advantageously sold. If timely and proper objection had been made to the petition on this ground, it would undoubtedly have been sustained. But the statement of condition here was certainly as complete as that involved in the case of *Estate of Devincenzi*, supra, where the only statement as to a piece of land, in addition to its value and the fact that it was improved, was that its condition was "fair." Manifestly, no one could tell what was meant by the word "fair" in that connection. It was there said that the petition purported to state the condition, and that, although the statement was not very definite, and might have been objected to at the hearing on the ground of uncertainty, no such objection having been made, it was sufficient to authorize the court to receive evidence in reference to the condition of the property, and to determine whether, in view of the condition of the estate, it would authorize its sale. It is true that in that case the attack was collateral, being the objection of a purchaser to the confirmation of a sale made to him, and it is further true that the estate of decedent consisted of a single piece of real property. As was said in that case, however, the statute does not specify any "particulars" of the condition of the property which are to be set forth in the petition; and as against one who was not only legally notified, but who actually appeared in the lower court and failed to make special objection on this ground, we are satisfied that the action of the lower court in holding the statement to be sufficient should be affirmed. The record does not indicate that there was any claim in that court that the parcel finally ordered sold was not the parcel that could be most advantageously sold, and also shows very clearly that a sale of one of the parcels was necessary to pay the debts of the deceased.

As to the omission to state the amount due or to become due on the family allowance, the petition was sufficient in the absence of special objection. If there had been any amount due or to become due thereon, it should, of course, have been stated; and, if there was no amount due or to become due, it would have been the better practice to so state, although the statute does not, in terms, so require. The sale was, however, not ordered for the purpose of paying any family allowance; and we will not, upon appeal, indulge in the presumption that there was anything due or to become due. It may also be remarked that, if anything was so due or to

become due, it created a greater necessity for the sale for the purposes for which the sale was ordered. The omission to state that the persons who were named in the petition as the devisees and legatees were also the only heirs of deceased, as appears from the order, was not fatal to the validity of the order. As a matter of fact, the names of all the heirs were stated in the petition. This fact is established by the order of sale.

There is nothing in the objection that the petition did not sufficiently show the character of petitioners as executors, for all the purposes of a petition for an order of sale presented to the court in which the estate was pending, and by which court they must have been appointed, if appointed at all.

The order is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

(141 Cal. 713)

**CALIFORNIA CURED FRUIT ASS'N v.  
STELLING et al. (S. F. 3,285).\***

(Supreme Court of California. Jan. 20, 1904.)

**SALES—BONA FIDE PURCHASER—ASSIGNEE OF  
INTEREST—CONTRACTS IN RESTRAINT  
OF TRADE—ENFORCEMENT.**

1. The growers of a crop of prunes agreed to deliver it to plaintiff, who was to pack and sell it, making advances in consideration of a certain interest in the crop. Subsequently the growers sold their interest to defendant for a nominal consideration, the writing conveying the vendors' interest in the prunes and in the money that is now due and to become due from persons in possession of such crop. *Held*, that the transfer only conveyed the right of the vendors which they retained under their contract with plaintiff, and the rule as to bona fide purchasers was not applicable.

2. To entitle one to protection as a bona fide purchaser of property he must show payment of purchase money in good faith, and without notice.

3. Where a defendant sets up an adverse claim to property in replevin, it is not necessary to show a demand.

4. The growers of a large crop of prunes agreed to deliver it to plaintiff, who was to pack and sell it and make advances in disposing of the same in consideration of a certain interest therein. The growers thereafter sold their interest therein to defendant for \$10 and other consideration. *Held*, that in replevin by plaintiff against defendant, who had taken the prunes from plaintiff's possession after delivery, it was not error to sustain an objection to a question put to one of the growers as to whether he received any consideration from defendant other than that mentioned in the contract of sale to defendant, it not having been claimed that defendant took an absolute interest for an adequate price, or that he bought without knowledge of the facts.

5. One who has contracted with another as a corporation cannot, by way of collateral attack, deny the other's corporate existence.

6. The growers of a crop of prunes agreed to deliver it to plaintiff, who was to pack and sell it, and make advances in disposing of the same in consideration of a certain interest therein. Subsequently the growers sold their interest therein to defendant. *Held*, that in replevin by plaintiff to recover the prunes from defendant and the growers, they having taken them after

delivery by the growers to plaintiff, that a defense that the contract was in restraint of trade and against public policy was of no merit, the action not being to enforce the contract or compel its performance.

Commissioners' Decision. Department 1. Appeal from Superior Court, Santa Clara County; J. M. Seawell, Judge.

Action by the California Cured Fruit Association against F. E. Stelling and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

John B. Kewin, for appellants. Jackson Hatch, for respondent.

COOPER, C. This action was brought to recover the possession of 225 tons of dried prunes, or the sum of \$17,543.14, the value thereof, in case a delivery cannot be had. The case was tried before the court, and findings filed, upon which judgment was ordered and entered in favor of plaintiff as prayed. Defendants bring this appeal from the judgment and order denying their motion for a new trial.

The defendants F. E. and H. G. Stelling (who will hereafter be called "Stelling Bros."), in March, 1900, entered into a written contract with the plaintiff, which recited that in consideration of the sum of \$1 and the further covenants contained in the contract the said Stelling Bros. "has sold and transferred and does by these presents sell and transfer and set over to the said association an undivided interest equal to two per cent. in his ownership or interest (free from all incumbrances) in and to all crops of green and cured prunes which shall be grown by or for him on the premises hereinafter described during the years 1900 and 1901, \* \* \* and the said association, in consideration of the sale and transfer to it of the said undivided interest, does by these presents promise and agree with the said first party to undertake the inspection, packing and sale of said entire crop, to establish and maintain uniform grades of fruits and nuts, as to size, condition and quality, and to procure such packing to be done in conformity therewith; also to make sale of such respective grades, under its own trademark and guarantee, and to make said sales as speedily as possible and for the highest obtainable prices. \* \* \* Said association also agrees to advance and pay all expenses necessary in and about the inspection and packing of said crops and in storing and moving the same." The contract further provided that Stelling Bros. should cultivate and care for the said crop at their own expense, and cure the said prunes to the satisfaction of plaintiff's inspector, and then deliver them to plaintiff, "said crop thereafter to be and remain at all times in and under the exclusive possession and control of said association." The contract further provided: "Said association shall have a lien upon said crops for a repayment to it of any

\*Rehearing denied February 19, 1904.

† See Replevin, vol. 41, Cent. Dig. § 81.

and all moneys paid or advanced for storage, insurance, inspection, packing charges and commissions paid or allowed in connection with the sale of said crops." It was further provided in said contract that if Stelling Bros. "shall fail to deliver said crops as soon as picked and cured to the said association as hereinbefore provided, that the said association shall be entitled to assume and take exclusive possession and control of said crops." On June 30, 1900, the plaintiff entered into a contract with the California Packers' Company, a corporation, by the terms of which the packers' company, among other things, was, as the agent of plaintiff, to receive, grade, and pack all the prunes of plaintiff. On July 28, 1900, the said Stelling Bros. entered into a contract with said packers' company, by the terms of which they leased to said company the warehouse and prune-packing plant in connection therewith. The lease provided that said Stelling Bros. were to remain in possession of said warehouse and prune-packing plant and conduct it and the business in connection with grading and packing prunes as the agents and representatives of the said packers' company, the prunes to be so graded and packed being the prunes referred to in the contract made by plaintiff with the said packers' company. The court found that said Stelling Bros., in accordance with said contract so entered into between them and the plaintiff on March 14, 1900, delivered to said California Packers' Company, for the account of plaintiff, the prunes in contest. This finding is supported by the evidence, which shows without conflict that the California Packers' Company was the agent of plaintiff for the purpose of receiving and packing the prunes; that the prunes, when picked, were hauled by Stelling Bros. and delivered to the California Packers' Company for plaintiff; that warehouse receipts were issued and delivered to Stelling Bros. for the prunes. We therefore conclude that the plaintiff had the possession, and the right to the possession, under its contracts, of the prunes at the time they were taken from its possession. It had the right to the possession at the time of the commencement of the action. Of course, the right to the possession does not carry the right of property, and the plaintiff must comply with its contracts and account to the defendants for the proceeds of the prunes. It appears that before the commencement of this action Stelling Bros. executed and delivered to their father, defendant John Stelling, a transfer of the prunes in the following language:

"San Jose, Calif., Feb. 14th, 1901.

"For, and in consideration of the sum of ten dollars and other good and sufficient considerations, we sell, assign and transfer to John Stelling all our right, title and interest in and to the following described personal property to wit; 225 tons more or less of dried French prunes now in the warehouse

upon the lands of said John Stelling; 6,000 50-lb. prune-packing boxes and all money that is now due or may become due us or either of us from the California Cured Fruit Association.

"F. E. Stelling.

"H. G. Stelling.

"Witness: Karl Klein."

It is claimed that by virtue of the above writing John Stelling became a bona fide purchaser for value of the prunes, while they were under the control and dominion of Stelling Bros. The court found that John Stelling never had nor claimed any interest in the prunes, except such interest as was conveyed to him by said writing, and that the only interest he now claims is the interest conveyed by said writing. The evidence supports the finding. John Stelling was a witness in his own behalf, but he did not testify that he paid anything for the prunes, nor that he was without notice of all the facts. He did testify that he had no interest in the prunes except the interest transferred by the writing. The writing states on its face that it conveys all the right, title, and interest in and to the prunes "and the money that is now due and to become due" from the California Cured Fruit Association. Of course, Stelling Bros. could convey their right, title, and interest in the prunes, which were rightfully in possession of the plaintiff. The right and title of Stelling Bros. were subject to the right and title of plaintiff under its contract. By the transfer to John Stelling they only conveyed the right and title they had, and no more. The rule as to bona fide purchasers does not extend to the assignee of an equitable interest. *Hyde v. Mangan*, 88 Cal. 319, 26 Pac. 180. The answer of a bona fide purchaser is in the nature of a new case founded on right and title set up to bar and avoid the plaintiff's title. To entitle a party to such protection, he must prove the payment of the purchase money in good faith and without notice. *Eversdon v. Mayhew*, 65 Cal. 167, 3 Pac. 641. Here there being no proof, as to the essential requisites necessary to make John Stelling a bona fide purchaser in good faith, we cannot presume that he was such. Hence, as to John Stelling, he stands in no different or better position than his codefendants.

It was not necessary for plaintiff to prove a demand before bringing suit. Defendants took the prunes from the possession of the plaintiff. They claim that John Stelling is the owner, and demand a return of the prunes to him. Therefore it is plain that a demand would have been unavailing. If the defendants had come rightfully into the possession of the prunes, and had never manifested any disposition to claim title to them, and had shown a willingness to surrender them, they could not be made to answer in costs without proof of a demand. But where a defendant sets up title or adverse claim to

property in replevin, it is not necessary to prove a demand prior to bringing suit.

Complaint is made that several findings are not supported by the evidence, but, after careful examination we think that all the material findings are supported by competent evidence.

There was no error in sustaining plaintiff's objection to the question put to F. E. Stelling as to whether he received any other consideration from John Stelling except the \$10 mentioned. If defendants proposed to show that the sale was not of a qualified title as the writing stated, but of the absolute interest, and that John Stelling bought for an adequate price, and without notice of plaintiff's rights, they should have so informed the court. They never claimed that John Stelling bought without notice of the facts, and without proof of that fact evidence of the adequacy of the price would have been of no avail, even if it be conceded that the defendants could vary the terms of the bill of sale by parol evidence.

Other rulings are complained of, but we find none of sufficient importance to justify a reversal of the case.

Most of appellants' brief is devoted to arguing that plaintiff is not a legal corporation, and that the contract between Stelling Bros. and the plaintiff and that between the California Packers' Company and plaintiff and Stelling Bros. are in restraint of trade, against public policy, and void. Stelling Bros., having made the contracts with the plaintiff and with the California Packers Company as corporations, will not be allowed by way of collateral attack to now deny that they were such corporations. *Rondell v. Fay*, 32 Cal. 354; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Pacific Bank v. De Ro*, 37 Cal. 538; *Bakersfield Town Hall Association v. Chester*, 55 Cal. 98. Nor will they be allowed in this proceeding to raise questions as to the contracts being in restraint of trade and against public policy in regard to matters not involved here. This is not an action to enforce the contracts, nor to compel the performance of them. The contracts have been performed so far as the delivery of the prunes to plaintiff under them, and so far as giving the plaintiff the right to the possession of the prunes for the purposes of the contracts. Surely Stelling Bros. will not be allowed to make the contracts and to deliver their prunes under them for the purposes therein specified, and then to convert the prunes to their own use, in disregard of the contract, because there may, perchance, be some clause in the contract in restraint of trade. It is sufficient to say that the contracts are valid so far as performed. If there should be an attempt to enforce any part of the contracts which can be shown to be against

public policy or in restraint of trade, then the court would declare such part void. The only penalty as to contracts in restraint of trade or against public policy is that courts refuse to enforce them. *Havemeyer v. Superior Court*, 84 Cal. 378, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; *Continental Insurance Company v. Board of Fire Underwriters of the Pacific (C. C.)* 67 Fed. 310; *Steamship Company v. McGregor*, 21 Q. B. Div. 544.

Plaintiff's case is based upon its possession and right of its possession by reason of matters that occurred before the suit was brought. It seeks judgment for the purpose of placing it in the condition in which it was before the prunes were taken from it. There is no question as to public policy or restraint of trade in restoring the parties to the position in which they had, by mutual agreement, placed themselves.

In arriving at the conclusion herein stated we have not overlooked *California Cured Fruit Association v. Ainsworth*, 134 Cal. 461, 66 Pac. 586, which is easily distinguished from the case at bar. There the action was in trover, and not for the recovery of the prunes. The court, on familiar principles, held that, as the plaintiff was only entitled as commission to 2 per cent. of the value of the prunes, it could only recover a money judgment for its damages, \$14. It could not be allowed to recover \$700 from defendant for the purpose of taking out \$14, and then repaying the balance, \$686, probably at the end of litigation. The courts do not countenance such circuity of action.

In this case it appears that the plaintiff gave a bond and retook possession of the prunes. The alternative judgment for the value is therefore immaterial, although too large in amount. If it has not sold them, or used due diligence to sell them, in compliance with its contracts, the defendants have their remedy. If, by their contracts and the placing of the prunes in the possession of the plaintiff, and making it their agent to dispose of the prunes, they should lose money, the answer is that the situation was brought about by the voluntary act of Stelling Bros. Parties should be careful about making contracts and creating agents; but when once made the courts will not relieve them for light or trivial reasons. Public policy is much better subserved in such cases by leaving the parties and their rights to be measured by the terms of their contracts.

It follows that the judgment should be affirmed.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: SHAW, J.; VAN DYKE, J.

I concur in the judgment: ANGELLOTTI, J.

(141 Cal. 624)

In re VANCE'S ESTATE. (S. F. 3,508).\*

(Supreme Court of California. Jan. 15, 1904.)

**ADMINISTRATION OF ESTATE—FINAL ACCOUNT OF ADMINISTRATRIX—EXCEPTIONS—SUFFICIENCY—SCOPE OF INQUIRY—QUESTIONS WHICH MAY BE DETERMINED.**

1. It was not error to refuse to disallow the final account of an administratrix on motion of the contestant at the close of the testimony for the administratrix, where the allegations of the exceptions were affirmative, and, so far as they related to matters of fact and the real objections of the contestant, constituted new and affirmative matter in opposition thereto.

2. Where a contestant filed exceptions to the final account of an administratrix, claiming that she had received money belonging to the estate, with which she had not charged herself, but the exceptions did not contain a statement of facts showing that the money actually belonged to the estate, no inquiry as to a gift by the testator to the administratrix, in fraud of the former's creditors, on which the contestant's claim was based, could be made.

3. The question whether a testator held property in trust, and his administratrix, therefore, took a transfer thereof, subject to the same trust, cannot be determined on exceptions to her final account, but only in a personal action against her to enforce the trust.

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

In the matter of the estate of Samuel L. Vance, deceased. From an order settling the final account of Clara M. Vance, administratrix, contestant, Bertha A. Smith, administratrix of Eliza A. Vance, deceased, appeals. Affirmed.

Geo. B. Graham, for appellant. L. L. Cory and E. E. Shepard, for respondent.

**SHAW, J.** This is an appeal from the order settling the final account of Clara M. Vance, administratrix of the estate of Samuel L. Vance, deceased. The final account of the estate of Samuel L. Vance, deceased, as filed in the court below, showed that the administratrix had received no assets belonging to the estate, and had expended something over \$1,000 on account of the estate. At the time of the hearing Bertha A. Smith, as administratrix of the estate of Eliza M. Vance, deceased, filed exceptions to the final account, claiming that the estate of Eliza M. Vance was interested as a creditor in the estate of Samuel L. Vance, and that the administratrix of the latter estate had received money to the amount of \$1,290.50 belonging to the estate of Samuel L. Vance, with which she had not charged herself in said account. The exceptions contained no statement of facts going to show that the money did actually belong to the estate of S. L. Vance, deceased. They are based on the bare allegations that the money had been in the possession of Clara M. Vance as administratrix ever since her appointment as administratrix; that it was still in her possession and control, and that the said property was a part of the estate of Samuel L.

Vance, deceased. Upon the hearing of the account and exceptions, the respondent introduced evidence to prove the disbursements as shown in the account, and the value of the services of the attorneys for which compensation was asked, and rested. Thereupon the appellant, Bertha A. Smith, moved the court to disallow the account, on the ground that there had been no proof of the falsity of the facts stated in the exceptions. The court overruled this motion. The hearing proceeded, evidence was given in behalf of the contestant subject to exception, and a motion to strike out, and after the evidence of the contestant was all given the motion to strike out was granted, and thereupon an order was made settling the final account as presented, and disallowing the exceptions.

1. The court did not err in refusing to disallow the account upon the motion of the contestant at the close of the testimony introduced by the respondent. The allegations of the exceptions are affirmative, and so far as they related to matters of fact, and the real objections of the contestant constituted new and affirmative matter in opposition to the account, and it was therefore incumbent upon the contestant to introduce evidence in support of these allegations, and the respondent was not required at the opening of her case to anticipate the evidence in support of the exceptions, and show that the allegations in the exceptions were not true.

2. The claim of the contestant upon the merits, as disclosed by the evidence offered, was to the effect that a few weeks prior to the death of Samuel L. Vance he had made a gift of all his property to the present administratrix of his estate, Clara M. Vance, who was his daughter; that at that time he was indebted to the estate of Eliza M. Vance, now represented by the contestant, and that the gift to his daughter was made with intent to defraud creditors; that for that reason the transfer was fraudulent and void as against the estate of Eliza M. Vance; and that consequently the administratrix of the estate of Samuel L. Vance was properly chargeable in her account with the property thus received by her from the deceased, Samuel L. Vance, in his lifetime. The respondent in opposition to this claim insists that no such issue can be tried upon the settlement of an account; that, where the administratrix claims title in herself to the property in dispute, such claim cannot be settled by proceedings in probate upon the settlement of an account, but must be made the subject of an independent suit, either at law or in equity, upon issues properly framed for the purpose of determining the title; citing in favor of the proposition *Ex parte Casey*, 71 Cal. 269, 12 Pac. 118; *Estate of Haas*, 97 Cal. 232, 31 Pac. 893; *Stuparich Mfg. Co. v. Superior Court*, 123 Cal. 290, 55 Pac. 985; *Heydenfeldt v. Jacobs*, 107 Cal. 378, 40 Pac. 492; *Haverstick v. Trudel*, 51 Cal. 431; *Smith v. Westerfield*, 88 Cal. 378, 26 Pac. 206; *Curtis*

\*Rehearing denied February 12, 1904.

v. Schell, 129 Cal. 208, 61 Pac. 951, 79 Am. St. Rep. 107; Ex parte Hollis, 59 Cal. 406. These cases generally involve the question whether, upon the hearing of a proceeding in probate, the rights of a third person not a party to the proceeding can be adjudicated. We do not find it necessary in the decision of this case to determine whether or not in a case where, as here, the third person who claims the interest in the property is in court in her capacity as administratrix of the estate of the deceased to whom it is alleged the property belongs, such personal right of the administratrix can be determined upon the settlement of an account. Even if it be conceded that the superior court sitting in probate might be held to have such jurisdiction, yet it must be admitted, on the other hand, that no such inquiry can or should be entered upon, either by the probate court or any other court, unless the necessary allegations of fact upon which the legal title to property depends is made in some pleading filed in the action or proceeding. The contestant here, if she had brought an independent action to have the transfer from the father to the daughter set aside as fraudulent and void, must have alleged the facts of the transaction, and also the facts showing that the transfer was fraudulent, and particularly that it was made with the intent to defraud creditors. By the provisions of section 3442 of the Civil Code the question of fraudulent intent is one of fact, and not of law, and therefore it must be made the subject of an allegation in any pleading in which the question of intent is material to the right claimed. The proviso to that section to the effect that any transfer made voluntarily, without a valuable consideration, by the party while insolvent, is fraudulent and void as to existing creditors, is a rule of evidence, and not of pleading, and does not affect the rule that the intent is a fact which must be alleged. Therefore it follows that there is no statement of facts contained in the exceptions sufficient to show that the transfer by Samuel L. Vance to his daughter was fraudulent and void as against creditors. The transfer was valid as between the parties, and it could not be considered as void in law in the absolute sense. It was effectual to transfer the legal title until there was some appropriate action by some court having jurisdiction declaring it fraudulent and void. It was not legally at the time of his death the property of Samuel L. Vance; therefore the evidence offered by the contestant did not support the bare allegation (or rather the recital, for there is no direct allegation) that the property belonged to the estate of Samuel L. Vance, deceased.

3. There are some allegations in the exceptions and some evidence from which it might be inferred that Samuel L. Vance, at the time he made the transfer to his daughter, was holding in trust, as executor of the estate of Eliza M. Vance, deceased, the sum of

money in controversy here, and that the respondent here took the transfer under such circumstances that she would hold the property subject to the same trust. Whether this be true or not is a question which cannot be considered in this case. If she did so hold the property in trust, that question could only be determined in a personal action against her to enforce the trust.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

(142 Cal. 1)

In re GRANNISS' ESTATE.

GRANNISS v. CENTER et al. (S. F. 3,467.)\*

(Supreme Court of California. Jan. 22, 1904.)

WILLS—CONSTRUCTION—LIMITING CLAUSE—EFFECT—DECEDENT'S ESTATES—COMMUNITY PROPERTY—SEPARATE PROPERTY—DECLARATION OF TESTATOR—EFFECT.

1. The character of the estate of a decedent as separate or community property of himself and his first wife is not affected or changed by his opinion thereon, or by any declaration which he may make in his will in reference thereto, but is determined from the mode in which the property was acquired.

2. Evidence held to support findings that the only estate of a decedent was his separate property under Civ. Code, § 103, providing that all property owned by a husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is separate property, and hence subject to testamentary disposition by him.

3. A clause of a will giving testator's daughter "all the rest, residue, and remainder" of his property, could not be controlled or limited by a subsequent clause to the effect that all his estate therein devised was the community property of his first wife and himself, so as to work intestacy as to such property as was not the community property of testator and his first wife.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of George W. Granniss, deceased. From a decree distributing a portion of the estate to Mrs. Harriet Granniss Center, Mrs. Elizabeth I. Granniss, surviving widow of deceased, appeals. Affirmed.

F. S. Brittain (Tobin & Tobin, of counsel), for appellant. Henry H. Reid (Charles W. Slack, of counsel), for respondents.

VAN DYKE, J. The appeal in this case is from a decree of distribution in the estate of George W. Granniss, deceased. The deceased left a last will and testament, which is in the words and figures following:

"I, George W. Granniss, of the City and County of San Francisco, State of California, do hereby make, publish and declare this my Last Will and Testament, as follows, to wit:

"First. I give unto my wife, Elizabeth Ingargiola Granniss, the sum of twenty thousand dollars (\$20,000.00), together with all the

\*Rehearing denied February 20, 1904.

household furniture and other personal property now contained in the dwelling No. 19 Hawthorne Street, San Francisco, with the exception that my daughter hereinafter mentioned may select and possess the portraits of her grandfather, grandmother, her father in his youth, and any or all pictures painted by her mother.

"Second. I give unto my daughter, Harriet Granniss Center all of the rest, residue and remainder of my estate, both real and personal, and wherever situated.

"Third. I hereby appoint my said daughter, Harriet Granniss Center, the executrix of this will without bonds.

"Fourth. I solemnly declare that all my estate herein devised is my separate property, and was the community property of my first wife and myself.

"In Witness Whereof I have set my hand to the foregoing will, which is all in my own handwriting, this eighth day of January, 1894.

George W. Granniss."

Six years and more after the date of the will the deceased executed a codicil, which is as follows:

"It is my desire and direction, that all my jewelry, my watch, swords, canes and personal effects of that nature be given to my grandson, Alexander Granniss Center, in the event of my death. G. W. Granniss.

"San Francisco, August 20th, 1900."

George W. Granniss died at the city and county of San Francisco, January 26, 1901. During the administration of the estate the bequest to his surviving wife mentioned in the first paragraph or item of the will was paid to her, and at the close of the administration the superior court distributed the remainder of the estate to his daughter, Harriet Granniss Center, and from this decree his surviving wife prosecutes the appeal.

1. It will be seen by the second clause or item in the will that the testator says: "I give unto my daughter, Harriet Granniss Center all of the rest, residue and remainder of my estate, both real and personal, and wherever situated." The declaration of the testator in the fourth item of the will that all his estate therein devised is his separate property, and was the community property of his first wife and himself, does not qualify or impair the language used in the second item or clause of the will, wherein it is declared that he gives all the residue of his estate to his daughter. Whether he is correct in his opinion that all his estate at that period was the community property of himself and his first wife is quite immaterial, and does not affect or control the previous express and emphatic clause of his will, wherein he gives "all of the rest, residue, and remainder" of his estate to his daughter. The character of the estate of the decedent, whether it is separate or the community property of himself and his first wife, is not to be affected or changed by his opinion thereon, or by any declaration which he may make in reference

to it, but is to be determined from the mode in which the property was acquired. The testator had been married previous to his marriage with the appellant, and his first wife died September 12, 1890. He was married to the appellant December 27, 1892. At the time of his first wife's death he had \$14,152 in money, and a note of the Pacific Improvement Company for \$100,000, which had been acquired during his first marriage. Between the time of the death of his first wife and his marriage to the appellant, he received \$17,400, as interest upon this note and from rents and services, and also a legacy of \$10,000. After his second marriage he received a legacy of \$5,000, of which \$3,500 was paid to him in May, 1893, and \$1,500 in May, 1894. He also received as interest upon the above note of the Pacific Improvement Company, after his second marriage, the sum of \$28,763. In October, 1893, he purchased 1,000 shares of stock in the P. M. S. S. Co., which, in about a month thereafter, he sold at a profit of \$1,440, and in January, 1894, purchased another 1,000 shares of the same stock, which he sold in April, 1895, at a profit of \$5,457. The note of the Pacific Improvement Company was paid September 25, 1897, and thereafter he purchased certain bonds for which he paid \$72,705. He received as interest upon these bonds during his lifetime the sum of \$9,375. These bonds were part of his estate at the time of his death. A portion of them was sold after his death, and the proceeds applied towards the payment of his bequest to the appellant. It was stipulated by the appellant that the decedent was engaged in no business after his second marriage from which he received any income, except that he received \$962.50 for certain services rendered by him, unless the purchase and sale of the above shares of stock in the steamship company be considered as business. It is also stipulated that, aside from his investments, his expenditures between September 25, 1897, and December 1, 1898, amounted to \$5,754. The note of \$100,000, which testator had at the time of his second marriage, together with the interest which he received thereon after such marriage, was his separate property, and any investments which he made with the money received upon this note, or any property which he purchased with it, continued to be his separate property. The income from such investments, as well as the increase in value and profits derived from the sale of the property so purchased, was also his separate property. Civ. Code, § 163; Estate of Cudworth, 133 Cal. 462, 65 Pac. 1041. In Estate of Cudworth the husband had an income derived from his separate estate, and also earned money, which became community property, and it was held that there was no presumption that the husband supported the family out of his separate property, and preserved the community property intact; that he is at liberty to devote all that is necessary

to the support of the family out of the community funds, and to preserve the separate property, if he so chooses; and that the commingling of the funds of his separate estate with the community funds, where the community interest is inconsiderable in the property with which it is intermingled, will not cause the fund to become community property, or destroy the character of his separate estate. The finding of the court that the only estate of said decedent was his separate property is fully sustained by the evidence, and, being his separate property, it was subject to his testamentary disposition. Civ. Code, § 1331.

2. It is contended on the part of the appellant that the separate property of the decedent consisted in part of the community property of himself and his first wife, and that it was only this part or portion which was given or bequeathed under the clause "all of the rest, residue, and remainder" to his daughter, the respondent; that as to his separate estate, not formed of the community property of himself and his first wife, it is not disposed of at all by the will, but as to that he died intestate, and the appellant is entitled to share therein according to law, as in case of intestacy. But the gift and bequest to his daughter in the second clause is explicit, and without any words of limitation or qualification, and all the authorities agree that when the absolute estate has been conveyed in one clause of the will it will not be cut down or limited by subsequent words, except such as indicate as clear an intention as would the words used in creating the estate. Words which merely raise a doubt or suggest an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the estate first conveyed. *Estate of Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071. "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will." Civ. Code, § 1322. In *Le Breton v. Cook*, 107 Cal. 416, 40 Pac. 552, cited by counsel for appellant, it is said: "Constructions which lead to intestacy, total or partial, are not favored; and therefore such an interpretation should, if reasonably possible, be placed upon the provisions of the will as will prevent that result. Especially should this be done where the will evinces an intention on the part of the testator to dispose of his whole estate. A devise or bequest of the 'residue' of the testator's property therefore passes all the property which he was entitled to devise or bequeath at the time of his death, not otherwise effectually devised or bequeathed by his will." And section 1332, Civ. Code, declares: "A devise of the residue of the testator's real property passes

all the real property which he was entitled to devise at the time of his death, not otherwise effectually bequeathed by his will." Section 1333 of the same Code declares: "A bequest of the residue of the testator's personal property passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will." In *Estate of Upham*, 127 Cal. 90, 59 Pac. 315, it is held that: "Where a testator gives all of his property remaining after the payment of specific gifts, though the fund be estimated in money, the gift of that which thus remains is not specific, but carries everything which has not been effectually disposed of by reason of lapses, or invalid and void devises or legacies." In *Lamb v. Lamb*, 131 N. Y. 227, 30 N. E. 133, it is said: "That rule that in the interpretation of wills residuary clauses are to be given a broad, rather than a narrow, interpretation, has a stronger foundation in natural reason than have some of the other rules adopted by courts." It is very plain from these rules of construction that what was said by the testator in item fourth of the will cannot control or in any way affect the plain and explicit declaration contained in the second, wherein he declares that all of the rest, residue, and remainder of his estate, both real and personal, and wherever situated, goes to his daughter, Harriet Granniss Center.

No question is raised as to the competency of the deceased, George W. Granniss, to execute the will in question at the date of its execution, or that there was any fraud, duress, or undue influence in any wise affecting its execution.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(141 Cal. 738)

ARNOLD v. PRODUCERS' FRUIT CO.  
(Sac. 1,094).\*

(Supreme Court of California. Jan. 22, 1904.)

NEGLIGENCE—ACTIONS—JURORS—COMPETENCY  
—EVIDENCE—MATERIALITY—INSTRUCTIONS—  
REFUSAL—RECORD—APPEAL.

1. Where, in an action for negligence in curing plaintiff's prune crop, there was evidence that some of the prunes were so damaged that they were thrown away; that others were fermented and moldy, and were treated with acids in such a manner as to make them unsalable; that the trays were improperly piled one upon the other; and that the prunes were placed in the bins wet and uncured, and were not shoveled or changed often enough to prevent them from becoming damaged—a verdict in favor of plaintiff should not be set aside on appeal for insufficiency of the evidence.

2. Where a juror was a tenant of plaintiff under a lease which required him to deliver as rent a certain share of the crop after harvest, and the crop for the current year had been delivered, the juror was not disqualified, under Code Civ. Proc. § 602, authorizing a challenge

\*Rehearing denied February 20, 1904.



against a person standing in the relation either of partner or agent of one of the parties.

3. Where, in an action for negligence in curing plaintiff's prunes, plaintiff's contract with defendant prohibited plaintiff from selling any portion of the prunes except through defendant, and by paying defendant's commission, and defendant in fact sold the prunes, a question asked of plaintiff as to whether, prior to the sale, he could not have sold his prunes at the market price, was immaterial.

4. In an action for injuries to plaintiff's prunes by defendant's negligence in curing them, questions asked plaintiff for the purpose of showing that he exhibited samples of prunes taken from S. county, for the purpose of comparing them with his own, was irrelevant.

5. In an action for injuries to plaintiff's prunes in curing them, a question asked of defendant by a witness as to whether or not he sold any car loads of the prunes in defendant's warehouse in December, 1897, and, if so, what price he received for them, was properly excluded, where such sales, if any, did not include any of plaintiff's prunes.

6. An objection that the instructions of defendant which the court refused to give were proper and necessary, and that the instructions Nos. 13, 14, 15, and 16 should have been given, will not be reviewed on appeal where appellant's counsel failed to state the propositions of law requested.

Commissioners' Decision. Department 1. Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by Ella H. Arnold, as executrix of the estate of D. H. Arnold, deceased, against the Producers' Fruit Company. Judgment was rendered in favor of plaintiff, and from an order denying defendant's motion for a new trial it appeals. Affirmed.

For opinion on former appeal, see 61 Pac. 283.

William M. Sims and B. F. Howard, for appellant. E. T. Crane and U. W. Brown, for respondent.

COOPER, C. This action was brought to recover \$1,355.49, damages alleged to have been caused by the negligence of defendant in drying, curing, and packing plaintiff's prune crop of the year 1897, and a balance of \$573.60, claimed to be due from sales of prunes made by defendant for plaintiff. The case has been here on a former appeal (128 Cal. 637, 61 Pac. 283), and the contract made by the parties is therein fully set forth, and also a statement of the facts, which need not be here repeated. On the former appeal the order denying a new trial was reversed and the cause remanded because of errors in the admission of evidence.

The new trial in the court below before a jury resulted in a verdict for the plaintiff in the sum of \$906.11, upon which judgment was entered. Defendant made a motion for a new trial, which was denied, and this appeal is from the order denying the motion, and comes here on a statement of the case. Counsel for appellant call attention to the fact that the statement consists of over 300 printed pages, most of it redundant and useless matter. We have carefully examined it, and have no hesitation in condemning it as

an undigested mass, not calculated to aid or assist this court in its arduous labors. Almost the whole of the reporter's notes appear in the statement. Pages upon pages are occupied with questions and answers in regard to rulings and evidence in no way challenged. In fact, it seems that the judge of the court below, in order to settle the disputes of counsel, ordered the whole matter to be incorporated in the statement. It is made the duty of the judge in settling a statement to strike out of it all redundant and useless matter, notwithstanding the consent of the parties to such matter or to any inaccurate statement. Code Civ. Proc. § 659. In cases where counsel are contentious, act in a spirit of bad faith; or attempt to insert all immaterial matter, the task of the trial judge is not an easy one. But he should meet it and perform his duty fearlessly. On the other hand, it is the duty of counsel to protect the high standard of their profession, and to aid and assist the court, with the sole object and purpose of having the record present only the material matter necessary to the consideration of the questions raised. To the credit of the profession and of the trial judges, this course is usually followed. It was not followed in this case, but we are not prepared from the record to say with whom the fault lies. Counsel for appellant insist that the matter was inserted by reason of the deliberate purpose of counsel for respondent to make a large and expensive record, while counsel for respondent call attention to the fact that appellant's counsel have specified 79 erroneous rulings, and allege that the statement served upon them was inaccurate in nearly all respects, and was not made from the reporter's notes. Without deciding the accusations of counsel against each other, we consider it sufficient to say that we trust this course will not be followed hereafter.

We will proceed to discuss the errors deemed by counsel most important and upon which they rely:

1. It is claimed that the evidence is insufficient to justify the verdict. Counsel for appellant say in their brief: "It will be seen that the testimony of the parties apparently conflicts, but a careful reading of the entire testimony will show that, notwithstanding that there is some evidence on minor points to support plaintiff's case, yet certain testimony given by his own witnesses, and especially by himself, nullified the weak statements of his witnesses as to any careless or improper handling of the prunes by defendant." We have carefully read the testimony, and it is sufficient to say that there is ample evidence in the record to justify the jury in finding negligence of the defendant in handling and drying the prunes. There is evidence that some of the prunes were so damaged that they were thrown away; that portions of them were fermented and moldy, and were treated with acids in such manner as to injure them and make them unsalable;

that the trays were improperly piled one upon the other; that the prunes were placed in the bins wet and uncured; and that they were not shoveled or changed often enough to prevent them from becoming damaged. The jury saw the witnesses and heard the testimony as it fell from their lips, and by its verdict found the truth of the evidence as to negligence. The judge of the court below again passed upon the testimony in denying the motion for a new trial. We cannot, under the rule, set aside the verdict for insufficiency of the evidence upon the record presented here.

2. It is claimed that the court erred in denying the challenge of the defendant to the juror Mullaly for cause. It appeared that the juror was a tenant of plaintiff under a lease which required him to deliver as rent a certain share of the crop after harvest, and that the crop for the year had been delivered. This did not make the juror either the partner or agent of the plaintiff (*Clark v. Cobb*, 121 Cal. 595, 54 Pac. 74), and hence he was not disqualified, under section 602 of the Code of Civil Procedure. The challenge was properly denied.

3. The plaintiff testified in his own behalf. It appeared from his testimony in cross-examination that he visited San Jose early in October, 1897; that he took with him some samples of his prunes which had been dried by defendant. He was then asked by defendant the following question: "Q. Isn't it a fact, Mr. Arnold, that at that time and on that visit you could have sold your prunes for at least two and one-half or three cents?" Plaintiff's counsel objected to the question on the grounds that it was not proper cross-examination, incompetent, and immaterial. The court sustained the objection, and the ruling is claimed to be error. It was evidently the purpose of defendant to show that plaintiff had an opportunity to sell his prunes for the market price, and failed to do so, and hence was not damaged. The evidence was not admissible for such purpose. The contract did not allow the plaintiff to sell any portion of the prunes except through the defendant and by paying its commission. By the contract defendant had the right to sell the prunes. It did sell them in February, 1898. Plaintiff was under no obligation to sell them, and if the prunes were damaged by the negligence of defendant it is no excuse for it to show that defendant at some prior time prior to the time of the actual sale could have sold them for the market price. The question was as to the negligence of defendant, and the damage, if any, finally sustained by the plaintiff. It does not appear that the prunes were cured in October, 1897, when plaintiff went to San Jose, and it does appear that the damage was caused after the time referred to in the question. But under any view of the case, we cannot think it was any defense for the defendant to show that in October, 1897, plaintiff could

have sold his prunes for more than defendant was afterwards able to sell them for. Plaintiff had the right to wait for a better market, and to assume that defendant would perform its part of the contract.

4. Complaint is made of several rulings of the court sustaining questions asked of plaintiff in cross-examination for the purpose of showing that he exhibited samples of prunes taken from Santa Clara county for the purpose of making a comparison with his own. The evidence was wholly irrelevant, as the question was not as to the character of the Santa Clara prunes, but the negligence of the defendant in not doing what it agreed to do in a proper manner. The quality of the Santa Clara prunes was not shown, and such comparison would have been worthless. But the defendant afterwards succeeded in getting the witness to testify that he compared the sample of his prunes with the Santa Clara prunes, and that his sample "beat anything he had seen in Santa Clara county."

5. Plaintiff's objections were sustained to questions asked by defendant of the witness Stahl as to whether or not he sold any car loads of the prunes in defendant's warehouse early in December, 1897, and, if so, what price he received. We do not think the evidence was competent to prove any issue in the case; and not only this, but the witness testified that the sales concerning which he was being questioned did not include any of plaintiff's prunes. Counsel for plaintiff stated in open court that they would not make any objections to questions as to the sale of any of plaintiff's prunes. We have examined the other alleged errors in the rulings upon the admission of evidence discussed by counsel in their brief, and find no error that would justify a reversal of the case.

6. The court instructed the jury: "In the event the jury find that the defendant did not use ordinary diligence, skill, or care in drying, curing, packing, and handling said fruit, the damage to plaintiff is the difference between the market value of such fruit at the time of the sale, had ordinary diligence, skill, and care been used by defendant in drying, curing, packing, and handling the same, and the sum for which the same was sold." Defendant argues that the evidence shows that the prunes were redipped by it about January 10, 1898, and that the measure of plaintiff's damage was the "difference between the market value of good, merchantable prunes and the value of plaintiff's prunes at the time they had been redipped, and not at the time of sale." We fail to find any evidence, and none has been pointed out to us, as to the date or dates when the prunes were redipped. The redipping may have just been completed at the time of the sale. Counsel for defendant say in their brief: "The instructions of defendant which the court refused to give were proper and necessary to guide the jury in its verdict;" and again:

"The instructions Nos. 13, 14, 15, and 16 should have been given." If any instruction was necessary and proper to guide the jury, it is the duty of counsel to point it out, and state the proposition of law requested as such guide to the jury; and, if any instruction was refused, counsel should call attention to the error caused by its refusal and the reasons why it should have been given. We will not examine the offered instructions and go through the record to see whether or not any one of them was necessary to guide the jury in its verdict.

We advise that the order be affirmed.

We concur: HAYNES, C.; GRAY, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

(141 Cal. 690)

**GALLAGHER v. EQUITABLE GASLIGHT CO. (S. F. 2,821.)\***

(Supreme Court of California. Jan. 20, 1904.)  
CONTRACTS—MUTUALITY—CONTRACT TO SUPPLY GAS—AGENCY—AUTHORITY OF AGENT—INJUNCTION.

1. Civ. Code, § 2316, declares that actual authority of an agent is such as the principal confers or allows the agent to believe he possesses. Section 2317 declares that ostensible authority is such as a principal allows a third person to believe the agent possesses, and section 2330 declares that an agent represents his principal for all purposes in respect to actual or ostensible authority. *Held*, that a solicitor and collector for a gas company had actual, if not ostensible, authority to make a contract, binding on the gas company to furnish gas at a certain price.

2. Civ. Code, § 2330, declares that an agent represents his principal for all purposes in respect to actual or ostensible authority, and section 2332 declares that as against a principal both principal and agent are deemed to have notice of whatever either has notice of or should in good faith communicate to the other. *Held*, that where the solicitor of a gas company inserted in a contract on a blank form of the company a provision that gas should be furnished at a certain price, and turned the contract in to the secretary, who filed it, without noticing the inserted provision, the company was chargeable with the notice of the provision.

3. Civ. Code, § 1584, declares that performance of the conditions of a proposal or the acceptance of the consideration offered with a proposal is an acceptance of the proposal, and section 1589 declares that a voluntary acceptance of the benefit of a transaction is a consent to all the obligations arising from it. A solicitor for a gas company presented a prospective customer a contract, which had been executed by the company, and on objection by the customer the solicitor inserted a provision as to the price of gas, and subsequently the company furnished gas under the contract. *Held* that, if there was a rejection of the original proposal and another proposal by the customer, the company was bound by acceptance and action thereunder.

4. Civ. Code, § 629, declares that a corporation supplying gas on the application of any occupant of a building must supply gas as required

therefor, and by section 632 the corporation may shut off the gas from any person who neglects to pay for gas supplied. *Held*, that a contract whereby the occupant of a hotel agreed to take gas from a gas company and pay a certain price per thousand cubic feet, and the company agreed to furnish the gas at a certain price, was not void for want of mutuality, because no definite time was fixed for the continuance of the service.

5. It was not necessary to the validity of the contract that the company should agree to furnish the gas, as that duty was required to be performed by law.

6. Under his contract the consumer was entitled to an injunction restraining the gas company from discontinuing the furnishing of gas.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Suit by John P. Gallagher against the Equitable Gaslight Company. From a decree in favor of defendant, plaintiff appeals. Reversed.

Edward J. Hill, for appellant. Naphtaly, Friedenrich & Ackerman, for respondent.

CHIPMAN, C. Plaintiff alleges in his complaint that he is the proprietor of the Hotel Langham, situated in the city of San Francisco, and prior to November 9, 1899, he lighted said hotel by electricity; that on that day defendant persuaded him to discontinue the use of electricity and use gas, to be furnished by defendant, instead thereof; that he expended considerable money in supplying gas fixtures, induced thereto by the agreement of defendant to furnish plaintiff gas for said hotel at a price not to exceed 65 cents per thousand cubic feet "while the same was used in said Hotel Langham." There are also allegations as to irreparable injury and inadequacy of remedy at law. Prayer that defendant be "required faithfully and honestly to carry out its contract with plaintiff, \* \* \* and for that purpose a decree of this court be entered ordering the defendant to furnish gas to this plaintiff so long as plaintiff will continue to operate and use the same in said Langham Hotel, provided, however, plaintiff shall pay or tender to defendant 65 cents per thousand cubic feet for all gas used by him in said hotel; that defendant be restrained \* \* \* from discontinuing furnishing gas to the plaintiff" for use as above and so long as plaintiff shall pay for same as above, and for other and further relief. Defendant denies the allegations of the complaint, and as further answer alleges an agreement in writing of the date of November 9, 1899, between plaintiff and defendant, whereby defendant agrees to supply said hotel 110 incandescent lamps, complete with chimneys, shades, and mantels and 150 open-tipped burners, and "place the said lamps and burners upon fixtures to be designated by the said John Gallagher (plaintiff), it being understood that the only charge to be made by the party of the first party (defendant) at the time of the installation of the above-mentioned lamps and tips is to be a

\*Rehearing denied February 19, 1904.

charge of twenty cents for each and every mantel so installed"; that title in the lamp and tip burners was to remain in defendant, and plaintiff "shall give them (defendant) timely notice in case of discontinuance of the gas or removal, so that the Equitable Gas-light Company may remove said lamps and tips from said premises"; that said party (plaintiff) "agrees to take from the party of the first part [defendant] gas for use in said Langham Hotel and on said premises, and pay therefor at the rate of sixty-five cents per thousand cubic feet, \* \* \* whenever the said \* \* \* company shall present the bills for same"; also, that he agreed to comply with the rules of defendant, and allow its employes free ingress to the pipes and meters. It is averred that this is the only agreement entered into, but that, after said agreement had been signed by defendant, there was indorsed upon the same, without the knowledge or consent of defendant, a clause as follows: "The party of the first part agrees that the price of said gas sold to the party of the second part shall not exceed the price of sixty-five cents per thousand cubic feet while in use in said Hotel Langham." It is further averred that defendant's regular rates for gas prior to May, 1899, was \$1 per thousand cubic feet, and that after said date it reduced the rate to 65 cents per thousand cubic feet, and that price was in force on November 9, 1899, and continued until April 1, 1900, "at which time defendant increased the price of gas to all its customers to one dollar per thousand cubic feet," at which rate plaintiff was requested to pay after said date, but plaintiff refused to do so, and thereupon, and not otherwise, defendant threatened to discontinue serving plaintiff with gas in said hotel; denies refusing to furnish gas to plaintiff provided he pay the rate charged all defendant's customers.

The court found against plaintiff on his allegation that defendant agreed to furnish gas at the price named so long as plaintiff might use it in said hotel. It also found that about May 14, 1900, defendant demanded from plaintiff pay for gas on and after April 1, 1900, at the dollar rate, which defendant refused to pay, and refused to pay any higher rate than 65 cents. The court, in effect, found that the provision indorsed on the written contract after it was signed by defendant was not executed by defendant, and was not its agreement. Judgment passed for defendant accordingly. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

The only witnesses were plaintiff, E. F. Cheffens, solicitor and collector of defendant, and S. H. Tacy, secretary of defendant. Cheffens testified that he went to plaintiff in November, 1899, to solicit his custom, and showed him the usual form of contract; that plaintiff was not satisfied with the form, and wished further time to consider the matter; witness went back once or twice more, "and

explained just what would have to be done"; that a special contract was drawn up; witness brought to plaintiff the contract in question, bearing the signature of defendant by Tacy, secretary, with the company seal attached. Plaintiff testified that he objected to the contract because it contained no clause—which plaintiff had previously insisted upon—relating to the price remaining at 65 cents per thousand cubic feet, and that Cheffens said, "I will have to put that in for you," and thereupon wrote the word "over," which appears near the bottom of the first page, and at the left of the company signature, and also wrote the clause above quoted, which appears on the next page of the contract. Plaintiff testifies that he did not sign until after this indorsement. Cheffens testified: "When I first went to see Mr. Gallagher, I carried him a printed contract, which I left him to look over. I saw him again, and he said that he was willing for the company to put in its gas, and that it was to be 65 cents for the whole time it was there. I do not remember how many times I visited Mr. Gallagher. I do not remember the general purport of any conversation. I do not remember that he would take it if we furnished it continuously for 65 cents per thousand cubic feet. I do not deny it. I do not affirm it. My recollection on that point is indistinct. Q. You swear positively that you wrote this in Mr. Gallagher's presence after the contract was signed by him? A. Not by him, but by the company, and the seal of the company was on it. But he signed it after you wrote that, did he not? A. That I do not remember." He testified that he took the contract, when signed, back to Secretary Tacy, and laid it on his desk, but did not call his attention to the change made in it. Tacy testified: "When Mr. Cheffens returned the contract to the office, it was then that I examined it, and placed it in the safe, and it stayed there until Mr. Gallagher came to the office in April. I am general custodian of all the papers and records of the company, and all the contracts come there. It is my duty to look over all contracts. I don't know that it is my duty to pass upon them, but, if a contract has been signed and delivered, and it is necessary for me to do anything of that kind to it, I naturally see that I have done my part, and file it away." In explaining what he did, he said: "I opened it to see if Mr. Gallagher's signature was there, and then I put it in the vault. I unfolded it in this manner (indicating), and saw Mr. Gallagher's signature, and folded it back in this way (indicating), and put in the envelope where we keep contracts, and put in the safe." Further explaining, he said, "I opened it and had my thumb on the word 'over' and did not see it." Cheffens testified: "Immediately to the left of John P. Gallagher's signature, about one-half an inch distance, was the word 'over' written in a plain, bold, distinct, and perfectly legible

handwriting. On the back or reverse side of the same sheet of paper, about one-quarter of the way down the page, was written in the same plain, bold, distinct, and perfectly legible handwriting the following clause" (the clause in question). It is undisputed that it was in this condition when delivered to plaintiff and to Secretary Tacy. Cheffens testified that he "had charge of and solicited contracts generally with everybody and anybody for the company. Never made any special contract like this one. We had a simple form which the consumers would sign and I would hand it in to the company. Would carry around a contract for sixty-five cents and get peoples' signatures to it, and would hand it in to the company." I think the evidence shows that Cheffens was the ostensible, if not the actual, agent of defendant in this matter. Civ. Code, §§ 2316, 2317, 2330. I think, also, that defendant must be charged with knowledge of all the provisions of the contract, because it had the means of such knowledge, of which it carelessly and negligently deprived itself. Civ. Code, §§ 2330, 2332; *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915; *Shain v. Sresovich*, 104 Cal. 405, 38 Pac. 51. If, as is urged, Cheffens was not defendant's agent with authority to make the contract, it became all the more incumbent on Secretary Tacy to examine the contract for himself, and his dereliction in failing to do so only reinforces the reasons for holding that defendant is charged with knowledge of the contract acted upon by both parties. If the change made by Cheffens to suit plaintiff may be regarded as a rejection of the contract, as originally proposed to plaintiff, and as a new proposal by plaintiff, the voluntary acceptance by defendant of this proposal and its acting under it would constitute it a contract binding upon defendant. Civ. Code, §§ 1584, 1589; *Bloom v. Hazzard*, 104 Cal. 310, 37 Pac. 1037. We think the objection that the findings in these particulars are not supported by the evidence is well taken.

Respondent objects that the time clause of the contract is void for want of mutuality; that if it can be construed as an obligation by defendant to furnish gas for a definite period of time, it is void because plaintiff does not agree to take gas for such a definite period, and for like reasons the time clause is void for uncertainty. It is also claimed by respondent that the contract cannot be specifically performed because not mutual, and, if it cannot be specifically performed, injunction will not lie. These several points may be considered together. Under section 629, Civ. Code, a corporation supplying gas "upon the application in writing of the owner or occupant of any building \* \* \* must supply gas as required for such building"; and by section 632 of the same Code it is provided that the corporation "may shut off the supply of gas from any person who neglects or refuses to pay for the gas supplied." In *Cap-*

*ital Gas Co. v. Young*, 109 Cal. 140, 41 Pac. 809, 29 L. R. A. 463, the court said: "Under section 629 of the Civil Code the respondent was bound, upon proper demand, to furnish gas to the city. \* \* \* Under the operation of this law the gas company was not a free agent with power to contract or refuse to do so, but it became its duty, upon demand, to furnish gas to the city, irrespective of the status of its president. This duty to furnish gas to the city devolved upon the respondent, not by virtue of any contract, but by operation of the law, and hence the law governing ordinary contracts resting on the volition of the parties has no application." In *Visalia G. & E. L. Co. v. Sims*, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105, where the company undertook to free itself from the responsibility of operating its plant by leasing it to one Lynch, the court said that "plaintiff having availed itself of the franchise granted it by the city of Visalia, it became its legal duty to operate its gas and electric works, and to supply the inhabitants with gas and electricity," and could not lease its works to Lynch. The evidence is that defendant's mains run through the streets within less than 100 feet of plaintiff's hotel; that plaintiff was solicited by Cheffens, who urged defendant to discontinue lighting the hotel with electricity and take defendant's gas, and plaintiff told Cheffens if he took the gas it was to be 65 cents for a thousand cubic feet "for the whole time it was there"; that, after the contract was signed, the electric lamps, meters, etc., were taken out, and the use of electricity discontinued, and defendant's appliances were substituted. Plaintiff testified, "I paid out considerable money for some of the fixtures," and the contract required him to pay 20 cents each for mantels, and both parties acted under the contract from November until the following April, when defendant notified plaintiff of the raise in price. By the terms of the contract plaintiff "agrees to take from the party of the first part gas for use in said Hotel Langham and on said premises, and to pay therefor at the rate of sixty-five cents per thousand cubic feet," and defendant "agrees that the price of gas sold to the party of the second part shall not exceed sixty-five cents per thousand cubic feet while in use in said Hotel Langham." Plaintiff took the gas under the contract, and still desires to take it, and has faithfully kept his agreement. He discontinued the use of electricity, and prepared for the use of gas at some considerable expense. These facts show consideration. There was a mutual exchange of promises—promise for promise—which will support each other, unless one or the other is void. *Siddall v. Clark*, 89 Cal. 321, 26 Pac. 829. The contract was mutually performed for several months, and was in course of execution when the suit was brought. By bringing the action plaintiff put himself under the obligation of the contract. *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44; *Spire*

v. Urbahn, 124 Cal. 110, 56 Pac. 794. We do not think it was necessary to mutuality that the contract should name a definite period of time for its continuance. It is unlike the case of an offer to sell personal property at a stated price, where the buyer does not agree to purchase or bind himself at all, as in the cases cited by respondent. Nor do we construe the action as being essentially one for specific performance, except as it incidentally seeks to enforce plaintiff's rights in the premises. Sayward v. Houghton, supra. There can be no question that the intention was that plaintiff would take gas from defendant, for he expressly agreed so to do, and that defendant should supply it at the rate agreed upon, as long as plaintiff should use it, for defendant expressly so agreed, and so long as plaintiff took the gas defendant could compel payment at the agreed rate. It was, indeed, not necessary that defendant should agree to supply the gas, for this was its duty under the statute. It could only fix the rate and enforce reasonable regulation as to the service. The obligation of defendant to supply property owners within the statutory limits of defendant's mains, as we have seen, results from the statute, and not from contract. The provisions of section 632, Civ. Code, imply that the gas corporation cannot shut off the supply of gas so long as the consumer does not refuse or neglect "to pay for the gas supplied \* \* \* by the corporation as required by his contract." The contract being shown, and plaintiff having complied fully with its terms, and averring readiness to continue to take gas and ability to pay for it, injunction will lie. Sickles v. Manhattan Gas Light Co., 64 How. Prac. 33; Xenia Real Estate Co. v. Macy, 147 Ind. 568, 47 N. E. 147; Mackin v. Portland Gas Co., 38 Or. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596. In this latter case it was stated: "The right of a court to compel by mandamus a company engaged in furnishing gas for general consumption to supply all persons along its mains or conduits who offer to and do comply with its rules and regulations is undoubted and unquestioned;" citing cases. The other two cases above cited are proceedings by injunction. In Sickles v. The Manhattan Gas Light Co. the action was to have the amount due the company ascertained, and that the company be restrained from removing the meter or cutting off the supply of gas. It was held that, when a dispute arises between the company and a consumer, the latter is entitled to have his rights investigated by the courts, and that an injunction will be granted to prevent the cutting off of the supply of gas until the cause can be tried. In that case it did not appear that there was any contract as to the rate, and presumably the rate was that charged generally to customers, and there was no agreement to take the gas for any specified time. The contract in all such cases is that the consumer shall pay the usual rate so long as he uses the gas.

There can be no difference between such a case and one where the company has agreed with a consumer as to the rate in his particular case. In enforcing such a contract in the case of a gas corporation operating under such a statute as ours it is not an action for specific performance in strict sense. If injunction would lie in the Sickles Case, it will also lie in the case here. The subject is quite fully discussed in the Xenia Real Estate Co. Case, supra. Whiteman v. Fuel Gas Co., 139 Pa. 402, 20 Atl. 1062, is cited, where the court held that a mandatory injunction would be awarded at least to restore the status quo. In both these cases there was consideration shown for the agreement to take gas, and the companies agreed to furnish the gas at a rate fixed by the contract, but in neither of them did the consumer agree to take the gas for any definite period of time. There was a definite period within which the gas companies agreed to supply gas, but no express agreement that the consumers should take gas for that or any definite period. It was urged that specific performance could not be enforced, and therefore injunction would not lie. But it was held that this contention could not be maintained. It was also held in this class of cases that there was no complete and adequate remedy at law. So held, also, in the Sickles Case, supra.

The judgment and order should be reversed.

We concur: HAYNES, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J

(141 Cal. 619)

BEN LOMOND WINE CO. v. SLADKY et al. (S. F. 2,468.)

(Supreme Court of California. Jan. 15, 1904.)

APPEAL — NEW TRIAL — REASONS GIVEN BY COURT BELOW — INSUFFICIENCY OF EVIDENCE — PRESUMPTION — FORCIBLE DETAINER — NOTICE TO QUIT — PRIOR ASSIGNMENT OF LEASE — SURRENDER OF POSSESSION — EFFECT.

1. Where an order granting a new trial, general in its terms, is entered upon the court's minutes, an opinion filed therewith showing the reasons for granting the new trial, and concluding with the words, "The motion for new trial is granted," cannot be considered on appeal to determine the scope of the order.

2. Code Civ. Proc. § 659, subd. 3, provides that, where the notice of a motion for a new trial designates as a ground the insufficiency of the evidence, the statement shall specify the particulars in which the insufficiency consists, and, if no such specifications shall be made, the statement shall be disregarded at the hearing. The notice of a motion for a new trial specified insufficiency of evidence as a ground, but the statement contained no specifications in relation thereto so far as certain findings favorable to the successful party were concerned. Held, on appeal, that it could not be presumed in favor of the granting of the new trial, that the evidence as to these findings was insufficient.

3. The statute relating to summary proceedings, and entitled "For obtaining the possession of real property in certain cases," provides that one can be guilty of unlawful detainer only when he continues in possession in person or by subtenant. Code Civ. Proc. § 1174, restricts the damages recoverable in such proceedings and those caused by the unlawful detainer. *Held*, that the assignee of a lease, who, before notice to quit was served on him, had assigned his leasehold and surrendered possession to his assignee, was not liable to an action for unlawful detainer.

In Banc. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by the Ben Lomond Wine Company against Charles Sladky and others. From a judgment in department (71 Pac. 178) affirming an order granting a new trial after verdict for defendants, defendant Sladky appeals. Reversed.

Lester H. Jacobs, for appellant. Klerce, Sullivan & Gillogley, for respondent wine company. Black & Leaming, for respondent Eaton.

ANGELLOTTI, J. This is an appeal by defendant Charles Sladky from an order of the superior court granting the plaintiff's motion for a new trial. The action was in unlawful detainer, the complaint alleging that Sladky, as assignee of a leasehold interest in plaintiff's land, and defendant Eaton, claiming to have some rights under the lease, were unlawfully holding over and continuing in possession of said land after certain alleged violations of the covenants and conditions of said lease, and after notice in writing requiring them to quit and deliver up to plaintiff possession of the demised premises. Judgment for restitution and possession of said premises was asked, together with damages for the unlawful detainer and also for the violation of the covenants of the lease. Sladky and Eaton filed separate answers, Sladky alleging that prior to the service upon him of notice to quit he had regularly executed to Eaton an assignment of the lease and all of his rights thereunder, and had, prior to the service of such notice, delivered to said Eaton full possession of said premises, and that he had not thereafter been in possession of any part of said premises. The action was tried with a jury, which rendered a special verdict. The following special issues, with 10 others, relating to other matters, were submitted to the jury, viz.: (1) Had the defendant Charles Sladky assigned his interest in the lease mentioned in the complaint to defendant George R. Eaton prior to the service of the notice to quit on the defendants Eaton and Sladky? (2) Had the defendant George R. Eaton taken possession of the premises referred to in the lease prior to the service on him of the notice to quit? To each of these queries the jury answered "Yes," and the record shows no evidence in conflict with these findings. The record shows that the notice to quit was served on Sladky and Eaton on the same day. Upon

the other issues, the special verdict was also in favor of both Sladky and Eaton. Judgment in defendants' favor was thereon entered.

While plaintiff's notice of motion for a new trial specified as a ground therefor insufficiency of the evidence to justify the verdict in favor of defendants on any of the issues, there is not in the statement on motion for a new trial any specification of insufficiency of evidence to justify the finding of the jury upon either of the issues above set forth, or any such specification relating in any degree whatever to the subject-matter thereof. In such statement there is no assignment of any error of law in any way material to the proper determination of these issues, or the determination of any question relating to the possession at the time of the service of the notice to quit or thereafter.

Some question is made as to whether the order of the lower court granting a new trial excludes insufficiency of the evidence as one of the grounds, this question arising from the fact that the opinion signed by the judge in deciding the motion, and filed, which purported to order a new trial, did state that he would not disturb the verdict on that ground, while the order entered in the minutes was general in terms. This question would appear to be settled by the decision of this court in *Newman v. Overland, etc., Ry. Co.*, 132 Cal. 73, 64 Pac. 110, wherein it was held that, where there is an order granting a new trial, entered upon the minutes of the court, and also an opinion filed showing the reasons for the granting of the motion, and concluding with the words, "the motion for a new trial is granted," the order entered in the minutes is the only record of the court's action, and is to be measured by its terms, and not by the reasons which the court may give for it.

As insufficiency of the evidence was one of the grounds specified in the notice of motion for a new trial, we would be compelled to assume, in favor of the order appealed from, that the motion was granted upon that ground, if the statement discloses a case in which the superior court would have been authorized to grant the motion on such ground as against the defendant Sladky. The superior court could not, however, properly grant the motion for a new trial upon the ground that the evidence was insufficient to justify the findings of the jury hereinbefore set forth as to the assignment by Sladky to Eaton, and the taking of possession of the premises by Eaton prior to the service of the notice to quit, for the statement contained no specification in relation thereto, and, so far as that matter was concerned, the statement could not be considered by the court. *Hayne on New Trial & App.* § 150; subdivision 3, § 659, Code Civ. Proc. The findings of the jury in that regard stand unchallenged, and, so far as Sladky is concerned, we have a case where an assignee of a lease-



hold interest, who has, as such assignee, been in possession of the demised premises, has, prior to the service of any notice to quit, assigned his interest to another and delivered possession to such other. In other words, at the time of service of such notice to quit, Sladky was not "continuing in possession" of the demised premises.

It would seem to require no argument to show that the summary proceedings provided, as the title to the chapter relating to them states, "for obtaining possession of real property in certain cases," will not lie against the mere assignee of a lease, who has again assigned and delivered possession to his assignee. We are, of course, speaking of an assignment and delivery of possession actually and in good faith made, for the pleadings and unchallenged findings of the jury and the absence from the statement of specifications relating to this matter permit no other assumption as to the character of the assignment and delivery of possession in this case. It is therefore unnecessary to determine what the situation would have been if, as is now contended by respondent, the assignment and delivery by Sladky to Eaton had been fraudulent, for that question is not presented by the record. It is also entirely immaterial, so far as Sladky is concerned, whether or not he had been guilty of a violation of covenants of the lease. He was not guilty of unlawful detainer in retaining possession of the premises after breach of covenants, if there was a breach, so long as notice requiring the surrender of possession of the premises was not served upon him (*Schnittger v. Rose* [Cal.] 73 Pac. 449), and, the lease not forbidding an assignment, he certainly had the legal right to assign it, and deliver possession of the premises to the assignee, at any time before service of the notice to quit. Having so done, and not thereafter being either a tenant or in possession of any part of the premises, he could not be guilty of an unlawful detainer, for one can be guilty of unlawful detainer only "when he continues in possession in person or by subtenant," of the property, or some part thereof, after service upon him of the notice to surrender possession. Such is the express provision of our statute. Not being guilty of an unlawful detainer, he could not be liable for damages in the summary proceeding provided by statute therefor, for the only damages recoverable in such a proceeding are the damages caused by the unlawful detainer. Code Civ. Proc. § 1174. For such damages as may have been suffered by plaintiff by reason of any breach of the covenants of the lease by Sladky while he was a tenant under the lease and lawfully in possession of the premises thereunder, plaintiff must resort to the ordinary action, and cannot take advantage of the summary proceeding, designed solely to enable him to speedily recover possession of the demised premises and put an end to the lease. It is well

settled that this proceeding can be resorted to only in the cases and by and against the parties mentioned in the statute. *Martel v. Meehan*, 63 Cal. 47. The statute is so plain and unambiguous that it is unnecessary to cite authorities in support of the proposition that an assignee who has assigned the lease and delivered possession of the demised property to his assignee, prior to the service of the notice to quit, does not come within its terms. As was said in the early case of *Reed v. Grant*, 4 Cal. 176: "In such an action the 'holding over' is in fact the foundation of the action, and must necessarily be proved, like any other substantive fact. If this proof can be dispensed with, then any one may be called on to answer in like manner for the wrongful holding over of premises which he may at one time have been in possession of." See, also, *Steinback v. Krone*, 36 Cal. 309, 310. Under these circumstances, it is immaterial whether or not the evidence was conflicting in regard to other matters. The uncontradicted evidence and the unattacked findings as to the assignment and delivery of possession of Sladky prior to the service of notice to quit conclude the case in his favor so far as the question of sufficiency of evidence is concerned, and the trial court could not grant a new trial as to him on the ground of insufficiency of the evidence.

No other legal ground for the granting of a new trial as to Sladky appears in the record.

It is ordered that the order granting plaintiff's motion for a new trial be, and the same is, so far as it affects the defendant Sladky, hereby reversed.

We concur: BEATTY, C. J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; VAN DYKE, J.

(141 Cal. 673)

AMERICAN FIRE INS. CO. OF PHILADELPHIA v. HART. (S. F. 2,863.)

(Supreme Court of California. Jan. 19, 1904.)

FIRE INSURANCE—PROCURING ISSUANCE OF POLICY BY FALSE REPRESENTATION AS TO AUTHORITY—MEASURE OF DAMAGES.

1. Where a person falsely represents himself to a fire insurance company as an authorized agent of a property owner for the purpose of procuring insurance on the property, the measure of damages, in an action by the company for the false representation, is the actual expense to the insurance company of making, issuing, and delivering the policy.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; Wm. R. Daingerfield, Judge.

Action by the American Fire Insurance Company of Philadelphia against W. H. H. Hart. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Reversed.



Alyett R. Cotton, for appellant. A. D. D'Ancona, for respondent.

HAYNES, C. The defendant appeals from the judgment, and also from an order denying his motion for a new trial.

The plaintiff is a corporation doing business as a fire insurance company in this state. Its complaint in this action alleged, in substance, that the San Justo Mining Company is a corporation doing business in this state, having its principal place of business in San Francisco; that on December 12, 1898, the defendant requested the plaintiff to issue to said mining company a policy of fire insurance for the period of one year from noon of that date, in an amount not exceeding \$17,000, upon certain property of which it was the owner; that, at and before the time of making said request, defendant represented to the plaintiff that he was the agent of said mining company, and was authorized by it to procure said policy for it, and agreed, on its behalf, that it would pay to plaintiff, as the consideration and premium of said policy, the sum of \$367.50; that, relying upon said statement of the defendant, plaintiff issued said policy; "that defendant, as a matter of fact, was unauthorized by, and did not have authority from, said San Justo Mining Company to procure or request the issuance of said policy, and defendant knowingly exceeded his authority in procuring the issuance thereof by plaintiff"; that said mining company has failed and refused to pay said money, or any part thereof; and that by said acts of defendant plaintiff has been damaged in the sum of \$390, with interest from December 12, 1898, and prayed judgment therefor. Defendant's demurrer to the complaint for want of facts and for uncertainty was overruled, and he thereupon answered, putting in issue all its allegations. Upon the trial the court found for the plaintiff that defendant requested the issuance of the policy; "that, at and previous to the time of making said request, defendant represented and stated to the plaintiff that he was the agent of said San Justo Mining Company, and was authorized by it to procure said policy of it; that defendant agreed on behalf of said corporation that it would pay to plaintiff, as the consideration and premium for said policy, the sum of \$367.50 on said 12th day of December, 1898; that defendant was, as a matter of fact, unauthorized by, and did not have authority from, said San Justo Mining Company to procure or request the issuance of said policy, and defendant knowingly exceeded his authority in procuring the issuance thereof by plaintiff; that said San Justo Mining Company has failed and refused to pay said sum of \$367.50, or any part thereof; that, by the aforesaid acts of defendant, plaintiff was damaged in said sum of \$367.50."

The material questions in the case are raised by demurrer to the complaint, by the

contention that the findings do not support the judgment, and by motion for a new trial upon the ground of the insufficiency of the evidence to justify the findings, and errors of law occurring upon the trial. The principal questions presented are, however, whether the defendant incurred any liability, and, if so, what is the measure of his liability?

It is distinctly alleged and found "that defendant, as a matter of fact, was unauthorized by, and did not have authority from, the San Justo Mining Company to procure or request the issuance of said policy." Upon this allegation and finding, it is clear that no liability upon or under the policy ever existed against the plaintiff; nor does it appear that any claim or liability upon it has ever been asserted, either by the mining company or the defendant or other person. It was a mere failure to effect a valid contract of insurance, which would have entitled the plaintiff to receive from the mining company the amount of premium or charge for an insurance, and which, if valid, would have fixed upon the plaintiff the duty and liability to pay the amount of all loss and injury by fire which might have accrued to the property of the mining company during the term of the policy. The policy being void, no risk or liability was created or existed against the plaintiff. It is not contended by the plaintiff that the defendant is liable to it for the sum of \$367.50 as a premium or consideration for an insurance of the property described in the policy, for the policy was void, and no liability was created; but it is contended that plaintiff was injured to that amount, and is entitled to that sum as damages, because "its liability—its chances of loss—were exactly the same as if Hart's act had been authorized." But the property of the mining company was not insured by the plaintiff. The mining company did not authorize the insurance, nor ratify Hart's act, but insured its property in another company, and no risk was created against or incurred by the plaintiff, and it is conceded by plaintiff that its "damage is the value of the risk incurred." If no risk was incurred by the plaintiff, it followed that no damages were suffered, or at least none that are alleged in the complaint or specified in the finding. If insurance companies could sell policies at their usual rates which justified their liability for the risk of loss, but which created no liability for the loss if it should occur, it would evidently be a safe and profitable business. The premium agreed to be paid bears no just relation to the injury suffered, and it is therefore not the proper measure of the plaintiff's damage.

Conceding, however, that the plaintiff would be entitled to some damage by reason of the representations, we are of the opinion that the finding on that point is not sustained by the evidence. The profit which the plaintiff would have made by reason of the

excess of the premium over the actual cost of the insurance, in case of such a policy, is not the true measure of damage. The plaintiff simply failed to obtain the opportunity of issuing a valid policy and receiving the premium therefor. If the defendant had not made the representations as claimed, but had informed plaintiff of his want of authority, it by no means follows that the plaintiff would have succeeded in finding the person who was authorized by the mining company to act in that behalf, and would have succeeded in inducing such person to pay the premium and accept the policy. The representations of the defendant were therefore not the proximate cause of the failure to obtain the premium, nor of the resulting loss of profit. The only proximate result of the representations shown was the issuance of a policy which was without legal force or effect, and the only loss proximately caused would be the actual expense to the plaintiff of making, issuing, and delivering the policy. There was no evidence of such expense, and the finding that the plaintiff was damaged in the sum of \$367.50 is not sustained.

Our conclusions upon the question discussed render it unnecessary to discuss the alleged errors occurring in the rulings upon the questions of evidence during the trial.

The judgment and order appealed from should be reversed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

(141 Cal. 615)

**VALENTINE et al. v. POLICE COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 2,773).\***

(Supreme Court of California. Jan. 15, 1904.)  
CERTIORARI—PROHIBITION—REMEDY BY APPEAL—MINISTERIAL ACTS—PREVENTIVE RELIEF.

1. Under Code Civ. Proc. § 1067 et seq., providing for writs of certiorari when there is no remedy by appeal, certiorari will not lie to the police court to determine the validity of an ordinance on which a conviction was based, and the sufficiency of the complaint and judgment, but such subjects are determinable on appeal from the conviction, and cannot be reviewed on certiorari, though the right to appeal has been lost by laches, or where an appeal has been heard and decided adversely to appellant.

2. Prohibition cannot be resorted to where there is a plain, speedy, and adequate remedy by appeal.

3. Prohibition will not lie to review an order for the issuance of a bench warrant after conviction, although it be conceded that no appeal lies from such order, for the bench warrant issues as of course, and as a merely ministerial act, if the conviction be valid, and the validity of the conviction can only be determined by appeal.

4. Prohibition is a writ for preventive relief, and is not a writ of review; nor will it serve as

a second appeal, after the adverse determination of the only appeal given by statute.

**Commissioners' Decision.** Department 1. Appeal from Superior Court of City and County of San Francisco; Wm. P. Lawlor, Judge.

Petition for writs of certiorari and prohibition by W. D. Valentine and others against the police court of the city and county of San Francisco and Hon. Geo. H. Cananiss, judge thereof. From a judgment for defendants, plaintiffs appeal. Affirmed.

Geo. D. Collins, for appellants. Jos. F. Coffey, for respondents.

GRAY, C. A petition was filed in the court below for writs of certiorari and prohibition. On demurrer to this petition the defendant had judgment. Plaintiffs appeal from the judgment.

From the petition it appears that the plaintiffs were tried and convicted in the defendant court of the crime defined in Order No. 1,587, §§ 1, 34, of the board of supervisors of the city and county of San Francisco. The judgment was that the defendants each pay a fine in a given sum, and that in default of payment they be imprisoned, etc. It further appears that, after the conviction had in the police court, the case of the plaintiffs herein and defendants therein was appealed to the superior court, and the judgment was affirmed. Thereafter bench warrants were issued by the police judge for the arrest and imprisonment of defendants therein to satisfy said judgments. The purpose of this action is to have it declared that the said judgments and bench warrants are in excess of the jurisdiction of the police court, and that said judgments and warrants be annulled. It is accordingly here urged that the ordinance upon which the prosecution was based was void for several different reasons, that the complaint filed in the police court did not state any offense, and that the judgments of the police court, and the warrant based thereon, are also void. All these questions were the proper subject of investigation and determination upon the appeal taken to the superior court. And it is not the purpose of the law that these same questions should be reinvestigated and redetermined by the Supreme Court or by any other court upon application for a writ of certiorari or prohibition, or upon an application for both of those writs. The writ of certiorari issues only in cases where there is no remedy by appeal. Code Civ. Proc. § 1067; *White v. Superior Court*, 110 Cal. 54, 42 Pac. 471. And this rule applies with equal force where the right of appeal has been lost by laches. *Faut v. Mason*, 47 Cal. 7; *Bennett v. Wallace*, 43 Cal. 25. It is equally clear that the rule continues to apply after the appeal has been heard and determined, as in this case, adversely to appellants. "The statute [section 1067, Code Civ. Proc.] was intended to supply a remedy where none existed in the first

\*Rehearing denied February 13, 1904.

¶ 2. See *Prohibition*, vol. 40, Cent. Dig. § 5.

instance." *Bennett v. Wallace*, supra. It was never intended that it should be substituted for an appeal. *Faut v. Mason*, supra.

It is also settled that prohibition cannot be resorted to where, as here, there is a plain, speedy, and adequate remedy by appeal. *White v. Superior Court*, 110 Cal. 54, 42 Pac. 471. But appellant contends that the law does not give an appeal from the order of the police court directing the issuance of the bench warrants. Let this be granted for the sake of argument, and yet no theory is presented to us upon which the order for the bench warrant, or the bench warrant itself, can be held invalid, without a review of the judgment, and a determination that the latter is void. Unless we can review the case, and determine that the judgment is invalid, we must proceed upon the theory that it is valid; and, its validity being admitted, the bench warrant is also valid. Indeed, the issuance of the bench warrant follows of necessity upon the affirmance of the judgment upon an appeal, and no judicial function is thereby brought into exercise, but it is a mere ministerial act. The writ will not issue to restrain an act unless it involves the exercise of judicial functions. 2 *Bailey on Jurisdiction*, § 449; *Hull v. Superior Court*, 63 Cal. 179. The case of *Terrill v. Superior Court* (Cal.) 60 Pac. 38, is cited to uphold the right to prohibition herein. In that case no judgment had been entered against the petitioner, and it was sought by prohibition to prevent the entry of a judgment; it plainly appearing that the court had no power or jurisdiction to enter such judgment. The court held that the remedy by appeal given by the statute was not adequate, because it was not sufficiently speedy. In that case the hearing in this court was upon an original petition. The case before us is different from the *Terrill* Case in several respects. The most material difference is that here the judgment has already been entered, and has been reviewed on appeal and affirmed by the court of last resort. The writ of prohibition is confined to preventive relief, and is not intended as a writ of review, nor is it contemplated by the law that it shall serve the purpose of a second appeal after a party has already availed himself of the only appeal given him under the statute. The judgment here attacked has become a fixed judicial determination. This writ will not issue "to prevent judicial acts already done." *Hull v. Superior Court*, 63 Cal. 179; 2 *Bailey on Jurisdiction*, §§ 480, 481. "This writ is not the appropriate one to secure the annulment of proceedings already had." *More v. Superior Court*, 64 Cal. 345, 28 Pac. 117.

We advise that the judgment be affirmed.

We concur: HAYNES, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

(142 Cal. 12)

## PEOPLE v. OATES. (Cr. 1,063.)

(Supreme Court of California. Jan. 23, 1904.)

## CRIMINAL LAW—CRIME AGAINST NATURE—ATTEMPT—ASSAULT—STATUTES—AMENDING AND REVISING ACTS—SUFFICIENCY OF TITLE.

1. Act April 9, 1880, entitled "An act to amend sections [numbering consecutively 108 sections] and to repeal sections 969 and 1025 of the Penal Code, and to add a new section thereto, to be known as section 809, to provide for prosecutions by information, and to adapt the provisions of said Code thereto," each section amended reading, "Section [number] of the Penal Code is hereby amended so as to read as follows," is an amendment of the Penal Code, and not a revision thereof, so that a republication of the entire Code was not required by Const. art. 4, § 24, providing that no law shall be revised by reference to its title, but the act revised shall be re-enacted and published at length as revised.

2. The title sufficiently embraces the subject of the act, within Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be sufficiently expressed in the title.

3. The crime against nature being one punishable by imprisonment in the state's prison, Pen. Code, § 604, providing that a person who attempts to commit a crime so punishable, but fails, or is prevented or interrupted in the perpetration thereof, is punishable for said attempt, is applicable to the crime against nature.

4. Assault is not an element of the crime against nature, or of an attempt to commit the same, when the victim is not a human being.

Commissioners' Decision. Department 1. Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

James Oates was convicted of committing an attempt to commit an infamous crime against nature, and appeals. Affirmed.

Geo. D. Buckley, for appellant. U. S. Webb, Atty. Gen., E. B. Power, Dep. Atty. Gen., and Geo. L. Jones, Dist. Atty., for the People.

CHIPMAN, C. This is an appeal from the judgment of conviction upon an information charging the commission of the infamous crime against nature. The verdict was guilty of an attempt to commit the crime charged. Defendant appeals from the judgment, and contends that his motion in arrest of judgment, which was refused, should have been granted.

1. It is claimed that the act approved April 9, 1880, is unconstitutional and void. It is entitled "An act to amend sections [then follow 108 sections of the Penal Code, numbered consecutively as they there occur] and to repeal sections 969 and 1025 of the Penal Code, and to add a new section thereto, to be known as section 809, to provide for prosecutions by information, and to adapt the provisions of said Code thereto." Amendments Pen. Code 1880, p. 10, c. 47. The contention is, first, that the act is a revision of the Penal Code, and hence required a republication of the entire Code; second, that section 809 added another subject to the Code, making two subjects treated of in the amendment, only one of which is ex-

pressed in the title; third, that section 1159 (one of the amended sections) is inoperative and void so far as it relates to prosecutions by information, because the act itself is void. The provision of the Constitution involved is section 24, art. 4: "Every act shall embrace but one subject, which subject shall be sufficiently expressed in its title. \* \* \*

No law shall be revised or amended by reference to its title; but in such case the act revised or sections amended shall be re-enacted and published at length as revised or amended." We do not think the act before us is anything more than what its title declares it to be, viz., "An act to amend" the sections named and "to repeal" certain sections named and "to add a new section" to the Penal Code. It is in no sense a revision of the entire Code, *Beach v. Von Detten* (Cal.) 73 Pac. 187, is not unlike the present case, and is decisive of it. Here each section of the act amending any one section reads: "Section [giving the number] of the Penal Code is hereby amended so as to read as follows." The repealing sections of the act referred also to the said Code and so in adding the new section 809. In *Lewis v. Dunne*, 134 Cal. 291, 66 Pac. 478, 55 L. R. A. 833, 86 Am. St. Rep. 257, the attempt made was a revision of the Code of Civil Procedure. That case does not aid appellant.

2. The point that the title does not embrace the subject of the act seems to be met by *People v. Parvin*, 74 Cal. 549, 16 Pac. 490, referred to and commented upon in *Beach v. Von Detten*. It was there held that an act entitled "An act to amend section 3481 of the Political Code sufficiently expresses the subject of the act and meets the requirements of the Constitution." The act of May 12, 1881, is entitled "An act to amend section 3713 of the Political Code and to provide for the levy of the tax for state purposes. \* \* \*" Held, in *S. F. & N. N. R. R. Co. v. State Board*, 60 Cal., at page 34, to express the subject of the act. From what has been said it follows that section 1159 amended by the act is operative.

3. It is contended that sections 663, 664, Pen. Code, "apply exclusively to prosecutions for attempts to commit crime, and not for the crime itself," and that the court erred in instructing the jury that "a person who attempts to commit a crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable for said attempt." The instruction is in the language of the Code (section 664), and the case falls within one of the classes of offenses mentioned therein, namely, an offense punishable by imprisonment in the state prison. The instruction was not error.

4. It is urged that an attempt to commit the offense involved an assault, and must be directed against a person; citing *People v. Hickey*, 109 Cal. 275, 41 Pac. 1027. In that case the trial court refused to instruct the jury that the defendant might be convicted

of a simple assault. The court held here that the instructions should have been given. In that case it was held that the offense of assault is an element of the crime when committed on a human being, but not so when the victim is not a human being. If, therefore, assault is not an element of the crime here charged, it must follow that it is not an element of the offense involved in the attempt to commit the crime. It was not error to refuse the instruction.

5. The instructions asked by defendant and refused were based upon the erroneous assumption that defendant could not be convicted of an attempt to commit the crime charged. Besides, the court elsewhere fully instructed the jury upon the doctrine of reasonable doubt, and also upon the remaining question involved in the rejected instructions.

We advise that the judgment be affirmed.

We concur: SMITH, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

(141 Cal. 633)

#### PEOPLE v. TESHARA. (Cr. 1,013.)

(Supreme Court of California. Jan. 16, 1904.)

##### MURDER—CROSS-EXAMINATION OF ACCUSED.

1. The evidence of the prosecution in a murder case set forth the events in a saloon, at cards, between the accused, deceased, and two others, culminating in the murder. Accused testified on his own behalf, beginning his account at a time later in the evening than the evidence of the prosecution first referred to. Held, that he might properly be cross-examined as to the whole transaction, including matters occurring before the time as to which he testified.

In Banc Appeal from Superior Court, Santa Cruz County; W. M. Conley, Judge.

Joseph Teshara was convicted of murder in the second degree, and appeals. Affirmed.

For former opinion, see 66 Pac. 798.

Carl E. Lindsay, for appellant. U. S. Webb, Atty. Gen., and Benj. K. Knight, Dist. Atty., for the People.

SHAW, J. The defendant appeals from a judgment of conviction of murder in the second degree and from an order denying his motion for a new trial. The error assigned is that upon the trial the court allowed the prosecution in the cross-examination of the defendant to ask questions not relating to matter testified to by him upon the examination in chief.

There was no evidence for the prosecution showing the circumstances of the homicide other than that contained in the dying declaration of the deceased, Garrett D. Loucks. He was a saloon keeper in Santa Cruz. According to this declaration, as illustrated by a map of the premises introduced in evidence, the defendant and one Manuel Amaya came

into his saloon on the evening of February 10, 1900, and Teshara asked Loucks to play a game of pedro. They sat down in the card room (which was immediately behind the front room or the barroom, as it is called) and played two games. Teshara then asked Amaya to play, but Amaya said he did not want to do so, and about that time Patrick Morrissey came into the saloon, and asked Teshara to take a drink with him. The two each drank, Morrissey left, and Loucks and Teshara played two more games and part of another; whereupon Amaya, who was sitting on a lounge behind Loucks, struck him over the head with something several times, and ran for the front door, the deceased following him, and Teshara following behind the deceased. When the deceased had reached the middle of the front room, Amaya shot him in the breast, and Teshara, being still behind Loucks, called out: "Kill him! Kill him! Don't let him get away." Amaya then fired another shot, hitting Loucks in the abdomen, and he fell. Shortly afterwards Loucks was found in the saloon badly wounded. Two days afterwards he died of the wounds. There was other testimony to the effect that Teshara and Amaya had been seen together on that evening shortly before the homicide, going toward the saloon. Morrissey also testified that he entered the saloon and treated Teshara to a drink, as stated in the dying declaration.

In his examination in chief the defendant testified that he had lived in Santa Cruz the greater part of his life; that he knew Patrick Morrissey, and remembered that Morrissey came into Loucks' saloon on the night of February 10, 1900; that he had a drink with Morrissey on that occasion; that Morrissey left the saloon; that two or three minutes afterwards the defendant himself left the saloon and went to bed, leaving Loucks standing behind the bar in the saloon, alive, uninjured, and well, and that he did not again see Loucks that night. It will be observed that the defendant gave no testimony whatever relating to any occurrence, in the saloon or elsewhere, before the entrance of Morrissey, and that his relation of the facts occurring at and subsequent to Morrissey's entrance corresponded exactly with Morrissey's statements during his presence, and differed entirely from the statements in the dying declaration as to what took place after Morrissey's departure. Upon cross-examination the district attorney began by asking questions relating to occurrences in the saloon prior to Morrissey's entrance, to which objections were sustained by the court. The district attorney then said: "I think I ought to have a chance to show how he arrived at the saloon, and who was with him if any one," to which the court said, "I think you will." A number of questions were then asked, in answer to which the defendant testified that Patrick Morrissey was in the saloon for a while; that after the defendant arrived at the saloon he went into

the card room; found deceased seated at a table engaged in a game of solitaire; that they greeted each other, and thereupon the deceased proposed a game of pedro with him. Many of the questions were objected to, but two questions were asked which elicited the fact that Manuel Amaya was in the saloon with the defendant and went into the card room with him, and to these questions there was no objection, nor was there any motion to strike out the answers. The statement as to what took place after he went into the card room was given in answer to the question: "What did you do after you got into the card room?" During the answer to this question one or two minor questions were interjected, but the witness continued with his answer until he made the statement that the deceased had proposed a game of pedro; thereupon the court interrupted, saying: "Strike out the last answer, ruling is reversed, and the objection is sustained. You will have to confine yourself to matters brought out on direct examination. The cross-examination must be confined to those matters and nothing else." Thereafter the cross-examination proceeded at considerable length, during all of which the district attorney was rigidly limited to facts occurring at and after the time when Morrissey entered the saloon. Many of the questions related to occurrences when Morrissey was there and afterwards were vigorously objected to by the defendant's counsel. We think there is manifestly no error in these questions. The defendant had attempted in his direct examination to state what occurred from the time Morrissey entered until he himself left the saloon, and his statements as to facts occurring after Morrissey left impliedly contradicted the dying declaration of the deceased. It was proper cross-examination for the prosecution to ask him concerning other matters that occurred during the time as to which he testified, and which he did not mention in his direct examination.

With respect to the facts elicited at the beginning of the cross-examination relating to matters occurring before the entrance of Morrissey, we are of the opinion that whatever there was of the evidence thus elicited that was injurious to the defendant was cured by the voluntary testimony of the defendant in the subsequent cross-examination. As to the evidence showing that a card game was proposed by Loucks, we do not perceive that it was harmful or material. In his cross-examination relating to the occurrences subsequent to Morrissey's entrance, the defendant testified that he was playing the last hand in a card game at a table in the card room at the time Morrissey entered. These facts being elicited, it was not particularly important to inquire how long he had previously been engaged in the game, nor who proposed it. With regard to the presence of Amaya in the room, the defendant in his subsequent examination volunteered the state

ment that Amaya was there prior to the entrance of Morrissey. The district attorney had asked him some questions relating to the position of the defendant at the time Morrissey entered the room. Thereupon this question was asked: "Q. Where was Manuel Amaya at this time?" An objection to this question was properly overruled, as the time referred to was the time of Morrissey's entrance. The answer was: "Manuel Amaya was seated in a chair on the opposite side of the table." The witness was then asked: "This has reference to the immediate time that Morrissey came in?" to which he answered: "Why Amaya was not there at all at the time Patrick Morrissey came in; there was no one there outside of Mr. Loucks and I. Mr. Morrissey made the third party." Neither the court nor counsel could foresee that the witness would misunderstand the question with reference to the whereabouts of Amaya. There was no motion to strike out the answer, and hence it remained as part of the testimony, and fully disclosed to the jury the fact that Manuel Amaya had been in the saloon prior to the entrance of Patrick Morrissey. All this testimony, of course, to some extent corroborated the dying declaration, but in so far as it was objected to we do not think it transcended the limits of cross-examination.

We have discussed the case so far upon the theory that any inquiry as to the occurrences in the saloon prior to Morrissey's entrance would not have been proper cross-examination. We are of the opinion, however, that the limits of proper cross-examination were not exceeded, even if the objections made should be considered as properly applying to all the questions with respect to such prior occurrences which were answered by the defendant, and even if the facts disclosed were material.

The statement of the deceased showed that the defendant and Amaya had entered the saloon together that evening, and had remained there until after Morrissey departed; that Amaya, in the presence of Teshara, then struck and shot the deceased; that Teshara encouraged Amaya to kill the deceased, whereupon Amaya shot again, and that when Teshara left the saloon the deceased had received his death wound and had fallen to the floor. Teshara's direct testimony showed, in effect, that he did nothing in the saloon except to drink with Morrissey, and that he went away a few minutes afterward, leaving Loucks in the saloon alone, alive, well, and uninjured, standing behind the bar. It was equivalent to a denial of all the facts stated by Loucks as occurring after the departure of Morrissey, and therefore to a denial of any part in, or knowledge of, the killing, and of any participation with Amaya in the offense. A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against

him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies. He can be cross-examined with respect to facts or denials which are necessarily implied from the testimony-in-chief as well as with respect to facts which he expressly states. And he cannot, by beginning his narrative at a particular moment of the occurrence, limit the cross-examination to the same exact period. The cross-examination may extend to the whole transaction, of which he gives a part, and which occurred in immediate connection with the part he relates, shortly before or after, and in which he must have been concerned, or of which he may be reasonably supposed to have had knowledge. Therefore it was proper to ask him with respect to things which occurred in the saloon that evening after he entered and in his presence or hearing, and also concerning the persons who were with him at and after the time of his arrival. In substance and effect he had denied that Amaya was in the saloon at the time he left. It was proper to show, if possible, on his cross-examination, that Amaya and he came there in company, and remained there together for a considerable part of the evening preceding the time when he chose to begin his narrative of events. It would tend to some extent to show that Amaya was there after Morrissey departed, and to contradict to that extent his implied denial of Amaya's presence there at all after that time. Also it was proper to prove the previous games of cards to impeach his implied denial that any games were played immediately preceding his own departure. Both Loucks and Morrissey said that Morrissey when he came in had interrupted the game of cards at which Loucks and defendant were engaged. If the games had been going on for some time before the interruption, it would furnish some slight ground for an inference that the play was resumed after Morrissey left.

No other questions are presented upon the record. It is therefore ordered that the judgment and order appealed from be affirmed.

We concur: BEATTY, C. J.; ANGEL-LOTTI, J.; LORIGAN, J.; HENSHAW, J.; VAN DYKE, J.

(141 Cal. 683)

PEOPLE v. CHUTNACUT. (Cr. 1,059.)

(Supreme Court of California. Jan. 19, 1904.)

GRAND LARCENY—CONTINUANCE—JUROR—COMPETENCY—VOIR DIRE TESTIMONY—SUFFICIENCY—APPEAL AND ERROR.

1. Defendant was charged with having, in company with S. and others, stolen a cow at a certain time. He moved for a continuance on an affidavit stating that two witnesses named therein had been subpoenaed, and were not in attendance, and that he expected to prove by them that at the time of the alleged larceny S. was three or four miles from where the larceny was committed. The affidavit did not show that

the witnesses could not be reached by attachment, nor that they could reasonably be expected to have been procured if the court had granted the motion. *Held*, that the overruling of the motion was not cause for reversal.

2. Where a juror is made to say on the voir dire cross-examination that he would have to be satisfied of the "innocence" of defendant, in a prosecution for grand larceny, before he would vote for his acquittal, in answer to a long and involved question, concerning which the cross-examiner admitted, in answer to a question by the court, that he had used the word "innocence" therein instead of "guilty" by mistake, a challenge of the juror on that ground is not sustained.

3. It is not the duty of the Supreme Court to look at instructions refused and given at certain folios of the transcript and certain sections of the Code cited by counsel in order to discover error for the purpose of reversing a case.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Juan Chutnacut was convicted of grand larceny, and appeals. Affirmed.

Dadum & Escobar, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

COOPER, C. Defendant was convicted of grand larceny, and appeals from the judgment and order denying his motion for a new trial. He claims that the court erred in denying his motion to postpone, in denying his challenge to a juror, and in regard to instructions given and refused.

A motion for the postponement of a case on the ground of the absence of a witness rests very much in the discretion of the trial court. It is only in a plain case of abuse of such discretion that we would interfere. The affidavit on which the motion was based stated that two witnesses, named therein, had been subpoenaed and were not in attendance; that the evidence was claimed to be material for the reason that the prosecution claimed that on the 28th day of February, 1903, at about 6 o'clock p. m., the defendant and one Syvoymolt, with two other Indians, stole the cow described in the information; that the defendant expected to prove by the absent witnesses that at the time of the alleged larceny Syvoymolt was at their house, some three or four miles distant from the place where the larceny was committed. In other words, the defendant expected to prove an alibi as to Syvoymolt, but Syvoymolt was not a defendant, and was not being tried. The evidence was therefore wholly immaterial, unless it might have been for the purpose of impeachment under certain conditions that might have arisen. Certainly, where the conditions must arise during the trial under which certain evidence might be admissible for the purposes of impeachment, the court did not abuse its discretion in denying the continuance. Furthermore, the affidavit did not show that the witnesses could not be reached by attachment, nor that they could reasonably be expected to have been procured if the court had granted the motion.

The court did not err in refusing to allow the defendant's challenge to the juror Airhart on the ground of actual bias. In cases where the evidence is such as to be capable of only one construction, and plainly and clearly shows the bias of the juror, the action of the trial court in disallowing the challenge is reviewable here. *People v. Wells*, 100 Cal. 231, 34 Pac. 718; *People v. Scott*, 123 Cal. 434, 56 Pac. 102; *County of Mono v. Flanagan*, 130 Cal. 108, 62 Pac. 293.

We have examined the record fully, and the questions and answers concerning the qualifications of the juror, and we not only find the evidence sufficient to support the view taken by the trial court, but we think the challenge was properly denied. The juror testified that he would not convict the defendant on any less evidence than if he were a white man; that he had no prejudice against him nor against Indians; that he would give the defendant the benefit of any reasonable doubt, and be guided by the instructions of the court. Counsel seem to lay much stress upon the fact that in cross-examination of the juror he was apparently made to say that he would have to be satisfied of the innocence of the defendant before he would vote for his acquittal; but the evidence, when fully examined, is not capable of such construction. The questions and answers following the part claimed to show the juror to have so answered are as follows: "Q. Would it take less evidence to convince you of the innocence of this defendant because he is an Indian? A. No, sir. Q. The court will instruct you that, if there exists in your mind a reasonable doubt as to the innocence of the defendant, it is your duty as a juror to so vote. That being the law, and you having convictions to the effect that you would not vote for a person's innocence unless you was positively convinced of it, would that law hinder you or impede you in any way in rendering a verdict, and would it be against your conscience to vote for his innocence because you was not positively convinced of it? A. I would do what I thought was right in my own mind. I would have to be convinced otherwise from argument. Q. What would you do under those conditions? A. I do not understand that. Q. (Repeated by reporter.) A. No; I think not. The Court: Do you mean reasonable doubt of his innocence or a reasonable doubt of his guilt? Attorney for Defendant: I should have said reasonable doubt of his guilt, your honor."

In the brief under the heading, "Instructions given and refused," we find the following language in defendant's brief: "And when the court refused to give the instructions asked for, and gave the instructions (Tr., folios 41, 44, 45) deprived the jury of the law which they were entitled to have as their guide, and took away the right to determine whose cow it really was when the instruction was given as shown in folio 41. Pol. Code, §§ 3167, 3168, 3169, 3170, 3171, 3172." It is not

the duty of this court to look at instructions refused and given at certain folios and to examine certain sections of the Code in order to discover error for the purpose of reversing a case. If counsel will not take the time to point out the particular instruction or instructions upon which he predicates error, and the law which he invokes, we will not do so. *People v. McLean*, 135 Cal. 309, 67 Pac. 770; *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181.

We advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: VAN DYKE, J.; SHAW, J.

ANGELLOTTI, J. (concurring). I concur in the judgment. The affidavit for continuance did not show the materiality of the proposed testimony of the absent witnesses so far as the charge against this defendant was concerned; the testimony of the juror Airhart was sufficient to sustain the finding of the lower court that he was qualified; and no error is apparent in the matter of instructions to the jury.

(141 Cal. 710)

BAKER v. SAN FRANCISCO GAS & ELECTRIC CO. (S. F. 2,829.)\*

(Supreme Court of California. Jan. 20, 1904.)  
GAS—REFUSAL TO FURNISH—PENALTY—PRIOR INDEBTEDNESS—PAYMENT—SUFFICIENCY OF TENDER.

1. Civ. Code, § 629, provides that on the written application of the owner or occupant of a building, and payment of all money due from him, a gas company must supply gas for such building, and on refusal for 10 days shall pay \$50 as liquidated damages, and \$5 a day thereafter. Section 1500 provides that an obligation for the payment of money is extinguished by a due offer of payment if the amount is immediately deposited in the name of the creditor with some bank, and notice given to the creditor. *Held*, that a tender of the amount already due for gas, unaccompanied by a deposit thereof to the credit of the gas company, was insufficient to lay the basis for an action under section 629.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Emma C. Baker against the San Francisco Gas & Electric Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Van Ness & Redman, for appellant. Bishop, Wheeler, & Hoefler, for respondent.

GRAY, C. This action was brought to recover \$530 as liquidated damages, under section 629, Civ. Code, for refusal and neglect of defendant to supply plaintiff with gas from January 9, 1900, to April 9, 1900. The defendant had judgment, and plaintiff appeals.

The case was tried upon an agreed statement of facts, which is made the findings

in the case by stipulation between the parties. So far as necessary to this opinion, these facts are as follows: Plaintiff formerly resided at 124 Fulton street, San Francisco, and there took gas of defendant after depositing with it \$5 in advance and receiving in return a receipt as follows: "Received from E. C. Baker, five dollars as deposit in advance for gas to be used at premises No. 124 Fulton Street. This deposit is only to be refunded upon the surrender of this certificate at final settlement. The regular bills of the company must be promptly paid without reference hereto. For the Company, W. Keegan." Plaintiff moved from Fulton street October 20, 1898, to 301 Grove street, in said city, owing \$3.85 for gas used at the Fulton street house. Plaintiff continued to take gas of defendant at the Grove street house, and on December 22, 1898, defendant presented to her a bill for \$2.45 for gas used at the Grove street house, and also a bill for \$3.85 for the gas consumed on Fulton street. The plaintiff thereupon offered to pay the \$2.45 for gas used on Grove street, and offered to surrender to defendant the aforesaid receipt for the \$5 deposit, and authorized defendant to deduct from said deposit said sum of \$3.85 due for gas used on Fulton street. The defendant refused so to do, and notified plaintiff that, unless the sum of \$6.30 was paid to it before noon of January 13, 1899, defendant would discontinue supplying said building on Grove street with gas. Plaintiff failed to comply with this notice, and the gas was accordingly shut off by defendant. On January 20, 1899, plaintiff, in writing, demanded of defendant that gas be supplied for the Grove street house, but defendant refused to do so, and continued to refuse during the time involved in this action.

The section 629, Civ. Code, upon which this action is based reads as follows: "Upon the application in writing of the owner or occupant of any building or premises distant not more than 100 feet from any main of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars a day as liquidated damages for every day such refusal or neglect continues thereafter." The agreed statement shows that the house was within a hundred feet from the defendant's main, that the application in writing was given as required by the statute, and 10 days elapsed and no gas was furnished by defendant. The action being based upon the statute, which is penal in its nature, strict compliance with its provisions must be shown by plaintiff to

\*Rehearing denied February 12, 1904.



entitle her to the remedy provided by its terms. It is conceded that there was no actual payment of the amount due for gas used at the Grove street house, but it is urged by plaintiff that payment was waived and excused by plaintiff's tender of the money and defendant's refusal to accept it. We do not think payment was excused because of the refusal to accept the money so as to give a right of action under the statute already quoted. The complaint alleges that at the time the gas was shut off and demand to continue the same was made, the plaintiff was not indebted to the defendant. This could not be true unless the obligation to pay for the gas previously supplied to the Grove street house had been extinguished. If, upon the refusal to accept the tender, plaintiff had deposited the money with a bank to the credit of defendant, she would have thereby "extinguished" the obligation, and perhaps there would then have been no indebtedness remaining, as is contemplated by section 629, Civ. Code. Section 1500, Id., provides: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state of good repute, and notice thereof is given to the creditor." Nothing short of a compliance with this section can be held to constitute payment, or to extinguish the debt so that payment would be unnecessary within the meaning of the section upon which this action is based, for it will be seen that the latter section 629, Id., does not give the right of action to a party upon waiver of payment, or when the payment is excused merely, but only on and after what may be treated in law as an actual payment of the amount due the defendant does this right arise to recover the penalty provided by the statute. The facts set forth in the agreed statement fail to meet the requirements of the law, because they do not show either actual payment for the gas at the Grove street house, or what might be held to be the extinction of the debt, merely, a compliance with section 1500, Id.

We advise that the judgment be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

(141 Cal. 725)

AGARD v. SHAFFER, County Auditor. (L. A. 1,406.)

(Supreme Court of California. Jan. 21, 1904.)  
COUNTY RECORDER—FURNISHING CLERICAL FORCE—DISCRETION OF BOARD OF SUPERVISORS—EFFECT ON COMPENSATION—CONSTITUTIONALITY OF STATUTE.

1. Pol. Code, § 3678, requiring the county recorder to transmit to the assessor abstracts of mortgages, etc., and providing that, "when necessary, the board of supervisors \* \* \* must

provide for the payment of such additional clerical force" as the section necessitates, is in conflict with Const. art. 11, § 5, providing that the Legislature shall regulate the compensation of county officers.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by W. E. Agard against E. Shaffer, as auditor of San Diego county. Judgment for plaintiff, and defendant appeals. Reversed.

Cassius Carter, Dist. Atty., and W. R. Andrews, Dep. Dist. Atty., for appellant. Sterns & Sweet, for respondent.

GRAY, C. The respondent, Agard, in a clerical capacity, assisted the recorder of San Diego county in the preparation of abstracts of mortgages to be furnished to the assessor of the same county, pursuant to the provisions of section 3678 of the Political Code. The board of supervisors of said county thereafter determined that the employment of respondent by the recorder was necessary to do such work, and allowed his claim therefor, amounting to \$1,304. The county auditor refused to draw his warrant for the claim, and Agard brought this proceeding in the superior court, and obtained judgment requiring the auditor to draw his warrant on the county treasurer for the amount of the claim. The auditor appeals.

One contention of appellant is that said section 3678 of the Political Code is in conflict with article 11, § 5, of the Constitution, in that it leaves, in some measure, at least, the regulation of the compensation of a county officer to the board of supervisors. We think this contention must be upheld. The section of the Code referred to reads as follows: "To assist the assessor in the performance of his duties, the recorder must annually transmit to the assessor, on or before the first Monday of April of each year, a complete abstract of all mortgages, deeds of trust, contracts and other obligations by which any debt is secured, remaining unsatisfied on the records of his office," etc. "When necessary, the board of supervisors of each county must provide for the payment of such additional clerical force as may be required to enable the county recorder to comply with this section." The said section 5, art. 11, of the Constitution, provides as follows: "The Legislature, by general and uniform laws, shall provide for the election or appointment in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of all such officers in proportion to the duties, and for this purpose may classify the counties by population," etc. If the quoted section of the Code is followed, it may well be that in some counties the board of supervisors will be of opinion that clerical

assistance of the recorder to perform the official duties prescribed by the section is entirely unnecessary, and as a consequence such recorder will be compelled to pay his clerical help out of his own salary. In other counties an abundance of clerical assistance may be furnished the recorder, and compensated directly from the county treasury. Thus it may be seen that the compensation of the recorder may be increased or diminished by the action of the several boards of supervisors under the statute. It was the purpose of the constitutional provision quoted that the Legislature should regulate the compensation of all such officers in proportion to duties, and it was not intended that such compensation should be left either directly or indirectly to the discretion or regulation of the board of supervisors. This is clearly pointed out in *Dougherty v. Austin*, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, and *Welsh v. Bramlet*, 98 Cal. 222, 33 Pac. 66, and the reasons fully given. The same principle was referred to in *Tulare County v. May*, 118 Cal. 306, 50 Pac. 427, and the previous decisions upon this point in *Dougherty v. Austin*, supra, and *Welsh v. Bramlet*, declared to be correct. In the cases cited the compensation of deputies to be allowed or disallowed by the board of supervisors was the point wherein the statutes were held to be in violation of section 5, art. 11, of the Constitution. In the statute before us in this case the compensation was to be allowed by the board to "additional clerical force" to assist the recorder in performing his official duties. In principle, there is no difference between helping out the recorder's compensation by furnishing him a deputy to perform the work of the office, and furnishing him a "clerical force" to do the same thing. The one affects his compensation in exactly the same manner as the other. And if the power to do the one thing should not be delegated to the board of supervisors, then the power to do the other thing should not be so delegated. Respondent cites the case of *Kirkwood v. Soto*, 87 Cal. 397, 25 Pac. 488, as being the same in principle as the case at bar. It will be seen on an examination of that case that section 5, art. 11, of the Constitution is not discussed or even referred to. The court in that case, however, does distinguish between the "incidental expenses of the office" and "compensation for services to be rendered," and that distinction might well render the provision of the statute there under discussion not obnoxious to the provisions of section 5, art. 11, of the Constitution. The case is therefore inapplicable to the question here decided.

We advise that the judgment be reversed.

We concur: HAYNES, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment is reversed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

(141 Cal. 659)

**HARTER v. CITY OF SAN JOSE et al.**  
(S. F. 2,836.)

(Supreme Court of California. Jan. 18, 1904.)  
**MUNICIPAL CORPORATIONS—PARKS—LEASING  
FOR HOTEL PURPOSES—INJUNCTION—STATUTES.**

1. Act March 13, 1872, § 63 (St. 1871-72, p. 333, c. 254), provided that a certain tract of land "be and the same is hereby declared a public park," and gave a right to a city to lease the same. The act took effect immediately. Thereafter, March 15, 1872, the Legislature passed another act, creating a board of commissioners, and providing that such park should be designated by suitable monuments, and remain a public park forever, under the control of the board of commissioners thereby created. *Held*, that the land had been dedicated as a park under the act of March 13, 1872, and the latter act could not affect the dedication of that which had already been dedicated, but only placed the control of the park in the board of commissioners, so that any provision in the first act authorizing the leasing of such park by the mayor and council was not affected by the latter act.

2. The execution by the mayor and council of a lease of a portion of a public park for hotel purposes for 25 years, pursuant to San Jose City Charter (St. 1897, p. 602, c. 15) § 1, subd. 19, subc. 2, art. 3 (such park having been neither dedicated nor conveyed by an individual to the public for the purpose of a park), will not be enjoined at the suit of a resident taxpayer, though Civ. Code, §§ 711, 718, forbid the leasing of municipal property for a longer period than 10 years, as such lease, if subject to such sections, would not be void except as to the excess of the period.

Commissioners' Decision. Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by George Harter against the city of San Jose and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Henry French and Rodgers, Paterson & Slack (Charles W. Slack and Jerome L. Van Dewerker, of counsel), for appellant. W. A. Beasley, Frank H. Benson, and H. L. Partidge, City Atty., for respondents.

COOPER, C. Upon the filing of the complaint in this action the court below granted a temporary injunction. Afterwards an amended complaint was filed. To this complaint defendant demurred, and at the same time moved to dissolve the temporary injunction. The court sustained the demurrer, and made an order dissolving the injunction. Judgment was thereupon entered in favor of defendants. Plaintiff appeals from the judgment and the order dissolving the injunction.

Plaintiff, as a resident and taxpayer of the city of San Jose, seeks to maintain the action against the city and the other defendants—the mayor and common council—to enjoin them from executing a lease. The complaint alleges that there is, within the county of Santa Clara, subject to the jurisdiction of San Jose, a tract of land of about 400 acres known as the "City Reservation," or "Alum Rock Park," and that the same is a public park, to the free use of which the plaintiff and the people of the city are entitled; that

the defendants are about to, and will unless restrained, execute and deliver a lease to one Terry of 2½ acres of the said park for hotel purposes for a period of 25 years; said proposed lease being set out in an exhibit annexed to the complaint. It is further alleged that the defendants have no power to execute the said lease; that such lease will deprive plaintiff and the residents of said city of the free use of the said park, destroy and injure the trees and shrubbery growing thereon, and mar the natural beauty thereof, to the great and irreparable injury of plaintiff and the residents of the city of San Jose.

The present charter of the city provides that a portion of the city park "may be leased for hotel purposes only, not exceeding two and one-half acres, for a term of not more than twenty-five years, but no such lease shall in any manner restrict or interfere with the free use of the waters and grounds of the park by the public." Section 1, subd. 19, subc. 2, art. 3, Charter of San Jose (St. 1897, p. 602, c. 15). The contemplated lease is of 2½ acres, and for the term authorized by the charter, and provides: "The premises leased hereby, and the business conducted thereon shall at all times be subject to such stipulations and restrictions as may be prescribed by the Park Commissioners, and this lease shall not, in any manner restrict or interfere with the free use of the waters or grounds of the park by the public." Therefore it is plain that the present charter gives the authority to execute the lease. In fact, the appellant does not contend otherwise.

The main contention is that the park was dedicated to the public solely for a public park, and that the city authorities cannot devote any portion thereof to other purposes. The cases cited and relied upon in support of the contention arose where the original title was conveyed by private parties for the use of a park, or other named public use. For the purposes of this case, it may be conceded that where the title is in a private party, and such private party conveys land to the public for a certain definite public purpose, it cannot be diverted to another and different purpose, not connected with the original dedication. The title in such case remains in the original owner, subject to the public use. The public takes it in trust, and for the public purpose designated in the instrument of conveyance. There may be cases where the public authorities have diverted or dedicated the property of the municipality for a public park or other public purpose under such circumstances that individuals have acquired rights with reference thereto that would entitle such individuals to insist that the city authorities should not be allowed to divert the property to other and independent purposes, but in this case the property was not dedicated or conveyed by an individual to the public for the purposes of a park. The plaintiff does not claim to be the owner, nor to have acquired any rights with reference to the park other than

such as are possessed by every taxpayer in the city.

It appears that on September 13, 1866, it was resolved by the mayor and common council that the committee on public buildings proceed at once to cause a survey of such parts of the lands on and in the vicinity of Penitencia creek as they may deem necessary for the purpose of being set apart for a public park. In March, 1867, the present park was by virtue of said resolution surveyed by one Bowen, the county surveyor, and a plat and field notes made. On March 13, 1872, the Legislature passed an act entitled "An act to re-incorporate the city of San Jose." St. 1871-72, p. 333, c. 254. Section 63 of this act provided that the tract of land surveyed by Bowen (being the present park) "be and the same is hereby declared a public park."

\* \* \* Provided that said mayor and common council may lease the same for a term not exceeding ten years upon such terms and conditions as they may deem proper, but such lease shall not authorize or permit any use or disposition of said park or reservation as to prevent the free use thereof during the existence of such lease by the people of said city as a public park." The said act took effect immediately. The acts of the city authorities, as thus approved by the Legislature, constituted a dedication by the city to itself as a public park. No acceptance, other than this, was necessary. The dedication was complete upon the approval of the act. *Hoadley v. San Francisco*, 50 Cal. 273. Thus it is plain that the original dedication authorized the mayor and common council to lease all the park upon such terms and conditions as they might deem proper, the term of such lease not to exceed ten years. The act did not attempt to specify the purpose for which such lease might be executed, but left it wholly in the discretion of the mayor and common council. Thus the dedication was on the condition that the park, or any portion of it, might be leased. On March 15, 1872, the Legislature passed another act entitled "An act to provide for the opening and improving of Santa Clara avenue, in the county of Santa Clara." St. 1871-72, p. 370, c. 269. This act created a board of commissioners, who were authorized to expend money and improve Santa Clara avenue. It was therein provided that "said land thus selected [the park] shall be designated by suitable monuments and shall be and remain a public park for public uses forever, and shall be under the charge, control and management of the board of commissioners hereby created."

Appellant contends that this latter act had the effect of making a dedication of the park, without any conditions as to leasing or any power to lease. We do not think such was the effect of the act. The tract of land had already been dedicated by the city authorities under the former act of March 13, 1872. The latter act could not dedicate that which had already been dedicated. It could and did

place the management and control of the park in the board of commissioners. If appellant's argument be conceded, then it must also be conceded that the Legislature could, after the dedication, change the conditions upon which the dedication was made from time to time. And this the Legislature has done. Thus in March, 1874, the charter of the city was amended, and the provisions as to leasing retained in substance as in the original act of March 13, 1872, authorizing the city authorities to lease for 10 years on such terms and conditions as they deem proper. St. 1873-74, p. 418, c. 289. A few days later the Santa Clara avenue act of March 13, 1872, was amended, authorizing the board of commissioners to lease any portion of the park for the purpose of securing the erection of buildings for resort, refreshment, and bathing. 1873-74, p. 539, c. 377. On March 16, 1878, the charter was again amended, retaining the substance of the original provision in regard to leasing. St. 1877-78, p. 289, c. 241. On the last-named day another act was passed for the purpose of putting an end to the authority of the board of commissioners of Santa Clara avenue. This act again placed the management of the park in the mayor and common council, and authorized them to lease the whole or any portion of the park upon such terms and for such periods, not exceeding 10 years, as they might deem advisable. St. 1877-78, p. 290, c. 242. The charter was again amended in 1891, authorizing the mayor and common council to lease any portion of the park for a term not exceeding 20 years. St. 1891, p. 97, c. 93. Finally the present charter, approved by concurrent resolution on March 5, 1897, expressly authorizes a lease "for hotel purposes only, not exceeding two and one-half acres, for the term of not more than twenty-five years." St. 1897, p. 602, c. 15. Thus it is readily seen that every charter of the city, including that dedicating the park, up to the present time, has authorized the leasing of the park, or portions thereof. It therefore appears clearly that the contemplated lease was in the minds of the city authorities and of the Legislature at the time the property was dedicated. Further, it does not clearly appear that, in the absence of any power to lease in the original dedication, the same parties who dedicated the land for a park might not agree to a use of a portion of it for hotel purposes. The charter was adopted by the city and by the Legislature.

It was said in *Brooklyn Park Com. v. Armstrong*, 45 N. Y. 242, 6 Am. Rep. 70: "Where the property is taken, the owner paid its true value, and the title vested in the public, it owns the whole property, and not merely the use; and, though the particular use may be abandoned, the right to the property remains. The property is still held in trust for the public by the authorities. By legislative sanction it may be sold, be changed in its character from real to personalty, and the

avails be devoted to general or special public purposes. \* \* \* The Legislature could discharge it from the trust to hold it for a park, and empower it to sell. It has done so, and, so far as any express limitation in our state Constitution is concerned, it had the power to do so." In *Commissioners of Franklin County v. Lathrop*, 9 Kan. 463, it is said: "The conveyance once made, the trust is created. It can be destroyed only by the consent of the grantor of the trust and the beneficiary. It is beyond the reach of legislative power. But we are told that the grantors of this trust, by their subsequent conveyance, have conveyed all their remaining interests to the plaintiffs in error; that the public is the beneficiary; and that the Legislature represents the public; so that we have here the consent of the grantor, the trustee, and the cestui que trust. This is probably true, and, if this consent had been given before any private rights had been built up on this trust, it is difficult to see how this injunction could be sustained." It was, however, held in the latter case that as the defendant had purchased after the property had been dedicated as a public square, and had made lasting and valuable improvements, which were enhanced by the square, and would be diminished by a change, the trust could not be destroyed. The rule is discussed in *Dillon on Municipal Corporations* (4th Ed.) § 651, and it is there said: "As between the municipality and the general public, the legislative power is, in the absence of special constitutional restrictions, supreme, and so it is in all cases where there are no private rights involved. If the municipal corporation holds the full title to the ground for public uses, without restriction, the Legislature may doubtless direct and regulate the purposes for which the public may use it."

But further, we are not prepared to say that the public authorities in this case did not have the authority to make the contemplated lease under their general power to control and manage the park. It was some seven miles from the center of the city. It consisted of 400 acres, only  $2\frac{1}{2}$  of which are to be leased. The leased premises were to be kept and maintained in first-class condition, and subject to the rules and regulations of the city authorities. Persons affected with certain diseases are not to be allowed as guests therein. The hotel is to be named "The San Jose Mineral Springs," or such other name as the mayor and common council consent to. It is evident that the city authorities desire to add to the comfort and attractions of the park, without expense to the city, and at the same time derive an income from the lease. It is not shown that the contemplated lease will in any way detract from the use of the park by the public. In *Gusbee v. The City of New York* (Sup.) 58 N. Y. Supp. 967, it was held that the department of public parks had the right to lease a building in *Riverside Park*, on

the Hudson, for a period of years, for restaurant purposes. The court said: "That, in the control and management of the public parks of a great city, it is perfectly proper to furnish not only such innocent amusements as may enhance the pleasure of those who resort to the parks, but such opportunities for rest and refreshment for themselves and their animals as may be required, will not be disputed. The doing of these things is no part of the public duty imposed upon municipal corporations as the agents of the state in the performance of its governmental functions, but, rather, a part of the business of the city, which it may not undertake in its private capacity, as the owner of the lands which have been set apart for park purposes. \* \* \* Whether, in doing these things, the authorities shall act themselves, or whether they shall be performed by private persons under an agreement with the park authorities, must be left very largely to the discretion of those who have control of the parks. If, in their judgment, it shall seem better that the furnishing of refreshment shall be farmed out to some person for a consideration, subject to the regulation and control of the authorities, it cannot be said, as a matter of law, that such discretion is beyond their power."

The Supreme Court of Missouri held in a late case (*The State ex rel. Attorney General v. Schweickardt*, 109 Mo. 496, 19 S. W. 47) that, under the power given to the city authorities of the city of St. Louis to regulate all parks belonging to the city, the city authorities could make a contract authorizing the sale of refreshments in Forest Park, and give the lessee possession of certain buildings on the premises for such purpose. The court said: "It seems, too, to be a matter of common knowledge that refreshments, both solid and liquid—refreshments of an intoxicating nature—are customarily served to the visitors of the great parks of this country: Central Park, New York; Fairmount Park, Philadelphia; and Golden Gate Park, San Francisco. On this basis of fact and of custom, it cannot be regarded as any diversion

of the legitimate uses of the park to have refreshments served in a manner contemplated by the ordinance and contract aforesaid. \* \* \* And so long as the proprieties of life are observed, no one of the throng who visit such a locality has any grounds to insist that his method of conducting a park should be adopted, instead of the plan deemed best by the regularly constituted authorities. Such intolerance, on whatever motive based, is at war with the theory and practice of our government and an enlightened civilization. Its voice should not prevail in a court of justice, and, in this connection it should be constantly borne in mind that, within the legislative sphere of their authority, the discretion confided to municipal corporations is as proportionately wide as is a like discretion possessed by the government of the state, and as free from outside interference, and that discretion is not subject to judicial revision or reversal."

Applying the above principles, we do not think the contemplated lease in excess of the powers of the city authorities. The park contains mineral springs. The proposed hotel is for the use of the public, where those who desire may get food and rest. It is to be under the supervision of the city. It, if properly conducted, will add to the attractions of the park. It will be no expense, but a profit, to the city.

Nor do we think the appellant is entitled to relief because the contemplated lease is for 25 years, instead of the time provided by sections 711, 718, Civ. Code. Such lease, if subject to the said sections, would not be void, except as to the excess of the period. The appellant is not entitled to an injunction if the authorities have the power to lease as prescribed in the charter.

The judgment and order should be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

(34 Wash. 347)

STATE ex rel. DONOFRIO et al. v. HUMES,  
Mayor, et al.(Supreme Court of Washington. March 16,  
1904.)EMINENT DOMAIN—OPENING OF STREETS—  
DAMAGES—RENTS AND PROFITS—ASSESS-  
MENTS—PAYMENT—JUDGMENTS—INTEREST—  
SATISFACTION—WARRANTS—MANDAMUS.

1. Where judgment was rendered in favor of relators in condemnation proceedings, and the city was directed to assess the benefits to pay a portion of such damages, which it did, and to pay the balance from its general fund, and thereafter relators caused their judgment to be satisfied on the docket, and presented to the city a transcript showing the judgment, and its satisfaction of record, as authorized by 2 Ballinger's Ann. Codes & St. § 5676, and demanded the issuance of a warrant on the fund for the payment thereof, which was denied, it was no defense that the assessment levied had not been fully collected.

2. Where a judgment in condemnation proceedings was rendered in favor of the owners for a certain sum, the fact that such judgment, on payment of the money, passed the title to the real estate to the city, did not limit its effect as a judgment for the recovery of money.

3. A judgment in favor of landowners in condemnation proceedings for the value of the land taken is a judgment within Laws 1899, p. 129, § 6, providing that judgments shall draw interest from date at the rate of 6 per cent. per annum.

4. Under 1 Ballinger's Ann. Codes & St. § 822, providing that a city may within two months from a condemnation judgment, if no appeal is taken, discontinue the proceedings, if no such discontinuance is made within the time provided, and no appeal is taken, it will be presumed that the city has elected to take the property specified in the judgment.

5. Where a judgment was rendered in favor of a landowner for property taken by a city for public use, the landowner was not entitled to interest on the judgment after its rendition while he remained in actual possession and had the rents and profits of the land, in the absence of a showing that such rents and profits were less than the interest.

Appeal from Superior Court, King County;  
Boyd J. Tallman, Judge.

Mandamus by the state, on relation of James Donofrio and others, against T. J. Humes, as mayor, and John Riplinger, as comptroller, of the city of Seattle. From a judgment in favor of relators, defendants appeal. Affirmed.

Mitchell Gilliam and Hugh A. Tait, for appellants. Sachs & Hale, for respondents.

HADLEY, J. The respondents in this appeal, who were the relators below, applied to the superior court for a writ of mandate directed to the respondents below, who are the appellants here. The affidavit in support of the application for the writ states, in substance, that on the 30th day of January, 1902, in an action entitled, "In the Matter of the Petition of the City of Seattle, Condemnation Proceedings under Ordinance No. 6,047, Rainier Avenue, Cause No. 29,945," then pending in the superior court of King county, such proceedings were had that a judgment

was rendered in favor of the relators and against the petitioner in the action in the sum of \$800 and costs of suit; that said judgment has not been paid in whole or in part, and no appeal therefrom has ever been taken; that after the time when execution might have issued on a like judgment against a private person, to wit, on January 19, 1903, the relators presented to the appellants a certified transcript of the docket of said judgment, showing satisfaction thereof duly entered; that the relators thereupon demanded of appellants, as the proper officers, that they should draw an order upon the treasury of the city of Seattle, and in favor of relators, for the amount of said judgment, which demand was refused; that, at the time of the presentation of the transcript of judgment as aforesaid, there was in the treasury of the city, in a fund known and designated as the "Rainier Avenue Condemnation Fund, Ordinance No. 6,047" (it being the fund out of which said judgment should properly be paid), more than sufficient money to pay the judgment, with interest, costs, and accrued costs. The appellants, as respondents to the application in the superior court, answered that the judgment mentioned in relator's affidavit was rendered in a proceeding brought by the city of Seattle, a city of the first class, under and by virtue of the laws of the state of Washington, relative to the right of eminent domain in cities of the first class, and in pursuance of an ordinance providing for the condemnation of certain property to be used as a public street in said city; that in said proceeding a judgment was rendered against the city, and in favor of 177 owners, aggregating the total sum of \$8,442.50, as compensation for property taken or damaged, and in said judgment it was ordered that said relators should recover the amount stated in their affidavit as compensation to them for property taken or to be taken for use as a portion of said street; that the ordinance authorizing the condemnation proceeding provides that an assessment shall be made for the purpose of raising the amount necessary to pay the compensation and damages for property taken, and that such part only of such compensation or damages as is not finally assessed against the property benefited shall be paid from the general fund of the city; that said judgment provides that upon the payment to the judgment holders or into the registry of the court of the several amounts, with costs, the city shall become the owner and entitled to the possession of the property described in the verdicts, for the uses and purposes mentioned. It is next alleged that the city proceeded to assess the amount of benefits to property benefited, for the purpose of providing the fund to pay said compensation or damages; that the total amount assessed is \$5,601.50, which sum the city is now proceeding to collect; that \$3,248.09 has already been collected, and there remains to be collected upon

the assessment roll the sum of \$2,353.41; that the appellants refused to draw their warrant upon the treasurer of the city for the payment of said judgment for the sole and only reason that there is an insufficient amount collected upon said assessment roll, or in said improvement district fund, for the payment of the total amount of the judgment rendered in said condemnation proceedings; that they stand ready and willing, as soon as the amount of said assessment roll shall have been collected to pay into court the sum so collected, together with a sum sufficient, from the general fund of the city, to be paid out to the persons entitled to receive the same as the court shall direct; that the city is not now, and never has been, in possession of any part of the property belonging to the relators which was condemned in said proceeding, and for which they obtained said judgment; that the improvement for which said condemnation proceeding was had has not been commenced; and that relators are now, and at all times since the rendition of the judgment have been, in possession of the whole of their premises, and have enjoyed the beneficial use thereof. To the answer, which is in substance stated above, the relators demurred on the ground that it does not state facts sufficient to constitute a defense. The demurrer was overruled. The appellants elected to stand upon their said answer, and refused to plead further. Judgment was thereupon entered, directing the issuance of the peremptory writ prayed. This appeal is from that judgment.

We have somewhat at length set out the averments in the pleadings in order that the points raised by the ruling on the demurrer may be more readily understood. Appellants contend that an award to one or more individual owners of property proposed to be taken in a condemnation proceeding by a city of the first class, where the ordinance directing such proceeding provides for a local assessment, is not payable until the collection by the city of the entire amount of such local assessment. It is said by them that the Constitution of the state (article 1, § 16) gives the city the right to make payment into court. The following extract from that section is referred to as giving that right: "No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner. \* \* \*" It is also stated that said provision is carried into effect by the statute wherever the subject of payment is mentioned, and attention is called to the fact that the judgment relied upon here so provides. Reference is made to the statutes authorizing a condemnation proceeding of the kind above mentioned as found in chapter 7, tit. 7, 1 Ballinger's Ann. Codes & St., which treats of eminent domain in cities of the first class. It is insisted that under the provisions of the law, and also of the

judgment, the right to pay the several amounts into court is given, and that it follows that the city has the right to make the whole payment at once, which cannot be done until after the collection of the whole local assessment. The argument, it seems to us, does not reach the real point involved here. Respondents are not asking any directions to appellants touching the custodianship of this condemnation fund. They are asking only the issuance of a warrant drawn upon such fund for the amount of their judgment. When the moneys have once been paid into such fund, they become a part of it, and must remain such until applied to the purposes intended. The mere deposit of the money in court, if done to carry out the purposes of the fund, would not remove it from the fund. If the city should insist upon the right to deposit the money in court, it must be done in trust for the purposes of the fund, and the surrender of the warrants drawn upon it would doubtless be required as a condition precedent to individual payments from such deposited fund. The city may, however, satisfy this judgment as it does any other, when the holders are willing to accept satisfaction in that manner. Following the provisions of section 5676, 2 Ballinger's Ann. Codes & St., respondents have caused said judgment to be satisfied on the docket thereof, and have presented to appellants a transcript showing the judgment, and its satisfaction of record. If the judgment is such as is contemplated by the above section, then they are entitled to their warrant. We see no reason why it is not such a judgment. It adjudges the recovery of the money or damages. It is true, the effect of the judgment when the money is paid is also to pass title to real estate, but it is none the less a judgment for the recovery of money. Such an adjudication was expressly held to be a judgment in *Plum v. City of Kansas*, 101 Mo. 525, 14 S. W. 657, 10 L. R. A. 371. It is provided by section 816, 1 Ballinger's Ann. Codes & St., as follows: "All moneys received or collected by the treasurer upon assessments for any purpose authorized by this chapter shall be kept as a separate fund, and in no wise used for any other purpose whatever, except for the redemption of warrants drawn against such fund." The above section applies to this fund, and we think, in reason, it is contemplated that warrants shall be drawn to the order of the several judgment holders in the condemnation proceeding. When the transcript of the satisfied judgment is presented, and the warrant issued, the latter thereafter becomes the evidence of the city's obligation. It represents a liquidated sum, which the city is obligated to pay from a given fund. We do not see that any confusion can arise as to the proper parties to receive payment, as suggested by appellants. This is not a demand for cash, but for a warrant representing cash. If the property holder were demanding cash before possession taken by the city, a differ-

ent question would be presented as to his constitutional right to a money compensation as a condition precedent to such possession. Appellants are, however, asking a warrant, only, and we think it is their right to have it.

It is assigned that the court erred in directing the issuance of a warrant including interest on the amount of the judgment from the date thereof. The first suggestion in support of this assignment is that the adjudication of condemnation and the award of damages is not a judgment, within the purview of the statute allowing interest upon judgments. Laws 1899, p. 129, § 6. What has already been said as to the judgment character of said adjudication answers the contention that it is not a judgment. Being a judgment, it must therefore draw interest at the rate of 6 per cent. per annum from its date, under the concluding provision of the section cited.

It is further urged that section 776, 1 Ballinger's Ann. Codes & St., authorizes the city to provide the entire cost by local assessment, and that it is impossible for the commissioners making the assessment in such proceedings to determine the amount of interest that may become due the holders of the condemnation judgments, and provide for its payment by assessment. This argument is based upon the theory that the commissioners would have no means of determining when the assessments would be paid or collected, so as to make it possible to pay the awards to the property holders. A possible deficit of the kind mentioned would largely be covered by the 10 per cent. penalty, which must be added to the amount of the assessment upon the day of sale, under section 808, 1 Ballinger's Ann. Codes & St. If there are no delinquent payments, the amount of accumulated interest must be small; and, if the sale of delinquent property is timely made, the penalty will largely meet the accumulated interest. In any event, the law authorizes, and the city in this instance provided, that whatever sum is not assessed against the property shall be paid by the city out of its general fund. That the judgment in question is such as bears interest from the date of its entry, see *Alloway v. Nashville* (Tenn.) 13 S. W. 123, 8 L. R. A. 123; *Plum v. City of Kansas*, supra; 2 *Lewis on Eminent Domain* (2d Ed.) § 499; 3 *Sutherland on Damages* (2d Ed.) § 1091.

It is, however, urged that the city has not yet taken possession of the condemned property; that appellants have had the benefit of the use thereof, and should, therefore, not recover interest upon their award. Section 822, 1 Ballinger's Ann. Codes & St., provides that the city may, within two months from the date of the condemnation judgment, if no appeal be taken, discontinue the proceedings and pay the costs. Not having so discontinued the proceedings in question, it must be held that the city has elected to abide by the award and appropriate the property. It follows that, since the expira-

tion of said two-months period, the appropriation has been complete, with the exception of actual satisfaction of the judgment and taking possession by the city, which it was at liberty to do at any time. The proceeding has therefore resulted in an obligation which is binding upon the city, and from which it may not withdraw, at least without consent of the property judgment holders. But may the judgment holder retain the rents and profits of the land, and for the same time recover interest upon the condemnation award? Respondents urge the following quotation from *Plum v. City of Kansas*, supra, as applicable to this point: "The long delay in reaching the end of the condemnation case arose from the acts of other parties. During it the plaintiff remained in possession of the land, but his enjoyment and use thereof were not such as belonged to complete ownership. His tenure, then, might be characterized as a sort of base or qualified fee, liable to be determined at any moment by the issue of the appellate proceedings. He could not with any degree of confidence improve the property, or make any but the most transient agreements for its use. He could not dispose of it, except subject to the paramount public easement which had become impressed upon it. So far as concerned his beneficial rights as owner, the judgment of condemnation amounted to the 'taking' of the property for public use, and the price for such taking then became justly due him." It will be observed that the above-quoted argument goes only to the point that, under the circumstances detailed, the condemnation judgment amounted to a taking, and the owner was entitled to the price for such taking, but it does not say that interest on that price may be collected without accounting for rents when the owner remains in possession. In that case it was held, as we have seen, that the judgment of condemnation draws interest; but there, as in the case at bar, the owner remained in possession for a time, and the court expressly held that it would be inequitable to permit him to recover interest, and at the same time retain the benefits of the possession held by him meanwhile as trustee for the city. The landholder sought to enjoin the city from taking possession without paying lawful interest from the date of the award of damages. The court stated that, before obtaining relief, he should do equity, and should account for rents and profits which accrued to him after the condemnation. Thus, in a measure, the rents and profits were held to offset the interest. But that the one was the necessary legal equivalent of the other was not held. Neither can it be so held here. The rate of interest upon the judgment is fixed by law, but the value of rents and profits depends upon market conditions. We think the rule followed in the Missouri case cited is eminently just, and under that rule



the respondents here are not entitled to a warrant including interest, inasmuch as there has been no accounting for rents and profits. If an accounting were here, and an excess of interest over rents appeared, respondents would be entitled to have such excess included in their warrant. On an accounting, however, the city would not be entitled to deduct from the face of the judgment any excess of rents over interest, for the reason that no express contract to pay any sum as rent exists; and, since the city has voluntarily permitted the use and occupation, it ought not to be heard to demand a sum in excess of its own fixed interest obligation in the premises. Respondents therefore are now entitled to a warrant for the face amount of their judgment.

The judgment is sustained as far as it relates to the principal sum of the condemnation judgment, but it should be modified to the extent of excluding from the warrant interest upon the judgment. The cause is therefore remanded, with instructions to modify the judgment in accordance with what is said above. Appellants shall recover costs.

ANDERS, MOUNT, and DUNBAR, JJ.,  
concur.

(32 Colo. 292)

#### CITY OF GREELEY v. FOSTER.

(Supreme Court of Colorado. March 7, 1904.)

MASTERS—SERVANT'S INJURIES—SAFE PLACE TO WORK—LIMITATION OF DOCTRINE—ASSUMPTION OF RISK—DANGEROUS WORK—OBEDIENCE TO ORDERS—OBVIOUS DANGER—ACTIONS—INSTRUCTIONS—PRESUMPTIONS—DEFENSES NOT PLEADED—AVAILABILITY.

1. A complaint against a city for injuries to a day laborer excavating a trench in a street, alleging defendant's failure to provide a reasonably safe place for plaintiff to work in, that the danger was known to defendant and unknown to plaintiff, and could not have been ascertained by him by the use of ordinary care, and that the risk was not ordinary or obvious, but extrahazardous, and beyond the ordinary risk assumed by plaintiff, stated a cause of action.

2. No presumption of negligence arises from the happening of an accident to an employé.

3. Where an employé was directed by the foreman to enter a trench, which had given signs of caving in, for the purpose of putting in cross-braces to hold the sheeting or curbing in place so as to prevent the banks from caving in, and voluntarily obeyed the order with full knowledge of the obvious danger, he was guilty of contributory negligence.

4. Where there was no allegation in the complaint that plaintiff's superior, who it was alleged was defendant's vice principal, was incompetent, it was error to permit evidence of incompetency.

5. A charge that an employer should provide a safe place for the employé to work in was erroneous in not qualifying the word "safe" by the adjective "reasonably."

6. An erroneous charge that it was the duty of an employer to furnish the employé a safe place to work, instead of a "reasonably" safe place, which error was repeated in various parts of the charge, was not cured by other instructions that only reasonable care was demanded.

7. The doctrine that it is the duty of a master to furnish an employé a reasonably safe place to work in only applies to places permanent in character, and is inapplicable where the servant is making his own place to work in; as where he is engaged in sheeting a ditch in order to render it safe.

8. Where the risk of working in a place is assumed by the servant, the rule requiring the master to furnish a reasonably safe place does not apply.

9. Where the danger to be incurred from obeying orders of a superior is so plain that no prudent person would obey, or when the thing ordered to be done is what the servant, with full knowledge of the perils ordinarily incident thereto, was employed to do, and the servant obeys, and receives injuries in doing the perilous work, the doctrine of assumption of risk precludes a recovery.

10. In such a case the servant is also guilty of contributory negligence.

11. Where the fact that plaintiff assumed the risk of doing the work in which he was injured, and that it was one of the ordinary perils of the work he agreed to do, and that it was open and obvious, clearly appeared from the evidence produced by plaintiff himself, defendant could avail itself of the defense of assumption of risk, although it did not specifically plead it.

Appeal from District Court, Weld County; Christian A. Bennett, Judge.

Action by Herbert M. Foster against the city of Greeley. From a judgment for plaintiff, defendant appeals. Reversed.

Charles D. Todd and H. E. Churchill, for appellant. E. A. Thompson, W. H. Thompson, A. C. Patton, and Ralph E. Esteb, for appellee.

CAMPBELL, J. Action to recover damages for personal injuries due to the negligence of the defendant. Judgment for plaintiff. Defendant appeals.

A tile drain which had been laid in one of the streets of the defendant city proving inadequate for the purpose for which it was constructed, the city determined to take it up and put in a larger one. This made it necessary to dig in the street above the old drain a ditch three feet wide and six feet deep. The work was done in the late winter and early spring by the city itself, under the immediate supervision of H. P. Heath, one of the members of the city council. The ground was thoroughly saturated with water, and a steam engine was used to pump this water out of the ditch and the manholes as the work was carried on. The old tile were also filled with water, which was poured into the trench as they were taken up, and the water, warmed somewhat by the escaping steam, was constantly flowing through the ditch, which caused the edges of the ditch at the bottom to be loosened, and thus withdrew support from the overhanging soil. In digging the trench, to prevent caving of its sides, which, for the reasons mentioned, occurred at different points of the work, from the beginning to the end, the sides were shored or sheeted. This sheeting consisted of boards or pilings placed upright against both sides

of the trench and driven into the soil at the bottom, along which horizontally 16-foot stringers were laid, which in turn were held in place by cross-braces. The city at all times furnished in close proximity to the ditch suitable and abundant material for properly curbing it. The plaintiff, as the complaint alleges, was employed as a day laborer in all the work of excavating the trench and relaying the drain tile, and for such other work in that connection as was ordinarily required. At the trial plaintiff testified that he was employed to do whatever work was necessary to be done in and about the digging of the trench, the removing of the tile, leveling the bottom thereof for the reception of the new tile, sheeting or curbing the trench, relaying the new tile, and filling in the trench when the same was laid. The plaintiff had been doing this kind of work for a period of about 30 days, and, although he had never been engaged in similar work before, was entirely familiar with the nature of the soil in which the trench was dug, was aware that in digging the same its banks or sides had fallen in or exhibited that tendency, and that material had been furnished by the city for safeguarding it; knew what the sheeting was put in for, had assisted in putting it in, and, as different sections were completed, in taking it out. In short, he had in all respects as much knowledge of the nature and character of the work and the dangers incident thereto as the foreman himself. The work was done in sections, and as fast as one section was completed and new tile laid the ditch was filled in with earth, and a new section begun. When the accident which resulted in plaintiff's injury occurred, the trench had been completed and filled in with the exception of about 30 feet at one end, and the only work left to be done was the laying of tile, or connecting that already laid with a manhole. About half an hour before the injury was received plaintiff was working at a manhole at the extreme end of the ditch, and was then called from this place by the foreman to go to the unfinished section of the trench to do whatever was necessary in completing it. For nearly 30 minutes he was engaged in wheeling dirt from or near the manhole about 30 feet distant and dumping it into the unfinished trench, and in doing so necessarily saw its condition. By the order of the foreman, given some time in the morning of this day, the stringers, cross-braces, and the uprights on the south side had been removed, so that the workmen could dump the dirt into the trench, instead of shoveling it over the piling that extended several feet above the natural surface. The north side gave evidence of caving, which was called to the attention of the foreman, and he determined to replace the curbing in order to make the place safe for the workmen to finish the work of laying or connecting the tile. About five minutes before the injury occurred, when some one

on top called out that caving had begun, plaintiff and others stopped the work they were then doing, and the foreman directed plaintiff to go down into the trench and assist a fellow laborer named Thomas, who was already therein, in replacing the cross-braces. In obedience to the order, plaintiff got down into the trench, and was holding one end of a stringer, the other end of which was held by Thomas, and while they were attempting to put in the cross-braces the earth from the north bank caved in and fell against plaintiff, pinning him against the south wall, and thus caused the injuries complained of. No evidence was introduced by the defendant, and the case was submitted to the jury upon that of the plaintiff and his witnesses. In his examination in chief plaintiff was of the impression that he was ordered into the trench for the purpose of removing a plank so as to make level the bottom of the trench on which the plank was to be laid for the reception of the tile, but by his cross-examination and the testimony of his own witnesses it is clearly established that he was ordered by the foreman to go into the trench, and knew that he was sent into it for the express purpose of making it a safe place. If this were not so, plaintiff learned that such was the work he was to do at once after getting into the ditch, and in ample time to get out of it to escape the danger which he necessarily saw was threatened. Plaintiff, in his testimony, as in his complaint, says that when he got down into the ditch he was ignorant of the dangerous character of the place, and did not know that the cross-braces had been removed; but it is quite clear from all the evidence that he not only had full opportunity for knowing the situation, but, as a matter of fact, knew as well as any one connected with the work that there was danger of the bank caving in and injuring those who were working in the trench at the time of the accident, and that the cross-braces had been taken out, and, if he did not actually assist in removing them, was present when others did so, and saw them in the very act. But if he did not know these things it was his own fault. It was because he did not use his eyes. He cannot close his eyes to danger, and be heard to say that he was not aware of it. All the witnesses testified that any one, whether experienced or inexperienced, if he had used his eyes, would have been able to see that the place was a dangerous one. Plaintiff was an adult, presumed to know the law of gravitation, and that the tendency of the sides of this trench, in its then condition, left unsupported, was to fall; and, if he was ignorant of such a law, the fact was well known to him that the sides of this very trench did fall on several occasions during the work of excavation, and he was ordered to assist in shoring the trench at this place to prevent the happening of the very thing which afterwards did happen and cause his injuries, and which he,

and all those present, knew was imminent from the indications visible to all of them. He was not called upon suddenly by the foreman to go into a place of danger, of which he was, and the foreman was not, ignorant, but he was actually engaged in a work for which he was employed, and which, in the very nature of things, was, to his own knowledge, obviously dangerous, and which he was doing in order to make safe a place for himself and others to work in. It is alleged in one part of the complaint that this particular work of bracing or curbing the trench at which plaintiff was engaged at the time he received his injuries, and which was extrahazardous, to defendant's knowledge, of which he was not aware, was not that for which he was employed, but he admitted at the trial that every kind of work that was necessary to be done in order to put in a new drain was within the terms of his employment. The defenses were that defendant was not guilty of negligence, that plaintiff's own negligence contributed to the injury, and that the risk of danger from the very work in which he was engaged was voluntarily assumed by him under the terms of his employment. Under the issues thus joined, and upon a state of facts substantially as we have above outlined, the case was submitted to the jury, which found a verdict for the plaintiff. The defendant has assigned many errors, most of which, in the view we take of the case, are not of importance upon this review.

1. The defendant insists that the complaint does not state a cause of action. This case was once before our Court of Appeals, and by that tribunal it was held that the complaint did state a cause of action, although, so far as its allegations disclose, H. P. Heath, who was said to be superior in authority to plaintiff, was a mere fellow servant. But this circumstance was not considered by the Court of Appeals, nor is it by us, as important in the light of the other allegations. *Foster v. City of Greeley*, 15 Colo. App. 176, 61 Pac. 482. We are of opinion that the complaint on its face states a cause of action, and the specific negligence alleged was the failure by defendant to provide a reasonably safe place for the plaintiff to work in, the danger of which was known to defendant and unknown to the plaintiff, and could not have been ascertained by him by the use of ordinary care in the circumstances of the case. It was also alleged that the risk was not of the kind called ordinary, nor was it incident to the work, nor obvious, but extrahazardous, and beyond the ordinary risk assumed by plaintiff; and so the case, on paper, was taken out of the rule that applies in the absence of such averment.

2. The court instructed the jury, in effect, that negligence might be presumed from the happening of an accident. This was error. This doctrine has been enunciated in cases of personal injury by a common carrier to

a passenger; but, as stated in *Reno's Employers' Liability Acts* (2d Ed.) § 206, it does not apply to actions between employes and employers for personal injuries founded upon negligence, though there are some cases of a contrary tendency in Massachusetts, and probably in some other jurisdictions. See, also, *Sack v. Dolese et al.*, 137 Ill. 129, 137, 27 N. E. 62; *The Nitro Glycerine Case*, 15 Wall. 524, 537, 21 L. Ed. 206. Our Court of Appeals is committed to the doctrine that no presumption of negligence arises from the happening of an accident in actions by an employe against an employer for personal injuries, and we think its reasoning is sound. *D. & R. G. R. R. Co. v. Robinson*, 6 Colo. App. 432, 40 Pac. 840; *D. & R. G. R. R. Co. v. McComas*, 7 Colo. App. 121, 42 Pac. 676; *Bishop v. Brown*, 14 Colo. App. 535, 61 Pac. 50.

3. Contributory negligence was specially pleaded by the defendant. The plaintiff was directed by the foreman who had charge of the work to enter this trench for the purpose of putting in cross-braces to hold in place the sheeting or curbing that was rendered necessary to prevent the caving of the banks. The danger was just as obvious to plaintiff as to defendant. It was not a case where the danger was known only to the master, and not to the servant; nor was it one where, in a case of emergency, the servant was suddenly called upon by the master or his representative to do work which was dangerous because of some hidden or latent danger. The plaintiff voluntarily did as he was ordered, and was engaged in doing that which he himself was employed to do, and which he, as well as others, knew was attended with more or less danger, real, apparent, open, and obvious, not latent, concealed, or hidden; so that, if defendant was chargeable with negligence by reason of the order of its foreman, plaintiff was equally guilty of negligence that directly contributed to the injury, and cannot recover.

4. There is no allegation in the complaint that Heath, who was alleged to be superior in authority over the plaintiff, and who, as was claimed at the trial, was its vice principal, was incompetent, either at the time of his employment by the city or that he became so afterwards; yet at the trial the court permitted evidence to be introduced by the plaintiff tending to show incompetency of Heath for work of this character. This of itself was prejudicial error.

5. In one of the instructions given by the court the jury were told that it was the duty of the defendant in this case to provide a safe place for the plaintiff to work in, and if, in this respect, there was negligence, plaintiff was entitled to recover. If this belonged to the class of cases to which the rule is pertinent, the instruction is erroneous in that the duty of the defendant is said to be to provide an absolutely, and not a reasonably, safe place in which to work. The same ex-

ror was accentuated by repeating the same language in other parts of the charge, and was not cured by other instructions that only reasonable care to that end was demanded. Such an instruction was considered reversible error in *Grant et al. v. Varney*, 21 Colo. 329, 40 Pac. 771. It is not always that the giving of an instruction technically erroneous is necessarily reversible error, and an instance of the kind is found in *Portland G. M. Co. v. Flaherty*, 111 Fed. 312, 49 C. C. A. 361, a case where it was the duty of the employer to provide a reasonably safe place. There, however, the instruction which omitted the necessary qualification was immediately followed by language in which the jury were expressly told that the defendant was in no sense an insurer of the plaintiff's safety, but was required to use only that care which a reasonably prudent man would use in such circumstances; and, besides, and what is of itself conclusive, the instruction was harmless because the defendant admitted at the trial that the place furnished by him was not reasonably safe, and defended the action upon the ground that he had never ordered the plaintiff to work therein for the very reason that he considered it dangerous. That is entirely different from the case in hand.

6. But for a much stronger reason the trial court was wrong when it ruled that the doctrine of safe place governs this case. Cases like *Hanley v. California Bridge & Construction Co.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597, cited by plaintiff in support of the rule that the master is bound to furnish a reasonably safe place for the servant to work in, are not in point. A careful examination of them shows that the doctrine relates to a place permanent in its character; and where a recovery has been allowed for failure of a master in this respect it is where the servant has been put into a permanent place that is dangerous, and that place has been prepared by the master himself, or by other workmen. But here, where the plaintiff was making his own place to work in, the rule is clearly inapplicable. In 2 *Bailey's Personal Injuries* relating to Master and Servant, in chapter 15, at section 2934, the author refers to the distinction made between cases where employes are of the crew who are making the trench, and where, after it is made, an employe is set to work to perform labor of a different character in the trench which has thus been prepared as a place for doing the work. The master is not under obligations to make reasonably safe the trench for those employes who are actually engaged in making it, but his duty is to have the trench made reasonably safe for the second class of employes, who are to perform work of a different character in the trench after it is made. In section 3022 et seq. of the same work it is said to be the rule that, where a piece of property is out of repair, as this trench was which the plaintiff was seeking to put into

proper condition, a servant who is employed in making it safe takes upon himself whatever added risk comes from the existing condition of the place or the work. Cases in some of their features quite similar to the one at bar are *Petaja v. Aurora I. M. Co.* (Mich.) 64 N. W. 335, 32 L. R. A. 435, 58 Am. St. Rep. 505; *Finalyson v. Utica M. & M. Co.*, 67 Fed. 507, 14 C. C. A. 492; *Showalter v. Fairbanks Moore & Co.*, 88 Wis. 376, 60 N. W. 257. The rule invoked by the plaintiff does not apply when the place at which the work is to be done and the appliances for the doing of the same are to be prepared by the servant himself, or where the work and the place of work are coincident. In *Faulkner v. Mammoth M. Co.*, 23 Utah, 437, 66 Pac. 790, the court said: "Where the servant is intrusted with the duty of making a place which is known to be dangerous safe, or engages in a work the danger of which as he proceeds necessarily changes from time to time, and he is left free to pursue his own course and select his own appliances, he assumes the risk, unless the master has done or neglected to do something that his duty to his servant reasonably requires, which unnecessarily increases the natural hazard of such changes." There can be no contention here, under the evidence, that the defendant had done or omitted to do anything which increased the ordinary hazard of the work which the plaintiff was employed to perform. The defect was not latent at all, but plainly observable. Where the risk of working in a place is assumed, the rule requiring the master to furnish a reasonably safe place does not apply. The same principle is laid down by our Court of Appeals in *C. C. & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251, where it is said there is a wide difference between providing a safe place for the servants to work in and putting a place already found to be insecure in condition for the resumption of labor. Certainly, the master "had the right to put an insecure place into a safe condition. Laborers who were employed to aid in this effort took upon themselves whatever of added risk might have come from" such work. That is precisely this case. Speaking to the same point in *Batty v. Niagara Falls, etc., Co.*, 79 App. Div. 466, 79 N. Y. Supp. 734, the court says: "It would be an anomalous condition of affairs which would impose upon the master, as a consequence of his efforts to safeguard his employes, liability for an injury resulting to one of them from the very danger which he was seeking to avoid, and which was perfectly apparent to the person attempting to remedy the same." It was there held, as we hold here, that the risk was either one which related to the detail of the work in which plaintiff was engaged, or one which was assumed by him, and in either event defendant was not liable. And while, as was said by this court in the *O'Brien Case*, *infra*, "a servant is generally excusable for obeying

orders in and about his master's business when such orders are given by one in authority over him as a representative of the master," yet when the danger to be incurred from yielding obedience is, as it clearly was in the case at bar, so plain and manifest that no prudent person would obey, or when the thing so ordered to be done was what the servant, with full knowledge of the perils ordinarily incident thereto, was employed to do, and the servant, in such circumstances, obeys, and receives injuries from doing such perilous work, the assumption of risk precludes a recovery, and contributory negligence also is established. Other cases clearly in point showing that under the facts of this case the doctrine of a safe place does not apply are *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017; *Curley v. Hoff*, 62 N. J. Law, 758, 42 Atl. 731; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80; *Griffin v. O. & M. Ry. Co.*, 124 Ind. 326, 24 N. E. 888; *Colo. Midland Ry. Co. v. O'Brien*, 16 Colo. 219, 225, 27 Pac. 701; *Reno's Employers' Liability Acts*, §§ 226, 238; *Goodes v. B.*, etc., Ry. Co., 162 Mass. 287. These and other like cases hold that whenever a servant is employed to work in the construction, alteration, or repair of any place or thing where the work as it is being prosecuted involves the construction of the place itself, the master fulfills his duty to the servant when he furnishes reasonably safe material and appliances for the performance of the work and selects competent servants to do it. The risk here was one which plaintiff voluntarily assumed. It was implied in the very terms of his contract of employment. *Town of Colorado City v. Liae*, 28 Colo. 468, 65 Pac. 630, cited by plaintiff, is not in point. It is clearly distinguishable from the case we are considering. There Liae, who had been employed solely to shovel gravel from a gravel pit into a wagon, had been at work only a few minutes. He had never been at the place before, and was ordered by the street commissioner of the town to work in an apparently safe place, but which in fact was dangerous because of a hidden and latent defect previously known by the commissioner to exist, knowledge of which he had not imparted to the plaintiff, who was entirely ignorant thereof, and by the exercise of reasonable care could not have acquired knowledge of it. There are other material differences between the two cases. The principal controversy there was as to whether the negligence of the street commissioner was properly chargeable to the town. The particular point as to whether or not it was necessary for the defendant to furnish a safe place for plaintiff to work in, or whether plaintiff assumed the risk in question, was not raised.

But it is said that the assumption of risk

is an affirmative defense that must be specially pleaded, and, since it was not pleaded in this case, defendant may not be heard to insist upon it either in the court below or here. In a late review of this doctrine in vol. 36, No. 3, of the *American Law Review*, it is stated that the better and more logical view is that the burden of proof is upon plaintiff. There are cases holding that the defense must be specially pleaded, and the burden is upon the defendant. The question is not of importance here, because there are allegations in the answer, which, while mingled with the defense of contributory negligence, are, in the absence of proper objections seasonably interposed, sufficient upon which to predicate the defense. Even in jurisdictions where it is held that the defense must be specially pleaded, a late Oregon case says that no plea is necessary when the risk is an ordinary one, for what the law presumes to be a fact it is not necessary to aver, and that it is only an extraordinary risk assumed by plaintiff which defendant is called upon to plead. *Tucker v. Northern Terminal Co.*, 41 Or. 82, 68 Pac. 426; *Bliss on Code Pleading* (3d Ed.) § 175. The defendant, under either rule, is in a position to take advantage of this defense. Indeed, the assumption of risk here is implied from the allegations of the complaint itself. Were it not so, still the fact that plaintiff assumed the risk, that it was one of the ordinary perils of the work he agreed to do, was open and obvious, so clearly appears from the evidence produced by the plaintiff himself, that defendant was in a position to avail itself thereof by a motion for a nonsuit or for an instruction which it asked directing a verdict in its favor. The court should have sustained the defendant's motion for a nonsuit, or directed a verdict for the defendant.

For each and all of the foregoing reasons the judgment must be reversed, and the cause remanded. Reversed.

STEELE, J., not participating.

(29 Mont. 504)

#### HENDRICKSON v. WALLACE.

(Supreme Court of Montana. Feb. 1, 1904.)  
APPEAL—EQUITY—INSTRUCTIONS—NEW TRIAL.

1. Appellant having at all stages of the suit insisted that it is an equity case, it will be treated as such; there being no ground for reversal.

2. Instructions to the jury may not be complained of on appeal in an equity case.

3. Denial of a new trial for insufficiency of the evidence will not be disturbed, there being a substantial conflict of evidence.

Commissioners' Opinion. Appeal from District Court, Deer Lodge County; Welling Napton, Judge.

Action by Louis J. Hendrickson against William Wallace. From an order denying a new trial, defendant appeals. Affirmed.

H. P. Napton and Geo. B. Winston, for appellant. Rodgers & Rodgers, for respondent.

CLAYBERG, C. C. This is an appeal from an order overruling a motion for a new trial. The action was instituted by the filing of a complaint on November 10, 1898, for an injunction against the diversion of certain waters which the plaintiff claimed he had appropriated, and which he was entitled to use and enjoy, and for damages for the unlawful interference with his ditches and his right to the use of the waters. The prayer of the complaint was for a judgment for damages and a permanent injunction. Defendant answered this complaint, practically denying all the material allegations of each cause of action, and, for further defense, set up an adverse use for 21 years, and the statute of limitations. To this answer, plaintiff replied.

The issues thus joined were tried before the court with a jury in 1899, and on June 3d of that year the jury returned a general verdict in favor of plaintiff for \$250 damages, and 12 special findings, covering all the issues in the case. A motion was made by the plaintiff for judgment upon this verdict and findings immediately after they were returned. The defendant made a motion to set aside the verdict and findings, and asked the court to make findings in lieu thereof, and enter judgment in his favor. The court on May 20, 1900, adopted substantially all of the special findings, and the general verdict of the jury, except the part allowing \$250 damages, and substituted in the place thereof a finding that plaintiff was only entitled to \$1 damages. On May 29, 1900, defendant gave notice of intention to move for a new trial.

Counsel for defendant has treated the action as one in equity. Counsel for plaintiff, on the other hand, has treated it as one at law. If the action was one in equity, counsel for defendant was required to give notice of his intention to move for a new trial within 10 days "after notice of the decision of the court." Section 1173, Code Civ. Proc.; *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106. If the action was an action at law, counsel for defendant was required to give his notice of intention within 10 days after rendition of the verdict. Section 1173, Code Civ. Proc. If one of the two causes of action was in equity, and one at law, the notice of intention to move for a new trial could only apply to the equitable cause of action, because, concededly, it was not given for more than a year from the rendition of the verdict.

Respondent still insists that the action is one at law, either in whole or in part, and that the injunction is merely incidental to the relief sought in the cause of action stated for damages, or that, at least, the cause of action stated for damages is clearly an action at law, and, as to that particular branch of the action, plaintiff below was entitled to a jury trial, and that the court

could not modify the verdict for damages, except upon motion for a new trial; that notice of intention to move for a new trial was not given within 10 days after rendition of the verdict, and therefore that there is no motion for a new trial upon the law side of the action; that, this being true, the verdict and judgment upon that cause of action are *res adjudicata* as to all the rights of the parties; and that this court cannot reverse the order of the court below made on defendant's motion for a new trial in the equitable proceeding.

Inasmuch as the appellant insists that the case was solely one of equitable jurisdiction, and has insisted so from the commencement of the suit, as disclosed by the record, he cannot complain if this court considers this appeal upon his own theory. We shall therefore not pass upon the important question as to the character of the suit brought—whether legal or equitable in whole or in part—but proceed to consider the case upon the theory advanced by the appellant.

Appellant only suggests to this court two errors as grounds for the reversal of the order overruling his motion for a new trial, and these are: First, insufficiency of the evidence to justify the findings and decision of the court, and the verdict and findings of the jury; second, errors at law occurring at the trial in giving of certain instructions. We will consider these alleged errors in the inverse order from that above stated.

If this was a suit in equity, the appellant cannot be heard to allege in this court that the court below erred in instructing the jury. This matter has been too often settled by the decisions of this court to be now questioned. *Lawlor v. Kemper*, 20 Mont. 13, 49 Pac. 398; *Wetzstein v. Largey*, 27 Mont. 212, 70 Pac. 717.

Counsel allege insufficiency of the evidence to support findings Nos. 1, 4, 5, 8, 6, 7, 10, and 12 of the jury, and findings Nos. 2, 4, 5, 6, 7, 8, 9, and 10 of the court. It is sufficient to say in regard to this alleged error that a careful perusal of the testimony included in the record discloses that it was very conflicting, and that the record contains evidence introduced on the part of the plaintiff, which, if uncontradicted, would clearly support the findings both of the jury and of the court. The rule of this court is well settled that, in cases upon an appeal to this court from an order overruling a motion for a new trial, if the record discloses a substantial conflict of the evidence, it will not reverse the order appealed from. *M. C. P. Co. v. B. & M. Co.*, 27 Mont. 288, 70 Pac. 1114; *Stevens v. Curran*, 72 Pac. 753; *Nelson v. Great Northern Ry.*, 72 Pac. 642, and cases.

We are of the opinion that the order appealed from should be affirmed, and so advise.

POORMAN and CALLAWAY, CO., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the order appealed from is affirmed.

(29 Mont. 496)

### EASTERLY v. JACKSON.

(Supreme Court of Montana. Feb. 1, 1904.)

VENDOR AND PURCHASER—ORAL AGREEMENT  
—VALIDITY—MERGER IN WRITTEN CONTRACT  
—CONSIDERATION—PARTIAL PAYMENT.

1. Under Civ. Code, § 2185, subd. 5, providing that a contract for the sale of land is invalid unless in writing; section 2186, providing that a contract in writing supersedes all previous oral negotiations or stipulations; section 2204, providing that, when a contract is in writing, the intention of the parties is to be ascertained from the writing alone; and section 2281, providing that a contract in writing may be altered only by a contract in writing or an executed oral agreement—where one who purchased land from joint owners thereof agreed to pay one of them a sum in addition to that named in the written contract of sale, to induce him to execute the contract, such agreement, being nullified by the written contract, does not constitute any consideration for a subsequent written agreement whereby the purchaser agreed to pay such sum.

2. Where joint owners of land entered into a contract for its sale, agreeing to execute deeds in escrow on the first payment being made, the refusal of one of them to sign the deeds on such payment was not a valid consideration for the purchaser's promise to pay him an additional sum.

3. When joint owners of land made a contract to sell and deed it to the purchaser or persons whom he might designate, an oral agreement by the purchaser to pay an additional sum to one of the vendors cannot be made the basis of a recovery against the purchaser as an agreement for sharing the profits of a resale of the land, unless it is resold for a higher price than that which was to be paid under the original contract.

4. Where a written instrument is sued on as an original and complete contract, not as an admission of a balance due on any other contract, and the complaint alleges that no part of the sum due under it has been paid, a payment which the plaintiff admits the defendant has made is no part of the amount expressed in the contract sued on, and hence it cannot be relied on to support a previous oral agreement as the basis and consideration of the written contract.

Commissioners' Opinion. Appeal from District Court, Broadwater County; W. L. Holway, Judge.

Action by Allen M. Easterly against James E. Jackson. From a judgment in favor of plaintiff and an order denying a new trial, defendant appeals. Reversed.

Walsh & Newman and Clayberg & Gunn, for appellant. Shober & Rasch, for respondent.

POORMAN, C. This is an appeal by defendant from a judgment entered on a verdict in favor of plaintiff and from an order overruling defendant's motion for a new trial. The facts appearing in the record are, substantially: That on the 14th day of December, 1899, Allen M. Easterly (this plaintiff), James J. Mayne, and Allen Easterly, Jr., agreed with James E. Jackson (this defendant) that for the sum of \$75,000 they would

sell and convey to Jackson, "or to such person or persons as he may designate," certain mining property. \$7,500 of the purchase price was to be paid on or before December 31, 1899, \$12,500 on or before August 15, 1900, and the remaining \$55,000 on or before February 15, 1901. That upon the making of the first payment the defendant should have the possession of the property, with the privilege of working the same, except one tunnel. That he should deposit 25 per cent. of the smelter returns from all ore extracted as fast as the same was realized, for the benefit of grantors, which sums were to be deducted from the final payment. Deeds were to be deposited in escrow with the Union Bank & Trust Company of Helena. Time was made the essence of the contract, and forfeiture was to be the result of any violation of its terms. It further appears that the real consideration which the owners were to receive for the property was \$60,000, and that the remaining \$15,000 was a profit to Jackson for his expenses and compensation in making the sale of the property. Jackson was to receive \$2,500 from the first payment made, and all of the \$12,500 payment due August 15, 1900. On December 29, 1899, the first payment of \$7,500 was made, and \$2,500 of the amount was turned over to Jackson, and deeds to the property were executed, and placed in the bank. The grantors then gave an order, addressed to the Union Bank & Trust Company, authorizing and requesting the bank "to pay to James E. Jackson, Agent, the full sum of twelve thousand five hundred (12,500) dollars, being the second payment provided for (to be paid on or before August 15th, 1900)." Thereafter, on August 8, 1900, Jackson gave his personal check for \$12,500 to the cashier, payable to the bank, and presented the order of the said grantors for the payment to him of this amount. The bank accepted this check with the sanction of Mayne, who was then present, indorsed it, "Pay to the order of James E. Jackson, agent, without recourse," and handed it back to Jackson, who receipted on the order as follows, after the same had been acknowledged by Mayne: "Full receipt acknowledged. James E. Jackson, Agent." The bank then indorsed on the escrow agreement: "8-8 1900. Rec'd \$12,500. U. B. & T. Co. G. L. R." It further appears that this check was never presented for payment. These are substantially all of the facts, so far as they relate to the transactions, necessary to be considered at this time. Plaintiff claims, however, that the instrument sued upon grew out of and is connected with these transactions. This instrument is as follows: "Helena, Mont. Dec. 29, 1899. Allen M. Easterly, Helena, Mont.—Dear Sir: I hereby agree and promise to pay you Twenty-five hundred dollars out of & from the sum of Twelve thousand five hundred (12,500) dollars for which yourself, James J. Mayne & A. Allen Easterly, Jr. have given me this day an order on

the Union Bank & Trust Co. Said sum to be paid on or before August 15th 1900 in accordance with terms of agreement made & entered into on Dec. 14 1899 between above named parties & myself. In case said payment of \$12,500.00 is not made then this agreement is null and void. [50 cent Internal Rev. Stamp, Cancelled.] Yours truly, J. E. Jackson." This instrument is attacked by defendant as being without consideration. To repel this attack, plaintiff testified that the actual consideration to be paid to the owners for the property was \$60,000, which was to be divided between plaintiff, his two sons, and James J. Mayne—\$15,000 to each—but that plaintiff had a verbal agreement with defendant, entered into prior to the execution of the agreement to convey, to the effect that plaintiff was to receive \$3,000 additional; that \$500 of this amount was to be paid when the first payment was made on the contract of conveyance, and \$2,500 when the second or August payment was made; that defendant did pay the \$500, and that plaintiff refused to sign the escrow agreement and deeds until defendant executed and delivered to him the instrument sued upon. With reference to this verbal agreement the plaintiff testifies: "The conversation between Mr. Jackson and myself in regard to entering into this agreement of December 14th was that I would not part with my interest unless I got \$3,000 more; that I had the largest interest, and I would not let it go for less than \$18,000; and that I would sign no papers, the escrow agreement or deed, transferring that property until I was secured by this contract." The contract to convey was executed in a room at Blacker's Hotel at Radersburg. All the parties were present. The verbal contract, plaintiff says, was entered into on the same day, and immediately prior to the signing of the written contract to convey. Plaintiff says, "There was nothing said about that \$3,000 in that room that day in the presence of Mr. Mayne." Again, plaintiff says, "My co-tenants did not know anything about this side deal I was making with Jackson." This \$500 was paid to Easterly on December 29th, and, though Mayne was present, he was not permitted to know anything about it; and Mayne says in his testimony that he did not know anything about this "side deal" until some time in August, 1900, and he further refers to it as "rake-off" and "boodling."

1. It appears from the undisputed testimony and the admissions of all the parties that Jackson was the common agent of all the owners for the purpose of effecting a sale of the property, although he was at the same time given the option to purchase it himself. This verbal contract between the plaintiff and this common agent, secretly entered into and purposely concealed, by which the plaintiff seeks to obtain an advantage over his partners with reference to the consideration to be paid for this mining property, trenches

dangerously near to the forbidden ground of fraud, and of being void as against public policy. This verbal contract, if a contract at all, under the provisions of subdivision 5, § 2185, of the Civil Code, related to the sale of land, and was superseded by the subsequent written agreement relating to the same matter, under section 2186, Civil Code. *Armington v. Stelle*, 27 Mont. 13, 69 Pac. 115. And this written agreement, when once entered into, could be altered by a contract in writing or by an executed oral agreement, and not otherwise. Sections 2281, 2204, Civ. Code; *Bradford Inv. Co. v. Joost*, 117 Cal. 211, 48 Pac. 1083. This oral agreement, being thus nullified by the subsequent written agreement, does not constitute any consideration whatever for the written instrument described in plaintiff's complaint. *Fisher v. Briscoe*, 10 Mont. 124, 25 Pac. 30. The contract to convey entered into on the 14th day of December, 1899, made it the duty of the plaintiff, as well as of all the other grantors thereto, to sign the deed to the property therein described, and to deposit the same in the bank in escrow. The refusal, therefore, of the plaintiff to sign this deed or escrow agreement until the defendant had executed the instrument described in the complaint, was not a valid consideration for any contract, for the reason that plaintiff was already bound by his former agreement to execute these instruments. *Abbott v. Doane, Jr.*, 34 L. R. A. 33, note. If this verbal agreement was only to the effect that the agent, Jackson, should share with the plaintiff, Easterly, the profits which Jackson made on the sale of the property, then it would be necessary for the plaintiff, in order to recover, to show that there was a sale of the property for some amount exceeding the \$60,000; and no such evidence appears in the record.

There is no contention in this case that this agreement to convey dated December 14, 1899, fails to state the actual intention of the parties, and that instrument was introduced in evidence by the plaintiff to sustain his case. The instrument set out in the complaint is sued upon as an original and complete contract, and is not presented as an admission by the defendant of a balance due on any other contract, either verbal or written. It was explained by evidence referring to the circumstances under which it was made and the matter to which it relates. Plaintiff insists that it was executed prior to the payment of the \$500. The complaint contains a copy of the instrument, and then follows the allegation: "But defendant has not paid the same, nor any part thereof." The \$500 was therefore not a part of the amount expressed in the contract sued upon, for plaintiff, in his testimony, admits this payment, and judgment is demanded for the full amount expressed in the instrument. There is a conflict in the evidence as to whether this verbal contract for the \$3,000



was made prior or subsequent to the execution of the written agreement to convey on December 14, 1899; also as to whether the \$500 was paid prior or subsequent to the execution of the instrument described in the complaint. The order in which these agreements were made, or the time of this payment with reference thereto, however, makes no difference in the legal question involved as to the consideration for the instrument constituting the basis of plaintiff's cause of action. In considering this question we have taken only the admissions of the plaintiff as the same appear in his evidence.

It appearing from the record that there was no consideration whatsoever to support the instrument on which the action is based, we recommend that the judgment and order appealed from be reversed, and the case remanded for a new trial.

CALLAWAY, C., concurs. CLAYBERG, C. C., being disqualified, takes no part in this decision.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order appealed from are reversed, and the case is remanded for a new trial.

HOLLOWAY, J., being disqualified, takes no part in this decision.

(29 Mont. 478)

#### BORDEAUX v. BORDEAUX.

(Supreme Court of Montana. Feb. 1, 1904.)

DIVORCE — ALIMONY — COUNSEL FEES — PAST SERVICES—NECESSITY OF ALLOWANCE—SUFFICIENCY OF SHOWING—PROSPECTIVE SERVICES—SECURING NEW TRIAL—APPEAL.

1. Civ. Code, § 191, empowers the court during the "pendency" of an action for divorce to allow a wife alimony or money "to prosecute or defend the action." Section 1895 provides that an action is "pending" from its commencement to its final determination on appeal or the expiration of the time for appeal. Section 1730 provides that an appeal shall stay proceedings in the court below on the judgment, but allows that court to proceed in any matter not affected by the order appealed from. *Held*, that the district court has jurisdiction, notwithstanding a judgment in favor of the husband for divorce, at any time prior to the determination of the appeal from the judgment or prior to the expiration of the time for appeal to require the husband to pay any money necessary to enable the wife to support herself, or to further prosecute or defend the action.

2. Under Civ. Code, § 191, empowering the court to allow a wife money "to prosecute or defend" a divorce suit, the court has no power, after trial and judgment, to compel the husband to pay for past services of attorneys, or for expenses incurred in the trial, except when such payment is necessary to enable the wife to continue her prosecution or defense.

3. In order to empower the court to allow a wife money to pay for past services of attorneys, it must be shown that such allowance is necessary to enable her to continue her prosecution or defense; and the fact that the court refused to allow such money during the trial,

and reserved the right to allow it until after the trial, does not show a necessity for the allowance.

4. Although judgment for divorce has passed against a wife, the court may allow her, on a proper showing, reasonable costs, expenses, and attorney's fees for services to be rendered in the preparation and presentation of a motion for a new trial, notice of which had been given.

5. While the district court may allow a wife against whom judgment of divorce has been rendered costs and expenses incident to the preparation and presentation of an appeal, such allowance cannot be made while a motion for a new trial is pending, and before the appeal has been taken.

6. While the district court may allow a wife against whom a judgment for divorce has been rendered money necessary to enable her to prepare her statement or bill of exceptions on motion for a new trial, a necessity for such allowance must be shown.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action for divorce by John R. Bordeaux against Ella F. Bordeaux. From an order allowing defendant counsel fees, plaintiff appeals. Reversed.

Stapleton & Stapleton, B. S. Thresher, and Breen & Mackel, for appellant. Jno. J. McHatton, Jesse B. Roote, and W. A. Clark, Jr., for respondent.

CLAYBERG, C. C. On January 28, 1899, plaintiff brought an action against defendant for a divorce. The trial was had in August, 1901, and resulted in a decree in favor of the plaintiff. Pending the action, and upon application filed by the defendant on the 28th day of February, 1899, the court ordered the plaintiff to pay the defendant certain alimony and expenses of the suit and \$600 for her attorneys "as a retainer." The order further provided: "And the matter of requiring the plaintiff to pay additional sums to the defendant for counsel fees during the pendency of the action is reserved for the further action and order of the court herein. And it is further ordered that the defendant shall have leave to hereafter apply to the court for an order against the plaintiff requiring him to pay an additional sum or sums of money to the defendant for her support and to defray the expenses of defending said action and prosecuting a cross-bill therein, and for attorneys' fees. And the court hereby reserves unto itself the right at any future time to make any further or additional order with reference to the support of the defendant and to the payment of money for counsel fees and to defray the expenses of defendant in said action." On August 17, 1901, which was prior to the completion of the trial, defendant made a further application for attorney's fees and certain expenses. The court allowed the expenses, but denied the application for attorney's fees, and made the following recital in the order: "Reserving the right to allow attorney's fees after the trial." After the entry of the decree, and on or about September 28, 1901, defend-

¶ 2. See Divorce, vol. 17, Cent. Dig. § 644.

ant made a further application for an allowance sufficient to pay costs of the trial remaining unpaid; the cost of preparing and presenting motion for a new trial; to pay attorney's fees "for services rendered in the case, including the trial thereof, and to pay them for services to be rendered in preparing, presenting, and serving a motion for a new trial"; and to pay sufficient to support the defendant during the pendency of the action. The application then recited: "This motion is made and based upon the affidavit of the defendant and the affidavits of John J. McHatton, and petition heretofore filed on behalf of the defendant herein with reference to the matter of alimony and counsel fees, and an allowance to the defendant for the defense of this action and the prosecution of her counterclaim; also upon the former order of the court made herein and defendant's bill of exceptions filed September 24, 1901, and upon the affidavits filed herewith, copies of which are herewith served upon the plaintiff; and will be heard upon the same and such other affidavits or oral testimony as may be introduced upon the hearing of the same." This motion came on for hearing on November 9, 1901. The defendant offered proof as to the reasonable value of attorney's fees for the trial of the case and for the preparation and presentation of a motion for a new trial, and also offered proof that the cost of the transcript of the testimony for use in the preparation of a statement on motion for a new trial or bill of exceptions would be \$325. Proof was also offered that defendant's counsel had given notice of motion for a new trial. The court made an order upon hearing this application, allowing the \$325 for a transcript of the testimony, and as to the attorney's fees ordered as follows: "That the defendant be, and she is hereby, allowed the additional sum of one thousand dollars for services of her counsel, McHatton & Cotter, performed from the time of their appearance as counsel herein and for services by them in preparing and presenting motion for a new trial in this court and upon appeal in said cause in the Supreme Court of this state." From this order plaintiff appeals.

It will be noticed that attorney's fees were allowed by this order for three purposes, viz.: (1) For past services in conducting the trial of the case; (2) for services to be rendered in preparing and presenting the motion for a new trial; and, (3) for services to be rendered in the preparation and presentation of an appeal from the judgment.

It seems necessary to a final decision of this appeal that the court first decide under what circumstances and for what purpose a district court might make an order allowing costs, expenses, and attorney's fees after the entry of final judgment. Section 191 of the Civil Code provides, among other things: "While an action for divorce is pending the court or judge may, in its or his discretion,

require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." This is the only statutory authority giving power to a court to grant alimony and expenses to a wife. Section 1895 of the Code of Civil Procedure provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Section 1730 of the Code of Civil Procedure provides that: "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, \* \* \* but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from." All the sections above quoted are referred to in the opinion of this court on an original application made by defendant to this court to compel plaintiff to pay attorney's fees on the appeal, costs for preparing transcript and printing brief in the Supreme Court, and maintenance pending the appeal. *Bordeaux v. Bordeaux*, 26 Mont. 533, 69 Pac. 103. This court said: "Whether the district court or judge has power, pending appeal, to require the husband to pay to the wife money necessary to prosecute or defend against an appeal in a divorce case is a question reserved as unnecessary to be decided." The court then decided that in the exercise of appellate jurisdiction it had no such power. Mr. Justice Pigott discusses the power of the courts of Montana in divorce cases, and in this discussion uses the following language when speaking of the appellate jurisdiction of this court in such cases: "The action—the entire case—is not transferred by appeal. Questions of law only are presented on appeal, even where the relief sought is equitable in character. The action itself is still pending in the lower court. On an appeal only questions of law are tried. Neither the mere weight of evidence in substantial conflict nor the credibility of the witnesses is re-examined, nor is evidence adduced. Except in so far as affected by the appeal, the cause remains in the district court, the primary forum." We are of the opinion that under the above-quoted provisions of the statute the district court had jurisdiction and power, notwithstanding the judgment, at any time prior to the determination of the action on appeal from the judgment, or prior to the expiration of the time of appeal, to require the husband to pay any money necessary to enable the wife to support herself and to further prosecute or defend the action. *Ex parte Winter*, 70 Cal. 291, 11 Pac. 630; *Larkin v. Larkin*, 71 Cal. 330, 12 Pac. 227; *Bohnert v. Bohnert*, 91 Cal. 428, 27 Pac. 732; *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 550; *McBride v. McBride*, 119 N. Y. 519, 23

N. E. 1065; *Watkins v. Watkins*, 66 Mo. App. 468; *State ex rel. Clarkson v. St. Louis Ct. of App.*, 88 Mo. 135; *State ex rel. Gercke v. Seddon*, 93 Mo. 520, 6 S. W. 342. It is well settled that the court below has no power, after trial and judgment in the case, to compel the husband to provide the wife with money to pay for past services of attorneys, or for expenses incurred in the trial of the case; that the necessity mentioned in the statute refers to prosecuting and defending the action in the future. Therefore, after the case has been tried, and the judgment has been entered, no such necessity can exist. *Lacey v. Lacey*, 108 Cal. 45, 40 Pac. 1056; *Loveren v. Loveren*, 100 Cal. 493, 35 Pac. 87; *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 550; *Newman v. Newman*, 69 Ill. 167. There is one apparent exception to the principle announced by the last decisions cited, and that is that the district court may allow the wife money with which to pay such past expenses, when it becomes necessary to make such payment in order to enable her to continue her prosecution or defense. *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 550; *Loveren v. Loveren*, 100 Cal. 493, 35 Pac. 87; *Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. 735. But, in order to apply the doctrine announced in the cases last cited, there must always be a showing of this necessity. The only attempted showing, as disclosed by the record, is that upon the applications made to the court pending the trial for allowance of attorney's fees the court refused to allow them, and reserved the right to allow them after the trial. We do not believe that this was a showing of a necessity for their allowance, under the above authorities, but only an excuse for not insisting upon their allowance before final judgment was entered. The court below evidently refused to make the allowance, further than the retainer above mentioned, on the theory that he was unable to tell what the reasonable value of such fees would be until after the trial of the case, and that he could reserve the right to grant such fees until that time. But, if the law did not allow him to order their payment after the trial and entry of judgment, he could not make the reservation effective.

Under the above authorities we are clearly of the opinion that the defendant, by her showing, did not bring her application within the exception recognized, and that the court below therefore erred in allowing attorney's fees for past services, after the judgment had been entered. There is no doubt that the court below had full authority and power to allow reasonable attorney's fees for services to be rendered in the preparation and presentation of a motion for a new trial, the proof disclosing that notice of intention to move for a new trial had been given. The mere fact that judgment passed against defendant

upon a hearing of the case did not prevent her from making the motion for a new trial. Nor did it prevent the court from allowing her the costs, expenses, and attorney's fees necessary to the making of said motion, if a proper showing had been made to the court for that purpose. We do not deem it necessary to state what that showing must be, but it is sufficient for the purposes of this opinion to say that the showing made before the court in that regard was, in our judgment, not sufficient.

Neither is there any doubt under the above authorities that the court below, after an appeal had been taken, had full jurisdiction to make an order compelling the plaintiff to pay to the defendant the necessary costs and expenses incident to the preparation and presentation of such appeal; but the court below had no power to make such order until after the appeal was taken. A motion for a new trial was pending. The court could not tell in advance whether this motion would be overruled or granted. If granted, there would be no occasion for an appeal. The court therefore was in error in making the order complained of, because included in that order was an allowance for attorney's fees for services to be performed in the preparation and presentation of an appeal.

The only further allowance complained of is that of \$325 for obtaining a copy of the testimony given at the trial for use in the preparation of a statement on motion for a new trial or bill of exceptions. Of course, under the above authorities, the defendant would have a right to whatever allowance might be necessary to enable her to prepare her statement on motion for a new trial or bill of exceptions, but it was incumbent upon defendant to show the necessity for such allowance. Thus, motion for a new trial might have been based upon bills of exceptions settled during the trial, in which case, there would be no necessity of obtaining a transcript of the entire testimony taken at the trial. We do not believe that the showing made in the court below upon this application was sufficient to authorize the court to make the allowance of \$325 for this purpose.

We are therefore of the opinion that the order appealed from should be reversed, and remanded to the lower court, with permission to the defendant to make a proper showing of the necessity of expenses in the preparation and presentation of a motion for a new trial.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the order appealed from is reversed and remanded, and the lower court is hereby directed to permit the defendant to make a proper showing of the necessity of expenses in the preparation and presentation of a motion for a new trial.

(29 Mont. 508)

**STATE v. KEERL.**

(Supreme Court of Montana. Feb. 1, 1904.)

**HOMICIDE — DEFENSES — NECESSITY — TEST — INSTRUCTIONS — QUESTIONS FOR JURY — INFORMATION — NECESSARY AVERMENTS — CONCLUSIONS OF PLEADER.**

1. An information for murder need not contain an express averment of an intent to kill.

2. Under Pen. Code, § 1834, providing that an information must be certain as to the party, the offense, and the circumstances charged; section 358, providing that guilt must be proved beyond a reasonable doubt; and section 357, providing that the victim must die of the mortal wound, and within a year and day thereafter — an information for murder should directly allege that death resulted from the mortal wounds inflicted by defendant.

3. Averments concluding an information for murder, "and so the said [defendant] did kill and murder the said [deceased]," are merely conclusions of the pleader, and do not cure or aid a defective allegation of the cause of death.

4. On the issue of insanity in homicide, instructions that an insane delusion must be such that if things were as the person possessed of such delusion imagined them to be they would justify the act springing from the delusion, and that one suffering from a partial delusion was in the same situation as to responsibility as if the facts with respect to which the delusion existed were real, were radically wrong.

5. In a prosecution for homicide, instructions on the issue of insanity based solely on the "right and wrong test" are in irreconcilable conflict with others based on that test as modified by the "irresistible impulse" test, and vitiate the conviction.

6. In a prosecution for homicide, a charge stating that certain testimony is corroborative of other testimony is a comment on the weight of the evidence, and invades the province of the jury.

7. In a prosecution for homicide, a charge stating that lunatics and insane persons are incapable of committing crimes, and if defendant was an insane person he should be acquitted, should have been qualified by adding after the words "insane person" a definition of the term "insanity," as used in criminal law.

8. The question whether defendant was affected with insanity to such a degree as would excuse him from the commission of an act otherwise criminal is one of fact for the jury.

9. Since Pen. Code, §§ 20, 21, provide that in every crime there must exist a joint operation of act and intent, or criminal negligence, and that the intent is manifested by the circumstances of the offense and the sound mind and discretion of the accused, an insane person in criminal law is one who is mentally unable to form a criminal intent.

10. On the issue of insanity in homicide, the court should instruct in the language of the statute (Pen. Code, §§ 20, 21), providing that in every crime there must be a union of act and intent, and intent is manifested by the circumstances and sound mind of accused, and define insanity as any weakness or defect of the mind rendering it incapable of entertaining in the particular instance the criminal intent, supplementing the definition by the comment that criminal responsibility is to be determined solely by defendant's capacity to conceive and entertain the intent to commit the particular crime or similar language, and should not give further instructions, but should leave the fact to be determined by the jury.

Holloway, J., dissenting in part.

Commissioners' Opinion. Appeal from District Court, Lewis and Clarke County; Henry C. Smith, Judge.

James S. Keerl was convicted of murder in the second degree, and appeals. Reversed.

C. B. Nolan and T. J. Walsh, for appellant. Jas. Donovan, for the State.

**CALLAWAY, C.** The defendant has appealed from a judgment finding him guilty of murder in the second degree, and from an order denying his motion for a new trial. A number of errors are assigned.

1. He first attacks the information, which, omitting the formal parts, is as follows: "That at the County of Lewis and Clarke, in the State of Montana, on or about the 11th day of April, A. D. 1902, and before the filing of this information, the said James S. Keerl did, wilfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought, make an assault upon one Thomas Crystal, a human being and a certain pistol, commonly called a revolver, which was then and there loaded with gunpowder and leaden bullets, and by him, the said James S. Keerl, had and held in his right hand, he the said James S. Keerl, did then and there wilfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought shoot off and discharge at, upon and into the body of said Thomas Crystal, thereby and by thus striking the said Thomas Crystal with the said leaden bullets, inflicted upon the said Thomas Crystal certain mortal wounds in the back, side and head of the said Thomas Crystal (a more particular description of which said mortal wounds is to the County Attorney unknown), of which said mortal wounds the said Thomas Crystal did then and there languish, and languishing did live, and thereafter, on the 21st day of April, A. D. 1902, at the County of Lewis and Clarke, in the State of Montana, the said Thomas Crystal died." The objections lodged against the information are: First. It does not contain an express averment of intent to kill. Second. It fails to allege that death resulted from the wounds inflicted.

The first objection must be overruled on the authority of *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182, *State v. Northrup*, 13 Mont. 522, 35 Pac. 228, and *Territory v. Godas*, 8 Mont. 347, 21 Pac. 26. While the pleading in this respect must be held sufficient under the cases cited, this court has hitherto suggested that, as following a better practice, prosecuting officers should aver intent specially. *Territory v. Godas*, supra.

The second point urged presents more difficulty. After alleging the infliction of certain mortal wounds, the information continues, "of which said mortal wounds the said Thomas Crystal did then and there languish and languishing did live, and thereafter, on the 21st day of April, A. D. 1902, at the County of Lewis and Clarke, in the State of Montana, the said Thomas Crystal died." An information must be direct and certain

¶ 1. See Homicide, vol. 26, Cent. Dig. § 195.

as regards the party charged, the offense charged, and the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. Pen. Code, § 1834. It is not permissible to convict the defendant upon mere inferences; he must be directly, plainly, and specifically charged with the commission of a certain crime, and it must be proved substantially as alleged in order to convict him. In order to convict an accused of murder, the fact of the killing by him as alleged must be proved beyond a reasonable doubt. Pen. Code, § 358. The fact that the defendant inflicted upon another human being a mortal wound deliberately, premeditatedly, with malice aforethought, and with the intent to kill the victim, is not sufficient to substantiate a charge of murder. The victim must die of the mortal wound, and within a year and a day after the stroke is received or the cause of death administered. Pen. Code, § 357. If the victim die of the mortal wound, but after a year and a day have elapsed since its infliction, the defendant may not be convicted of either murder or manslaughter. Neither can he be so convicted if, while the victim is languishing because of the mortal wound, death ensue from some cause not connected with or a consequence of the wound. For these reasons the information should directly allege that death resulted from the mortal wounds inflicted by the defendant. This view being so clearly correct in principle, it would seem that no citation of authorities is necessary, but see Clark on Criminal Procedure, 178; *People v. Lloyd*, 9 Cal. 55; *Commonwealth v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; *State v. Sundheimer*, 93 Mo. 311, 6 S. W. 52; *Maxwell's Criminal Procedure*, 180; *Bishop's New Criminal Procedure*, §§ 527, 531, 532; *Wharton's Criminal Law* (10th Ed.) § 536. In *Lutz v. Commonwealth*, 29 Pa. 441, while an indictment containing language similar to the one at bar was sustained, the court say: "This indictment is not artistically expressed. Its grammatical construction is open to criticism, and it trenches hard on those rules of certainty which obtain in criminal pleading." The Attorney General relies on the concluding clause of the information as supplying the defect, because it alleges, "and so the said James S. Keerl did in the manner and form aforesaid wilfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought kill and murder the said Thomas Crystal." These words "are the mere conclusions drawn from the preceding averments. If the averments are bad, the conclusion will not aid them; if they are good, and sufficiently describe the crime as the law requires, \* \* \* the formal concluding words are immaterial." *Territory v. Young*, 5 Mont. 244, 5 Pac. 248; *State v. Northrup*, 13 Mont. 522, 35 Pac. 228. We cannot give our approval to this information. As this case must go back for a new trial, the information may be amended by

leave of the court to conform to the views herein expressed.

2. The defense interposed was that the defendant, when he committed the homicide, was affected with insanity. The defendant excepts to instructions Nos. 48, 50, 51, 52, 56, and 57, and alleges that 48, 51, and 52 are in conflict with 34, 38, 49, 53, 54, and 55. A discussion of a portion of those excepted to will be sufficient to dispose of the points raised. We quote 52, 56, and 57.

(52) "The standard of accountability is this: Had the defendant, at the time of the commission of the act, sufficient mental capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another, and in itself wrong? Did he know that it was prohibited by the laws of this state, and that its commission would entail punishment and penalties upon himself? If he had the capacity thus to appreciate the character and comprehend the possible or probable consequences of his act, he is responsible to the law for the act thus committed, and is to be judged accordingly."

(56) "The court further instructs you that, if you find that the accused was possessed of a delusion or delusions, you are carefully to bear in mind that it is not every delusion that can be considered an insane delusion. The delusion must be of such a character that, if things were as the person possessed of such delusion imagined them to be, they would justify the act springing from the delusion."

(57) "The court further instructs you that if you find the accused was possessed of a partial delusion only, and was not in other respects insane, then he must be considered in the same situation, as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposed another man to be in the act of attempting to take away his life, and he killed that man, as he supposed, in self-defense, he would be exempt from punishment; but if his delusion was that the deceased had done a serious injury to his character or person, and he killed him in revenge for such supposed injury, he would be liable to punishment."

These instructions bring us to a realm in which the investigator feels himself lost in a labyrinth of conflicting decisions. Of course, any discussion of the principles applicable to insanity as a defense to crime must necessarily be limited to the particular case in hand. As to what extent juries should be instructed upon this subject and the subject-matter of such instructions is of the greatest importance. Some general rules have always been, and must be, laid down by the courts for the guidance of juries in trials of this character. This view is universally adopted; the only question is, what rule or rules should be adopted, and should the courts lay down any test? The tests of insanity generally adopted by the courts are the right and

wrong test, the irresistible impulse test, the right and wrong test as regards the particular act, and the right and wrong test as modified by the irresistible impulse test. The Supreme Court of New Hampshire denies the existence of any test. *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242. A majority of the courts seem to follow the right and wrong test laid down in *McNaghten's Case*. 10 Clark & Finely, 200; 1 C. & K. 47 Eng. C. L. Rep. 129; 8 Eng. Rep. Full Print, 718. For this reason, and because instructions 52, 56, and 57 are based upon the doctrines enunciated in that celebrated case, we are justified in discussing it at some length. We shall do so with special reference to instructions 56 and 57. In 1843 Daniel McNaghten was tried for the murder of Edward Drummond. At his trial medical testimony was adduced showing that McNaghten was of unsound mind at the time of the killing; that he suffered from morbid delusions; that a person so laboring under a morbid delusion might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had connection with his delusion. The prisoner was acquitted, but public feeling ran so high in consequence that the House of Lords asked the opinion of the judges on the law governing such cases. Three of the five questions propounded were: "(2) What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion in respect of one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defense? (3) In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed? (4) If a person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused?" To the second and third questions the judges answered "that to establish a defense on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." To the fourth question they answered: "On the assumption that he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts, with respect to which the delusion exists, were real. For example, if, under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he

would be exempt from punishment. If his delusion was, that the deceased had inflicted a serious injury to his character or fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." Dr. Clevenger, in discussing this case, says: "Great ignorance in the nature of insanity is displayed in these answers, which seem to have been constructed with special reference to the popular wishes in the particular instance of McNaghten's offense;" and then follows with an illustrative criticism in which he demonstrates the absurdity of the abstract right and wrong test, as well as the dangerous and inhuman doctrine enunciated in that part of McNaghten's Case which refers to insane delusions. Clevenger's *Medical Jurisprudence of Insanity*, 19 et seq. One of the most learned discussions on this subject is by Mr. Justice Somerville, in *Parsons v. State*, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193. From that opinion we quote with approval the following language: "If the rule declared by the English judges be correct, it necessarily follows that the only possible instance of excusable homicide in cases of delusional insanity would be where the delusion, if real, would have been such as to create in the mind of a reasonable man a just apprehension of imminent peril to life or limb. The personal fear or timid cowardice of the insane man, although created by disease acting through a prostrated nervous organization, would not excuse undue precipitation of action on his part. Nothing would justify [excuse?] assailing his supposed adversary except an overt act or demonstration on the part of the latter, such as, if the imaginary facts were real, would under like circumstances have justified [excused?] a man perfectly sane in shooting or killing. If he dare fail to reason, on the supposed facts embodied in the delusion, as perfectly as a sane man could do on a like state of realities, he receives no mercy at the hands of the law. It exacts of him the last pound of flesh. It would follow also, under this rule, that the partially insane man, afflicted with delusions, would no more be excusable than a sane man would be, if, perchance, it was by his fault the difficulty was provoked, whether by word or deed; or if, in fine, he may have been so negligent as not to have declined combat when he could do so safely, without increasing his peril of life or limb. If this has been the law heretofore, it is time it should be so no longer. It is not only opposed to the known facts of modern medical science, but it is a hard and unjust rule to be applied to the unfortunate and providential victims of disease. It seems to be little less than inhuman, and its strict enforcement would probably transfer a large percentage of the inmates of our Insane Hospital from that institution to hard labor in the mines or the penitentiary. Its fallacy consists in the assumption that no other phase of delusion, proceeding from a diseased brain, can so de-

stroy the volition of an insane person as to render him powerless to do what he knows to be right, or to avoid doing what he may know to be wrong." We therefore think that instructions 56 and 57 are radically wrong, and should never be given.

3. Now, taking up 52. Defendant's counsel especially object to this instruction, because it does not recognize that the defendant may have acted under an irresistible impulse caused by mental disease. It seems to be demonstrated by modern investigation, beyond cavil, that many insane persons, while having the mental capacity to distinguish between right and wrong, are not able to choose between doing what is right and doing what is wrong. The lower court recognized this in instructions 34, 38, 49, 53, 54, and 55. As illustrative of this, we quote a portion of 38: "If, by reason of disease affecting his mind, his mental faculties were so impaired or perverted as that he was unable to distinguish between right and wrong as to the particular act with which he is charged; or if he was able to recognize that it was wrong, and yet was impelled by some impulse, originating in disease, to the commission of the act, and was unable by reason of the diseased condition of his mind, enfeebling his will or otherwise, to refrain from its commission—he should be acquitted by reason of insanity." This proposition was also recognized in *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529, in which the court, speaking through Mr. Chief Justice Brantly, says: "One may have mental capacity and intelligence sufficient to distinguish between right and wrong with reference to the particular act, and to understand the consequences of its commission, and yet be so far deprived of volition and self-control, by the overwhelming violence of mental disease, that he is not capable of voluntary action, and therefore not able to choose the right and avoid the wrong." Instruction 52 is based upon what is called the right and wrong test, which does not recognize that the accused may have been involuntarily impelled to the commission of an act from which he was mentally unable to refrain, and therefore is in conflict with instructions 34, 38, 49, 53, 54, and 55, which are based upon the right and wrong test as modified by the irresistible impulse test. In the *Peel* Case the court suggested that, in a case in which there is no pretense that the party cannot control his own actions, it may be proper to apply the right and wrong test. We thus see that the lower court gave to the jury two different tests by which the defendant's responsibility for crime might be determined as the test to be followed by them. These tests are based upon different theories, and consequently upon different states of fact, and the two are irreconcilable. If instructions 34, 38, 49, 53, 54, and 55 were applicable to the facts in the case, 48, 51, and 52 could not be; the three latter excluded from the jury any con-

sideration of the question whether, under the evidence, the defendant acted under an insane irresistible impulse. When instructions are conflicting upon a material issue, the judgment cannot stand. *State v. Rolla*, 21 Mont. 582, 55 Pac. 523; *State v. Sloan*, 22 Mont. 293, 56 Pac. 364; *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529; *State v. McClellan*, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.

4. Defendant also attacks instruction No. 50, on the ground that it comments upon the weight which is to be given to certain items of the testimony. So much of the instruction as is criticised reads: "That subtle essence which we call 'mind' defies, of course, ocular inspection. It can only be known by its outward manifestations, and they are found in the language and conduct of the man. By these his thoughts and emotions are read, and according as they conform to the practice of people of sound mind, who form the large majority of mankind, or contrast harshly with it, we form our judgment as to his soundness of mind. For this reason evidence is admissible to show conduct and language, at different times and on different occasions, which indicate to the general mind some morbid condition of the intellectual powers; and the more extended the view of the person's life, the safer is the judgment formed of him. Everything relating to his physical and mental history is relevant, because any conclusions as to his sanity must often rest upon a large number of facts. As a part of the language and conduct, letters spontaneously written afford one of the best indications of mental condition. Evidence as to insanity in the parents and immediate relatives is also pertinent. It is never allowed to infer insanity in the accused from the mere fact of its existence in the ancestors. But when testimony is given directly tending to prove insane conduct on the part of the accused, this kind of proof is admissible as corroborative of the other. And therefore it is that the defense has been allowed to introduce evidence to you covering the whole life of the accused and reaching to his family antecedents." This instruction was taken from the charge of Judge Cox to the jury in the *Guiteau Case* (D. C.) 10 Fed. 161. In the United States courts the judges are permitted to comment upon and explain the testimony of the witnesses, but such is not the rule in this jurisdiction. The instruction is certainly open to defendant's criticism. For instance, the jury is first told that "it is never allowed to infer insanity from the mere fact of its existence in the ancestors," and is then instructed, "but, when testimony is given directly tending to prove insane conduct on the part of the accused, this kind of proof is admissible as corroborative of the other." When the court told the jury that certain evidence was corroborative, it commented on the weight of that testimony. In this the court erred. It is the sole province of the



jury to weigh each item of the testimony, and to give it such credit as they believe it entitled to. *State v. Sullivan*, 9 Mont. 174, 22 Pac. 1088; *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294, 52 Am. St. Rep. 655; *State v. Mason*, 24 Mont. 341, 61 Pac. 861.

5. While we have not passed upon the correctness of any instructions in this case which have not been argued by counsel, we call the court's attention to 32, 33, and 36. No. 32 reads: "Under the law of this state certain persons, including lunatics and insane persons, are incapable of committing crimes. Accordingly, if you find that, at the time of the doing of the acts charged in the information against the defendant, he was an insane person, it is your duty to acquit him on the ground of insanity." After the words "an insane person" the court should have explained the meaning of the term "insanity," as it is regarded in the criminal law, either by direct definition or by reference to other parts of the charge. It is not sufficient to give the statute without explanation, because it is not every form of insanity which will excuse the defendant of the act committed.

6. The disease of insanity is subject to so many different phases, which are manifested in so many different ways—as various as human thought—that each case must stand upon its own facts. A court, therefore, cannot instruct the jury on every phase or manifestation of insanity, nor should it attempt to; the instructions should be as brief and simple as it is possible to make them. It should only declare generally upon the subject, and it must be left to the jury to find from the proof upon the issue of insanity. The question whether the defendant in any case was affected with insanity to such a degree as will excuse him from the commission of an act which would be criminal if done by a sane person is one of fact; it certainly is not a question of law. When a defendant sets up insanity as a defense, laymen, and experts on insanity, are permitted to testify upon the question of his sanity, under the rules of evidence. Upon the testimony adduced the jury is to find the defendant guilty, or not guilty, by reason of insanity. What persons, then, are insane within the purview of the criminal law? Manifestly, those who are mentally unable to form a criminal intent. The Penal Code declares:

"Sec. 20. In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence.

"Sec. 21. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity."

For the purposes of this discussion, we shall treat insanity and lunacy as synonymous terms. What, then, is insanity in a legal

sense? Mr. Bishop gives the following definition: "Insanity, in the criminal law, is any defect, weakness, or disease of the mind rendering it incapable of entertaining, or preventing its entertaining, in the particular instance, the criminal intent which constitutes one of the elements of every crime." 1 Cr. Law, § 381, subd. 2. "Criminal responsibility is to be determined solely by the capacity of the defendant to conceive and entertain the intent to commit the particular crime. If there is no intent, there is no crime." *State v. Peel*, supra. In the Peel Case the court did not attempt to lay down any test; it was merely discussing the case presented to it. It gave its approval to instructions 36 and 37 quoted in the opinion, saying that upon that branch of the case the lower court instructed the jury fully and fairly. It will be observed that instruction 37 dealt wholly with the question of the defendant's intent. That the instructions last mentioned were correct in the Peel Case is undoubted. It is worthy of remark that juries must be composed of men of a very high order of intelligence if they are much enlightened—indeed, if they are not badly confused—by the mass of instructions usually given them by the courts in insanity cases. Instructions are given to enlighten a jury, not to confuse it. *Yoder v. Reynolds*, 28 Mont. —, 72 Pac. 417. Recognizing the general doctrines asserted in the Peel Case as correct, we are of the opinion that the result sought to be obtained, to wit, a solution of the question whether the defendant, when he committed the act for which he is on trial, had the mental power to entertain a criminal intent, and did entertain it, can be reached best by submitting to the jury a test founded solely upon statute. The question for determination being, was the defendant, when he committed the act, sane, or affected with insanity? the court should give to the jury the appropriate sections of the statute, at the same time defining insanity in accordance with Bishop's definition, as supplemented by this court's comment thereon in the Peel Case, or make use of equivalent language. We doubt if any other or further instructions on the subject of insanity are necessary or useful. *State v. Pike*, supra; *State v. Jones*, supra. The jury may determine the fact from the testimony adduced before it, no matter what may be the character of the insanity attributed to the defendant. This includes, of course, insane delusions and insane irresistible impulses. To illustrate: If the defendant, when he committed the act which would be criminal if done by a sane person, did not know the difference between right and wrong, or, knowing it, was mentally unable to refrain from doing the wrong, he was incapable of forming the criminal intent; or if he was so mentally diseased that he was under the overmastering influence of a delusion which obliterated his power to refrain from the commission of



the wrongful act, he was incapable of forming the criminal intent. In a case where insanity is urged as a defense, the particular technical phase of insanity from which the defendant suffered when he committed the act (if he was in fact insane) is utterly immaterial to the jury; they do not know nor care what the alienists may call it; their desire should be, and their duty is, to ascertain whether the defendant committed the act with a criminal intent; if he did, he is guilty; if he did not, he is not guilty by reason of insanity.

For the foregoing reasons we are of the opinion that the judgment and order should be reversed, and the cause remanded for a new trial in conformity with the views herein expressed.

CLAYBERG, C. C., and POORMAN, C., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial in conformity with the views expressed in the above opinion.

HOLLOWAY, J. I am unable to agree with much that is said in the foregoing opinion. In my judgment, conflicting doctrines on the subject of insanity are announced in *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529, and, if it is intended in this instance to approve what is said in that decision upon this subject, great difficulty must necessarily be experienced upon a retrial of this cause.

In my opinion, instructions 56 and 57 are erroneous.

Instruction No. 50 does not state correct principles of law, and the court therein comments on the weight of the evidence. For these reasons, I think it should not be given at all.

I am also unable to reconcile the doctrine announced in *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533, and *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242, which I think correct, and which seems to be approved, with what is said in other portions of the opinion of the majority of the court.

However, without attempting any discussion of the subject, I content myself with concurring in the order reversing the judgment, but do so upon the grounds that conflicting instructions upon a material issue were given, and that the court gave instructions 50, 56, and 57 above.

(27 Utah, 179)

# SEELEY v. HUNTINGTON CANAL & AGRICULTURAL ASS'N.

(Supreme Court of Utah. Feb. 4, 1904.)  
CORPORATIONS—ARTICLES OF INCORPORATION  
—OBJECT—POWERS.

1. A corporation, the object of which is "to construct, manage, and control the number of canals and ditches hereinafter described, taken

from Huntington creek," followed by the number and description of each canal and ditch, "for the purpose of diverting the waters of said creek" through the canals or ditches for irrigation, and which is empowered to construct and maintain all necessary dams, head gates, flumes, and other or different means necessary to "control, regulate and distribute the said waters for the purposes herein mentioned," is not authorized to construct reservoirs for storing water; and hence an assessment on the capital stock for the construction of such reservoirs is void.

Appeal from District Court, Seventh District; Jacob Johnson, Judge.

Action by Don C. Seeley against the Huntington Canal & Agricultural Association. From a judgment dismissing the case, plaintiff appeals. Reversed.

The plaintiff brought this action against the defendant corporation to recover damages for its failure to deliver to him the quantity of water to which he claims he was entitled as a stockholder of the corporation. The defendant answered, denying any wrongful infringement of plaintiff's rights, and, as an affirmative defense, alleged that, under its articles of incorporation, it had the right to levy an assessment for reservoir purposes; that, pursuant to its authority, an assessment of 2½ per cent. was levied on its capital stock for such purposes; that plaintiff failed to pay his assessment; that thereupon certain of his shares were sold to pay the same; and that, if the plaintiff did not receive the water to which he may have been originally entitled, it was because of his failure to pay said assessment. For the purpose of presenting the questions of law by demurrer to the answer, it was stipulated that the levying of the assessment, the giving the notice of sale of delinquent stock, and the conduct of sale, were regular and legal, provided the defendant, under its articles, had the power to levy assessments for that purpose. To the affirmative allegations in defendant's answer the plaintiff demurred, and also filed a motion to strike the same from the answer, for the reason that said allegations, upon their face, show that defendant had no authority to levy or collect assessments on the capital stock of the defendant company for reservoir purposes, and that any attempt to levy or collect assessments was unauthorized, and in excess of any authority granted by the articles of incorporation to the board of directors, and was therefore an infringement of plaintiff's rights, and without authority and void. The demurrer was overruled, and the motion denied. Plaintiff thereupon filed a reply to the affirmative allegations of the defendant's answer, and prayed for equitable relief against the defendant. On motion of the defendant, the reply was stricken out by the court. It was then stipulated that if, upon the pleadings and record in the case, the plaintiff was entitled to recover, it would only be necessary for him to prove the amount of his damages, but if, on the other hand, the court was of the opinion that the plaintiff was not en-

titled to recover (the pleadings being taken as true), and that the defendant's answer was a defense to plaintiff's complaint, then the defendant would be entitled to recover, and the complaint could be dismissed, the plaintiff saving his right of appeal. In other words, it was, in effect, stipulated that if the corporation, under the showing, possessed the power to levy the assessment, then the complaint might be dismissed. The court held that the company had the right to levy the assessment for reservoir purposes, and dismissed the case. From this decision, plaintiff appealed.

King, Burton & King, for appellant. J. W. N. Whitecotton, for respondent.

BARTCH, J. (after stating the facts). The decisive question here presented is whether the corporation had the power to levy an assessment for the purpose of constructing a reservoir. To ascertain what its power in the premises was, we must look into its articles of incorporation; the same having been entered into in the year 1889. Article 3, so far as material to this decision, reads: "The object and pursuit of business is to construct, manage, and control the number of canals and ditches, hereinafter described, taken from Huntington creek, and more particularly described, as follows [here are given the number and description of each canal and ditch], for the purpose of diverting the waters of said creek from its present channel and causing it to flow through said canals or ditches, thereby making practicable the irrigation and cultivation of large tracts of land heretofore unavailable for agricultural purposes, except that which has been made so by the water that has run through the said canals and ditches. And to this end the association may construct and maintain all necessary dams, head gates, flumes and other or different means which may be necessary to control, regulate and distribute the said waters for the purposes herein mentioned." In this article the canals and ditches which constitute the subject-matter of the incorporation are specially enumerated. As will be noticed, the object of the incorporation was to divert the water of a particular stream by means of certain canals and ditches already, at the time of the incorporation, constructed, and not to impound or store water by means of reservoirs or otherwise. Clearly, the design of the incorporators was to divert, not to store, water; and, for the "purpose of diverting" the water, they made provision in the articles to "construct and maintain all necessary dams, head gates, flumes," and other means requisite for its proper distribution among those entitled thereto. It is manifest from a perusal of the articles that the power to construct reservoirs for the purpose of storing or impounding water was not within the intention of the incorporators, and not an object of the incorporation, and therefore

such power cannot be exercised by the board of directors. Nor, under these articles, can the stockholders confer such power upon the board. It is well-settled law that a corporation cannot legitimately transact business not embraced within the purposes and scope of its incorporation. It follows that the board of directors, having had no power to build reservoirs for the purpose of storing water, had no authority to levy an assessment upon the capital stock for that purpose. Under the circumstances and the law applicable to this case, the assessment was unauthorized, and therefore null and void. We are clearly of the opinion that the court erred in entering judgment in favor of the defendant. Such being the case, it is not deemed necessary to discuss any other question presented.

The judgment must be reversed, with costs, and the cause remanded, with directions to the court below to reinstate the complaint, and proceed with the trial in accordance herewith.

BASKIN, C. J., and McCARTY, J., concur.

(27 Utah, 183)

#### BOUNTIFUL CITY v. LEE et al.

(Supreme Court of Utah. Feb. 4, 1904.)

MUNICIPAL CORPORATIONS—IRRIGATION—CONVEYANCE OF WATER THROUGH CITY—CONSTRUCTION OF FLUMES—ORDINANCES—NOTICE TO CONSTRUCT.

1. A city ordinance provided that no one should convey water for irrigation across any street, except by covered flumes constructed to the satisfaction of the road supervisor, and imposed a penalty for any violation of the provision. The owners of water conveyed the same across a street of the city, but refused to convey it in a proper flume, though required to do so by notice of the road supervisor, and thereafter the city caused the road supervisor to construct a proper flume. *Held*, that the owners of the water were not liable in an action by the city for the cost of the work, there being no liability either under the ordinance or on the facts.

Appeal from District Court, Davis County; H. H. Rolapp, Judge.

Action by the city of Bountiful City against D. C. Lee and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

D. O. Willey, Jr., and Rollin W. Dole, for appellant. Wilson & Smith, for respondents.

BASKIN, C. J. The complaint in this case was filed on the 24th of December, 1902, and it is alleged therein: That Bountiful City was incorporated and organized on the 1st day of January, A. D. 1893. That the South Branch of West Bountiful Mill Creek Water Ditch is an artificial irrigation ditch owned, operated, and maintained by these defendants, through and along which defendants convey water as hereinafter set forth; and the said ditch intersects and crosses said Fourth West street within the corporate limits of said city. That section 14 of an ordi-

nance of Bountiful City, entitled "An ordinance in relation to streets and roads within the limits of Bountiful City," passed and approved the 11th day of May, 1893, provides as follows: "No person shall convey water for irrigation or other purposes, across any street or road, or sidewalk within the city limits, excepting by covered flumes, culverts, or piping across the whole width of such road, street, or sidewalks; such fluming culverts or piping to be done to the satisfaction of the road supervisor. Any person violating this section shall be liable for all damages done said road, street or sidewalk by reason of such violation and also to a fine of not less than five nor more than fifty dollars." That said ordinance is still in force and operative as the law of said city. The defendants, D. C. Lee, Charles F. Hogan, William Winegar, Wallace Muir, Levi Muir, Harry Muir, and Joseph C. Wood, and each of them, and their predecessors in interest, and each of them, are, and at all times mentioned herein were, severally and separately the owners of farms and gardens and homes in Davis county, state of Utah, situate to the west of and outside the corporate limits of Bountiful City; and they and each of them, and their and each of their predecessors in interest, are, and for more than 30 years have been, the owners and users of a portion of the waters of said Mill creek, and at all times mentioned herein have conveyed their portion of the waters of the said Mill creek along and through the said South Branch of the West Bountiful Mill Creek Water Ditch over and across said Fourth West street to their said farms, gardens, and homes. That the defendant G. W. Roberts is and was on the 23d day of July, 1902, the duly appointed and acting agent and water master of the said South Branch of West Bountiful Mill Creek Water Ditch. That at all times since the incorporation of said city, and since the passage of said ordinance, as set forth in paragraph 5 of this amended complaint, defendants have failed and refused to convey their said water across said Fourth West street by means of a covered flume, culvert, or piping, as provided by said ordinance, and have at all times failed and neglected to keep said crossing in good repair. That by reason of defendants' negligent failure to keep said crossing in good repair, and their negligent failure to properly flume their said water across said street, on or about the 23d day of July, 1902, the said street became dangerous and wholly unsafe for public travel, and said crossing became an obstruction to free travel along said street. That on or about the 23d day of July, 1902, the plaintiff caused the road supervisor of the said city to notify defendants of the dangerous and unsafe condition of said crossing, and to request defendants to construct a flume across said street, repair said crossing, and remove said obstruction. That, notwithstanding said notice, defendants failed, refused, and neglected to

construct said flume, repair said crossing, or remove said obstruction. That thereafter, on or about the 5th day of August, 1902, plaintiff caused said road supervisor to construct a flume across the said street at said crossing, and to make other necessary repairs to thereby remove said obstruction and render said street passable and safe for public travel. That the cost of constructing said flume and making said repairs and removing said obstruction amounts in all to the sum of twenty-five dollars (\$25). That plaintiff has made demand upon defendants to pay the said sum, but defendants have failed and refused to pay the same or any part thereof. That there is due and owing from defendants to this plaintiff the sum of twenty-five dollars (\$25). Wherefore plaintiff demands judgment against defendants for the sum of twenty-five dollars, and for costs of this action. The defendant interposed a general demurrer to this complaint, which was sustained, and, the plaintiff having elected to rest, a judgment was entered dismissing the complaint.

The appellant contends that the complaint contains facts sufficient to constitute a cause of action, and that therefore the judgment is erroneous. It is clear that the recovery sought by plaintiff is not authorized by the provisions of the city ordinance set out in the complaint, and that the other alleged facts are not sufficient to constitute a cause of action.

The judgment is affirmed, with costs.

BARTCH and McCARTY, JJ., concur.

(27 Utah, 215)

# MAPLE ORCHARD GROVE & VINEYARD CO. v. MARSHALL.

(Supreme Court of Utah. Feb. 5, 1904.)

PAROL LICENSE—CONSTRUCTION OF PIPE LINE—IRREVOCABLE GRANT—PROTECTION IN EQUITY.

1. A parol license to enter on the land of the owner to construct a pipe line to carry water for purposes of irrigation operates as an irrevocable grant, after entry and the construction of the pipe line at considerable expense, and after commencing the use of the water for purposes of irrigation, and the rights acquired under the grant will be protected in equity.

Appeal from District Court, Box Elder County; H. H. Rolapp, Judge.

Suit by the Maple Orchard Grove & Vineyard Company against C. P. Marshall. From a decree for plaintiff, defendant appeals. Modified.

Geo. J. Marsh, J. S. Perry, and Thos. Maloney, for appellant. Henderson & Macmillan, for respondent.

BARTCH, J. This is an action in equity to restrain the defendant from interfering with a certain pipe line owned by the plaintiff company, and with the water flowing through it to the plaintiff's premises. The

¶ 1. See Licenses, vol. 32, Cent. Dig. §§ 120, 121.

appeal is from the judgment roll, and the evidence is not before us, but from the findings of fact it appears that the plaintiff is the owner of certain land, which it has cultivated and improved. For the purpose of irrigating the land, cultivating an orchard, and raising crops, the company constructed a pipe line, crossing in its course land owned by the defendant, which he purchased from one Cragun. While Cragun was the owner and in the possession of the land, he gave to W. B. Wedell, the predecessor of the plaintiff, a license and right of way to construct a flume or pipe line across it. In 1898, pursuant to this parol license, a flume was constructed, and afterwards, by April or May, 1900, the flume was replaced with pipe. All this was done with the consent of, and without any objection from, Cragun, and at considerable expense. By means of the flume or pipe line, water was carried to the company's premises for irrigation. In September, 1900, the defendant purchased his land, and on August 6, 1902, while the company was using the water to cultivate crops and fruit trees, he entered upon the right of way, tore up the pipe line, and prevented the water from flowing onto the company's land. Because of these acts, this suit was instituted, and a temporary restraining order issued, enjoining the defendant from interfering with the pipe line, which order was made perpetual at the trial of the cause, and the plaintiff's damages were assessed at \$250. The action of the court in the premises has been made the basis of this appeal.

The appellant contends that the license of Cragun to Wedell to enter upon the land in question for the purpose of constructing a flume or pipe line, being by parol, could be revoked by the owner of the land at any time; that the exercise of this right of revocation could not be inhibited by injunction; and that therefore the plaintiff was entitled to no relief in this action. This contention, under the facts and circumstances of this case, is not well taken. It is true, a mere parol license to enter upon the land of another for a specific purpose, or to construct a specified thing thereon, even if it contemplates the expenditure of money, may, so long as the license remains unexecuted, be revoked by the licensor, or owner of the land, as within the statute of frauds; but where, as in this instance, the license has induced the expenditure upon the land of considerable sums of money by the licensee, and has been fully executed in good faith, and the pipe line, or object of the license, used for a long period of time by the licensee without objection by the licensor, the law—at least, as declared by the great weight of authority—is otherwise. In such case the licensee is to construct a particular thing on the licensor's land, and to enjoy the same without limit as to time, followed by the expenditure of money on the faith of it, will, when, as here, fully executed, be regarded and

treated in equity as a binding contract, and is then irrevocable—this upon the principle of estoppel. Thereafter neither the licensor nor his grantee will be permitted to arbitrarily revoke the license, and annihilate and render useless the thing which he permitted to be constructed upon his land by the licensee, and for which he thus induced him to expend money and labor. To permit a revocation under such circumstances would be a fraud upon the licensee, because the parties could not be placed in statu quo after the license has become executed. This fact—that the parties cannot be placed in statu quo—is of itself sufficient to induce a court of equity to enjoin the licensor from committing any act which will prevent the licensee from securing the benefits of the expenditures made on the faith of the license. A right acquired by the expenditure of money under such a license is, when unlimited, commensurate with that of which the license is an accessory; and, therefore, where, as in this instance, the license results in or induces the construction of a flume or pipe line, it amounts to a grant of a right of way for the same, and confers upon the licensee the privilege to enter upon such right of way, after the license has become executed, for the purpose of repairing, maintaining, and operating the flume or pipe line. A person cannot, by granting such a license, encourage another to expend money, and then, when benefits begin to flow from the expenditure, insist upon a revocation of the license. While rights so acquired may not be enforceable at common law, equity will, to prevent fraud being perpetrated upon the licensee, render them effective by restraining the licensor or his grantee from interfering with them. "A license," says Mr. Justice Gibson in *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497, "may become an agreement on valuable consideration, as where the enjoyment of it must necessarily be preceded by the expenditure of money; and, when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived." In *Huff v. McCauley*, 53 Pa. 206, 91 Am. Dec. 203, Mr. Justice Strong, referring to such a license, said: "The parties cannot be placed in statu quo after the license has been executed, and work done or money expended on the faith of it, and hence such a case is regarded as presenting a sufficient reason for a chancellor's interference to restrain any action of the licensor which would deprive the licensee of the benefit of the expenditure he was encouraged to make by the very party who seeks to make it fruitless. Equity treats the license thus executed as a contract giving absolute rights, and protects

the licensee in the enjoyment of them." So, in *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463, Mr. Justice Bedle, speaking of a license to construct something upon the land of another, which required the expenditure of money, said: "To the extent that the license is executed, equity will not disturb it or permit its revocation. Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law, affecting the land of another, and to which his consent is necessary, and where such consent is expressly proved, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of the consent, although not according to the strict mode of the common law, or within the statute of frauds, and, to defeat such a purpose, will, upon proper bill filed, enjoin the licensor from accomplishing his fraud, or, when he asks relief, it will be refused, or, if granted, will be allowed merely in the shape of compensation, but protecting the right of the licensee." *De Graffenried v. Savage*, 9 Colo. App. 131, 47 Pac. 902, was a case in many respects like the one at bar. There the plaintiff had constructed a ditch upon the defendant's land under a parol license from the latter, and operated the same for some time, until the defendant attempted to revoke the license by obstructing the flow of the water in the ditch. The contention in behalf of the licensor—very like as in this case—was that the right to enter, construct, and operate the ditch was by parol license, which was revocable by the licensor at any time he saw fit, but that, by the construction of the trial court, the right of the licensee became an easement in the land of the licensor; that the easement could only be created by deed, and, as there had been no conveyance, and the license had been revoked, the licensee could not enter upon the land to repair, maintain, and operate the ditch. The court held: "The right of way for an irrigation ditch may be acquired by contract between the parties, by condemnation proceedings, or by the gratuitous license of the landowner. In either case, after entry and expenditure of money, the right is irrevocable. After entry under a license, and construction of the ditch, the license operates as an irrevocable grant." The same doctrine herein applied is maintained by Mr. Angell in his work on *Water Courses*. In section 318 he says: "There appears to be no doubt that, in equity, licenses executed are taken out of the statute of frauds, and that relief may be had in equitable tribunals by the licensee against an action at law. The decisions of the courts of equity on that statute proceed on the principle, not that the right passes by parol license or agreement, but that wherever one party has executed it, by payment of money, taking possession, and making valuable improvements,

the conscience of the other is bound to carry it into execution, and equity will compel him to do it." Angell on *Water Courses*, §§ 318-326; *Yunker v. Nichols*, 1 Colo. 551; *McKellip v. McIlhenny*, 4 Watts, 317, 28 Am. Dec. 711; *Flickenger v. Shaw*, 87 Cal. 126, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; *Schilling v. Rominger*, 4 Colo. 100; *Ruffatti v. Lexington Min. Co.*, 10 Utah, 386, 37 Pac. 591; *Lee v. McLeod*, 12 Nev. 280; *Le Fevre v. Le Fevre*, 4 Serg. & R. 241, 8 Am. Dec. 696; *Wickersham v. Orr*, 9 Iowa, 253, 74 Am. Dec. 348; *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574; *Turner v. Stanton*, 42 Mich. 506, 4 N. W. 204; *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142; *Barksdale v. Hairston*, 81 Va. 764.

From the foregoing considerations, we are clearly of opinion that the license in dispute, under the facts and circumstances disclosed by the record, is irrevocable, and that the action of the trial court in restraining the appellant from interfering in any manner with the pipe line is in harmony with at least the weight of authority and the better reason. The judgment must be sustained by this court, with some modification of the decree, notwithstanding that the appellant also insists that the complaint does neither justify the decree, nor support the findings of fact and conclusions of law.

Without referring to the allegations in detail, it is sufficient to say that, while the complaint is not artistically drawn, it, in the absence of a demurrer or proper plea, sufficiently supports the findings and conclusions made, as shown by the transcript. The decree, as is apparent from the complaint and findings, erroneously describes the land upon which the flume and pipe line were constructed; and the cause must therefore be remanded, with instructions to the lower court to modify the decree by correcting such description so as to conform to the pleadings and findings of fact. When so modified, the decree and judgment must stand affirmed, with costs to the respondent. It is so ordered.

BASKIN, C. J., and McCARTY, J., concur.

(27 Utah, 158)

NASH v. CLARK et al.

(Supreme Court of Utah. Jan. 23, 1904.)

EMINENT DOMAIN—PUBLIC USE—IRRIGATION.

1. The provision in the federal and state constitutions that private property shall not be taken for public use without compensation is construed to mean that private property cannot be taken for strictly a private use.

2. Property is taken for a public use, within the provision of the Constitution declaring that private property shall not be taken for public use without compensation, when the taking is for a use that will promote the public interest, and will tend to develop the resources of the state.

3. The taking of property for the purpose of obtaining water for the irrigation of a farm

¶ 3. See *Eminent Domain*, vol. 18, Cent. Dig. § 76.

and to render the same productive is a taking for a public use, and hence the owner of the farm may condemn a right of way through another's ditch for the purpose of carrying the water to his land for irrigation.

4. It is within the province of the Legislature to enact such laws respecting the appropriation and distribution of water as will tend to prevent unnecessary loss and waste, so long as vested rights are upheld and maintained.

Baskin, C. J., dissenting.

Appeal from District Court, Utah County; J. M. Booth, Judge.

Action by E. J. Nash against Lee Clark and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Plaintiff brought this action to condemn a right of way in a ditch owned by the defendants. The provisions of the statute upon which he bases his right of action, so far as material to this case, are as follows: Rev. St. 1898, § 3588, in part provides: "Subject to the provisions of this chapter the right of eminent domain may be exercised in behalf of the following public uses: \* \* \* (5) Reservoirs, dams, water-gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons, mines, mills, smelters, or other works for the reduction of ores, with water for domestic or other uses, or for irrigating purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable. (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters, or other works for the reduction of ores, or from mines; mill dams; \* \* \* also an occupancy in common by the owners or possessors of different mines, mills, smelters, or other places for the reduction of ores, of any place for the flow, deposit, or conduct of tailings or refuse matter. \* \* \* (10) Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light, or heat." Section 1277, Rev. St. 1898, is as follows: "Any person or corporation shall have the right of way across and upon public, private, and corporate lands, or other right of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, or other means of securing, storing, and conveying water for irrigation, or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use." Section 1278 provides:

"When any person or corporation desires to convey water for irrigation, or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person or corporation, or the owner or owners of the lands through which a new canal or ditch would have to be constructed to convey the quantity of water necessary shall have the right to enlarge said canal or ditch already constructed by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement: provided, that said enlargement is to be done at any time from the first day of October to the first day of March, or at any other time that may be agreed upon with the owner of said canal or ditch." The complaint herein in substance alleges that plaintiff is the owner of 80 acres of land situated in Utah county, this state, which land, without irrigation, is arid, barren, and unproductive, but with irrigation would produce in abundance, hay, grain, and other agricultural crops; that Ft. Canyon creek is a natural stream of water in Utah county, flowing from the mountains north of plaintiff's land in a southerly direction to and near plaintiff's land; that the defendants own a tract of land contiguous to and adjoining plaintiff's land on the north, and are also the owners of a certain ditch leading from Ft. Canyon creek over and across their land to a point within 100 feet of plaintiff's land, which ditch is a mile and a quarter in length, 18 inches wide, and 12 inches deep; that plaintiff owns water in Ft. Canyon creek sufficient to irrigate his land above mentioned; that there is no other convenient or practicable way in which to divert the waters of said creek and convey the same onto plaintiff's land except by and through the ditch of defendants; that, in order to irrigate his land, it is necessary that plaintiff have a right of way through defendants' ditch; that for plaintiff to enter upon defendants' land to enlarge their ditch will not injure them; that plaintiff requested of defendants that they allow him to go onto their land and enlarge their ditch, and use it for conducting his water to and on his land, and offered to contribute his share of the expense of maintaining the ditch and all damages; that the defendants refused to permit him to do so. Plaintiff asks that he be permitted to enlarge defendants' ditch to the extent of widening it one foot more; that he have a perpetual right of way through said ditch when so widened and constructed for the purpose of diverting and carrying his water from Ft. Canyon creek to his land for irrigation purposes; that the damages for such right of way and use of the ditch by plaintiff be fixed and determined, and that upon payment by the plaintiff of such damages he have such ditch condemned to the extent of and to the use and for the purposes above set forth, and that defendants be enjoined from in any way or manner asserting any right antagonistic

to this right of plaintiff; that, if plaintiff is permitted by decree of this court to enlarge and use the ditch as aforesaid, his land can be made productive, and the use of the water to which plaintiff is entitled can and will be put to a beneficial and public use in the irrigation of plaintiff's said land, and for no other purpose. Defendants interposed a general demurrer to plaintiff's complaint, alleging that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendants elected to stand upon their demurrer, and the plaintiff introduced evidence in support of the allegations of his complaint, and the court entered judgment and decree in favor of plaintiff, condemning defendants' land as prayed for in the complaint; and for a reversal of this judgment the defendants have appealed to this court.

J. W. N. Whitecotton, for appellants.  
Warner, Houtz, Prentiss & Warner, for respondent.

McCARTY, J., after a statement of the foregoing facts, delivered the opinion of the court.

Appellants contend that the order of the district court overruling the demurrer was erroneous for the reason that the complaint on its face shows that the use to be made of the property sought to be condemned is strictly private, and in no sense a public use. Both the Constitution of the United States and the Constitution of this state provide that "private property shall not be taken or damaged for public use without just compensation." This provision is construed to mean that private property cannot be taken for strictly a private use, which counsel for respondent concede to be the true and proper construction. This brings us to the only question presented by this appeal, to wit: Was the condemnation of appellants' land in this case in law and in fact for a public use? There is no fixed rule of law by which this question can be determined. In other words, what is a public use cannot always be determined by the application of purely legal principles. This is evident from the fact that there are two lines of authorities, neither of which attempts to lay down any fixed rule as a guide to be followed in all cases. One class of authorities, in a general way, holds that by public use is meant a use by the public or its agencies—that is, the public must have the right to the actual use in some way of the property appropriated; whereas the other line of decisions holds that it is a public use within the meaning of the law when the taking is for a use that will promote the public interest, and which use tends to develop the great natural resources of the commonwealth. After a careful examination of the leading cases on this subject, we are of the opinion that the class of decisions last mentioned are more in harmony with enlightened public policy, and the liberal interpreta-

tion given the term "public use" which the Legislature has, in effect, declared shall be followed in this state, is far more conducive to individual and public advancement than the restricted construction adopted and followed by the line of decisions first referred to.

The question of the manner of appropriation and use of water for domestic, irrigation, mining, and manufacturing purposes is, and ever since the advent of the early pioneers has been, the most important and vital of all industrial questions with which the people within this arid region have been confronted. Their requirements, and, we might add, their absolute necessities, impelled the Legislatures and courts at an early date in the history of the states and territories strictly arid in character to depart from and lay aside as impracticable some legal doctrines and rules relating to the control and use of water which had theretofore been adhered to and followed for ages, and to adopt and put in operation a new system of acquiring title in and to the streams which are within the arid belt, the use of which was found to be indispensable in agricultural pursuits, in mining, in the establishment of industries, and in the general development of the arid states and territories. By an examination of the records of the early cases in this state (then territory) wherein the courts declined to follow and be governed by the common-law doctrine of riparian rights in its entirety, the same arguments were advanced by those claiming title to water under and by virtue of this doctrine as are advanced by appellants in this case, to wit, that fundamental rights were being interfered with, and the property of one citizen was being taken and given to another. We very much doubt whether either advocate or layman who has witnessed the magnificent results wrought by the change, would now contend that the Constitution was overridden, or any natural or legal right of the citizens invaded, and their property confiscated, when the common-law doctrine of riparian rights was modified for the purposes of irrigation and mining, and a system for appropriating and acquiring title to water adopted that made it possible for populous and flourishing commonwealths to grow up where the country otherwise would have remained a desert, uninhabited, with the possible exception perhaps of an occasional cattle or sheep ranch. The question of how to increase the water supply in the arid region has steadily grown in magnitude and importance until it has become national as well as local. Congress realizing the great public necessity for an increased water supply, and appreciating the great possibilities that may be accomplished in this and other states and territories within the arid belt by conserving and storing the high and surplus waters caused by the melting snows which in the spring months come down from the mountains in torrents, and are either wasted in the deserts or find their way into box canyons, where

they can never be made available for irrigation or other useful purposes, by a provision in the enabling act (section 12) granted to this state 500,000 acres of the public lands lying within the state, with which to create a fund to be used for the purpose of building reservoirs; and later on, by an act known as the "Irrigation Bill," created a fund from the public revenues, which is swelling into the millions of dollars, for the purpose of aiding in this most important of all enterprises of a public character in the arid West, and upon the success of which its future growth and prosperity largely depends. The large expenditure of public funds in this direction is not to be made for the purpose of enabling the states and territories directly benefited thereby, in their sovereign capacity, to engage in farming and other lines of industry, which are dependent upon the water supply, but to ultimately enable the citizens, as individuals, to provide themselves with homes, and to furnish additional opportunities for the further development of the great natural resources with which the arid region abounds. These questions, which are the most important with which the arid states and territories have had to deal, and the successive steps that have been taken in advancing our system of irrigation, are referred to for the purpose of showing the interest that the public have always had, and must of necessity continue to have, in the question of irrigation. The natural physical conditions of this state are such that in the great majority of cases the only possible way the farmer can supply his land with water is by conveying it by means of ditches across his neighbor's lands which intervene between his own and the source from which he obtains his supply. The question before us not only involves the right of the farmer to invoke the law of eminent domain, when necessary, to enable him to convey water to his farm, but that of the miner, manufacturer, and persons engaged in other industrial pursuits to build canals, flumes, and lay pipe lines over adjoining and intervening lands, when necessary for the purpose of conveying water necessary for the successful prosecution of their respective enterprises. The future growth, prosperity, upbuilding, and industrial expansion of the state not only depend upon the storing and holding back the high and surplus water so they can be used in times of scarcity, but also in a careful and judicious husbandry of the supply now available; and it is entirely within the province of the Legislature to enact such laws respecting the appropriation and distribution thereof as will tend to prevent unnecessary loss and waste, so long as vested rights are upheld and maintained. Experience has shown that, the greater the amount of water flowing in a ditch of a given size and grade, the less the percentage of seepage and evaporation. Therefore, as a general rule, the owners of canals and ditches, instead of being damaged by their en-

largement and the turning therein of an additional quantity of water, as is proposed in this case, will at least in times of scarcity during the hot summer months, and especially during the periods of protracted drouths, which have become so common of late years in this state, be benefited thereby, besides receiving the market value of the land condemned. In view of the physical and climatic conditions in this state, and in the light of the history of the arid West, which shows the marvelous results accomplished by irrigation, to hold that the use of water for irrigation is not in any sense a public use, and thereby place it within the power of a few individuals to place insurmountable barriers in the way of the future welfare and prosperity of the state would be giving to the term "public use" altogether too strict and narrow an interpretation, and one we do not think is contemplated by the Constitution.

The foregoing conclusions are supported by abundant authority. 10 Am. & Eng. Ency. Law (2d Ed.) 1064, and cases cited. In the case of Dayton Mining Co. v. Seawell, 11 Nev. 394, the plaintiff sought to condemn a right of way over certain lands to a mining claim owned by plaintiff, to be used for the purpose of transporting wood, lumber, timbers, and other material to enable it to conduct and carry on its business of mining. The claim was made in that case, as it is in this, that the statute under which the action was brought was unconstitutional for the same reasons as are urged in the case before us. Mr. Chief Justice Hawley, speaking for the court, says: "That mining is the paramount interest of the state is not questioned. That anything which tends directly to encourage mineral developments and increase the mineral resources of the state is for the benefit of the public, and is calculated to advance the general welfare and prosperity of the people of this state, is a self-evident proposition. Hence it necessarily follows that, if the position contended for by petitioner is correct—and I believe it is—then the act is constitutional, and should be upheld. Although other and weaker reasons have been more frequently assigned, it seems to me that this is the true interpretation upon which courts have really acted in sustaining the right of eminent domain in favor of railroads and other objects, and in several of the decided cases this reason is expressly given. \* \* \* Now, it happens, or at least is liable to happen, that individuals, by receiving the title to barren lands adjacent to the mines, mills, or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, \* \* \* to greatly embarrass, if not entirely defeat, the business of mining in such localities. In my opinion, the mineral wealth of this state ought not to be left undeveloped for any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has



denied to this state many of the advantages which other states possess, but by way of compensation to the citizens has placed at her doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future development unobstructed by the obstinate action of any individual or individuals." In the case of *Oury v. Goodwin*, 28 Pac. 376, practically the same question was involved as is presented here, and the Supreme Court of Arizona, in an elaborate and exhaustive opinion, in which many cases are cited and reviewed, held that the use of water for irrigation is a public use, and that an act of the Arizona Legislature, providing for the condemnation of lands for canal purposes, was constitutional. *De Grafenried v. Savage*, 9 Colo. App. 131, 47 Pac. 902; *Yunker v. Nichols*, 1 Colo. 551; *Schilling v. Rominger*, 4 Colo. 100. In the case of *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 58, 41 L. Ed. 369, the court, in the course of the opinion, says: "On the other hand, in a state like California, which confessedly embraces millions of acres of arid lands, an act of the Legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. \* \* \* To irrigate, and thus to bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose, and a matter of public interest, not confined to the landowners, or even to any one section of the state. The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation." In conclusion the court on this point further says: "We have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use." *Eltinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757. There are many other well-considered cases which declare the same general doctrine as those referred to, but we deem it unnecessary to make further citations.

The judgment of the district court is affirmed; the costs of this appeal to be taxed against the appellants.

BARTCH, J., concurs. BASKIN, C. J., dissents.

(27 Utah, 211)

WESTERN LOAN & SAVINGS CO. v.  
GARFF et al.

(Supreme Court of Utah. Feb. 5, 1904.)

BUILDING AND LOAN ASSOCIATIONS—MEMBERS—RIGHTS—MORTGAGES—FORECLOSURE—PLEADING—COUNTERCLAIM—FAILURE TO REPLY.

1. Where a party subscribed for stock in a building association, which he pledged to secure

a loan, and thereafter made payments on the stock, and the loan association took no steps to foreclose its lien thereon for nonpayment of the loan, or in any way to apply the stock to the payment thereof, it was not entitled to contend that the issuance of the stock was a mere device to obscure the real transaction, and that the subscriber was not a member of the association.

2. Where, in an action to foreclose a real estate mortgage by a building association, defendant filed a counterclaim for the value of his stock in the association, which he had pledged to secure the loan, and alleged that it was agreed between plaintiff and defendant that by the time the principal note should mature the stock so subscribed and paid for would be worth par, and would be as cash, and the note paid out of the proceeds, and any balance paid to defendant, and plaintiff's reply did not deny such allegations, and that plaintiff retained the stock and the accumulations as its own under a claim that defendant never owned or had any rights in the same, defendant was entitled to recover the difference between the principal of the note and the value of the stock and its accumulations.

Appeal from District Court, Utah County; J. E. Booth, Judge.

Action by the Western Loan & Savings Company against Louis Garff and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

J. W. N. Whitecotton, for appellants. Price & McCrea and W. H. King, for respondent.

BASKIN, C. J. The following facts were found by the trial judge, and are not controverted by either of the parties, viz.: On the 21st day of July, 1892, the defendant Louis Garff executed and delivered to the plaintiff his promissory note for \$1,600, payable on the 16th day of July, 1899, with interest thereon, payable monthly from date, at the rate of \$12.50 per month; and on the same day, for the purpose of securing the payment of said note and interest, the said Louis Garff and his codefendants executed and delivered to plaintiff a deed of trust on certain real estate; that on or about the 11th day of July, 1892, the defendant Louis Garff subscribed for and bought of the plaintiff 24 shares of Class A general stock of said plaintiff, as evidenced by certificate No. 260, in accordance with the rules, by-laws, and regulations of said plaintiff, at the agreed and guarantied maximum cost and price of \$50.40 per share to be paid for by said Louis Garff at the rate of 60 cents a month per share, for the period of 84 months; that afterwards the said Garff, as required by the terms of said purchase, paid in monthly installments to the plaintiff \$1,209.60, and that the amount so paid was the full purchase price of the 24 shares of stock; that the stock, at the time the note was given, was, upon the demand of the plaintiff, assigned to it by the said Louis Garff as collateral security for the payment of the note and interest; that the said Garff paid all the interest on the note as it became due, up to and including July 21, 1899; that at the maturity of the note, the plaintiff applied the \$1,209.60 paid for the stock as part payment of the principal

¶ *L. Howells v. Pacific States Savings Co.* (Utah) 40 Pac. 1026, 31 Am. St. Rep. 659.

(\$1,600) due upon the note, but the said Garff never authorized the sum paid as the purchase price of the stock to be so applied; that on the 1st day of July, 1899, the 24 shares of stock, with the accumulated earnings thereon, were, as shown by the books of the plaintiff, worth \$1,719.78; that the plaintiff has taken no steps to foreclose its lien upon the stock, or in any way to apply the stock to the payment of the said Garff's indebtedness. The plaintiff, on the 1st day of May, 1902, instituted this action to foreclose the trust deed and obtain a decree directing the sale of the real estate described in the trust deed, or so much thereof as necessary to satisfy the judgment for \$558.10 rendered against the defendant on the note secured by the trust deed, after the payment of costs and an attorneys' fee of \$50.

The contention of the respondent, as stated in its brief, is as follows: "Garff assigned and transferred absolutely to respondent the 24 shares of stock he subscribed for, and, as this court has held that the stock was a mere device to obscure the real transaction, and issued simply to induce the appellant Garff to believe that by subscribing for the stock he would derive a benefit other than the advancement of the loan, there was nothing in which Garff had any interest which respondent could exhaust. Then, too, Garff was not a stockholder, did not own the stock, and it would be a mere play upon time to compel the respondent to go through the form of selling stock in which Garff had no interest." In view of the well-settled rule of law that no one is permitted to take advantage of his own wrong, this statement is remarkable. The case of *Howells v. Pacific States Savings Co.*, 21 Utah, 45, 60 Pac. 1025, 81 Am. St. Rep. 659, is cited as supporting the respondent's contention. In that case the defendant was, in terms, required, when all of the stipulated payments were made, to surrender to the company the stock subscribed for and assigned to it in payment of the loan. There is an absence of any such requirement in the pending case. It is clear from the facts found that the said Garff purchased the 24 shares of stock, and at the time it was assigned by him he was the owner thereof; that the \$1,209.60 credited on the note was paid by him as the purchase price of the stock, and not as a partial payment on the note; and that the stock was assigned to the plaintiff merely as collateral security.

The defendant Garff, in his answer, set up a counterclaim for \$119.78, that sum being the difference between the principal of the note and the value of the stock with accumulated earnings found by the court. The following material allegations in the counterclaim are not denied by the plaintiff's reply, viz.: "That it was further agreed and understood mutually by and between the plaintiff and the defendant Louis Garff, at the time of executing said note and mortgage,

that by the time said principal note should mature the said stock so being paid for at the rate of sixty cents a share per month would be worth par value of \$100 per share, and that the same could be cashed to the plaintiff by the defendant, and the said note paid in full out of the proceeds, and the balance paid to the defendant." The plaintiff having failed to deny these specific allegations, they must be taken as true, and no findings respecting the same are required. In view of the failure to deny these allegations, and that the plaintiff retains the stock and the accumulations thereof as its own, and under the claim that the defendant never owned or had any rights in the same, the defendant is entitled to recover the difference between the principal of the note and the value of the stock and its accumulations.

It follows that the decree of foreclosure and the judgment for \$558.10 and the award of attorney's fees are erroneous. It is therefore ordered that they be reversed, with costs, and the case remanded, with directions to the court below to render judgment in favor of defendant, for the difference between the value of the stock and the accumulations thereof, specified in the findings of fact, with interest thereon from the maturity of the note.

BARTCH and McCARTY, JJ., concur.

(27 Utah, 205)

COLE et al. v. RICHARDS IRR. CO. et al.

(Supreme Court of Utah. Feb. 5, 1904.)

WATERS AND WATER COURSES—APPROPRIATION—DIVERSION—RIGHTS OF APPROPRIATORS—SOURCES OF SUPPLY—LAKES.

1. Where the waters of a natural stream have been appropriated and put to a beneficial use, the rights thus acquired include an interest in the stream from the point where the waters are diverted to the source from which the supply is obtained, entitling the appropriator to sue a person having no interest in the stream for any interference therewith which materially deteriorates the quantity or quality of the water.

2. Const. art. 17, § 1, providing that all existing rights to the use of any of the waters of the state for any useful or beneficial purpose are hereby recognized and confirmed, deprives any person who has not acquired an interest in a stream of the right to go on the stream and interfere with the existing rights of others so as to destroy or cut off the source of supply of such stream, though such source of supply consists of a pond or lake.

3. Where certain lakes formed a part of the source of supply of a creek, and, with the exception of one of the lakes, formed a part of the natural channel of one of the tributaries thereof, prior appropriators of the waters of the creek were entitled to the same usufructuary rights to the waters naturally flowing and collecting in the lakes, which eventually flowed into the main channel of the creek.

Appeal from District Court, Salt Lake County; W. C. Hall, Judge.

Action by B. H. Cole and another against the Richards Irrigation Company and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

This is an action to quiet title to six reservoir sites and to all the surplus waters that flow into said sites from the country surrounding them, and to restrain defendants from interfering with any of the reservoirs and reservoir sites, dams, headgates, or other improvements thereon, or from appropriating to their own use any of the waters stored or to be stored therein. Four of these reservoir sites are situated within the watershed and near the headwaters of Little Cottonwood Canyon, and the other two reservoir sites are situated lower down, and on the main channel of Little Cottonwood creek. The complaint contained three causes of action. The first and second causes of action were to recover damages from defendants for their alleged wrongful interference with some of the reservoir sites, and the alleged appropriation of the waters stored therein; and the third cause of action to quiet plaintiffs' title to the several sites and to all surplus waters flowing therein, and to enjoin defendants from interfering with plaintiffs' rights to the same. Defendants demurred to the first and second causes of action, which demurrer was sustained by the court. The plaintiffs declined to amend, and the case was tried on the issues raised by the allegations of the third cause of action, and defendants answered thereto. The complaint alleges and the answer admits that Little Cottonwood creek is a natural stream of water, which from time immemorial has flowed continuously through Little Cottonwood Canyon; that for many years the natural and ordinary waters of said stream constituting the primary waters thereof have been and are now appropriated by farmers and others residing in Salt Lake county, Utah, to useful and beneficial purposes; that the volume of waters flowing continuously at all seasons of the year through Little Cottonwood creek and constituting the primary waters thereof is a stream equal to 185.30 cubic feet per second; that the waters of said creek are derived from various springs, lakes, and other natural sources of water supply, and all are tributary to said creek, and lie within the watershed thereof, and at times there is a surplus of waters in excess of said primary waters. It further appears from the record that at different times between the 1st day of October, 1892, and the 15th day of July, 1896, plaintiffs and their predecessors in interest located the reservoirs mentioned, viz., Red Pine Reservoir No. 1, Red Pine Reservoir No. 2, White Pine Reservoir No. 3, Minnie Lake Reservoir, Alta Reservoir, and Gadd Valley Reservoir. Plaintiffs in due time posted notices of their intention to appropriate for storage in these reservoirs, when completed, the surplus and unappropriated waters that flowed in and through the several reservoir sites mentioned, had surveys made of the sites, and filed plats of the same in the United States Land Office at Washington, D. C. Some work was done on the several sites thus claimed and

located. Small embankments of earth and stone were thrown up across the outlets of the lakes, trenches were dug therein, and headgates constructed, so that a portion of the natural storage water could be drained off. All of these reservoir sites except Alta and Gadd Valley are small natural lakes situated on and near the head of tributaries of Little Cottonwood creek. These lakes, which are nothing more than small basins in the canyons, of a few acres each, are supplied and filled with waters which eventually find their way into said creek. The defendants concede the right of plaintiffs to dam up the outlets of the lakes and hold back the surplus and unappropriated waters that flow therein, but deny their right to lower the outlets and drain the lakes of water which the plaintiffs have not held back and stored by means of their artificial embankments; whereas the plaintiffs claim the right to not only draw off the surplus waters stored by them, but to cut down the natural barriers at the outlets, and drain the lakes of the water which nature has stored therein. This appears to be about the only material controverted question involved in the case, as the evidence shows that the Alta and Gadd Valley reservoirs are uncompleted, and in no condition to hold water. A. F. Doremus, the state engineer, was called as a witness, and testified that he made an examination of the lakes in 1901, and found that Red Pine No. 1 is formed by a natural barrier across the bed of the canyon, composed of large cubes of granite, earth, and gravel. Through this barrier the plaintiffs had cut a channel from seven to eight feet in depth in which a culvert had been built. "Above this lake, and in the same neighborhood, were three others. The only overflow that was apparent was from the lower lake. From the second lake you could hear the water running, but you could not see a continuous stream. You could see it in places between the spaces in the rocks. It escaped from this barrier, and discharged into the other lake. This, in a general way, describes the situation. As to the artificial work done on Red Pine No. 1, my opinion is that it is not capable of storing water to any greater extent than the natural barrier would have done. In the first place, it was not much, if any, higher. In the second place, it was not constructed in a manner that would hold water as well as the natural barrier. It would be like substituting a leaky barrel for a tight barrel. It was not calculated to hold water. There was a small overflow at Red Pine No. 1." The record shows that practically the same conditions existed at the other lakes. It will thus be observed that the work done on the several reservoirs was not of a character to increase their capacity for holding water. Therefore the only change made by plaintiffs affecting the volume of water in Little Cottonwood creek was to drain the lakes in a few days by drawing therefrom large quantities of water.

which from time immemorial had gradually, during the hot summer months, when most needed, found its way into the main channel of the creek. The effect of the course thus pursued by plaintiffs was to diminish, rather than increase, the supply of water in this creek. The court found the issues in favor of the defendants, and plaintiffs appealed.

Pierce, Critchlow & Barrette and J. M. Thomas, for appellants. Sutherland, Van Cott & Allison, for respondents.

McCARTY, J., after stating the facts, delivered the opinion of the court.

It is settled in this arid region by abundant authority that when the waters of a natural stream have been appropriated according to law, and put to a beneficial use, the rights thus acquired carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained, and any interference with the stream by a party having no interest therein that materially deteriorates the water in quantity or quality previously appropriated, to the damage of those entitled to its use, is unlawful and actionable. *Kinney on Irrigation*, 249; *Bear River & Auburn Water & Min. Co. v. N. Y. Min. Co.*, 8 Cal. 327, 68 Am. Dec. 325; *Hill v. King et al.*, 8 Cal. 337; *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769; *Phoenix Water Co. v. Fletcher*, 23 Cal. 482; *Natoma Water & Mining Co. v. McCoy et al.*, 23 Cal. 491; *Stein Canal Co. v. Kern Island Irr. Co.*, 53 Cal. 563; *Lobdell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 537. Section 1, art. 17, Const. Utah, provides that "all existing rights to the use of any of the waters of this state for any useful or beneficial purpose, are hereby recognized and confirmed." It will thus be observed that the organic law of this state has put it beyond the power of any party to lawfully go upon a stream of water in which he has acquired no right, and interfere with existing rights, or to destroy or cut off the source of supply of such stream because it happens to be a pond or lake. It is a matter of common knowledge that some of the most valuable and permanent sources of water supply in this state are its numerous lakes, which bodies of water vary in size from a few square rods to several townships of land in extent, and sections 1265, 1266, Rev. St. 1898, recognize the rights that have been acquired by appropriation of the waters of the lakes as well as other natural sources of supply within the state.

It is conceded that respondents are, and for many years have been, the owners of and entitled to the use of all the normal flow or primary waters of Little Cottonwood creek. Therefore, in the light of the foregoing principles, the only question for our determination is, do the natural waters of the lakes under consideration form a part of the source

of supply of Little Cottonwood creek? If they do, then the judgment of the district court must be affirmed. The great preponderance of the evidence not only shows that the lakes in question form a part of the source of supply of this creek, but, with the exception of the upper lake, they form a part of the natural channel of one of its tributaries; hence it necessarily follows that respondents have the same usufructuary rights to the waters which naturally flow and collect in these lakes, which eventually find their way into the main channel, as they have to the balance of the natural flow of the creek. *Malad Val. Irr. Co. v. Campbell (Idaho)* 18 Pac. 52. While it is the policy of the state to encourage enterprises which tend to increase the available supply of water in the state, yet parties engaged in these laudable undertakings must respect the vested rights of others to the streams and other sources of water supply throughout the state accrued to them by prior appropriation.

The judgment is affirmed; the costs of this appeal to be taxed against appellants.

BASKIN, C. J., and BARTCH, J., concur.

(27 Utah, 186)

NYSTROM, City Recorder, v. CLARK.

(Supreme Court of Utah. Feb. 5. 1904.)

JUSTICE OF THE PEACE—DOCKETS AND FILES—CUSTODY AND DISPOSITION—DELIVERY TO CLERK OF CITY COURT—STATUTE—CONSTITUTIONALITY—REFERENCE TO SUBJECT IN TITLE.

1. By Sess. Laws 1901, p. 109, c. 107, the five precincts theretofore existing in Salt Lake City were abolished, and the entire city made one precinct, for which a single justice of the peace was elected pursuant thereto. *Held*, that the fact that he happened to be one of the five justices who held office before the precincts were merged into one did not except him from the requirement of section 23, p. 114, of chapter 109, Sess. Laws 1901, that justices "whose term of office shall have expired" should deliver all their files, papers, etc., to the clerk of the city court created by that chapter.

2. When such statute went into effect, abolishing these precincts, the terms of office of the several justices therein not only expired, but their offices ceased to exist.

3. Rev. St. 1898, §§ 3760-3763, providing in general for the custody and disposition of the dockets and files of justices of the peace on the expiration of their terms of office, and in cases of vacancy by death or removal, etc., include only cases where the justice precincts continue to exist, and hence do not render invalid Sess. Laws, 1901, p. 114, c. 109, § 23, which provides for cases where several city precincts have been abolished and merged into one.

4. The purpose of Sess. Laws 1901, p. 110, c. 109, as shown by its title, was to establish city courts in cities of the first class, provide for the qualifications, elections, and removal of judges, their powers, authority, and jurisdiction, and prescribe the rules of practice and procedure. *Held*, that section 23, relating to the custody by clerks of the files, papers, etc., of city justices of the peace whose terms of office had expired, was not void as not being a subject clearly expressed in the title, as required by Const. art. 6, § 23.

¶ 2. *State v. Howell*, 72 Pac. 187, 26 Utah, 53.

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Mandamus by J. O. Nystrom, city recorder, and ex officio clerk of the city court of Salt Lake City, against Frank H. Clark. From a judgment for plaintiff, defendant appeals. Affirmed.

J. O. Nystrom brought this action in his official capacity as clerk of the city court of Salt Lake City, which office and court were created by chapter 109, p. 110, Sess. Laws 1901. Prior to January 5, 1903, Salt Lake City, which is a city of the first class, was divided into five precincts, in each of which was elected a justice of the peace. In 1901 the Legislature, by an amendment to the then existing law, provided as follows: "That cities of the first class shall not be divided into precincts for the purpose of electing precinct officers, but such cities shall be deemed one precinct for the purpose of electing one justice of the peace." Chapter 109, p. 110, Sess. Laws 1901. Chapter 108, p. 109, provides "that in cities having a population of over fifteen thousand, the office of city justice of the peace is hereby abolished and no election for said office shall be had. This provision shall not affect the office or term of office of present city justices of the peace." The Legislature at the same session passed an act (chapter 109, p. 110) creating and establishing city courts in cities of the first class. Section 1 of the act provides that "there is hereby created within cities of the first class in this state a court to be known as the city court of — (naming the city) and there is also created the office of city judge, whose election, qualification, duties and term of office shall be as hereinafter provided." Section 9, so far as material here, is as follows: "The city recorder of such cities of the first class is ex-officio clerk of the city court." Section 23, in part, provides that "the ex-officio clerk shall be the custodian of all the files, papers, indexes and dockets of justices of the peace of cities of the first class, whose term of office shall have expired, and said justices of the peace are hereby required and directed, on the termination of their offices, to deliver to said clerks all of the papers, files and indexes and dockets, \* \* \* and the said city courts are hereby authorized and directed to proceed to hear and determine all actions and cases so pending before such justices of the peace, and to issue final processes therein and to receive such fees therefor as are now or herein may be provided by law." The defendant, Frank H. Clark, was duly appointed and acting justice of the peace in the First Precinct of Salt Lake City from June 9, 1902, when the law abolishing the several precincts referred to, and merging them into one, went into effect. At the general state election held November 4, 1902, he was elected justice of the peace of Salt Lake precinct, which precinct covered the territory included in the five precincts mentioned.

He duly qualified and entered upon the duties of the office, and continued to retain possession of all papers and files, and to use the indexes and dockets in his new office that he had formerly used while acting as justice of the peace of the First Precinct before said precinct was abolished. The plaintiff, by virtue of the provisions of section 23, c. 109, supra, demanded of the defendant that he surrender and deliver to plaintiff the files, papers, indexes, and dockets above mentioned, which defendant refused and neglected to do, and this action was instituted to compel him by writ of mandate to comply with the foregoing provisions of chapter 109, Sess. Laws, by delivering to plaintiff the papers, files, indexes, and dockets referred to. The court found the issues in favor of the plaintiff, and issued the writ. Defendant appeals.

Frick & Edwards, for appellant. George L. Nye, City Atty., Walter C. Shoup, Asst. City Atty., and Jas. Ingebretsen, Asst. City Atty., for respondent.

McCARTY, J., after stating the facts, delivered the opinion of the court.

The first question presented by this appeal is, does section 23, p. 114, c. 109, apply to the appellant? By the terms of chapter 107, p. 109, Sess. Laws 1901, the five precincts theretofore existing in Salt Lake City were abolished, and the entire city made one precinct. That the Legislature had the constitutional power and authority to do this is not questioned. This being conceded, when the act went into effect by which the territorial limits of each of the five precincts in Salt Lake City were obliterated, and the precincts thereby abolished and merged into one, the term of office of each of the five justices of the peace who held office in these precincts prior to and next preceding January 5, 1903, expired, and it necessarily followed that they could not hold over; neither could they be elected to succeed themselves in the precincts which had been abolished. The provisions of chapter 107 are general, and they contain no saving clause or proviso that excepts any precinct in cities of the first class from their operation; and, as hereinbefore stated, the First Precinct, by the terms of said section, was abolished in common with the other four precincts of Salt Lake City. Therefore the language of section 23, p. 114, c. 109, which refers to justices of the peace "whose terms of office shall have expired," includes all five of the justices of the peace who held office in the precincts mentioned at and prior to the time they were abolished, because, when the act went into effect abolishing these precincts, the terms of office of the several justices of the peace not only expired, but ceased to exist. *State v. Howell*, 26 Utah, 53, 72 Pac. 187. Suppose, for illustration, that neither of the five justices of the peace who held office in Salt

Lake City prior to January 5, 1903, had been elected to the office now held by appellant, but that some new man had been elected and installed in the office; which of the former five justices would he have succeeded, and which set of indexes and dockets would he be entitled to take possession of by virtue of his office? It is manifest that he would either be entitled to the justices' indexes and dockets of all five of the precincts, or none. It is therefore plain that appellant possesses no greater right to the possession of the books in question because he happened to be one of the five justices of the peace who held office in Salt Lake City before the precincts were all merged into one, than if he had on January 5, 1903, been installed for the first time into the office.

Appellant, in his brief, says: "When section 23, p. 114, c. 109, thus was framed, it was framed in view of the fact that at least four out of five of the offices of justice of the peace in, and for Salt Lake City had been abolished." And again: "It is no answer to say that all of the other justices in Salt Lake City were required to deliver their dockets and papers to respondent. All these other justices, by virtue of the abolishment of their office, ceased to be courts, and thus held no office under the Constitution or laws of this state." If this contention is sound, viz., that "all these other justices, by virtue of the abolishment of their offices, ceased to be courts," it disposes of this branch of the case, because, as hereinbefore stated, chapter 107 operated upon all alike.

Appellant contends that chapter 109 is a special law, and that section 23 is void, because, as he insists, there is a general law covering the same subject. This position of appellant is untenable, as it will be seen by an examination of sections 3760 to 3763, Rev. St. 1898, which he relies upon in this connection, that they refer only to cases wherein the terms of office of justices of the peace have expired by limitation in precincts which have not been abolished, but continue to exist, or the office for any other reason has become vacant, and not to cases where, as in the case under consideration, several precincts have been abolished and merged into one. As stated by counsel for respondent in their brief: "A new situation was about to arise in Salt Lake City. Something that had not occurred before, and likely would not happen again, was foreseen, for which no provision then existed in the statutes." Elective terms of office were not merely to expire, but the precincts in which the then offices were held had been abolished. It was to meet exigencies of this character that the law in question was passed.

Appellant further contends that section 23, p. 114, c. 109, is void because the title thereof

does not contain some direct reference to the justice's dockets, indexes, and files affected thereby, which, he insists, does not comply with the requirements of section 23, art. 6, Const., which provides that "except general appropriation bills, and bills for the codification and revision of laws, no bill shall be passed containing more than one subject which shall be clearly expressed in its title." On this point appellant, in his brief, says: "If papers, files, indexes, and dockets are to be taken from an existing constitutional court, should not some reference thereto be contained in the title of the act itself. Bear in mind that the act (chapter 109) created a city court, and provided for all such matters that pertained thereto. To do this, the Legislature had ample power." As hereinbefore stated, the First Precinct, in which the court referred to was held, was abolished by the provisions of chapter 107, Sess. Laws 1901, and the term of office of the then acting justice of the peace for that precinct expired when the act went into effect. No provision was made in this act for the disposition of the records, files, and papers of the justice of the peace of that precinct when it ceased to exist. Therefore the contention that the tribunal of this particular precinct remained an "existing constitutional court" is untenable.

The validity of chapter 107, supra, and the power of the Legislature to create the city court, being conceded, the only remaining question for our determination is, does the title of chapter 109 clearly express the subject-matter of the act? The title, so far as material here, is as follows: "An act relating to and establishing city courts in cities of the first class, providing for the qualifications, elections and removal of its judges, their \* \* \* powers, authority and \* \* \* fixing the jurisdiction, both civil and criminal \* \* \* and prescribing the rules of practice and procedure." It will be noticed that the purpose of the act is the creation of a city court, and this is clearly expressed in the title; and, while the jurisdiction and powers of the court are not particularized and set out in detail in the title, they are referred to in a general way, and are sufficient to enable a person upon reading the title to understand that the jurisdiction and powers of the court are defined in the act. To hold that the title must recite in detail the contents of each section of an act would require the title to be as broad and comprehensive as the body of the act itself, which we do not think is contemplated by the foregoing provision of the Constitution.

The judgment of the trial court is affirmed, with costs.

BASKIN, C. J., and BARTCH, J., concur.

(27 Utah, 168)

**HONE v. MAMMOTH MIN. CO.**

(Supreme Court of Utah. Feb. 3, 1904.)

**INJURY TO EMPLOYE—SAFE PLACE TO WORK—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—WANT OF ORDINARY CARE—ASSUMPTION OF RISK—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY—CONCLUSIVENESS OF GENERAL VERDICT.**

1. There is a want of ordinary care constituting contributory negligence only where, under all the circumstances of the case, something was done or omitted which an ordinarily careful and prudent person in like situation as the person injured would not have done or omitted, and which was the efficient and proximate cause of the injury.

2. The want of ordinary care constituting contributory negligence must be determined from the facts disclosed in each particular case, and is generally a question of fact for the jury, and not of law for the court.

3. Contributory negligence is a question of law only when the testimony is not conflicting, and is such as permits no reasonable difference of opinion as to its effect; but, whenever there is any doubt as to the facts, it is the province of the jury to determine the question, or, whenever there may reasonably be a difference of opinion as to the inference and conclusions from the facts, it is likewise a question for the jury. It belongs to the jury, not only to weigh the evidence and find upon the questions of fact, but to draw conclusions as well, alike from disputed and undisputed facts.

4. Plaintiff, an inexperienced miner, was injured by a cave in a stope, and the evidence tended to show that from the deportment and statements of experienced miners present he thought the place at which he was injured was not dangerous; that "practical miners acknowledged it to be a fact that in a large stope a cave comes in piecemeal," whereas in this case the entire stope fell in; that ordinarily a stope properly timbered will not cave; that those present did not expect the stope to cave when it did, and were waiting for "the boss to come and see where he would send them to work." *Held*, that the question of his contributory negligence was for jury.

5. A servant assumes the natural and ordinary risks of his employment, but the negligence of the master is not among them, and the master is liable whenever that is the proximate cause of injury to the servant.

6. In an action by an employé for an injury claimed to be due to defendant's negligence, a general verdict is conclusive on the question of contributory negligence and assumed risk.

**Appeal from District Court, Juab County; Thomas Marioneaux, Judge.**

Action by Charles Hone against the Mammoth Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover for personal injuries to plaintiff, alleged to have been caused by the negligence of the defendant while the plaintiff, as an employé of the defendant, was engaged as a miner in defendant's mine. The complaint in substance alleges that the defendant negligently failed to fur-

nish plaintiff with a reasonably safe place in which to work, and negligently permitted the place where the plaintiff was by the defendant sent to work to become and remain unsafe; that the defendant, after it had been informed that the plaintiff was inexperienced as a miner, not having been previously engaged in the business of mining, and after it had become fully aware of the unsafe and dangerous condition of the place in which the plaintiff was by the defendant sent to work, negligently failed both to warn or inform plaintiff of the unsafe and dangerous condition of said place, and by timbering to make and keep the same reasonably safe; and that while the plaintiff was in the service of the defendant in said place, and unaware, by reason of his inexperience, of the unsafe and dangerous condition of the same, owing to the alleged negligence of the defendant, a cave occurred, and caused the injury of which the plaintiff complains. The defendant, in the answer, denies the alleged negligence, and pleads the contributory negligence and assumed risk of the plaintiff. The jury returned a verdict in favor of the plaintiff, and judgment was entered thereon.

The appellant assigns as error the refusal of the court to grant a new trial. The first objection urged in the brief by appellant's counsel is that "the evidence affirmatively shows that plaintiff was guilty of contributory negligence, without which the accident and injury would not have happened." It appears from the evidence that the plaintiff was inexperienced as a miner, and that the defendant was aware of the fact; that the plaintiff was injured about 1:30 o'clock a. m. on the 18th day of August; that he, with several other miners, was sent by the defendant's shift boss to work on the night shift in the "800" stope, and that they commenced to work about 12 o'clock p. m. on the 17th of August; that, for several days previous to the accident, rock had been shelling and dropping from the wall of the stope, and the timbers and track in the same had been settling, and that both the defendant's foreman and shift boss were aware of that fact.

The shift boss testified:

"I first heard of the danger in the '800' stope right after supper time. The men came up about 10 o'clock. We used to have an hour for supper. I was on top. I was about coming back from supper, and I heard some of the boys talking, and went over to where they were. I heard them talking among themselves, saying that they thought the stope was settling. That was on the night of the 17th, about 10:30. I went over to a man named Joe Tilly. I asked him about it. He said he thought she was settling a little. 'Well,' said I, 'you go right down and look after it, Joe,' and I says, 'If there is any danger, for God's sake get the men out of there,' and he says, 'All right.' It must have been possibly 10:30, somewhere along there, when I had anything of apprehension of anything unusual in the stope. At 10:30 the boys were at supper, and they were talking that the stope was settling. At that time I went to Joe Tilly and ask-

¶ 1. *Faulkner v. Mammoth Min. Co.*, 66 Pac. 799, 23 Utah, 437-441.

¶ 2. *Holland v. Oregon Short Line R. Co.*, 72 Pac. 940, 26 Utah, 209, 212; *Linden v. Anchor Min. Co.*, 58 Pac. 355, 358, 20 Utah, 134, 148.

¶ 3. See *Master and Servant*, vol. 34, Cent. Dig. § 533.

ed him about it, and he told me that it was settling a little. After that, at 12 o'clock, I sent laborers down, and among the laborers was Hone. I says to Tilly, 'Just stay there and watch it, and, if you think anything is dangerous, get the men out.'"

The shift boss failed to inform the plaintiff, or any of the other employes so sent down, of the threatened danger. It further appears from the evidence that, after the men so sent down began to work (but how long after does not appear), they were warned of the approaching cave by the falling of a large rock, and the increased dropping of loose material in the "800" stope, and, after about 20 minutes occupied in removing their tools and the car on the track beneath the stope, they assembled at a place in a drift 1,200 feet long leading from the stope to the main working shaft, about 30 feet from the stope, and while they were standing there the stope caved, and the current of wind in the drift caused by the cave drove the car, taken from beneath the stope, upon the plaintiff, and injured him. The evidence is indefinite and conflicting as to the time which elapsed between their assemblage at said place and the occurrence of the cave. It is, however, clear that sufficient time elapsed to enable them to retreat to the mule drift, which runs at a right angle from the drift in which they so assembled, and is situated 100 feet from the main working shaft, and also to a large room in said drift 600 feet from the stope, and a crosscut 60 feet from said stope. The drift leading from the stope to the shaft was winding. Among the employes of the defendant so assembled there were three or four experienced miners.

The plaintiff testified that he did not know how high the stope was; that he believed the place to which the employes retreated was safe; that he asked the miners if it was safe, and they said there would not be much concussion, and, if there was, if we would go out near the shaft we would go down it, and that it was as safe there as anywhere; that he did not know any better, and believed them; that they were experienced men, and that he listened to them and judged they knew more about it than he did; and that, when he saw so old and experienced miners there taking it easy, he thought it was safe there.

Gilbert Losee, a witness for the plaintiff, who was present, testified that "the miners did not seem to be excited at all; they said the concussion would not hurt us at all; there were too many outlets; that the concussion would not be enough to throw us down, and that if it was, and we were out to the shaft, it would blow us down it." This witness further stated that there were air passages down to the 900 level, up to the 700 level, and through to the Grand Central Mine.

J. W. Reed, a miner who had worked in the mine a year and nine months, and who

was present at the accident, testified as follows:

"\* \* \* Some of the boys went back in the stope and got the cars out that was standing empty, and we got back in the drift where we knew the ground would not fall, and talked about the cave. We thought there was so much way for the air to get around that the concussion would not hurt us and we were safe there, and waited till the boss came down to see where he would send us to work. When we were talking about the concussion, Hone was in the crowd. We were all together. It was a general discussion. \* \* \* Among the miners the discussion in the presence of Hone was that the ground where we had got to was safe, and there was nothing to fear, only the concussion, and that had lots of room to escape. I presume we did not think the stope would come in as soon as it did. We did not expect it to cave before morning, maybe not until the next day, because the timbers generally take time to break, and the concussion of air so they will give less. My experience is, it is seldom that the cave comes all down."

James A. Beaman, a witness for plaintiff, testified as follows:

"I have been engaged in mining thirty-five years; have worked in a great many mines; have had experience on the ground where rock is shelling, or where it is 'working,' as it is called. In a stope that is one hundred feet high, and fifty to seventy-five feet wide, and one to two hundred feet long, rock shelling and dropping would indicate to me that there was great danger of a portion of the stope coming in. Suppose, in addition, that the track over which the cars were run would swell, rising up apparently from pressure, and the sets were sets raised above it, that would show that the ground was working either below or above, and if the ground was working it would indicate danger of its caving. Under those conditions it would not be safe to remain. I have been in mines when caves have occurred in large stopes. I never was in but two or three that I remember. I don't know whether caves in large stopes are very rare occurrences. In my experience of thirty years, two is all that I could witness. I will admit that the falling in of an entire stope, while it is being worked, is an unusual occurrence. Practically, miners acknowledge it to be a fact that in a large stope a cave generally comes in piecemeal."

The stope which caved was 200 feet long, 75 feet wide, and 100 feet high, and was timbered by square sets, the dimensions of the main timbers of which were 8 by 8 inches.

J. C. Balch, a witness for the plaintiff, testified:

"I have been a miner for twenty-five years, and have worked in a great many places. I have had experience in mines when rock would crumble and shell. That indicates to the practical miner that the ground is moving and working, and, if the ground is moving and working, the usual and natural result is that it will fall sooner or later. If a stope is timbered properly with square sets eight by eight, as the ore is taken out, and the country rock is lime, there should be no crumbling or falling of rock."

The country rock in defendant's mine is lime. Edward Cox, who for two years was defendant's foreman, testified, in behalf of defendant, that this splitting and shelling was not an indication of danger all of the time,



but was some of the time in some places, and that such ground required close attention; that ordinarily, where square sets and lagging are properly put in a stope, there will be no cave, but there are exceptions to that.

The assignment most strenuously urged by defendant's counsel is "the evidence affirmatively shows that plaintiff was guilty of contributory negligence, without which the accident and injury would not have happened."

It appears that the plaintiff was 24 years old. Defendant's counsel contend that plaintiff knew the location of the shaft, and the distance from the shaft to the stope, knew the location of the "mule drift" running 50 feet at right angles from the main drift situated 100 feet from the shaft, knew, or must have known, of the crosscut only 30 feet from where he stood, and of the large room 600 feet away, and that these were places of safety; that he was perfectly familiar with the main drift, and knew that it was not straight, but curved and bent, and that there was little or no danger of being blown down the shaft if he went in that direction; that he knew a fall would cause a gust of wind—"a rush of air"; and that, having ample opportunity of seeking a place of absolute safety, and knowing from the threatening indications that a cave in the stope was liable to occur, he should have disregarded the assurance of the experienced miners respecting the safety of the place where the accident occurred, and retreated to one or other of the places last mentioned, and that his failure to do so, and remaining in such proximity to the stope, was contributory negligence on his part, and the proximate cause of his injury.

It appears from the testimony that the plaintiff knew of the existence of the "mule drift," and that it was 100 feet from the shaft, and that in the drift leading from the stope to the shaft there were turns, but it does not appear that he was aware of either the crosscut or the large room before mentioned. It also appears that he knew that, if the stope caved, there would be a rush of air.

Sutherland, Van Cott & Allison, S. R. Thurman, and Hurd & Wedgwood, for appellant. Powers, Straup & Lippman, for respondent.

BASKIN, C. J., after stating the foregoing facts, delivered the opinion of the court.

Contributory negligence, as defined in 7 Am. & Eng. Ency. of Law, p. 371, "is the want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." This is an accurate definition of contributory negligence. See *Faulkner v. Mammoth Min-*

*ing Co.*, 23 Utah, 437-441, 66 Pac. 799. There is a want of ordinary care on the part of the plaintiff only when, under all of the circumstances and surroundings of the case, he has done, or omitted to do, something which "an ordinarily careful and prudent person," in a like situation as the plaintiff, would not have done, or omitted to do, and which was the efficient and proximate cause of plaintiff's injury. "The test of contributory negligence or want of due care is not always found in the failure to exercise the best judgment or the wisest precaution, but some allowances may be made for the influences which ordinarily govern human action, and what would under some circumstances be a want of reasonable care might not be such under others." *Lent v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 467, 473, 24 N. E. 653. The want of ordinary care, however, must be determined from the facts disclosed in each particular case, and is generally a question of fact for the jury, and not one of law.

This court held, in *Holland v. Oregon Short Line R. Co.*, 26 Utah, 209, 212, 72 Pac. 940, that "contributory negligence is a question of law only when the testimony is not conflicting, and is such as permits no reasonable difference of opinion as to its effect; but, whenever there is any doubt as to the facts, it is the province of the jury to determine the question, or, whenever there may reasonably be a difference of opinion as to the inference and conclusions from the facts, it is likewise a question for the jury. It belongs to the jury, not only to weigh the evidence and find upon the questions of fact, but to draw conclusions as well, alike from disputed and undisputed facts."

This court, in the case of *Linden v. Anchor Mining Co.*, 20 Utah, 134, 148, 58 Pac. 355, 358, held, in the opinion delivered by Mr. Justice McCarty, that: "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or, because of the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

In the case of *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 483, Mr. Justice Lamar, in the opinion, said: "The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstance and surroundings of each

particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court. \* \* \* As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury was likewise a question of fact for the jury to determine under like rules."

As it appears that the plaintiff was an inexperienced miner, and evidence was introduced tending to show that from the deportment and statements of the experienced miners present he thought the place at which he was injured was not dangerous, that "practical miners acknowledged it to be a fact that in a large stope a cave comes in piecemeal," that ordinarily a stope properly timbered with square sets will not cave, that it was not expected by those who were present that the stope would cave before morning or until the next day, and that they were waiting there for "the boss to come and see where he would send them to work," and that the plaintiff did not know the height of the stope, we cannot say that an ordinarily careful and prudent person, under the circumstances, would not, as the plaintiff did, have stayed at the place of the accident. Therefore the question of contributory negligence was properly submitted to the jury.

The second, and only other, objection urged by appellant's counsel, is that "the evidence affirmatively shows that by his acts and conduct plaintiff knowingly and voluntarily assumed the risk of the accident and injury." The servant assumes the natural and ordinary risks incident to his employment, but the negligence of the master is not among the risks so assumed. Whenever the master's negligence is the proximate cause of injury to the servant, the master is liable. Much evidence was introduced in the case at bar tending to prove the alleged negligence of the defendant, and that such negligence was the proximate cause of plaintiff's injury; therefore the issues of both assumed risk and contributory negligence were properly submitted to the jury. The general verdict rendered in favor of the plaintiff is conclusive, both as to the question of contributory negligence and assumed risk.

The judgment is affirmed, with costs.

BARTCH and McCARTY, JJ., concur.

(27 Utah, 142)

# STATE v. CREECHLEY.

(Supreme Court of Utah. Jan. 22, 1904.)

## CRIMINAL LAW—AUTREFOIS ACQUIT—PLEADING—VERDICT—APPEAL—PRESUMPTIONS.

1. Rev. St. 1898, § 4891, providing that verdict on a plea of not guilty shall be either "Guilty" or "Not guilty," which imports a conviction or acquittal on the offense charged, and that on a plea of former conviction or acquittal it shall be either "For the state" or "For defendant," requires a verdict on the latter plea, and, where defendant pleaded not guilty and autrefois acquit, it was error to enter judgment on a verdict of guilty.

2. On appeal it was not to be presumed that because the burden of proof was on defendant to establish his defense of autrefois acquit, and the evidence was not before the Supreme Court, no evidence was given in support of the plea.

McCarty, J., dissenting.

Appeal from District Court, Morgan County; Thomas Marioneaux, Judge.

Moses Creechley was convicted of perjury, and appeals. Reversed.

L. R. Rogers and John A. Street (S. Francis, of counsel), for appellant. M. A. Breeden, Atty. Gen., and W. R. White, Dep. Atty. Gen., for the State.

BARTCH, J. The defendant was charged by information with having committed the crime of perjury. He entered the pleas of "Not guilty" and "Former acquittal." At the trial the jury returned a verdict of "Guilty as charged in the information," but made no finding upon the plea of autrefois acquit, and was discharged. The court afterwards entered judgment of conviction, overruled a motion for a new trial, and passed sentence of imprisonment in the penitentiary. Thereupon the defendant appealed.

It is contended for the prisoner that, the jury having failed to make a finding upon the plea of former acquittal, the court erred in pronouncing judgment upon the verdict of guilty. This contention appears to be sound. Our statute in relation to verdicts (section 4891, Rev. St. 1898), so far as material here, provides: "A verdict upon a plea of not guilty shall be either 'Guilty' or 'Not guilty,' which imports a conviction or acquittal of the offense charged in the information or indictment. Upon a plea of a former conviction or acquittal of the same offense, it shall be either 'For the state' or 'For the defendant.'"

Under these provisions, whenever a defendant in a criminal action enters the plea of autrefois acquit it becomes the plain duty of the court to require the jury, before discharging it, to find upon the issue thus raised. This is so notwithstanding the fact, as insisted by the respondent, that the burden of proving his former acquittal of the same offense is upon the accused. Whether or not

there was proof showing a former acquittal of the identical offense, the plea raised a question of fact for the determination of the jury, as much so as the plea of not guilty. This court held likewise in *People v. Kerm*, 8 Utah, 268, 271, 30 Pac. 988, where it was said: "It was the duty of the court at the former trial to require the jury to find on the issue raised by the plea of former acquittal, and the jury should not have been discharged until they had by their verdict found as to both the issues presented, and, if judgment had been entered on the verdict without such finding, it would have been, on appeal, ground for a new trial." So, in this case, the court having discharged the jury without a finding upon that plea, it was ground for a new trial, and the motion therefor ought to have been granted.

The Attorney General, however, appears to insist, on behalf of the state, that, since the evidence introduced at the trial of the cause is not before us, we must presume, the burden of proof being upon the defendant to establish his plea, that there was no evidence introduced in support of the plea of *autrefois* acquit, and that therefore we cannot interfere with the judgment. This, under the circumstances of this case, where it appears a trial was regularly had upon both pleas, and that no disposition was made of the one, either by the court or jury, would be carrying the doctrine of presumptions to a greater length than justice would warrant. As well might we indulge a presumption that there was no evidence offered as to the plea of not guilty. Both pleas raised questions of fact to be determined by the court and jury.

In *People v. Fuqua*, 61 Cal. 377, a case similar to the one at bar, the Supreme Court of California said: "In this case the defendant, in addition to the plea of not guilty, pleaded a former acquittal. The jury returned a verdict of manslaughter, and omitted to find upon the plea of former acquittal. The record does not disclose that the defendant withdrew or waived the defense of a former acquittal; but the Attorney General contends that, in the absence of anything appearing to the contrary, the appellate court must presume, in support of the correctness of the judgment of the court below, that that defense was withdrawn or waived. But we are not aware that the doctrine of presumptions has ever been carried to that length. To presume that a party had withdrawn or waived a defense which he had pleaded, simply because a jury had failed to find upon it, might lead to very serious consequences. The evidence in the case is not before us, and we cannot know whether any attempt was made to establish that defense. But as we view the matter it is immaterial whether there was or not. If the jury had found in favor of the people upon the plea of a former acquittal, and had failed to find upon the plea of not guilty, it does not seem probable that we would have been asked to pre-

sume, in support of a judgment of conviction, that the defendant had withdrawn or waived his plea of not guilty."

So, in *Solliday v. Com.*, 28 Pa. 13, Mr. Justice Black, speaking for the court as to a plea of *autrefois* convict, said: "If the representative of the commonwealth traverses the plea by denying that the former conviction was for the same offense, and thus forms an issue in fact, it must go to a jury, and no judgment can be given in the case until that question is disposed of. No matter how clear the opinion of the court may be against the defendant, nobody but the jury can decide an issue like that. The judge may influence the verdict—in some cases he may and ought to control it—but he cannot pronounce it. A defendant has a right to complain of mistrial if a question of fact in his cause has not been answered by that tribunal which the law has made his only judge, and to whom he and his accuser have mutually agreed to refer it. When the two pleas of former conviction and not guilty are both in the issue, one is just as important as the other. Both may be false or both true, or one may be false and the other true; but the necessity of a response to both is palpable, since a verdict for the defendant on either would equally entitle him to his free discharge." 22 Ency. Pl. & Pr. 875; *People v. Kinsey*, 51 Cal. 278; *People v. Helbing*, 59 Cal. 567; *People v. Hamberg*, 84 Cal. 468, 24 Pac. 298; *Com. v. Demuth*, 12 Serg. & R. 389; *Burks v. State* (Tex. App.) 6 S. W. 300; *Moody v. State*, 60 Ala. 78; *Wright v. State*, 27 Tex. App. 447, 11 S. W. 458; *Dom-inick v. State*, 91 Am. Dec. 496.

The judgment must be reversed, and the cause remanded with directions to the court below to grant a new trial. It is so ordered.

BASKIN, C. J., concurs.

McCARTY, J. (dissenting). I am unable to concur with my Brethren in the foregoing opinion. The appeal in this case is taken solely on the judgment roll. There being no bill of exceptions, the evidence is not before us.

The information, in part, charges that "the said Moses Creechley, on the 2d day of July, A. D. 1902, at the county of Morgan, state of Utah, \* \* \* did then and there take an oath before the said Honorable H. H. Rolapp, judge as aforesaid, that certain testimony then and there given by him, the said Moses Creechley, in behalf of the defendant Moses Creechley in an action then and there on trial before the said Honorable Henry H. Rolapp, judge as aforesaid, entitled 'In the District Court of the Second Judicial District of the State of Utah, in and for the County of Morgan. The State of Utah v. Moses Creechley and William L. Smith, Defendants. Information'—in which action the said defendant Moses Creechley was then and there on trial, should be the truth, which

said testimony, touching the matter in issue in said action and on said trial, so given by the said Moses Creechley, was in part and in substance and effect as follows, to wit." A part of the testimony set out in the information is, in substance: "That some time in the month of August or September, A. D. 1901, he, the said Moses Creechley, was requested by one Bird to take a certain steer belonging to Bird to one Crouch, a butcher doing business at Morgan City, Utah, which defendant promised to do, or to get one Carpenter to take the steer to Crouch; that Carpenter took the steer to Crouch; that on the 16th day of September, A. D. 1901, at the request of Bird, the said Moses Creechley, together with one Alma Bertosch, drove the said steer from the corral or slaughterhouse of said Crouch right along the road west from the said Morgan City to the creamery (meaning thereby a certain building called the creamery, about a mile west of said Morgan City), and after they, said Creechley and Bertosch, left the creamery (meaning thereby while they were then and there driving said steer), they turned south and west towards Porterville, and stayed there all night." Then follows a long list of specifications of other parts of the testimony wherein it is alleged the defendant committed perjury.

To the information the defendant entered a plea of not guilty, and the record contains the following plea of autrefois acquit: "The defendant also pleads that he has already been acquitted of the offense charged by the judgment of the district court of the Second Judicial District, rendered at Morgan City, Morgan county, Utah, on the 2d day of July, 1902."

The record shows that the case mentioned in the information wherein it is alleged defendant committed perjury is one in which he was acquitted of the crime of grand larceny, and the judgment rendered in that case is the judgment referred to and pleaded in bar by defendant in this action.

The record also contains the following stipulation, which is indorsed "defendant's Exhibit 1, D. H.," which is the usual way official stenographers in this state have of marking a paper or document for identification when offered in evidence: "It is stipulated as a fact in this cause that upon the trial of the case of the State of Utah v. Moses Creechley, charged with grand larceny, and which was tried in this court on July 1st and 2nd, 1902, and being the same case referred to in the information herein, that there was no other or further evidence introduced by the state upon that trial which tended to show the guilt of the defendant Creechley of grand larceny, then the evidence introduced upon this trial, with the exception, viz., that it is further stipulated that upon the trial of said larceny case evidence was given tending to show that on Nov. 3, 1901, defendant did kill on the place of Wm. L. Smith a certain steer, which the state

claimed was the steer described in the information in that case, which claim the defendant disputed, and which he claimed was some other steer. This stipulation is made to bear upon the question of res adjudicata, as the same may be applicable to this case. A. B. Hayes, Dist. Atty. L. R. Rogers, Deft's Atty."

The court, in part, instructed the jury as follows: "It is contended by the state in this case that there was pending in this court on the 1st and 2d days of July, 1902, a case in which the state of Utah was plaintiff and said Moses Creechley and William L. Smith were defendants, founded upon an information in which it was alleged that said Creechley and Smith did, on the 3d day of November, A. D. 1901, at the county of Morgan and state of Utah, then and there unlawfully and feloniously steal, take, and carry away one certain steer, \* \* \* then and there being the personal property of one W. Calderwood."

The court also gave the following instruction: "You are further instructed that at the trial of the cause in which the defendant was accused of grand larceny, last July, the substantial thing in controversy between the parties (the state and the defendant) was whether the steer driven from Crouch's corral in Morgan by the defendant Moses Creechley and Alma Bertosch was the steer described in the information filed by the state in that case (as in this charge already mentioned), or whether it was another steer, the property of one Bird; and since the jury in that case found the defendant not guilty it must be considered by you that that jury believed that the steer thus driven by Moses Creechley and Alma Bertosch was not the steer described in the information in that case. The verdict of that jury finding the defendant not guilty was a decision of that point against the state of Utah, and it is your duty to consider, and I do instruct you as a matter of law, that it is established by the judgment of this court that the steer driven by the defendants Moses Creechley and Alma Bertosch on the 16th of September, 1901, from Crouch's corral in Morgan, was not the steer described in the information filed in the case on trial last July."

The record shows that certain witnesses were sworn and examined on the part of the state, and then the following entry appears: "No witnesses examined on part of defendant. Counsel for state made a brief argument to jury, while counsel for defendant submitted his case without argument. The court charged the jury, and the jury retired to consider their verdict."

The jury returned the following verdict:

"We, the jury, empaneled in the above entitled action, find the defendant, Moses Creechley, 'guilty,' as charged in the information. L. H. Durrant, Foreman."

"We find the following statements attributed to the defendant at the trial in this court in July, 1902, to have been false and to

constitute perjury; that after he and the said Alma Bertosch reached the creamery on the 16th day of September, 1901, they proceeded South to Porterville. L. H. Durrant, Foreman."

It will be observed that the record in brief discloses the following facts: Defendant on the 2d day of July, 1901, in the district court of Morgan City, Utah, was on trial for the crime of grand larceny, and a verdict was returned in his favor of not guilty. Subsequently he was informed against and placed on trial in the same court for the crime of perjury, alleged to have been committed by him on the former trial for grand larceny. He pleaded his former acquittal on the charge of larceny as a bar to a prosecution for perjury; that is, he pleads he was acquitted of the crime of perjury in the very case in which he is charged with having committed the crime. At the trial he introduced no evidence in support of the plea of former acquittal, and the jury failed to find on that issue. The burden of proving his plea of a former acquittal was on the defendant. Underhill, *Crim. Ev.* 245; 3 *Rice on Evidence*, 615; Wharton, *Crim. Ev.* 332; Wharton, *Crim. Pro. & Prac.* 483; 3 *Greenl. Ev.* 35; *Vowells v. Commonwealth*, 83 Ky. 196; *Commonwealth v. Daley*, 4 Gray, 210; *Rocco v. State*, 37 Miss. 367, 368; *Bainbridge v. State*, 30 Ohio St. 264; *Emerson v. State*, 43 Ark. 372; *State v. Heath*, 8 Mo. App. 99; *Hozler v. State*, 6 Tex. App. 501; *O'Connor v. State*, 28 Tex. App. 288, 13 S. W. 14; 9 *Ency. Pl. & Pr.* 637, and cases cited.

Section 4876, Rev. St. 1898, provides that, "on a trial for any other offense than libel, questions of law are to be decided by the court; questions of fact by the jury." Under this provision of the statute the court could only submit to the jury the questions of fact raised by the plea under consideration. The burden being upon the defendant to prove by competent evidence his plea of former acquittal, it necessarily followed that, unless there was some evidence introduced tending to support this plea, there was nothing for the court to submit to the jury on this issue. The principles of law governing the trial of an issue raised by a plea of not guilty made by a party charged with crime by an information or an indictment are entirely different, so far as they affect the defendant, from the rules of law governing the trial of an issue made by a plea of *autrefois acquit* or *autrefois convict*. As to the first proposition the law presumes the plea of not guilty to be a true plea, and that the defendant is innocent of the crime with which he is charged, and when he is placed on trial the burden is on the state to not only produce evidence of defendant's guilt, but the evidence must be of sufficient weight to overturn the presumption of innocence and establish the guilt of the accused beyond a reasonable doubt; whereas, on an issue raised by a plea of former acquittal or former conviction there

is no presumption of law that the plea is true, and the burden, as hereinbefore stated, is on the defendant to prove the issue raised by his special plea. And, further, a finding by a jury, either in favor of or against the defendant, on a plea of not guilty, bars any further prosecution for the crime charged in the information or indictment, whereas a finding by the jury against the defendant on his special plea has no such effect—in fact, he cannot avail himself of it for any purpose. Hence there is a reason why a court should direct a verdict in favor of the defendant when there is no evidence offered, or when the evidence introduced is wholly insufficient to sustain a verdict of guilty.

While some of the authorities hold that when a plea of former acquittal or conviction is entered, and the defendant fails to produce any evidence in support of the plea, or when the evidence in the case is insufficient to sustain it, the court may instruct the jury to find against the defendant on this issue, there are none that go to the extent of holding that in such cases the question should be submitted to the jury as a question of fact for them to decide. The only reason that can be urged why a court should direct a finding against a defendant on his special plea, where there is no evidence to support it, is for the protection of the state, as it could not possibly, in any way, benefit the defendant for the court to direct a finding against him on an issue of this kind. It is not pointed out in any of the cases cited by counsel on either side, nor do I think it can be shown, wherein it would be prejudicial to the interests of a defendant for a court to fail to direct the jury to find against him on his special plea of former acquittal. I can understand wherein it might be to the advantage of the defendant for a court to fail to direct a finding against him on a special plea of this kind when there is no evidence to support it, as the jury might, if the question was left to it, make a random guess in favor of the defendant, which would be equivalent to an acquittal of the crime for which he is on trial. It is not claimed that there was any evidence introduced by defendant in this case to sustain his plea of former acquittal—in fact, the record shows there was none. Therefore I am decidedly of the opinion that the court did not err in failing to submit the question to the jury.

In the case of *O'Connor v. State*, 28 Tex. App. 288, 13 S. W. 14, the defendant was on trial for murder, and in addition to a plea of not guilty he interposed a special plea of former jeopardy. The evidence being insufficient to warrant it, the trial court refused to submit the question to the jury. The Court of Appeals in passing on the question says: "As the defendant wholly failed to establish his special defense of jeopardy by evidence, it was not error for the court to refuse to submit that issue to the jury, and to direct the jury to find the special plea un-

true." *State v. Lee*, 46 La. Ann. 623, 15 South. 159.

In *Johnson v. State*, 34 Tex. Cr. R. 115, 29 S. W. 473, the court, in disposing of this question, says: "Appellant interposed a plea of former jeopardy. There is no evidence in the record. We are not aware whether there was any evidence adduced upon the trial in support of the plea. If there was not, it was not the duty of the court to submit the plea to the jury, and hence no error in the jury not finding upon the plea."

So, in the case of *State v. Paterno*, 43 La. Ann. 514, 9 South. 442, this same question was before the court, and the opinion is, in part, as follows: "The defendant complains of the overruling of his plea of former jeopardy based on the fact that under a prior indictment of the same offense the district attorney had entered a nolle prosequi during the impaneling of the jury and before the jury had been completed. \* \* \* Complaint is also made of the judge's refusal to refer the above plea to the jury. The plea on its face was not good in law, and was clearly demurrable. It involved no matter for a jury, and the judge acted correctly in overruling it."

In *State v. Helveston*, 38 La. Ann. 314, it was held that, "when the plea of autrefois acquit shows on its face that the offense pleaded was not the same of which the prisoner was before acquitted, the plea may be demurred to, and it is not necessary to submit it to a jury." *State v. Lee*, 46 La. Ann. 623, 15 South. 159.

It appears from the record that one of the material and controverted facts in the grand larceny trial was the identity of the steer described in the information in that case, which steer it was alleged the defendant had stolen. The court in its instructions, which were unduly favorable to the defendant, withdrew from the consideration of the jury all questions respecting the falsity of his testimony as to the identity of the steer, holding that the verdict in the grand larceny case in favor of defendant determined these issues in his favor, and the special finding of the jury shows that they followed the court's instructions. Therefore, while there was no formal finding by the jury on the special plea, the defendant obtained all he claimed under his plea of former acquittal, and more than he was legally entitled to under the stipulation on file, which shows precisely what he did claim. The plea and stipulation raised an unmixed question of law, and it would have been error for the court to have submitted it to the jury. The question raised by the plea and stipulation, shorn of all verblage, simply amounted to this: Was the defendant's acquittal of the crime of grand larceny a bar to the prosecution for perjury alleged to have been committed by him while testifying in his own behalf when on trial for the larceny?

The defendant does not claim that he did

not have a fair trial on the merits. His only complaint is that the foregoing question of law was not submitted to the jury, which, under section 4876, Rev. St. 1898, supra, was for the court, and not for the jury, to decide. When a special plea of the nature of the one under consideration is interposed by a defendant in a criminal action, and there is any evidence introduced to sustain it, which raises an issue of fact, it is undoubtedly the duty of the court to submit the same under proper instructions to the jury for determination, and it would be error for the court to refuse; but where, as in this case, the record shows that no question of fact could possibly have been raised, and no evidence whatever introduced, it is not error for the court to withhold the question from the jury.

There is another reason why the judgment of the district court ought not to be disturbed. At common law the defendant in his plea of autrefois acquit was required to set out the former indictment, together with the verdict rendered thereon, and aver that he and the party named as defendant in such indictment were one and the same person. "If the identity alike of the parties and offenses were conceded, it became a question for the court whether or not there had been a former conviction or acquittal." 1 Bishop, Crim. Pro. 814-816. If the record thus pleaded, on its face, established his former acquittal, it remained for the defendant to prove the existence by the record. This he could do by producing the record itself or a copy thereof duly certified. If, however, the record pleaded showed on its face that it could not operate as a bar, the state demurred to the plea, which raised a question of law for the court to decide, and, if the identity of the two offenses and the parties named in the two indictments was denied by the state, a question of fact was raised to be determined by the jury.

While our practice is different from that of the common law, the foregoing distinctions between questions of fact and issues of law remain the same. Under our practice the state cannot demur to a plea of autrefois acquit, but must raise the question of the sufficiency of the record relied on by defendant to sustain his plea, when it is offered in evidence, and if it shows on its face that it is not capable of having the effect claimed for it—in other words, of operating as an acquittal of the crime for which the defendant is on trial—the state may have it rejected by objecting to its admission in evidence, and the only way the question can be brought to this court for review is by a bill of exceptions, as the judgment roll does not contain the rulings of the court on the admission or rejection of evidence offered. This being the practice in this state, there is nothing in the record, when the appeal is taken on the judgment roll, to advise this court of the disposition made of defendant's special plea, when the

record he relies on has been rejected by the trial court.

In the absence of a bill of exceptions in this case showing error on the part of the trial court in disposing of, or in failing to dispose of, this question, error cannot be presumed, as it is settled by the great weight of judicial authority that, unless error is made to appear, the presumption is in favor of the regularity of the proceedings of the trial court. *People v. Kerm*, 8 Utah, 268, 30 Pac. 988; *Elliot*, App. Proc. 709, 718, 721. "If the record does not show what the action of the court was, and upon which it is based, and all the material circumstances in regard to it, it will be presumed to have been regular and correct. There must, therefore, be a record on appeal to make these facts appear to the Supreme Court. \* \* \* Such record must contain everything necessary to make the error apparent. If it appear that the record does not contain a complete account of what took place in the court below, the judgment or order will be affirmed." *Hayne*, New Trial and Appeal, 285, and cases cited in note.

And again, courts will take judicial notice of the judgments and orders contained in their own records. Section 3374, Rev. St. 1898; *Woodward v. State* (Tex. Cr. App.) 58 S. W. 135; *George v. State* (Neb.) 80 N. W. 486. Therefore the presumption in this case should be that the trial court took judicial notice of its judgment pleaded by defendant as a former acquittal, and when offered, if it was offered, examined it to determine whether or not it had that effect, and, on finding it to be a judgment of acquittal of the crime of grand larceny, made the proper disposition of it, and of the issue raised by the plea.

The rule as above stated is that prejudicial error must be shown in order to justify a reversal of a case. Now, it is manifest that the defendant could not have been prejudiced by the failure of the court to take from the jury the question of his former acquittal, even if we assume such to be the case, as the jury could, so long as the question was before them, find for the defendant on that issue. And furthermore this question was not brought to the attention of the district court on the motion for a new trial, and the court had no opportunity to incorporate into the record what its rulings were with reference to the question under consideration. The defendant having failed to refer to this alleged error in his motion for a new trial, and having failed, as shown by the record, to invite the court's attention to it at the time the motion was considered and disposed of, he ought not to be heard to complain for the first time in this court. Justice to the state and fairness to the trial court demand that alleged errors of this character, which do not go to the jurisdiction of the court, be brought to the attention of the lower court, and an opportunity afforded to

either supply the defect when it can be done, by incorporating into the record just what took place, or to grant a new trial, and thereby avoid the delay and expense of an appeal.

For the purpose of the foregoing observations, I have assumed that the defendant's plea of *autrefois acquit*, as first entered, was before the court and undisposed of when the case was submitted to the jury, which, however, is not the case.

The Constitution of the United States and of this state declares that "no person shall twice be put in jeopardy for the same offense." This same provision is found in all of the state Constitutions, and, while there is some conflict in the earlier cases as to when and under what circumstances a jeopardy attaches or is complete in the first instance, the authorities all agree that to constitute a second jeopardy a party must be indicted or informed against for the same offense—the same criminal act—for which he has already been on trial before a court of competent jurisdiction; and if he desires to avail himself of the former jeopardy he must plead it.

Section 4789, Rev. St. 1898, so far as material here, provides that "every plea must be oral and \* \* \* substantially in the following form: \* \* \* 3. If he (the defendant) pleads a former conviction or acquittal: 'The defendant pleads that he has already been convicted (or acquitted) of the offense charged by the judgment of the court (naming it) rendered at (naming the place) on the — day of —.'"

It will be observed that, under the foregoing provision of the statute, a defendant, in order to avail himself of a former acquittal or conviction of the offense for which he is on trial, is required to plead the specific judgment relied on by him to sustain his special plea. This the defendant did. He pleaded in bar a judgment rendered in the court before which he was on trial, on the 2d day of July, 1902, a judgment wherein he was acquitted of the crime of grand larceny. He then stipulated "that the case of the State of Utah v. Moses Creechley, charged with grand larceny, and which was tried in this court on July 1st and 2nd, 1902, and being the same case referred to in the information herein." By this stipulation the defendant abandoned his plea of former acquittal as completely as though he had in open court withdrawn it, because he in effect changed his plea from one of former acquittal of the crime of perjury, for which he was on trial, to one of former acquittal of the crime of grand larceny. He now alleges as error the failure of the court to submit the question of his acquittal of the crime of grand larceny to the jury. This is the principal question relied upon by defendant on this appeal, and the only one of this character that can be predicated upon the record in this case.

I am therefore decidedly of the opinion that

the court did right in ignoring the plea, as it was, in effect, changed by the stipulation, as it raised no issue that could in any way affect the rights of the defendant, and that the judgment of the trial court ought to be affirmed.

(32 Colo. 166)

**PEOPLE ex rel. DU BOIS v. DISTRICT COURT OF ARAPAHOE COUNTY et al.**

(Supreme Court of Colorado. Feb. 1, 1904.)

**SUPREME COURT — MANDATE — RETRIAL — AMENDMENTS—ERROR—REMEDY —MANDAMUS.**

1. Where the question whether the pleadings could be amended on the issues remanded for retrial by the Supreme Court was not before the Supreme Court, the act of the trial court in permitting amended pleadings, injecting new questions into the case, and bringing in new parties is not a disobedience of the mandate of the Supreme Court.

2. Where a cause is remanded for retrial on certain designated issues, the remedy for error of the trial court in permitting the filing of amended pleadings, injecting new questions, and bringing in new parties is not by mandamus, but appeal or error.

Mandamus by the people, on the relation of Bradford H. Du Bois, against the district court of Arapahoe county and others. Writ denied.

Stuart & Murray, for petitioners. T. J. O'Donnell and L. F. Twitchell, for respondents.

**PER CURIAM.** Du Bois v. Bowles, 30 Colo. 44, 69 Pac. 1067, was remanded for trial upon certain designated issues. In the court where the cause is now pending, application was made on the part of defendant Bowles for leave to file an amended answer. Over the objection of plaintiffs, this amendment was permitted. Plaintiffs contend that the amendment changes the issues remanded for trial, in that new questions are injected into such issues, and new parties brought in, and they now apply to this court for a writ of mandamus, directing the court to try such issues as made by the pleadings when judgment was entered here. It is the duty of trial courts to yield obedience to the mandates of this court, and in proper cases they may be compelled to do so by mandamus; but the case stated by petitioners is not of that character, for the reason that the trial court is not disobeying our mandate. The question of whether or not the pleadings could be amended on the issues remanded for trial was not before us. Nothing was said on that subject. Whether or not such an amendment is permissible is an open question, so far as any mandate of this court is concerned, within the jurisdiction of the trial court to determine. If it has erred in allowing the amendment, that question cannot be tested by mandamus. Mandamus lies to compel a subordinate court to exercise its jurisdiction, but not to correct errors committed in the exercise of such jurisdiction. People ex rel.

v. District Court, 18 Colo. 500, 33 Pac. 162; People ex rel. v. District Court, 14 Colo. 396, 24 Pac. 260; State ex rel. v. King, 32 Fla. 416, 13 South. 891; Ex parte Whitney, 13 Pet. 407, 10 L. Ed. 221.

On behalf of petitioners it is claimed that if they yield to the order of the district court in permitting the amendment, and make new issues, then they would waive their right to have the question of the alleged error of the district court in allowing such amendment reviewed. This view is not tenable. If the district court, in retrying the issues remanded, commits error, such action, if exceptions are duly preserved, may be reviewed on appeal or error. People v. District Court, 29 Colo. 365, 68 Pac. 221.

Writ denied, and proceeding dismissed.

(32 Colo. 1)

**PEOPLE ex rel. COLORADO BAR ASS'N v. KELSEY.\***

(Supreme Court of Colorado. Dec. 7, 1903.)

**ATTORNEYS—DISBARMENT—EVIDENCE—SUFFICIENCY.**

1. In proceedings for the disbarment of an attorney on the charge that he had failed to pay over the proceeds of a claim collected by him, and that he retained money sent to him by a client for the purpose of redeeming the client's land from a tax sale, evidence considered, and held sufficient to prove the charge beyond a reasonable doubt, authorizing his disbarment.

Original proceeding by the people, on the relation of the Colorado Bar Association, for the disbarment of W. D. Kelsey. Disbarred.

C. C. Post, Atty. Gen., George P. Steele, and Frank E. Gove, for petitioner. T. J. O'Donnell, Milton Smith, and W. D. Kelsey, for respondent.

**CAMPBELL, C. J.** The information charges the defendant with five separate acts of misconduct for which his disbarment is asked. As the evidence is confined to the first two, only these will be considered.

1. In 1893 the respondent received a claim for collection, the proceeds of which were received from the debtor but not paid over to the creditor. Respondent acknowledges that the account was paid to him, and his defense is that, under the instruction of an attorney from whom he received the account, he paid the proceeds to the cashier of a local bank. Respondent, though filing an answer in which this defense is set up, did not give any testimony at the hearing, although he had abundant opportunity to do so. The deposition was taken of the cashier who was named in the answer as the one to whom the money was paid, and he denies that any such payment was made to him. The depositions of other witnesses were taken, and they contradicted the material allegations of the answer. There not being a particle of evidence in be-

\*Rehearing denied February 1, 1904.



half of respondent to negative the positive evidence in behalf of petitioner, and the circumstances all tending to substantiate the charge, we cannot do otherwise than hold that it has been proved beyond any reasonable doubt.

2. A second ground relied upon is that respondent received from a client the sum of \$31 which was sent to pay taxes. The answer admits the receipt of the money, and says that it was sent for the purpose of redeeming the client's land from a tax sale, with the understanding that such amount would be sufficient for that purpose, provided the county held the certificate issued upon the same, and would accept it in settlement of the taxes due. The answer proceeds to state that subsequent investigation disclosed the fact that not the county, but an individual, held the certificate, and that redemption could not be made for less than the full amount received; and after repeated unsuccessful efforts by respondent to effect a redemption for that amount, and it becoming impossible to use the money for the purpose for which it was sent, he sent to his client a personal check, drawn on a local bank of the town where he lived, for the sum therefore received, which check was not presented for about one month after it was drawn, and when so presented payment thereof was refused by the bank upon which it was drawn on account of such delay, and protest for nonpayment was duly made. He says that at the time the check was issued, and at all times thereafter until it was presented, he had funds on deposit with the bank more than sufficient to pay it, and that it would have been paid if presented within a reasonable time; and when it was presented, after the lapse of an unreasonable time, he says that he was absent from home, and did not return until about two weeks thereafter, when he was informed that the check had been presented and payment refused, and he says that he then went to the bank to pay the original amount of the check, but refused to pay the protest fee, as he considered protest unnecessary. He further says that his client has not demanded the payment of the original sum received, but that he (respondent) has at all times been, and now is, ready to pay the same upon the surrender of his former check. In support of this answer respondent offered no evidence whatever, although full opportunity was afforded. The evidence of petitioner shows that the certificate of sale was held by the county, and not by a private individual, and that, during the negotiations by respondent with the county commissioners looking to a redemption, he was acting not only as county attorney for the county, but as attorney for a taxpayer seeking to redeem from a tax sale made by the county which held the certificate, and for a sum less than that which the statute authorized the county to demand. It also appears that respondent, instead of being absent

for two weeks after the presentation of the check at the bank, was at his home not more than three days thereafter, and then and there wrote a letter to his client with reference to the business in hand. Between the time when the check was given and the institution of these proceedings respondent had about two years within which to pay to his client the original amount received by him, but did not do so. The excuse given by his counsel, that his refusal to repay the amount due was because of a dispute over the protest fees, is not sustained. Even if respondent could not be held to the payment thereof, he certainly should have promptly returned to his client the money received, when he ascertained that it could not be used for the purpose for which it was sent. This he has not done.

The allegations of the complaint are clearly proven, and the answer, if its allegations are admitted, does not furnish an excuse to respondent for retaining his client's money. In arriving at this conclusion we have not enforced any harsh rule against respondent, but have given him the benefit of every doubt. Indeed, the uncontradicted positive evidence, coupled with the fact that respondent did not see fit to testify in his own behalf, and his failure to avail himself of the frequent opportunities which the court gave him to sustain his defense, compel the court, much as it dislikes to do so, to hold that these charges have been sustained, and to enter a judgment striking respondent's name from the roll of attorneys of this court. In this conclusion my Brother STEELE concurs, but, notwithstanding the numerous defaults of respondent, he thinks respondent should have been given still further opportunity to testify.

Respondent's name will be stricken from the roll of attorneys of this state.

GABBERT, J., though hearing the oral argument, did not participate in the decision.

(32 Colo. 102)

PLATTE VALLEY IRR. CO. v. CENTRAL TRUST CO. et al.

(Supreme Court of Colorado. Oct. 5, 1903.)

IRRIGATION—WATER RIGHTS—RES JUDICATA—ABANDONMENT—ENLARGED USE—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE—UNAUTHORIZED USE—CERTAINTY OF PROOF—TRIAL COURT'S MISCONCEPTION OF ISSUES—REVIEW OF EVIDENCE.

1. Adjudication proceedings awarding priorities to water for irrigation purposes are res judicata of the volume awarded to a certain ditch, so that the question of abandonment thereof is limited, in subsequent litigation between the grantees of the parties, to acts subsequently done.

2. Evidence in a suit for an injunction to restrain the unlawful diversion of water to an irrigating ditch held sufficient to sustain a finding that defendants had not abandoned the priorities in a certain volume of water previously awarded to their ditch.

3. The burden of proof is on a plaintiff seeking to enjoin the diversion of water by an ir-

rigation ditch to show an abandonment of the priorities previously awarded thereto.

4. In an action to restrain the diversion of water by an irrigating ditch, the plaintiff, to show an increased use by defendants, introduced testimony that the acreage actually irrigated was in excess of that irrigated before the ditch was extended and enlarged. It appeared, however, that defendants had an independent appropriation of water from the river, and had conserved further water by means of a seepage ditch. *Held* insufficient to establish the use of an enlarged quantity of water, as claimed.

5. The burden of proof is on a plaintiff seeking to restrain an enlarged use of water by an irrigating ditch to show such enlarged use.

6. Plaintiff, suing to restrain the unauthorized use of water by the owners of an irrigating ditch having priorities to irrigate remote lands, from which no seepage returned to the river, cannot secure relief in the absence of testimony from which the diminution in the amount of seepage due to such use can be ascertained with reasonable certainty.

7. Plaintiff sued to restrain the diversion of water by the owners of an irrigating ditch having priorities, on the theory of abandonment thereof, subsequent enlarged use, and wrongful application to remote lands. In deciding against plaintiff, the court announced that it did not appear that defendants were using more than the volume of water representing their priorities. *Held*, that this announcement would not warrant a review of the findings, made on conflicting testimony, on the theory that the trial court had misconceived the issues; it appearing that evidence on all the issues was received without objection, and that plaintiff had tendered to the court for its approval findings favorable to himself on all of these issues, which the court had rejected.

Appeal from District Court, Arapahoe County; Booth M. Malone, Judge.

Action by the Platte Valley Irrigation Company against the Central Trust Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Jas. W. McCreery, for appellant. Chas. D. Todd, R. D. Thompson, Talbot, Denison & Wadley, and S. A. Osborn, for appellees.

GABBERT, J. By adjudication proceedings had in 1883, the Evans Ditch, No. 2, and the Hewes & Cook Ditch, were each awarded priorities to water from the South Platte river for the purpose of irrigation. The priorities awarded the Hewes & Cook Ditch are in advance of those awarded the Evans Ditch. The appellant has succeeded to the ownership of the latter ditch and its priorities. Appellees, except the officials named, are the tenants in common of the Hewes & Cook Ditch and its priorities. In April, 1900, appellant brought an action against the appellees to restrain them from the alleged unlawful diversion and use of water through the Hewes & Cook Ditch. The complaint, according to the contention of plaintiff, was framed upon the theory (1) that there had been a partial abandonment of the priorities awarded the Hewes & Cook Ditch; (2) an enlarged use of such priorities; and (3) that the change of place of use made, or proposed to be made, by the West-

ern Ditch & Land Company, of the undivided one-half of the appropriations awarded the Hewes & Cook Ditch, which that company now owns, injuriously affected the rights of the plaintiff. The issues on these questions were determined in favor of the appellees, and plaintiff brings the case here for review on appeal.

We shall first consider the question of the alleged partial abandonment of the priorities awarded the Hewes & Cook Ditch. It is contended by counsel for plaintiff that the evidence established such abandonment, and that the defendants who now claim the right to the use of the water represented by the priorities awarded that ditch should be limited in their diversion to that portion which has not been abandoned. The volume of the priorities awarded the Hewes & Cook Ditch in the adjudication proceedings must be treated in this action as *res adjudicata*, and none of the facts upon which that award was predicated can be inquired into for the purpose of determining the question under consideration. The *Boulder & Weld Co. D. Co. v. The Lower Boulder D. Co.*, 22 Colo. 115, 43 Pac. 540; *Water Supply & Storage Co. v. Larimer & Weld I. Co.*, 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322. So that the question of abandonment must be limited to those acts on the part of defendants who now own the Hewes & Cook Ditch priorities, and their grantors, which occurred subsequent to the decree entered in the adjudication proceedings.

On the part of the plaintiff, it is contended that the abandonment in question took place between the date of the conclusion of the adjudication proceedings and the year 1894, or during a period covering about 11 years. This contention is based principally upon non-user during this time, or that for this period there had been but a small part of the volume represented by the priorities of the Hewes & Cook Ditch beneficially applied to the irrigation of lands. For the purpose of establishing this claim, testimony was introduced by plaintiff touching the capacity of the ditch during that period, the acreage irrigated by water diverted through that channel, and the quantity of water necessary for that purpose; tending to prove that but a small portion of the priorities awarded had actually been used, or that during this period there had been an excessive use of such priorities. Defendants also introduced testimony on this subject which tended to prove that, between the years named, the capacity of the ditch was such, and the acreage under it irrigated was sufficient, taking into consideration its character, that the full volume of the priorities awarded their ditch was annually diverted and applied. On testimony of this character, conflicting as it is, we cannot disturb the finding or conclusion of the trial court that there had been no abandonment on the part of the defendants or their grantors, and it can be of no advantage to

more than briefly review some of its most salient features.

Ditches, the capacity of which was measured by witnesses on behalf of plaintiff, it is claimed by those testifying for defendants, were but laterals of the Hewes & Cook Ditch proper. This ditch, according to some of the witnesses for defendants, was constructed in part through what is termed "Hall Creek," an old or overflow channel of the river, into which water was diverted from the main stream through a head gate of sufficient capacity to carry the volume representing the priorities awarded. According to the testimony introduced by defendants, that volume, or some part of it, was from time to time passed through this head gate, as the necessities for its use required; that from this part of the ditch laterals were constructed, through which the water was distributed; and that, for the purpose of irrigating natural meadow lands lying under it, dams were placed in that part of the old channel utilized as a ditch, by means of which the water was caused to overflow these lands, which, on account of the thin soil, underlaid with sand and gravel, required a great deal of water. This testimony is certainly sufficient to sustain the conclusion of the trial court that abandonment for failure to use the water in question was not established. The burden of proof was upon the plaintiff to establish the alleged abandonment. *Hall v. Lincoln*, 10 Colo. App. 360, 50 Pac. 1047.

The enlarged use of water through the Hewes & Cook Ditch, of which plaintiff complains, is based principally upon the assumption that the greater portion of the priorities awarded that ditch had been abandoned. It is not claimed that more water than that representing the priorities of the ditch is being conducted through that channel, and, as no portion of these priorities has been abandoned, the only ground upon which plaintiff can rest an alleged enlarged use is that more lands are now being irrigated than formerly through water supplied by the Hewes & Cook Ditch, which has been extended and enlarged by the Western Ditch & Land Company. It may appear from the testimony that the acreage actually irrigated under this extension and enlargement and that irrigated under the Hewes & Cook Ditch, as it originally existed, is in excess of the acreage irrigated before that ditch was extended and enlarged; but it also appears that the Western Ditch & Land Company has an independent appropriation of 100 feet from the river, which is utilized in time of high water, and has conserved some 25 feet by means of a seepage ditch. The water from both these sources is applied upon lands under the Hewes & Cook Ditch as extended, so that the claim of appellant that a large additional acreage is being irrigated by means of the priorities originally awarded the Hewes & Cook Ditch is not borne out by the record. It was cer-

tainly incumbent upon appellant, in order to establish the alleged enlarged use of these priorities, to prove in some appropriate way that a greater quantity of water, measured either by volume or time, than these priorities were entitled to, was being diverted. The mere fact that an additional acreage was being supplied with water from these priorities was not sufficient to establish the issue of an enlarged use, when it appeared that this same acreage was also supplied from other sources.

In support of the claim of plaintiff that the change of place of use by the Western Land & Ditch Company of its share of the priorities awarded the Hewes & Cook Ditch, to which it has succeeded, injuriously affects its rights, it is contended that the water thus represented is applied to lands located at a greater distance from the river than those upon which such water was formerly applied, and therefore less water is returned to the stream by way of seepage. While it may be true that the application of water through the extension of the Hewes & Cook Ditch made by the Western Land & Ditch Company is upon lands so located that the seepage water will not find its way as quickly or in as great quantity to the river as formerly, the evidence is too indefinite from which to determine with any degree of certainty what the difference in this respect may be. Judgments affecting substantial rights cannot be predicated upon mere conjecture; so that, if it should be conceded that the seepage returned to the river has been lessened because of the use of water upon lands other than those to which it was originally applied, and that this is a matter of which plaintiff may complain, no relief could be granted it on this account, in the absence of testimony from which such difference could be ascertained with a reasonable degree of certainty.

Counsel for appellant concede that the issues made by the pleadings were decided upon conflicting testimony, and that ordinarily such findings could not be disturbed on appeal, but contend that this rule does not apply, for the reason that the court, in deciding the case, announced that it did not appear the owners of the Hewes & Cook Ditch were using more than the volume of water representing the priorities decreed to it; and hence, it is argued, the court failed to consider the testimony bearing upon the litigated questions of fact, and misconceived the real issues in the case. This contention is not sustained by the record. At the conclusion of the trial, counsel for appellant tendered to the court for its approval what he conceived should be the findings of fact from the testimony, and the decree to be based thereon, which the court refused to adopt. These proposed findings were substantially to the effect that the greater portion of the priorities awarded the Hewes & Cook Ditch had been abandoned; that the

lands to which these priorities were applied at the time of the adjudication proceedings were so situate with reference to the river that surplus water applied to them readily found its way back to the stream; that the diversion of such priorities through the Hewes & Cook Ditch, as extended, was unlawful and injurious to appellant; and that these priorities were being applied to an enlarged use to its injury. The court found the issues generally in favor of the defendants. These issues—so counsel for appellant claims—presented the questions of abandonment, enlarged use, and injury to appellant by reason of a change of place of use. Testimony was received pro and con on these subjects without objection. So it would appear from the action of the court in receiving the testimony, in refusing to find in favor of the appellant on the issues tendered by its pleadings, and in finding in favor of the defendants on these questions, that the real theory of the case, as well as the vital questions involved, were fully understood and passed upon.

The judgment of the district court will stand affirmed. Affirmed.

(32 Colo. 168)

**PEOPLE ex rel. COLORADO BAR ASS'N  
v. ESSINGTON.**

(Supreme Court of Colorado. Feb. 1, 1904.)

**ATTORNEYS—DISBARMENT—EVIDENCE—SUFFICIENCY—REINSTATEMENT.**

1. Where, subsequent to the admission to the bar, an attorney is guilty of such conduct that he no longer possesses the qualifications necessary to admit him, he should be disbarred.

2. On proceedings for the disbarment of defendant, charged with appropriating to his own use a part of the money received from a third person for the purpose of loaning on chattel security, and property pledged as security for a loan of a part of the money, and with furnishing to the third person a false statement of alleged loans, defendant's partner admitted the misappropriation of the money, and stated that defendant appropriated a part of it, and pawned the property received as security for the loan made, and used the money so obtained. With respect to the pawning of the property, a witness corroborated the partner. Defendant stated that his partner, against his protest, pawned the property, and that he accepted part of the money. Defendant further stated that he had no knowledge of the fraudulent character of the statement given the third person. Defendant also testified that his evidence, given in the proceedings to disbar his partner, that he had consented to the use of \$20 of the money received from the third person, was incorrect. Held sufficient to warrant the disbarment of defendant.

3. The same authority that empowers the Supreme Court to disbar attorneys gives to the court power to reinstate them.

4. Where, in proceedings to disbar an attorney on the ground that he had appropriated to his own use a part of the money received from a third person for the purpose of loaning on chattel security, and property pledged as security for a loan of a part of such money, the evidence warranted his disbarment, but also showed that he was admitted to the bar of

another state before the Civil War, that he entered the Union Army and served more than four years, that he had resided in the state for 15 years, and that his conduct had been exemplary except in the instances charged, the court, as an act of judicial clemency, will reinstate him as a member of the bar.

Original proceedings by the people, on the relation of the Colorado Bar Association, for the disbarment of John M. Essington. Disbarred and reinstated.

N. C. Miller, Atty. Gen., and Albert E. Grier, for petitioner. S. El. Browne, J. A. Fowler, and H. T. Sales, for respondent.

STEELE, J. The information charges that the respondent, while engaged in the practice of law in the city of Denver, with one Michael Waldron, under the firm name of Essington & Waldron, received from one Dimock Bruce the sum of about \$350 for the purpose of loaning upon chattel security. That the said respondent appropriated a large sum thereof to his own use. That of the moneys so received by said firm a loan of \$40 was made to one Annie Watson, and that as security a gold chain was deposited with the firm. That the respondent, without the knowledge or consent of the said Bruce, appropriated the said chain to his own use, and caused the same to be pawned at a pawnshop in the city of Denver for the sum of \$25, and that the respondent appropriated the said \$25 to his own use. That the respondent caused to be made out and furnished to said Bruce a false and fraudulent statement of alleged loans of money, with intent to deceive and mislead said Bruce, and that said statement represented that a loan of \$150 had been made to one Thomas Clark, and that a loan of \$50 had been made to one Mrs. Ferguson. That Clark and Ferguson were fictitious persons, that loans were never made to them, and that the representations were so made by the respondent to said Bruce for the purpose of deceiving and misleading him, and of covering up and accounting for the money theretofore appropriated by the respondent to his own use.

In the case of *People v. Waldron*, 64 Pac. 186, which resulted in the disbarment of Waldron, the respondent testified that he had consented to the use of \$20 belonging to Bruce in the payment of his firm's office rent. In his testimony in this case he says his testimony concerning the use of money in payment of rent was incorrect, and that he did not so consent. Waldron admits the misappropriation of funds belonging to Bruce, and says that the respondent appropriated to his own use a large portion of the money belonging to Bruce; that the respondent caused the chain deposited as security for the Watson loan to be pawned, and used the money so borrowed. With respect to the pawning of the chain, the witness Gavin corroborated Waldron. The respondent says that Waldron, against his protest, pawned

¶ 3. See *Attorney and Client*, vol. 5, Cent. Dig. § 84.

the chain, and that he accepted from Waldron \$5 of the money. Waldron testifies that the statement given Bruce was submitted to the respondent, and that the respondent knew that the statement was false and fraudulent. The respondent says that he did not know of the fraudulent character of the statement; that he only glanced at it, and supposed it contained a true statement of the loans made by the firm for Bruce. The witness Varnum testifies to a conversation with Bruce in which Bruce exonerated the respondent from all criminal responsibility and placed the blame wholly upon Waldron.

Counsel have cited *People v. Allison*, 69 Ill. 151. In that case it is held that the name of an attorney will not be stricken from the roll upon proof of charges "affecting his character as a man or integrity as a private citizen," and it is insisted that the firm of Esington & Waldron did not receive the money from Bruce in their capacity as attorneys at law, but in some other capacity, and that under the authority of the case cited the court is without authority to disbar. We cannot assent to the doctrine of the case cited, in so far as it applies to the character and integrity of members of the bar. This court is committed to the doctrine that if, subsequent to his admission to the bar, an attorney is guilty of such conduct that he no longer possesses the qualifications necessary to admit him to membership, his name should be stricken from the rolls. Accordingly, an attorney who obtained money by false pretenses, and an attorney who was guilty of larceny, were disbarred and their names stricken from the rolls.

The testimony is not altogether satisfactory, and we are not convinced that the respondent was cognizant of or consented to the misappropriation of all of the funds placed in the hands of the firm of which he was a member, nor has he convinced us that in his dealing with Bruce his conduct was such as should characterize the conduct of a member of the profession. His admissions at this trial and at the trial of his partner are sufficient to warrant his disbarment, and our duty requires us to order his name stricken from the roll of attorneys, and it is so ordered.

The same authority that empowers this court to strike the names of unworthy attorneys from the roll grants us the power to reinstate, and in this case we shall exercise the power rather in the nature of a pardon. The respondent's testimony shows that he was admitted to the bar of Pennsylvania some time prior to the Civil War; that he entered the Union Army, and served for more than four years; that he has resided in Colorado for the period of 15 years, and that his conduct has been exemplary except in the instances charged in the information. The witnesses who testify to his good reputation are: Hons. Moses Hallett, E. T. Wells, G. Q. Richmond, L. W. Wells, and F. C.

Goudy. While we cannot exonerate him, the promptings of mercy impel us to extend to him our judicial clemency, and we therefore order that he be reinstated as a member of the bar.

(32 Colo. 172)

### WILSON v. HARNETTE.

(Supreme Court of Colorado. Feb. 1, 1904.)

MINES—VIEW BY JURY—PARTY AS GUIDE—OPINION EVIDENCE—FORM OF OBJECTION.

1. A general objection to testimony as incompetent, immaterial, irrelevant, and leading does not raise the question of the admissibility of expert testimony.

2. Whether a lead in a mine is such as a reasonably prudent person would be justified in following, with an expenditure of time and money, with the hope of finding gold in paying quantities, is a proper subject for expert testimony.

3. Under Mills' Ann. Code, § 188a, authorizing a view of a mine by the jury, and the appointment of one guide chosen by each party, it is proper to appoint a party to the action as one of the guides.

4. A witness' testimony that he knew the value of the vein matter where a lead was discovered in a mine, and his statement of the value, were not objectionable as opinion testimony, where an opportunity was afforded to cross-examine him, which was not improved, and it does not appear upon what he based his statements.

Appeal from District Court, Teller County; Louis W. Cunningham, Judge.

Action by Louise Wilson against C. E. Harnette. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Geo. Q. Richmond and Temple & Crump, for appellant. George A. H. Fraser and Jno. R. Smith, for appellee.

STEELE, J. Action was begun by Louise Wilson, owner of the Side Hill No. 2, in support of an adverse claim against the H. & H. No. 2. The claims are situated in the Cripple Creek mining district. The verdict was in favor of the defendant, and judgment was rendered thereon. The plaintiff appeals. The assignments of error relied upon to reverse the judgment are those relating to the admissibility of testimony, and the order of court approving the nomination of the defendant as one of the guides to accompany the jury while it was inspecting the premises in controversy.

The H. & H. No. 2 was located in June, the Side Hill No. 2 in December, 1896; and the principal contention at the trial was the existence or nonexistence of a vein in the H. & H. No. 2. The witness Dean, a miner, over the objection of the plaintiff, was permitted to answer the following question: "I will ask you if, in your judgment as a miner and prospector, the lead discovered on the H. & H. No. 2 is such a lead as a reasonably prudent person would be justified in following, with an expenditure of time and money, with the hope of finding gold in paying quantities." The same question, in substance, was asked the witnesses Minning and Eigle, and

the objection that the testimony was incompetent, immaterial, irrelevant, and leading was overruled.

Under the authority of section 188a, Mills' Ann. Code, the court appointed C. E. Harnette, the defendant, and E. E. Miller guides to accompany the jury to the premises in controversy. The following appears in the abstract: "By Mr. Crump: We ask that the jury be permitted to examine the ground under proper instructions and guidance. (The plaintiff objected to the appointment of C. E. Harnette as one of the guides on the part of the defendant, he being the defendant in the case.) By the Court: I will appoint Mr. Harnette, as he seems to be the only person who is familiar with the property. (Plaintiff excepts.)"

The three witnesses who answered the question were miners and prospectors, and had been engaged in mining and prospecting at Cripple Creek for a number of years. There was no testimony tending to discredit them as persons of experience as miners and prospectors, and we shall assume that they qualified themselves as persons possessing a knowledge of mining and prospecting. We held in the case *United Oil Company v. Roseberry*, 30 Colo. 177, 69 Pac. 588, that an objection to the form of the question did not present to the court the objection that expert testimony was not admissible, and we are of opinion that the general objection did not raise the question of the admissibility of expert testimony, and we are moreover of opinion that the matter inquired of was not a matter of common knowledge, and was a subject upon which expert testimony was properly taken. The objection now made, that it was a question for the determination of the jury and not for the witnesses, is not well taken, for although the general rule is, as stated by counsel, "that no witness may give his opinion in answer to a question which invades the province of the jury to determine the ultimate fact in the case," the exception that on questions of science or skill, or relating to some art or trade, persons instructed therein by study or experience may give their opinion, is universally recognized. *Lawson on Expert and Opinion Evidence*, § 2.

In the case *McGonigle v. Kane*, 20 Colo. 292, 38 Pac. 367, the court held that the opinions of men who, by study, observation, or experience, have become expert with respect to matters not of common knowledge, may be given in evidence to the jury, and in commenting upon the opinion in *Railroad Company v. O'Brien*, 16 Colo. 219, 27 Pac. 701, said with reference to a question put to a witness: "The question was held proper upon appeal, although, if the opinion of the witness was accepted by the jury, the principal element going to show negligence on the part of the defendant was established."

We do not regard the action of the court in appointing the defendant one of the guides to accompany the jury to the property as an

abuse of discretion. The statute does not require the appointment of disinterested persons, but persons who are designated by the respective parties. The court appointed the defendant as one of the guides and the grantee of the plaintiff as the other, probably selecting the two persons most likely to be of service to the jury, and his action in so doing should be sustained. Moreover, we do not think it good ground for objection that a guide nominated by a party, or that a party himself, has been appointed to act as a guide. The statute contemplates the appointment of partisans of the respective interests involved, and, where the court selects the nominees of the parties, the statute has been followed, even though a party should nominate himself.

A witness, in response to a question, stated that he knew the value of the vein matter at the point of discovery in the H. & H. No. 2 lode. An objection that the witness was not qualified was overruled, the court remarking that counsel might cross-examine. The witness then stated the value of the vein matter. It is urged that the question called for opinion testimony, and that the witness must have testified to information given him by some assayer. The defendant was afforded an opportunity to cross-examine the witness, but did not do so. The abstract fails to show upon what the witness based his answer, and, as the question propounded did not call for an opinion, we shall assume that the answer was based upon his own knowledge.

No error appearing in the record, we shall affirm the judgment. Affirmed.

(32 Colo. 135)

#### QUINN et al. v. PEOPLE.

(Supreme Court of Colorado. Feb. 1, 1904.)

LARCENY — CATTLE — VALUE — INFORMATION  
— CONSOLIDATION OF TRIALS — EVIDENCE  
— CONVERSION — APPEAL.

1. Under Mills' Ann. St. § 1256, providing that, if any bailee of chattels shall convert them to his own use with intent to steal them, he shall be guilty of larceny, the same as if the original taking had been felonious, and section 4281, as amended by Laws 1891, p. 430, § 1, making the stealing of cattle grand larceny, without regard to their value, the value need not be alleged in the information or proved.

2. Where defendants in prosecutions for larceny consented to the consolidation of their cases, it did not become the duty of the trial court, upon its appearing that two separate defenses were being proved, of his own motion, to order that the trials be separate.

3. Where one was convicted of two offenses on the same trial, the sufficiency of the evidence to support the conviction for one offense will not be considered, where the sentence therefor runs concurrently with the sentence for the other, the conviction for which the evidence clearly sustains.

4. Evidence that parties cut out the brand on a heifer, and intended in the fall to take the piece of skin to the owner of the heifer, and tell

¶ 1. See *Larceny*, vol. 32, Cent. Dig. § 77.

him it was dead, and, when the heifer got fat, to kill it, and sell and divide it, showed a conversion of it at that time, and not a mere intent to convert it in the future.

Error to District Court, Weld County; Christian A. Bennett, Judge.

John Quinn and another were convicted of larceny, and bring error. Affirmed.

H. E. Churchill and W. A. Hill, for plaintiffs in error. N. C. Miller, Atty. Gen., for the People.

STEELE, J. Four informations were filed in the district court of Weld county, at the November term, 1902, of said court, against these defendants separately. One information against Quinn (No. 1,002), and one against Marooney (No. 1,004), charged in different counts the larceny of a heifer belonging to Robert A. Brown, the larceny as bailee of the same animal, the branding of it with a brand not the recorded brand of the owner, and the obliteration of a brand upon it, on the 8th day of July, 1902. One information against Quinn (No. 1,003), and one against Marooney (No. 1,005), charged in a similar manner the larceny of a heifer belonging to Samuel R. Faris, the felonious branding of the animal, and the larceny as bailee of the same animal, on the 8th day of July, 1902. The causes were consolidated for trial, the defendants consenting thereto. The defendants were found guilty under the count charging larceny as bailee in each of the informations, and sentenced to imprisonment in the penitentiary. The case is brought here on error to test the regularity and correctness of the conviction and sentence.

The counts upon which the defendants were convicted allege "that the said \* \* \* late of the county of Weld and state of Colorado, on the eighth day of July in the year of our Lord one thousand nine hundred and two, at and within the county aforesaid, then and there being the bailee of one head of neat cattle, to wit, one heifer, then and there being the personal goods and chattels of one \* \* \* then and there being found, then and there willfully, knowingly, unlawfully, and feloniously did convert the same to his own use, with an intent to steal the same, contrary," etc.

The facts proved upon the trial would have sustained a conviction under section 4270, Mills' Ann. St., providing that "if any person who may receive from any owner or owners thereof any animals, sheep, cattle or horses for the purpose of herding or caring for the same, or any person who may be employed in any manner about the herding or caring for any animals, sheep, cattle or horses, shall sell, give away, kill, dispose of or convert the same or any one or more thereof in any manner to his own use, shall be deemed guilty of the crime of embezzlement"; but the allegations of the information are clearly insufficient to charge an offense under that section. The count was evidently drawn

under section 1256, Mills' Ann. St.: "If any bailee, by finding or otherwise of any money, bank bill, or note, or goods or chattels, shall convert the same to his or her own use with an intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious, and on conviction thereof shall be punished accordingly." It is not argued that this section is repealed, in whole or in part, by section 4270; but it is urged that, in a prosecution under it for the conversion of live stock, there must be both allegation and proof of value. At the time of the enactment of this statute, and for some years thereafter, the punishment for larceny depended in all cases upon the value of the property stolen; but in 1877 a statute was enacted (section 4281, Mills' Ann. St.) making the stealing of cattle, horses, etc., grand larceny, without regard to the value of the animal stolen. This statute was amended and re-enacted in 1891. Laws 1891, p. 130. These statutes have been construed by this court in the cases of *Kollenberger v. People*, 9 Colo. 233, 11 Pac. 101, and *In re Pratt*, 19 Colo. 138, 34 Pac. 680; the court holding that the statutes defining larceny generally and the larceny of live stock were concurrent, and that the crime of larceny of live stock is indictable and punishable under either statute. We think the language of the statute, "he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious, and on conviction shall be punished accordingly," makes the conversion by a bailee with intent to steal the exact equivalent of a felonious stealing, taking, and carrying away, and that any sentence that would be correct under an information charging simple larceny is equally correct under this statute concerning larceny by bailees. Counsel cite the case of *State v. Hayes*, 13 Mont. 116, 32 Pac. 415, as an authority to the contrary. We think it is not, for the reason that the Montana statute concerning larceny by bailees says: "He shall be guilty of grand or petit larceny, according to the amount of the property or value of the goods, chattels, or property converted, in the same manner as if the original taking had been felonious." Under this statute, the court held, in the case cited, that the conversion of a horse by a bailee would be grand or petit larceny, depending on the value of the horse, notwithstanding section 78 of the same chapter made the stealing of a horse grand larceny, without regard to its value.

It is urged that, notwithstanding the defendants consented to the consolidation of the cases for trial, it became the duty of the trial court, upon its appearing that two separate offenses were being proved, of his own motion, to order that the trials be separate. We do not think, under the authority of *Chesnut v. People*, 21 Colo. 512, 42 Pac. 656, that the cases were improperly consolidated; and we do not understand that, after the

jury was sworn for the trial of the two cases, the court could take one of the cases from the jury without the consent of the defendants. The court certainly did not err in not so interfering after the defendants had consented to the consolidation.

It is next contended that the evidence is not sufficient to warrant a conviction, particularly with reference to the Faris heifer. We shall not consider the objection concerning the sufficiency of the evidence in the cases in which the defendants were charged with the conversion of the Faris heifer, because the record shows that the defendants were sentenced to a term in the penitentiary of not less than 18 months nor more than 2 years for the larceny of the Brown heifer, and that the sentence for the larceny of the Faris heifer runs concurrently with it. The evidence upon the trial abundantly sustained the conviction of larceny of the Brown heifer. This evidence is summarized by counsel for defendants as follows: "In the spring of 1902, Robert A. Brown sent six head of cattle to John Quinn, one of the defendants, to be herded. All of these animals were branded the day before they were sent, 'B lazy S,' on the right side of the neck. This brand was not a recorded brand, but was borrowed from a neighbor, and the animals were branded for the purpose of identification by Quinn. The understanding was, at the time the animals were sent to Quinn, that they were to be returned in the fall, and that the sum of 25 cents per head a month was to be paid for their pasturage. On the 8th day of July, 1902, Brown, the prosecuting witness, in company with several others, went to the ranch of Marooney (the other defendant), and found there the animal which the defendants were charged with having stolen. A piece of hide had been cut out or removed from the neck of this animal, and it was branded 'T lazy T' on the hip. The animal was then taken into Brown's possession. A short time after this the prosecuting witness, with his companions, met the two defendants south of the Marooney ranch, and Mr. Ireland asked the defendant Quinn if he knew who claimed the black heifer with the 'T lazy T' brand on her left hip. Quinn replied that he did not, but that Marooney claimed the brand. Thereupon Marooney, being questioned, stated that he owned the black heifer; that he had raised it, and could prove it by Quinn. Quinn thereupon said: 'Yes; that's so. I guess you did raise her.' Afterwards Marooney stated to Mr. Ireland, in the presence of Sheriff Elliott, that he had roped the heifer, and that Quinn had cut out the brand; that they intended to take this piece of skin, in the fall of the year, and show it to Brown, and tell him the heifer was dead, and, when the heifer got fat, they were going to kill it, and sell it and divide it." The last sentence is italicized by counsel, and it is argued that it shows merely an intent to convert the

animal at some time in the future. We think it shows a conversion at that time.

We find no error in the record, and the judgment is therefore affirmed. Affirmed.

(32 Colo. 12.)

GERMAN NAT. BANK OF DENVER v. J. D. BEST & CO. et al.

(Supreme Court of Colorado. Feb. 1, 1904.)

CONSOLIDATION OF ACTIONS—EXPENSES OF RECEIVERSHIP—RETENTION OF JURISDICTION—PARTY ENTITLED TO JUDGMENT—FINALITY OF PRIOR DECREE—ELECTION OF REMEDIES—PARTY SECURING APPOINTMENT—NOTICE OF CLAIM.

1. Where, in its order consolidating actions, in the first of which a receiver has been appointed, the court expressly reserves jurisdiction of all matters in such suit, or arising out of the receivership therein, as fully as if the consolidation were not made, and reserves for consideration the priorities of the claimants or of the receiver in such suit, it thereby secures jurisdiction to render judgment in the consolidated action for the expenses of the receivership against the plaintiff in the original suit, securing the appointment.

2. Where a receiver has been discharged on the consolidation of a suit with another suit, and his successor appointed in the consolidated suit has also been discharged, judgment directly in favor of a claimant furnishing supplies to the original receiver, instead of in favor of the receiver for the benefit of such claimant, is not ground for reversal.

3. The holder of a promissory note given by a corporation sued thereon, and secured the appointment of a receiver. Afterwards the trustee for mortgage bondholders of the corporation sued to foreclose the mortgage, and the two actions were consolidated; the first receiver being discharged, and a successor appointed. A decree was rendered in the consolidated suit foreclosing the mortgage, and making the expenses of the first receivership a prior lien thereto, but on appeal by the trustee the decree was modified in this latter respect. Plaintiff in the first suit took no steps to have the issues involved therein determined. The foreclosure decree reserved for future adjudication all questions not thereby disposed of, and permission was given to any party to apply for further relief. The effect of the various orders and decrees was to leave all of the issues in the first suit, except as to the rank of the receiver's certificates, open for adjudication. *Held*, that the foreclosure decree did not terminate the suit, so as to prevent a subsequent judgment against the plaintiff in the first suit for the expenses of the receivership therein.

4. Claimants for supplies furnished a receiver, who, after the consolidation of the action with a foreclosure suit against the same defendant, endeavored to have their claims decreed to be liens prior to the mortgage sought to be foreclosed, did not thereby make an election of remedies which precluded them from afterwards pursuing the plaintiff in the original action, who secured the receiver's appointment.

5. Claimants for supplies furnished a receiver are not obliged to notify the plaintiff securing the appointment that they will look to it for reimbursement, especially where the defendant is so far insolvent that claims having priority over plaintiff's will exhaust the assets.

Error to District Court, Arapahoe County; F. T. Johnson, Judge.

Suit by the German National Bank of Denver against the United Coal Company, consolidated with, and reported under the title



of, the International Trust Company against the United Coal Company, in which J. D. Best & Co. and others petitioned for an allowance of their claims against the bank. Judgment for petitioners, and the bank brings error. Affirmed.

A. B. Seaman and H. S. Silverstein, for plaintiff in error. Hodges, Wilson & Hodges, for defendants in error.

**CAMPBELL, J.** This writ of error was sued out to review a judgment for defendants in error against plaintiff in error for the value of supplies furnished by the former to E. F. Bishop, as receiver, who, at the instance and request of the bank, had been appointed to that office by the district court of Arapahoe county in an action pending therein brought by plaintiff in error against the United Coal Company. The controversy here arises out of one branch of a cause once before this court, and reported under the title of *International Trust Co. v. United Coal Co.*, 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59. A full statement of the facts of the case will make plain the legal questions involved: In 1894 the German National Bank of Denver brought an action in the district court of Arapahoe county against the United Coal Company to recover judgment upon an unsecured promissory note, and, in its aid, applied for and secured the appointment of a receiver; the object of the ancillary proceeding being to conserve for the benefit of its unsecured debt, which it hoped to reduce to judgment, the assets of the coal company, if any, in excess of those covered by a prior mortgage which the coal company had given to the International Trust Company, as trustee, to secure the payment of the mortgagor's negotiable bonds. Mr. Bishop, as such receiver, was empowered to, and did, under the direction of the court, operate coal mines belonging to, or leased by, the coal company, of which he had taken possession, and, in conducting the business, incurred indebtedness, for which receiver's certificates were issued. After this receiver had conducted the business for some time, and had incurred the debts which are the subject-matter of the case at bar, the International Trust Company brought its action in the same court in which the bank suit was pending to foreclose the mortgage of which it was trustee. Thereupon the court, apparently with the consent of all parties, consolidated the two causes of action, viz., the one by the bank against the coal company, numbered on the docket as 20,837, and the one by the International Trust Company against the coal company, No. 24,636, for trial as one action, which consolidated action was thereafter prosecuted as No. 24,636. In the order of consolidation it was recited: "The court expressly reserving jurisdiction to hear and dispose of all matters and things relating to the cause of the German National Bank v. The United Coal

Company, or arising out of the receivership in the last-named suit, in this cause, as fully as though the said the German National Bank v. The United Coal Company suit had not been consolidated herewith." There was a further recital: "The court expressly reserving to itself for future consideration and determination the respective priority and rank of each and every claimant and creditor of the United Coal Company or of the receiver in the cause of the German National Bank v. The United Coal Company et al." At the same time the receiver who was appointed in the bank suit was discharged, and ordered to turn over to Mr. MacNeil, the receiver appointed in the trust company suit, and, upon the qualification of the latter, Bishop did turn over to MacNeil, all property of every description which had come into his possession, and that belonged to the coal company. Afterwards, and in No. 24,636, an order was made by the court allowing the claims of those who had furnished supplies to the receiver while he was operating the coal mines under the order of appointment in the bank suit, which embraced, among other claims, those that are involved here; and in its final decree, of March 28, 1898, directing a foreclosure of the mortgage of the trust company, the receiver's certificates which had been issued to these claimants were made a lien upon the previously mortgaged property prior to that of the mortgage itself. To review this decree, or a part of it, the International Trust Company, as trustee under the mortgage, sued out a writ of error in this court; and on March 5, 1900, it was reversed and set aside in so far as it made the receiver's certificates a paramount lien upon the mortgaged property, and the lower court was directed to modify its decree by making the mortgage the first lien thereon. After the remittitur was sent down, and on May 21, 1900, the defendants in error here, who furnished the supplies to the receiver Bishop, used by him in working the coal mine, and who held receiver's certificates therefor, filed in the district court a petition in cause No. 24,636, in which they asked that the final decree of foreclosure be modified, to the extent that their claims should be paid out of the proceeds of the foreclosure sale in his hands before any sum was paid to the German National Bank or its assignees, who held certain of the mortgage bonds. The application seems to have been based upon the theory that since the German National Bank secured the appointment of a receiver, who incurred the debts for its benefit, it should not, as holder of mortgage bonds, nor should its assigns with notice, be allowed to participate in the proceeds of the sale of the mortgaged property until after the claimants were paid; the fund being inadequate for all creditors. This petition was denied, without prejudice. Afterwards, on the 28th of May, 1900, a final order and decree of foreclosure and sale, modified to conform to the judgment

of this court, was entered. On June 11, 1900, the defendants in error filed a motion in cause 20,837, which was the number of the suit begun by the German Bank against the coal company, in which motion they asked that the amount of their claim be taxed as costs against the German Bank; but afterwards, on the same day, they appeared and obtained leave to withdraw this motion without prejudice. Six days later they filed a motion in No. 24,636 to vacate the decree of foreclosure of May 28, 1900, in which they claimed that the court was in error in denying their prayer for judgment against the German National Bank for the amount of their claim as costs. This motion was denied by the court, and on the next day (July 18, 1900) the defendants in error filed in the consolidated cause No. 24,636 another motion to tax the amount of their claims as costs against the German Bank. On the same day the court, by proper order, accepted the bid received for the sale of the mortgaged property, and confirmed the sale, and ordered the special master to deliver the property to the purchaser, and at the same time reserved for future consideration all questions relating to the settlement of the account of MacNeil, receiver in the trust company case, and the matter of his discharge. August 2, 1900, his final report was acted upon, his accounts were approved, and he was discharged. On the 21st of September, 1900, there was filed in the consolidated cause a stipulation by the parties to this controversy that the petition or motion filed on the 18th of July, 1900, which was pending, undisposed of, when MacNeil was discharged as receiver, might be withdrawn, and another petition substituted therefor, in which the relief prayed was a judgment against the bank for the amount of petitioners' claims, evidenced by receiver's certificates issued by Bishop, as receiver in the bank case, for supplies, to be taxed as costs of such receivership. To this petition an answer was filed by the bank, and to the answer a replication was filed by the defendants in error, and upon the issues joined therein the court made its findings of fact—which, indeed, were not traversed—and upon them gave judgment against the plaintiff in error in favor of the defendants in error for the amount of their respective claims; and it is to this judgment that this writ of error is prosecuted. Such other facts as throw light upon the controversy will be stated further on in the opinion.

The objections which the plaintiff in error, in varying forms, has assigned to this judgment, are: That there was no action pending at the time the judgment complained of here was entered in which the court had jurisdiction to enter the same, or in which defendants in error could properly intervene, as against the German National Bank; hence the question of costs, as against the plaintiff in error, not having been reserved at the time the order of consolidation of the two suits

was made, it fell at that time, and could not be revived. It was error to render any judgment at all in favor of the defendants in error as individuals, but, if any judgment was proper, it should have been in favor of Bishop, as receiver, for their benefit. The judgment entered here January, 1901, is void, because it was given long after the final decree in the action had been signed, to wit, March 28, 1898, and there was no reservation in the final decree, or any retention by the court, of jurisdiction over the German Bank, either to enter judgment on the merits, or to tax costs of receivership, against it. Under these different heads, which really are more or less interwoven, the legal questions will be treated.

1. When two or more separate actions pending in the same court are consolidated for trial, at least some of the authorities say that each of them is thereby discontinued as such, and the consolidated action proceeds as if it had been originally brought as a single action for the purpose of determining all the issues included within the former and constituent actions. And it would seem that, if no provision or reservation is made at the time of consolidation with reference to the costs of the separate actions accruing before the union is effected, it is too late thereafter to tax them in the consolidated action. 6 Enc. Pl. & Pr. 699 et seq. So that, as it is said, in a final judgment in a consolidated action only such costs as are incurred after the order of consolidation is made can be entered. Relying upon this principle, plaintiff in error says that, since no provision was made for the payment of costs in the suit of the bank against the coal company at the time the consolidation was made, it was too late thereafter to make it. It may be observed that this doctrine seems to be limited, in the cases cited, to statutory fees or costs, such as belong to, and are earned by, officers of the court. It is true that the expenses of the receivership are taxed, and usually spoken of, as costs in the action, but they stand upon a different footing from statutory costs of court officials. But if this were not so, the contention of plaintiff in error is unsound, for several reasons. In this order of consolidation the court expressly reserved jurisdiction to hear and dispose of all things relating to the case of the bank against the coal company, or relating to the receivership therein, as fully as though no order of consolidation had been made. The very authorities cited by plaintiff in error—*Hiscox v. New Yorker Staats Zeitung* (Com. Pl.) 23 N. Y. Supp. 682; *Browne v. Hickie*, 68 Iowa, 330, 27 N. W. 276; and *Blake v. Railroad Co.*, 17 How. Prac. 228—say that, where provision is made for costs in the order of consolidation, they may thereafter be awarded. After the order of consolidation was made, the German Bank suit, as a separate and distinct action, was discontinued, and nothing further therein could be done. But it remain-

ed, by operation of law, as one of the component elements or issues in the consolidated action; and every issue and question that could have been determined therein, had no consolidation been made, was still open for decision in the new consolidated action, if for no other reason, because, by the express provisions of the order of consolidation, all the issues therein were carried over into the new action for determination. If these two actions had not been combined, it would have been entirely competent for the court to tax the costs and expenses of the receivership in the bank case against the plaintiff bank, in its action against the coal company, if the fund in the receiver's hands was inadequate. That being so, it necessarily follows that the same result could be reached in the consolidated cause, for jurisdiction over that question was expressly reserved for future consideration. The appropriate suit was pending in which such action could be taken, and the necessary parties were present in court, between whom such differences remained for adjustment.

2. Allowances to a receiver for counsel fees and other expenses of a receivership are properly made to the receiver himself, and not to those who furnished supplies or rendered services to him while he was acting in that capacity; but in this case not only was Bishop, the receiver in the bank suit, discharged, but so, also, was MacNeil, the receiver in the suit of the trust company against the United Coal Company, and neither was before or under the control of the court at the time this application for judgment against the bank was made. For that reason, it was not improper to give judgment directly in favor of those who furnished supplies to the receiver; at least, the bank may not be heard to object to what, at most, is an irregularity in the usual practice, to which, to say the least, in some measure it contributed.

3. The principal objection seems to be that this judgment was rendered long after the final decree in the cause was entered, and after the lapse of the term, when there were neither parties nor a cause before the court. The final modified decree in the consolidated cause, so far as concerns the question of foreclosure of the mortgage, was entered May 28, 1900, and which was made to conform to the modification by this court of the original foreclosure decree of March 28, 1898; and therein it was recited that all questions not thereby disposed of were reserved for future adjudication, and permission was given to any party, or any intervening creditor or claimant, to apply to the court from time to time, and at any time, upon proper notice, for such other or further order of relief as was not inconsistent with the final decree itself. We are not now concerned with the question—for plaintiff in error is not in a position to raise it, and has not done so—as to whether an appeal was permissible from the order of foreclosure of March 28, 1898. The doctrine has been declared that

when causes have been consolidated for trial as one action, and the issues in one of the constituent cases have been heard, and judgment thereupon given, no appeal therefrom can be taken until all of the issues have been disposed of, though, when all are decided, an appeal from one of the judgments only may be taken (*Mills v. Paul* [Tex. Civ. App.] 30 S. W. 242), for, as it is said, there can be but one final judgment in an action, and, until all the issues are decided, a judgment as to some, and not as to others, is not final in the sense that it can be reviewed by an appellate court. But whether that doctrine applies here is not important, for, in addition to the reason already given, no objection on such ground was ever made to the review which was had of the foreclosure decree, and that objection cannot now be made by plaintiff in error; and it is very clear that the issue which is presented on the pending review was not decided in the foreclosure decree, but was expressly left open for future determination. This order awarding the relief here given is not in any sense inconsistent with the foreclosure decree, but in harmony with and supplemental to it. But a careful examination of the voluminous and somewhat complicated record discloses the fact that, as was remarked by this court in its opinion in *International Trust Co. v. United Coal Co.*, supra, only the issues in the consolidated cause which pertain to the foreclosure of the mortgage—that is, with the exception hereinafter noted, only those issues which originally were included in the separate suit of the trust company against the coal company—were disposed of either in the first decree, of March 28, 1898, which was reversed by this court, or in the final modified decree, of May 28, 1900, the one under which the sale was made. After the order of consolidation was entered, the bank took no further steps in the premises—never sought for or obtained any relief against the United Coal Company—and up to the present time no trial has been had of, or judgment entered in, its action upon the note, either refusing or denying it the relief asked. It is altogether clear that all the issues which were included in the suit of the bank against the coal company, which afterwards constituted issues in the consolidated action, but which, nevertheless, remained entirely distinct from the component issues of the trust company case, still remain undisposed of; and in none of the decrees or judgments entered by the trial court or by this court was any attempt made to determine any of the issues in the bank suit, save only that as to the rank of the lien of the receiver's certificates. Our construction of the various orders and decrees made is that all of the issues and questions included in the suit of the bank against the coal company, except as to the rank of the receiver's certificates, were open for adjudication by the district court at the time the defendants in error presented their petition

for judgment against the bank for the amount of the supplies which they furnished to its receiver. The fact that the bank was indifferent to the success of its suit against the coal company, and that it has not seen fit to press it to a conclusion, does not operate to deprive defendants in error (petitioners below) of their right to proceed against it for supplies furnished to its receiver, when the fund in his hands proves insufficient for their liquidation.

4. It is further contended that when the defendants in error, as interveners in the consolidated cause, sought to make the receiver's certificates, which they obtained for the supplies which they furnished, liens ahead of the prior mortgage, they thereby elected one of two inconsistent remedies open to them, in that they sought to realize upon their claims from the fund in the hands of the receiver, instead of looking to the plaintiff bank, and therefore they may not thereafter, when they failed in their first attempt, proceed against the bank. The doctrine of election holds good only when the remedies are inconsistent with each other. Here there is no inconsistency at all. On the contrary, they are clearly consistent, and, until satisfaction has been had, it was proper to pursue either or both of the remedies. *Woolworth v. Gorsline*, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417; *Bradner, Smith & Co. v. Williams*, 178 Ill. 420, 53 N. E. 358, is quite in point. Under the doctrine of *Welch v. Renshaw*, 14 Colo. App. 526, 59 Pac. 967, the bank was liable for these claims. Indeed, plaintiff in error does not seriously contend that a recovery would not be proper, had application been made at what it calls the right time, and in an appropriate way.

5. There is no force in the point sought to be made by plaintiff in error that, had the bank been seasonably advised that defendants in error intended to look to it, it could have protected itself as against the United Coal Company, for it clearly appears from this record that the entire assets of the coal company were inadequate to pay debts and incumbrances which were ahead of any lien or claim of the bank. Besides, when the bank had obtained the appointment of a receiver in its suit against the coal company, it acted at its peril, and was charged with knowledge of the fact that, if the fund which the receiver took possession of was inadequate to defray the costs and expenses of the receivership, it, as the party responsible for the order of the court making the appointment, might be compelled to care for such expenses. This being true, it was not incumbent upon defendants in error to advise the bank that they would look to it for payment, for the law imposes the liability in just such cases as this record discloses; and the record further shows that, had defendants in error specifically notified the bank at any time during the progress of these cases that they would look to it for their claims, it

would have been unable to protect itself or save itself from loss by any action that it might have taken against the coal company.

We have examined with care not only the briefs of counsel, but the authorities on which they rely. Those cited by plaintiff in error, though numerous, are not in point, because the facts to which they are sought to be applied are absent from this record. The difficulty with the argument of plaintiff in error is that its premises are entirely wrong, and at variance with, and directly contradicted by, the record itself.

The judgment of the court is right, and it should be affirmed. Affirmed.

(32 Colo. 67)

# PUEBLO REALTY TRUST CO. v. TATE.

(Supreme Court of Colorado. May 5, 1908.)

QUIETING TITLE—TAXATION—VOID TAX-SALE CERTIFICATES—RIGHTS OF HOLDER—UNLAWFUL COMBINATION—ESTOPPEL.

1. In an action to quiet title and remove a cloud consisting of void tax-sale certificates, a decree requiring plaintiff, as a condition precedent to the vesting of the fee-simple title, to pay to or deposit with the clerk of the court an amount sufficient to reimburse the holder of the certificates for the amount for which the land was sold at the tax sale, with interest thereon, and penalties prescribed by Mills' Ann. St. § 3905, together with the amount of subsequent taxes paid by the certificate holder, and interest thereon at the rate prescribed by section 3904, is proper.

2. Where it appears in an action to quiet title, and to remove a cloud consisting of tax-sale certificates, that the person who procured the certificates to be issued to defendant is the agent of the plaintiff, and that the corporations responsible for the action of such agent and the plaintiff corporation were controlled by the same officers, plaintiff cannot be heard to complain that the transaction was an unlawful combination to prevent competition or to stifle bidding.

Appeal from District Court, Pueblo County; N. Walter Dixon, Judge.

Action by the Pueblo Realty Trust Company against William H. Tate. From a decree for defendant, plaintiff appeals. Affirmed.

Waldron & Devine, for appellant. McBeth & May and John T. Adams, for appellee.

STEELE, J. Suit was begun by the appellant in the district court to quiet its title to certain unimproved lands in Pueblo county, and to remove an alleged cloud, consisting of certain tax-sale certificates issued by the treasurer of Pueblo county to the appellee at a tax sale held in Pueblo on the 1st of February, 1897; alleging that the said tax certificates are void and of no effect because of certain irregularities in the proceedings leading up to the sale, and because of an alleged unlawful combination on the part of the bidders at the sale to stifle competition. It developed upon the trial that the Colorado Coal & Iron Development Company was in

¶ 1. See Taxation, vol. 45, Cent. Dig. § 1612.

the year 1897 the owner of the land; that the treasurer of the Colorado Fuel & Iron Company was the receiver of the Colorado Coal & Iron Development Company; that the fuel company was a creditor of the development company, and held its bonds; that the treasurer of the fuel company directed a person named Ladd to proceed to Pueblo for the purpose of attending the tax sale, and furnished him money for the purpose of buying the property; that on the day of the tax sale, when the property was about to be offered for sale, Ladd publicly announced that he held the 1894 tax certificate on nearly all the development company property, that he would like to bid in the property on which he held the certificates, and that, if he could not bid in the property, he would pay the subsequent taxes. He also had a private understanding with the agent of the appellee to the effect that appellee was to permit him to purchase the property without opposition, and that he (Ladd) would request the treasurer to issue certificates to the appellee for the property in controversy here. The property was then sold to Ladd, and, under written instructions from Ladd, the certificates were issued to Tate, the appellee. Tate paid the amount of taxes then due upon the property, and, up to the time of the institution of the suit, had paid the taxes upon the property as they became due. The assets of the development company, including the property in controversy, were purchased by an employé of the fuel company, who transferred them to the appellant. The appellant is a company organized by the officers of the fuel company, and all the stock of the appellant is held by the fuel company, except the shares owned by the officers of the company in sufficient amount to qualify them as directors. The court held that the tax certificates were void, and directed that, upon the payment of the amount of taxes due upon the property, together with interest and penalties, as provided by section 3905 of Mills' Annotated Statutes, a decree be entered declaring the said appellant to be the owner in fee of the premises; the order being, in part, as follows: "And it is further hereby ordered, adjudged, and decreed that upon the payment to, or deposit with the clerk of this court for the use of, the said defendant, of the said sum of money aforesaid, then, in such event, all and singular the said certificates of sale shall, and hereby are adjudged to be, canceled and wholly held for naught, and that, after the payment of said sum of money as hereinbefore mentioned as aforesaid, the plaintiff shall be, and hereby is, adjudged to hold its fee-simple title to the premises in controversy, and every part thereof, free and clear of all and every character of claim, interest, estate, lien, or demand of the defendant herein, of every kind and character whatsoever." From the decree the plaintiff prayed an appeal to this court.

In the brief filed by the appellant, the following statement appears: In this connection, we are confronted with the decision of this court in *Charlton v. Kelly*, 24 Colo. 273, 50 Pac. 1042; and to an examination of that case, which, we contend, announces an utterly erroneous rule of law, entirely unsupported by any authority, good, bad, or indifferent, we now address ourselves. In truth, the question as to whether this court will allow its decision in the *Charlton Case* to stand as the law of this state, or whether it will refuse to follow that decision, is the chief bone of contention in this case, and was the only serious question at issue between the parties below." It was held in the case of *Charlton v. Kelly*, 24 Colo. 273, 50 Pac. 1042, that where a tax deed has been found to be void, in a suit brought to remove a cloud upon a title, the decree for the plaintiff should be conditioned to take effect only upon the payment into court within a reasonable time, for the use of the grantee in the deed, of an amount sufficient to reimburse him for the amount for which the land was sold at the tax sale, with interest thereon and penalties as prescribed by section 3905, Mills' Ann. St., together with the amount of subsequent taxes paid by him, and interest thereon at the rate designated by section 3904. The decree rendered by the court is in compliance with this decision, and the plaintiff was decreed to be the owner in fee of the property, upon condition that it deposit in court the amount prescribed by the statute. It is contended that the doctrine announced in the case of *Charlton v. Kelly* is not applicable to this case, because in the *Charlton Case* a tax deed had issued, whereas in this case tax certificates only had issued. There is no substantial difference in the cases, and, if the *Charlton Case* shall be reaffirmed, it is decisive of this case. We think we are not warranted in again considering the questions presented in the case referred to, particularly as real property is involved; and for the reasons assigned in the case of *Mouat Lumber Co. v. Denver*, 21 Colo. 1, 40 Pac. 237, we must decline to recede from the position then taken. It may be, as counsel contend, that it does not find support in the majority of the other courts of the Union, but that is not a ground for changing the rule of law there announced. If it were established that an unlawful combination had been entered into to prevent competition and to stifle bidding, a different rule might, perhaps, prevail; but in this case, although it is asserted that such unlawful combination did exist, the testimony fails to establish any other combination than that in which the parties who now seek to relieve themselves of the rule announced in the *Charlton Case* were parties. These corporations and the corporation now asking relief were controlled by the same officers; the person who is alleged to have made the unlawful combination to prevent competition

was the agent of the company that now owns the stock of the appellant; and, under such circumstances, the company cannot be heard to complain.

For the reasons given, the judgment is affirmed. Affirmed.

(32 Colo. 156)

**TANNER et al. v. HARPER.**

(Supreme Court of Colorado. Feb. 1, 1904.)

**MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—FELLOW SERVANTS—CONCURRENT NEGLIGENCE—DECLARATION—AMENDMENT—TRIAL COURT'S DISCRETION.**

1. The discretion of the trial court in granting leave to amend a complaint, which does not change the cause of action, will not be disturbed unless it has been abused to the prejudice of defendant.

2. Where a complaint averred that an injury to a servant was caused by the negligent manner in which defendants operated their mining property, and the defective construction of certain specified appliances therein, an amended complaint, alleging further that the injury was caused by defects in the condition of the ways, works, and machinery connected with and used by defendants in operating the mine, and that their superintendent was incompetent, did not change the cause of action.

3. The allowance of the amendment was not an abuse of the trial court's discretion.

4. Over the mouth of a winze in a mine trapdoors had been placed, which, when closed, constituted part of a track on which a truck was operated. The doors, which opened parallel with the track, being left open, the truck ran along the track and fell into the winze and injured a servant. In an action for the injuries a witness was asked what, if anything, he observed in regard to the track, and he answered that the doors were, according to his judgment, put in wrong. Plaintiff claimed that the way the doors opened was faulty. *Held*, that the answer was not objectionable as not responsive.

5. An objection that the answer of a witness amounted to a mere opinion could not be raised for the first time on appeal.

6. In an action for injuries sustained by a servant in a mine owing to a truck used in a level falling down a winze, evidence held sufficient to warrant submitting the question of defendant's negligence to the jury.

7. The evidence considered, and held sufficient to warrant submitting to the jury the question of plaintiff's contributory negligence.

8. Where, in an action for a servant's injuries, the evidence warrants submission to the jury of the question as to defendant's negligence, a finding for plaintiff thereon will not be disturbed.

9. A master is liable for an injury to a servant occasioned by the concurrent negligence of the master and a fellow servant.

10. In an action for injuries to a servant counsel for plaintiff stated, when the jury were being impaneled, that an insurance company was the real party in interest in defense, but the court advised the jury to disregard the remark, and on the examination of the jurors plaintiff's counsel asked each juror whether he was acquainted with the insurance company. *Held*, that if the statement was erroneous, and not cured by the ruling of the court, or if the question was improper, the error was harmless, the evidence on the merits being strongly in favor of plaintiff.

Error to District Court, Teller County; Wm. P. Seeds, Judge.

Action by Lewis Harper against S. J. Tanner and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Action by defendant in error to recover damages for personal injuries claimed to have been caused by the negligence of plaintiffs in error. From a verdict and judgment in the sum of \$5,500, the defendants bring the case here for review on error. The errors assigned are permitting an amended complaint to be filed, refusal to strike certain testimony, overruling motions for nonsuit and to direct verdict for defendants, the giving and refusal of instructions, alleged improper statements of counsel, and the examination of the jurors on their voir dire.

T. J. Lock and Thomas, Bryant & Lee, for plaintiffs in error. Henry H. Clark and S. D. Crump, for defendant in error.

GABBERT, C. J. (after stating the facts). Plaintiff was in the employ of defendants, who were engaged in operating a mine under a lease, and while in the discharge of his duties growing out of such employment was injured by a truck falling down a winze in which he was at work. The complaint filed averred that the injury sustained was caused by the negligent manner the defendants operated their mining property and the defective construction of certain specified appliances therein. To this complaint an answer was filed, to which the plaintiff replied. Afterwards, over the objection of the defendants, plaintiff was permitted to file an amended complaint, which, in addition to the negligence pleaded in the original complaint, further alleged that the injury was caused by reason of defects in the condition of the ways, works, and machinery connected with and used by defendants in operating the mine, and that their superintendent was incompetent. The amended complaint did not change the cause or character of action. Both were based upon the alleged negligence of the defendants. It does not appear that defendants were prejudiced by the amendment. The granting of leave to amend a complaint, which does not change the cause of action, is within the discretion of the court, and, unless it affirmatively appears that this discretion has been abused to the prejudice of the defendant, its action will not be interfered with on review. *Cascade Ice Co. v. Water Co.*, 23 Colo. 292, 47 Pac. 268; *Davis v. Johnson*, 4 Colo. App. 545, 36 Pac. 887.

During the progress of the trial a witness on behalf of the plaintiff was being interrogated regarding a track constructed from the mouth of the winze upon which a truck that caused the injury to plaintiff was operated. Over the mouth of the winze trapdoors had been placed, which, when closed, constituted a part of the track. The construction of this track, as well as the way the trapdoors opened, was relied upon by plaintiff to establish the negligence of the defend-

¶ 9. See *Master and Servant*, vol. 34, Cent. Dig. § 512.

ants. The witness, after being interrogated with respect to his inspection of the track, was asked what, if anything, he observed in regard to it, and in reply answered: "I observed that the trapdoors were, according to my judgment, put in wrong; that is, that would be my judgment." The defendants moved to strike this answer upon the ground that it was not responsive, which motion was overruled. The trapdoors were a part of the track, and the way they opened was claimed to be faulty. In these circumstances it cannot be successfully urged that the answer was not responsive to the question. The principal objection now called to our attention is that the answer did not state facts, but the opinion of the witness, which was improper. That objection was not called to the attention of the trial court by the motion made, and cannot be raised for the first time on review.

At the conclusion of the testimony for plaintiff, defendants moved for nonsuit, and at the close of all the evidence for a verdict in their favor. These motions, as now argued, were based substantially upon the following grounds: (1) Plaintiff knew, or should have known, of the defects which he claimed caused his injury; (2) there was a failure of proof that the defendants were negligent; and (3) the proximate cause of the injury was the negligence of a fellow servant. Under the pleadings the issues were the negligence of the defendants, the contributory negligence of the plaintiff, and the negligence of a fellow servant. All these issues, by the verdict returned, were resolved in favor of plaintiff, and the several questions presented by the motions can best be determined by a consideration of the sufficiency of the testimony to sustain the general finding on the issues presented, and the province of the jury in cases of this character.

According to the testimony, plaintiff was engaged in working at the bottom of a winze. From the collar of this shaft a track was constructed along the level in which it was sunk, upon which a truck was operated to move the ore and waste hoisted from the winze to the level. Over the mouth of the winze trapdoors were placed, upon which this track was extended, so that the truck could be run upon the doors when closed. These doors opened parallel with the track. If they had opened crosswise, the door next to the stationary track, when open, would have lain across or against the track at right angles. When the bucket used in hoisting from the winze was raised sufficiently high above the level of the doors, they were closed, the truck run on the track thereon, the bucket lowered onto the truck and unfastened from the rope used in hoisting it from the winze. The truck was then pushed along the track to the point where the bucket was taken up by another hoisting apparatus and conveyed to the surface. When the bucket was returned to the truck, the latter was again run upon the

trapdoors, the bucket fastened to the rope and elevated sufficiently to clear the truck, when it was pushed from the doors to the stationary track, and the doors opened, so as to permit the bucket to descend into the winze. This track, it is claimed, for a distance of 10 or 12 feet from the mouth of the winze, was constructed on an incline towards the winze. In fact, counsel practically concede that this was the fact. To prevent the truck being precipitated into the shaft when the doors were open, a timber was fastened to a pivot attached to one of the uprights, which it was intended should be dropped across the track near the mouth of the winze, and, when down, it is claimed by some of the witnesses, was sufficient to prevent the truck from being precipitated into the shaft, while others said that it was not, because of its insufficient strength, or because the end not fastened had no support against a pressure towards the shaft. The person engaged in operating the truck had returned with the empty bucket, fastened it to the rope, and as soon as the bucket was clear of the truck, shoved or kicked the latter onto the track and hoisted the trapdoors. Just at this moment an accident happened to the lights, and, without paying any attention to the truck or putting down the bar, he proceeded to attend to the lights, with the result that the truck, by force of gravity on account of the incline of the track, was precipitated into the shaft, striking plaintiff, and injuring him very severely. It may be said here that the person engaged in operating the truck admits he knew of the incline, and that the truck, unless restrained in some way, if standing upon this part of the track, would run into the shaft. This incline was not particularly marked, and but one witness stated that he noticed it from a casual examination with the naked eye. Plaintiff had no knowledge of the track inclining towards the shaft, and had nothing to do with its construction. He had been engaged in the shaft but three or four days prior to his injury, subsequent to the date when the trapdoors were put in and the track extended thereon. In going to and from his work he passed over this track. There is testimony to the effect that at least one of the defendants knew of the incline in the track.

It was the duty of the defendants to exercise ordinary care in rendering the winze in which the plaintiff was working reasonably safe, and to this end it devolved upon them to exercise ordinary care in constructing the track running to the mouth of the shaft in such manner, and providing appliances to be used in connection therewith, as would be reasonably sufficient to prevent the truck from being precipitated into such shaft.

In this connection it is also proper to observe that the care required of them in this respect would be such as reasonably prudent men would exercise under similar circumstances, having in mind the dangers naturally

to be apprehended from the operation of a truck on a track extended to the mouth of the shaft. Counsel, from their argument, appear to assume that, because a bar was provided to drop across the track for the purpose of preventing the truck from being precipitated into the shaft, and as the party operating the truck neglected to use the bar for this purpose, that, therefore, the proximate cause of the injury to plaintiff was the negligence of the trammer. This view cannot be sustained. Whether or not the defendants had exercised the degree of care imposed by the law in constructing the track and appliances to be used in connection therewith to prevent the truck from running into the shaft was a question for the jury to determine from the testimony. The evidence was certainly sufficient upon which to submit this question, and, being sufficient for that purpose, the finding that defendants were negligent will not be disturbed.

There was no proof that plaintiff knew of the incline in the track. He had worked but a few days after it was connected with the doors. It was no part of his duty to operate the truck. His work was confined to the bottom of the shaft. The only question was whether or not, by the exercise of ordinary care, he should have observed the defect in the track. The incline was not so marked that it could readily be detected by observation alone. So that, in the circumstances of this case, the question of his alleged contributory negligence was within the province of the jury to determine. *Sampson M. & M. Co. v. Schaad*, 15 Colo. 197, 25 Pac. 89; *Clow & Sons v. Boltz*, 92 Fed. 572, 34 C. C. A. 550; *U. P. R. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433. Having determined from testimony sufficient to support their conclusion that he was not guilty of contributory negligence in the respect urged, the finding on that question must stand.

The jury having necessarily determined that the defendants were negligent, and that plaintiff was not guilty of contributory negligence, the question of the negligence of the trammer is practically eliminated. In the order of events, the injury was caused by the grossly culpable negligence of the trammer, but, if the defendants had taken the proper precautions to keep the truck from falling into the shaft in the circumstances it did, the injury would not have happened; so that the sole cause of the plaintiff's injury was not the negligence of the trammer in handling the car, but the result of the concurrent negligence of the defendants in failing to exercise a reasonable degree of care to prevent the car from being precipitated into the shaft when left standing upon the track. When the injury of an employé by a co-employé would not have happened except for the negligence of the common employer, the latter is responsible for the injury. *Cone v. Del., L. & W. R. R. Co.*, 81 N. Y. 206, 37 Am. Rep. 491; *Sherman v. The Menominee*

*R. & L. Co.*, 72 Wis. 122, 39 N. W. 365, 1 L. R. A. 173; *D. & R. G. Ry. Co. v. Sipes*, 28 Colo. 17, 55 Pac. 1093; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Shearman & Redfield on Negligence*, § 10, quoted with approval in *C. M. & I. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42.

Objections are urged to the instructions given upon the ground that they were mere abstract propositions of law, too technical to be easily comprehended by the jury. The instructions are not open to this objection. It is also urged that one of the instructions given is faulty because it omits the doctrine of negligence of a fellow servant, and is in conflict with other instructions in which the law on this subject is stated. The objection is not well taken. The instructions referred to merely state the law on the different phases of the case. Each is complete within itself on the subject or subjects to which it refers; hence there is no conflict. These instructions must be considered as a whole on the different questions involved. This instruction is also criticised because it is said to advise the jury, in effect, that plaintiff was entitled to recover if the track and appliances were unsafe, without regard to whether this condition was caused by the negligence of the defendants. The instruction is not as accurately worded as it should be, but, on the whole, and when read in connection with other instructions on the subject, is not open to the objection offered.

It is also urged that a further instruction is erroneous because it improperly states the degree of care which the defendants were required to exercise. The objection is not tenable. The law on that subject had already been given, and the part of the instruction challenged, but advised the jury that, if the negligence of the defendants was the proximate cause of plaintiff's injury, they were responsible. This instruction is readily distinguished from the one referred to in *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771. In that instruction it was clear the jury were improperly advised as to the degree of care which the defendants were required to exercise.

It is also urged that, if an instruction given at the request of defendants had been followed, the jury should have returned a verdict in their favor. This instruction, if proper, called the attention of the jury to a controverted question of fact, and as they evidently determined this fact against the defendants upon testimony sufficient to support their conclusion, the defendant cannot be heard to complain. The instruction requested by defendants and refused was substantially incorporated in those given.

When the jury were being impaneled, one of the counsel for plaintiff stated that an insurance company was the real party in interest in defense of the suit. Counsel for defendants objected to this statement, and the court thereupon advised the jury that



they should disregard the remark of counsel. On the examination of the jurors on their voir dire counsel for plaintiff, over the objection of defendants, were permitted to ask each juror whether he was acquainted with the insurance company in question, and whether he had been in its employ. If the statement complained of was erroneous, and was not cured by the ruling of the court, or if the questions to the jurors were improper, they are not sufficient to work a reversal if it affirmatively appears that the defendants were not prejudiced thereby. The great weight of the testimony on the question of the negligence of defendants in constructing the track, and also on the subject of the alleged contributory negligence of the plaintiff, was overwhelmingly in favor of the latter. He was very seriously injured. The extent of his injuries was such that the amount awarded by the verdict returned is not at all unreasonable. So it appears from the record that there were no close questions of fact in the determination of which the jury might have been unconsciously influenced by the consideration of extraneous and improper matter. We conclude, therefore, that it affirmatively appears the defendants were not prejudiced by the alleged errors, and hence cannot complain of their commission. *Manigold v. Black River Traction Co.* (Sup.) 80 N. Y. Supp. 861.

The judgment of the district court is affirmed. Affirmed.

(32 Colo. 147)

**PEOPLE ex rel. HAGERMAN v. COURT OF APPEALS OF COLORADO et al.**

(Supreme Court of Colorado. Feb. 1, 1904.)

**CERTIORARI—COURT OF APPEALS—JURISDICTION—DECISION—REVIEW—CONFLICT WITH PRIOR DECISIONS—SPECIAL CASE.**

1. Certiorari will not lie to review the decision of the court where it has jurisdiction of the case, though it is based on immaterial facts, or the court has failed to consider material facts, or has misapprehended the facts, and grievously erred in its statement of them.

2. Where a life policy was made payable to the insured's wife, if living, otherwise to her children, and the insured and his wife assigned the policy, though the children were not made parties to an action after the wife's death by the assignee against the company for conversion of the policy, the Court of Appeals has jurisdiction to render judgment that the assignee cannot maintain the action because her interest has passed to the children.

3. Where a life policy was made payable to the insured's wife, if living, otherwise to her children, and the insured and his wife assigned the policy, the decision of the Court of Appeals that the assignee's interest in the policy passed to the children on the wife's death does not, by enforcing the "payable clause," instead of the "insurance clause," so conflict with a prior decision of the Supreme Court, holding a fire policy void on transfer of the property to a mortgagee to whom the loss was payable as his interest might appear, as to render the decision of the Court of Appeals reviewable by certiorari.

4. Where the Court of Appeals held that the interest of a wife in her husband's policy, payable to her, if living, otherwise to "her children," was contingent, and that on her death it passed to her children, and the Supreme Court had held that a beneficiary acquires an irrevocable interest in a life policy on its issuance, the two decisions are not so in conflict as to render that of the Court of Appeals reviewable by certiorari.

5. Where a life policy is payable to the insured's wife, if living, otherwise to her children, and the assured and his wife assign it, an action, after the wife's death, by the assignee against the company for conversion of the policy, involving the rights of the assignee and the children, does not present such a special case or great public question as to require review by the Supreme Court of the decision of the Court of Appeals.

Petition by Jennie R. Hagerman for writ of certiorari to the Court of Appeals and the Mutual Life Insurance Company of New York. Denied.

For opinion below, see 72 Pac. 889.

Stuart & Murray, for petitioner. D. V. Burns and William R. Barbour, for respondents.

**PER CURIAM.** In 1866 the respondent company issued its policy of insurance upon the life of David Heller. The policy contained the following among other provisions: "This policy of insurance witnesseth that the Mutual Life Insurance Company of New York, in consideration of the representations made to them in the application for this policy, and of the sum of \$22.08, to them duly paid by Mrs. Fannie Heller, wife of David Heller, merchant, and of the semi-annual payment of a like amount on or about the seventeenth days of May and November in each year during the continuance of this policy, do assure the life of David Heller of New York, in the County of New York, State of New York, for the sole use of his said wife, in the amount of two thousand dollars, for the term of his natural life. And the said company do hereby promise and agree to pay the amount of said insurance at their office in the City of New York, to the assured for her sole use, if living, in conformity with the statute, and if not living, to her children, or their guardian for their use, in sixty days after due notice and proof of the death of the said party whose death is hereby insured, the balance of the year's premium, if any, being first deducted therefrom." In the year 1884 David Heller and Fannie Heller, his wife, executed their promissory note, payable to one Body, for \$600, and as additional security assigned their interest in the policy. The note and policy were assigned in 1887 by Body to Metzler, by Metzler in 1890 to Norman Hagerman, and by Hagerman in 1891 to petitioner. The policy was delivered with each assignment to the assignee, and the insurance company duly notified. The company, pursuant to the request of the petitioner, converted it into a paid-up policy for \$1,903. After the policy was indorsed as a paid-up policy it was de-

¶ 1. See *Certiorari*, vol. 9, Cent. Dig. § 42.

livered by mistake to David Heller. It is admitted that the cash surrender value of the policy in July, 1898, was \$810. After the delivery of the policy to Heller, and in July, 1898, the petitioner demanded of the company its return or the payment of \$810, its surrender value. The company was unable to deliver the policy, and refused to pay the sum demanded. Fannie Heller, the beneficiary named in the policy, died in the year 1889, leaving her husband, David Heller, and several children, surviving her. In October, 1898, Jennie B. Hagerman brought action against the insurance company in the district court of Arapahoe county, alleging the conversion of the policy, and demanding judgment for its value. The trial resulted in a judgment in favor of the plaintiff for the value of the policy, and provided that the judgment might be satisfied by the delivery of the policy to the plaintiff. The defendant appealed from the judgment to the Court of Appeals. That court reversed the judgment of the district court, and held that, as Jennie R. Hagerman had no substantial interest in the policy in question, she was not damaged by the alleged conversion. Subsequently Mrs. Hagerman filed her petition in this court for a writ of certiorari. The petition, after reciting that petitioner recovered judgment against the insurance company in the district court, that the judgment was reversed by the Court of Appeals, and that the petition for rehearing was overruled, alleges, among other things: (1) "That the Court of Appeals, in arriving at its judgment and decision, refused to consider matters pertinent and vital in said controversy." (2) "That the opinion announced is contrary to the law in reference to said matters therein contained, as heretofore laid down by the prior decisions of this court, and also in said Court of Appeals." (3) "That the Court of Appeals was without jurisdiction to render the particular judgment announced." (4) "That the judgment of the Court of Appeals is based upon wholly immaterial facts." And (5) "that the opinion and judgment of the Court of Appeals fails to state certain material facts, and that said court has misapprehended the facts, and grievously erred in its statement so far as it attempts to give the same."

We shall consider those allegations only which we have numbered 2 and 3, because we have repeatedly held that, if the Court of Appeals has jurisdiction of the case, this court will not exercise the superintending control granted by the Constitution, even though it should appear that the decision of the Court of Appeals is erroneous, or that the facts upon which the decision was based were insufficient in law to sustain the conclusion of the court, or that such facts were immaterial under the issue made by the pleadings. We do not recall a decision of this court in which it is held that we will refuse to grant the writ where it is alleged in the petition and shown by the record that

the Court of Appeals has failed to consider facts which are alleged to be material to the issue, or where it is alleged that the court has misapprehended the facts and grievously erred in its statement of them; but we now decide that such conditions do not warrant this court in the exercise of the power granted by law, for, unless the Court of Appeals is without jurisdiction to render the judgment, or unless in a clear case it ignores the decision of this court, or unless cases, if any, are presented involving the same principle, certiorari will not be granted. *People v. Court of Appeals*, 28 Colo. 442, 65 Pac. 42; *People v. Court of Appeals*, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105; *People v. Court of Appeals*, 27 Colo. 411, 61 Pac. 594. In holding that Mrs. Hagerman had no interest in the policy of insurance, the court declared that upon the death of Fannie Heller her children became the beneficiaries, and it is urged that the court was without jurisdiction to render judgment in favor of these children because they were not parties to the suit. The specific objection is as follows: "That the said the honorable Court of Appeals had no jurisdiction to consider and determine the questions it has adjudicated in said action, for want of necessary parties; that the entire opinion is based on the supposed rights of the children of Fannie Heller; that, in order to have their rights passed upon, the defendant should have made them parties by cross-bill, and caused them to interplead with petitioner; that the matters determined by the Court of Appeals could only properly be considered upon an interplea; that said children, not being parties thereto, could in no way be bound by the judgment of the Court of Appeals; that, as such an adjudication could not be binding upon them, neither had it, nor can it legally be made to have, any binding force or effect on your petitioner." Counsel's position is not tenable. The court had jurisdiction of the appeal—jurisdiction to determine Mrs. Hagerman's right in the subject of litigation—and, while the children were not parties to the litigation, and while counsel is correct in stating that they would not be bound by any judgment rendered against them, the court had power, nevertheless, in passing upon the right of Mrs. Hagerman, to declare that upon the death of the wife of the insured her assignee's rights ceased, and that her children became the beneficiaries.

We cannot say that the Court of Appeals has ignored the decisions of this court, or has refused to be guided by the law as announced by this court. In *People v. Court of Appeals*, in 27 Colo. 411, 61 Pac. 594, it is held that: "The Supreme Court will not, in the exercise of its power of superintending control, review by certiorari a judgment of the Court of Appeals in a case in which that court has final appellate jurisdiction, on the ground that the Court of Appeals in its decision ignored decisions of the Supreme Court and disregarded

the law therein announced, where the opinion of the Court of Appeals discloses that it did not ignore the decisions of the Supreme Court, but considered them, and accepted the law as therein laid down as correct and controlling as a general proposition, but decided that in the particular case before the court the peculiar facts and circumstances took the case out of the general rule laid down in the Supreme Court cases, and brought it within certain well-recognized exceptions." The Court of Appeals in this case did not ignore the decisions of this court, but considered such cases as were called to its attention, and determined that they were not in conflict with the other authorities cited in the opinion. Let us examine the cases referred to for the purpose of ascertaining whether the Court of Appeals has refused to apply the law as announced by this court. It is said that the Court of Appeals, in holding that Mrs. Hagerman had no substantial interest in the policy, and that the children, upon the death of Mrs. Heller, became the beneficiaries, has enforced the "payable clause" of the policy, rather than the "insurance clause" thereof, and that in so doing the court has decided directly contrary to the decision of this court in the case *Scania Insurance Company v. Johnson*, 22 Colo. 476, 45 Pac. 431, but we find nothing in the case cited in conflict with the decision of the Court of Appeals. The household goods of Mrs. Quigley were insured by the Scania Company against loss by fire. Attached to the policy was a provision, "Loss, if any, payable to Mrs. H. Johnson, as her interest may appear." The policy contained the usual provisions declaring it void if any change in possession or ownership of the property was made without the consent of the company. Afterwards, without notice of any kind to the company, Mrs. Quigley made an absolute sale of the property to Mrs. Johnson. The property was destroyed by fire, and Mrs. Johnson brought suit upon the policy to recover the value of the goods destroyed. The court held that the effect of the language of the attached provision was merely an appointment of Mrs. Johnson to receive the amount of any loss that might occur; that the contract of insurance was one directly between the company and the mortgagor; that it was the mortgagor's, and not the mortgagee's interest that was insured, and that the sale of the property, being in violation of the terms of the policy, invalidated it. This is far from a decision holding that under provisions such as we have quoted from the Heller policy an assignment of the policy vests in the assignee the absolute title thereto, and authorizes him, during the life of the insured, and after the death of the wife, to surrender the policy, and collect the cash value; or one holding that the assignee of such a policy, indorsed as being "paid up," takes, after the decease of the wife, and during the life of the insured (to the exclusion of the children), the sole title thereto; or one

holding that under a policy such as we have before us the wife is the sole beneficiary. But it is urged that the children of Fannie Heller do not have an insurable interest in the life of David Heller, that stepchildren do not have an insurable interest in the life of their stepfather, and that the policy should be read as though the children had not been mentioned. In the opinion of the Court of Appeals, it is stated that at the time of the assignment of the policy "David and Fannie Heller had nine children, who still survive." In the petition for certiorari it is alleged that there is no allegation in the pleadings nor statement in the evidence that David Heller was the father of any of the said children, and it appears to be assumed because the policy mentions "her children," and, there being no proof or allegation on the subject, that the children surviving are the stepchildren of David Heller; and it is insisted that the decision in the case of *Love v. Clune*, 24 Colo. 237, 50 Pac. 34, sustains the position of Mrs. Hagerman, and that the Court of Appeals refused to be guided by the law as announced in that case. We do not so read the case. The case decides that an insurance policy of a benevolent association organized "to aid and benefit the families of deceased members of the brotherhood in a simple and substantial manner" cannot be changed so as to name a beneficiary "not within the class for whose benefit the association was organized." And in considering the case presented upon the subject of the right of the insured to change the beneficiary at will, the court said: "We think the greater number and better-reasoned cases favor the rule that, in the absence of any provision upon the subject, the beneficiary named cannot be displaced without his or her consent." The cases approved by the court hold that the "beneficiary, upon the issuance and delivery of the policy, acquires a vested interest that is irrevocable." The decision is not in conflict with the decision of the Court of Appeals, and that court rightly read the opinion of this court.

The Court of Appeals held that the interest of Mrs. Heller in the policy was contingent upon her surviving her husband, and that with her death ended her contingent interest in the policy, and all rights therein became vested in her children. The rule announced in the case *Love v. Clune* as being sustained by the greater number and better-reasoned cases, that "a beneficiary acquires, upon the issuance and delivery of the policy, a vested and irrevocable interest therein," is not authority for the position taken by Mrs. Hagerman that stepchildren have no insurable interest in the life of their stepfather, nor is it contrary to the rule announced by the Court of Appeals. The policy in question made Mrs. Heller the beneficiary in the event that she survived her husband. If she did not, her children became the beneficiaries. Our attention has not been called to any decision of this court which holds that a wife

has such a vested and irrevocable interest in a policy of insurance such as was under consideration in the Court of Appeals that the rights of the children therein are defeated by an assignment of the wife although she does not survive her husband.

Other cases are cited by the petitioner as being in conflict with the decision of the Court of Appeals, but we do not so regard them, and we shall not discuss them.

As additional reasons for the issuance of the writ, it is alleged that this is a special case, an extreme case, a case of peculiar facts and law, and one in which great public questions are involved; but we do not so regard it. The application for certiorari is denied.

Application denied.

(32 Colo. 71)

**FLORENCE & CRIPPLE CREEK R. CO. v. TENNANT.**

(Supreme Court of Colorado. Feb. 1, 1904.)

CONTRACTS—SALES—SETTLEMENT WITH ASSIGNEE OF SELLER—ACTION BY ASSIGNOR—INSTRUCTIONS—ACTION ON ACCOUNT—INTEREST—LIMITATIONS.

1. Defendant took lumber from a mill, which was in the hands of an assignee for the benefit of creditors, and subsequently paid the assignee a certain sum in settlement. Subsequently the assignee was discharged, and the mill, etc., reconveyed to the assignor, who sued for a balance due for the lumber. The court instructed that the testimony showed that the settlement with defendant was made on the statements of defendant's representatives as to the amount of lumber taken, and that, if such statements were true, that item might be considered to have been settled for, but that if more lumber was taken, and more than the assignee undertook to settle for, the plaintiff could recover for the value of the lumber not paid for. *Held*, that the instruction was proper.

2. It was proper to refuse an instruction which, in general terms, stated that if the assignee had charge of the lumber, and settled with defendant, the plaintiff was not entitled to recover.

3. In an action for the price of lumber, there was evidence that the contract of sale was that the lumber should be considered delivered "when taken by defendant, accepted, and used," and the court instructed that if the agreement was that the lumber was not to be paid for until it was "accepted for use," and that before so "accepted for use" it was washed away by a flood, there could be no recovery. *Held*, that the instruction was not erroneous because of the phrase "accepted for use," the distinction between the instruction and the evidence not being so marked as to have misled the jury.

4. Mills' Ann. St. § 2251, provides that creditors should be allowed interest on money due on account from the date when the same became due. *Held* that, in an action on account for goods sold and delivered, though it appeared that the amount of goods delivered had been disputed, plaintiff was entitled to interest on the amount found to be due.

5. An action on account of lumber sold and delivered is not barred where there has been a partial payment, claimed by the debtor to be in full payment, within six years of the bringing of the suit.

Appeal from District Court, Fremont County; M. S. Bailey, Judge.

Action by William Tennant against the Florence & Cripple Creek Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Karl Schuyler and Henry M. Blackmer, for appellant. James T. Locke and Lee C. Champion, for appellee.

STEELE, J. Suit was brought by the plaintiff on June 23, 1900, to recover judgment in the sum of \$4,067, and interest, on account for materials furnished prior to December, 1894. The jury returned a verdict for the plaintiff in the sum of \$5,410.10. The case is brought here by the defendant by appeal.

The appellant contests but two items of the account—one amounting to \$1,352, the value of lumber alleged to have been taken by the appellant from appellee's mill in the month of June, 1894; the other amounting to the sum of \$2,417, the value of piling furnished appellant at its request. Counsel say in their brief: "It was the intention of counsel to urge various objections in detail to the manner in which the account was proved, and to take up in detail various objections to the introduction of various items, \* \* \* but, upon more mature consideration, it now is the intention of counsel for appellant to resolve the discussion as hereinabove set forth to a consideration of the case as being an action brought to recover the value of the two items mentioned in the account; that is, the piling of the claimed value of \$2,417.28, and the 104,000 feet of lumber claimed to have been taken from the mill site by the railroad company, of the value of \$1,352.00."

We shall not consider the assignment of error that the judgment is not supported by the evidence, because the evidence of the appellee, if believed by the jury, will support the judgment. The appellee was the proprietor of a sawmill, and in his absence—so he says—the agents of the company took 104,000 feet of lumber for use in the repair of its road, and the officers and agents of the company informed him that they had taken the lumber, and had credited him upon the books of the company with that amount. These statements are denied by the appellant's witnesses. They admit, however, that they took lumber from the mill, but they say that the amount taken was only about 13,000 feet. The appellee testified that he furnished the piling mentioned in the second item, and produced a memorandum showing the amount and value thereof. It seems that the appellee had made an assignment for the benefit of creditors, and while his affairs were in the hands of his assignee the transaction with the company occurred. The assignee received from the company payment for a few thousand feet of lumber taken from the mill, and testified with reference to the piling that he agreed with the company that the piling

¶ 5. See Limitation of Actions, vol. 33, Cent. Dig. § 632.

should be considered as delivered when it was used. Other witnesses testified that the piling was put upon the right of way of the company, and was carried away by a flood. The jury was properly instructed upon the appellant's theory of the case, and must have believed the witnesses for the appellee. The jury was instructed that if the assignee of Tennant made a contract with the company, by the terms of which he agreed to furnish them certain quantities of piling, and that the piling was not to be paid for until used by the company, and that before the piling was accepted by the company it was washed away by a flood, or if there was no delivery or acceptance of the piling, the verdict should be for the defendant. And the appellant insists that the jury disregarded the instruction in finding for the appellee. There was testimony offered by the appellee upon which the jury could base a finding that he delivered the piling in question to the officers of the company, and we cannot say that the jury disregarded the instructions.

Instruction No. 7 was objected to by the appellant because it contains a statement of fact, but we think the objection is not tenable. The statement contained in the instruction was from the uncontradicted testimony of appellant's witnesses, and could not have been prejudicial. The company, without authority, took a quantity of lumber from the mill of the appellee, and the assignee accepted from the company \$153 as payment for the lumber. The court instructed the jury that the testimony showed that the settlement with the company was made upon the statements of the representatives of the company as to the amount of lumber taken, and that, if such statements were substantially correct and true, that item might be taken and considered to have been fully settled for, but that if more lumber was taken than the agents reported, and more than the assignee undertook to settle for, and in fact did settle for, the plaintiff could recover for the value of the lumber not paid for by the company. Before this suit was begun, the assignee of Tennant was discharged, and the property reconveyed by proper writing to Tennant. This instruction was correct, and the court did not err in giving it, nor in refusing to give an instruction offered by the appellant which in general terms stated that if the assignee had charge of the lumber, and settled with the company, the plaintiff was not entitled to recover. The instructions, it is claimed, are inconsistent, but we do not so regard them, and they appear to fully and fairly present the issues raised. The assignee of Tennant testified that, by agreement with the company, the piling should be considered delivered "when it was taken by the railroad company, accepted, and used." The jury was instructed that if they believed from the evidence that there was an agreement between the assignee and the company "that the piling was not to be paid for by said company

until it was accepted by it for use, and that before it was so accepted for use by said company it was washed away by a flood. \* \* \* then, so far as this particular item is concerned, your verdict should be for the defendant." It is claimed that by this instruction a new element is introduced into the agreement, and that the use of the words "accepted for use" tended to confuse the jury. The agreement testified to by the assignee of Tennant was that the piling was not to be considered delivered until used. There is a distinction between the terms employed in the instruction and those given in the testimony, but the distinction is not so marked as to have misled the jurors, or to have convinced them that placing the piling on the company's right of way, if they believed the assignee's testimony, rendered the company liable.

The action of the court in allowing interest upon the amount of \$3,592 from December 31, 1894, to the date of trial, is assigned as error. Upon the subject of interest the court instructed the jury as follows: "And if you find from the evidence given, under the instructions of the court, that any such sum whatsoever is now due and owing to the plaintiff from the said defendant for said material, or for any part or portion of it, then you will allow the plaintiff interest on such sum so found to be due to him at the rate of eight per cent. per annum from December 31, 1894, to the present time." No error was committed by the court in giving this instruction, nor was error committed by the jury in awarding interest in accordance therewith. The plaintiff sued upon an account for materials sold and delivered. The statute (section 2251, 1 Mills' Ann. St.) provides that "creditors shall be allowed to receive interest when there is no agreement as to the rate thereof, at the rate of eight per centum per annum \* \* \* on money due on account, from the date when the same became due." Conceding that the statute allows interest upon accounts from the time they become due, counsel insist that, unless the account has been liquidated, interest should not be awarded, and the case of *Dexter v. Collins*, 21 Colo. 455, 42 Pac. 664, is cited in support of this contention. The action in the case cited was not based upon an account, but was an action to recover commissions alleged to be due for the sale of real estate, and the court held that interest was not recoverable upon an unliquidated demand. The decision in the case cited is not in conflict with the decision here, for the action in that case was brought upon an express contract and an implied contract, while this action is brought upon an account. Debtors cannot avoid the payment of interest by disputing the account, and when at the trial the account, or any portion of it, is established, the creditor is entitled to interest upon the amount found to be due.

The appellant also contends that the claim

for the lumber is barred by the statute of limitations; that the lumber was taken about the middle of June, 1894; and that suit was brought on June 23, 1900. The account for lumber sued upon was not a mutual account, and, but for the partial payment and the acknowledgment of it, would probably be barred by the statute. But the acknowledgment of it and the partial payment occurred within six years of the bringing of the suit.

After the assignee was discharged, he made a reconveyance to Tennant, and Tennant was permitted to testify to that fact, and the assignment to Tennant was introduced, over objections. This action of the court, the defendant urges, was prejudicial to the appellant. We do not think the jury could have been influenced by this testimony. It was immaterial, but its introduction was not prejudicial. The case has many peculiar features, but the jury accepted the story of the appellee as truthful, and rejected the statements of the appellant's witnesses; and we cannot say that the verdict was not just, because the jury accepted the testimony of appellee, although uncorroborated in many particulars, and rejected the testimony of witnesses for appellee, although corroborated and supported by other witnesses and by circumstances.

There being no error in the record, the judgment is affirmed.

**Affirmed.**

(32 Colo. 205)

**VENNER et al. v. DENVER UNION WATER CO. et al.**

(Supreme Court of Colorado. Feb. 1, 1904.)

**APPEAL—JURISDICTION—ACTION INVOLVING FREEHOLD.**

1. An action to annul certain conveyances, where the effect of the decree sought would divest defendants of title to a waterworks system and vest it in plaintiffs, was an action involving a freehold, and transferable from the Court of Appeals to the Supreme Court.

Appeal from District Court, Arapahoe County; N. Walter Dixon, Judge.

Action by Clarence H. Venner and others against the Denver Union Water Company and others. From a decree for defendants, plaintiffs appeal. Transferred from Court of Appeals. Motion to remand denied.

Yeaman & Gove, Gondy & Twitchell, and H. H. Babb, for appellants. Wolcott, Vaile & Waterman, H. H. Dunham, W. W. Field, and Chas. J. Hughes, Jr., for appellees.

**PER CURIAM.** Appellants commenced an action in the district court of Arapahoe county against the appellees, one purpose of which was to obtain a decree annulling certain conveyances under which the Denver Union Water Company obtained and asserts title to the waterworks system of which it claims to be the owner. The effect of such a judgment, so appellants claim, would be to divest the Denver Union Water Company of title to the waterworks system in question

and vest it in the American Waterworks Company. That is the relief to which they claim to be entitled. The issues were found in favor of the defendants, and a decree rendered adjudging the American Waterworks Company had no right, title, or interest in the property in controversy, and that the Denver Union Water Company was the owner thereof. From this judgment the plaintiffs appealed to the Court of Appeals. Defendants there moved to transfer the cause to this court, upon the ground, among others, that a freehold was involved. The motion prevailed, and appellants now move to remand.

In support of this motion it is contended that the action only incidentally relates to a freehold, because the suit was commenced to set aside and vacate certain conveyances. The relief to which the plaintiffs claim to be entitled can only be secured through the annulment of these conveyances. A judgment to that effect, and its purpose, is to adjudicate the title to the property in controversy, so that the real subject-matter in dispute between the parties is the title to real property, and a decree in the action, as it did by the one rendered in the district court from which the appeal is prosecuted, must determine the title to be in one or the other of the parties. When the ultimate object of an action is to unconditionally divest one party of title to realty and vest it in another, a freehold is involved. *McCandless v. Green*, 20 Colo. 519, 39 Pac. 64. The motion to remand is denied.

**Motion denied.**

(32 Colo. 127)

**GRAVES v. PEOPLE.**

(Supreme Court of Colorado. Feb. 1, 1904.)

**LARCENY BY EMBEZZLEMENT—STATUTE CREATING OFFENSE—CONSTITUTIONALITY—TITLE OF ACT—REVIEW—EVIDENCE—TRIAL—ABSENCE OF JUDGE FROM COURTROOM.**

1. Sess. Laws 1893, p. 119, c. 68, punishing as larceny the embezzlement or fraudulent conversion of property which may be the subject of larceny, and mentioning only larceny and not embezzlement in its title, does not violate Const. art. 5, § 21, providing that no bill shall contain more than one subject, which shall be clearly embraced in its title.

2. Where the absence of the judge from the courtroom during the argument to the jury was such that he was not within sight of counsel and the jury, and did not hear an objection on behalf of accused, and was not in a position where he could discharge his duties as effectively as if he had been in the courtroom and had been able to see as well as hear what was there taking place, it constitutes reversible error.

Error to District Court, Arapahoe County; Samuel L. Carpenter, Judge.

James S. F. Graves was convicted of larceny by embezzlement, and he brings error. Reversed.

Frank I. Willsea, for plaintiff in error. N. C. Miller, Atty. Gen., and I. B. Melville, Asst. Atty. Gen., for the People.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 146L.

CAMPBELL, J. Defendant was tried and convicted of embezzling money intrusted to him by another, which by our statute is deemed and called larceny. Sess. Laws 1893, p. 119, c. 68. Upon this review he relies upon three grounds for reversal.

1. In the title larceny, but not embezzlement, is mentioned, while the act itself, in substance, reads that whoever embezzles or fraudulently converts to his own use certain property delivered to him which may be the subject of larceny shall be deemed guilty of larceny, and punished accordingly. The specific objection urged here is that, since embezzlement and larceny are distinct crimes, the title of an act which speaks of larceny is not broad enough to cover a provision therein treating of embezzlement, and, besides, is misleading. Section 21 of article 5 of our Constitution provides that no bill, except the general appropriation bill, shall contain more than one subject, which shall be clearly embraced in its title. The objection is not good. In the body of this act it is declared, in the circumstances therein pointed out, that one who wrongfully embezzles or converts personal property, in the absence of a trespass, shall be deemed guilty of larceny. It follows that, since the doing of the prohibited thing in the circumstances stated is deemed larceny, the section so providing comes clearly within the title. In Bishop on Statutory Crimes (3d Ed.) § 418, it is stated that in such a case as this the rule of pleading requires the circumstances to be set out, and that the common-law form of indictment for larceny will not support a conviction for the commission of the thing prohibited by the statute. This, however, is not authority for the point sought to be made by plaintiff in error.

2. The defendant was agent for the prosecuting witness in making loans of money and taking mortgage securities therefor. It is admitted that he collected a note evidencing one of these loans. The principal issue in the case was whether or not the defendant paid the proceeds to the prosecuting witness, or converted the same to his own use. There was a direct conflict of testimony upon this point, the prosecuting witness swearing that the money had not, and the defendant that it had, been paid to her, and there were certain circumstances in evidence tending to corroborate each of them. Plaintiff in error strenuously insists that the verdict is manifestly against the weight of, and is not supported by, sufficient legal evidence. The mooted questions of fact were peculiarly for the jury to determine. They heard the testimony, saw the witnesses upon the stand, and the general rule, to which there are exceptions, is that the jury's findings will stand. We express no opinion as to this assignment, however, since the judgment must be reversed on another ground.

3. It appears in the bill of exceptions, from an uncontroverted affidavit of the attorney for the defendant, that while the district attor-

ney was making his opening, and again while the assistant district attorney was making the closing, argument to the jury, the presiding judge left the bench and went into the clerk's office adjoining the courtroom, and remained there on the first occasion more than five, and on the second more than ten, minutes; that defendant's counsel, each time desiring to object to certain language and conduct of the district attorney, interrupted the latter and tried to have a record made of his objection, but as the judge was then out of the sight and presence of counsel and the jury, and outside of the courtroom, and, as the affidavit states on information and belief, also beyond hearing, counsel was, because of such absence, unable on the first occasion either to obtain a hearing of his objection or to preserve his exceptions. No counter affidavit traversing the facts contained in this affidavit was filed by the district attorney, but statements of the presiding judge in overruling defendant's motion for a new trial throw some light upon the situation. Whether the statements of the presiding judge are, in such circumstances, to be considered as evidence, we need not decide. It has been held that they are competent as evidence only as to such matters as are in their nature better known to himself than they could be to others. Here, with respect to the matters complained of, the knowledge of the judge, at least his opportunity for acquiring it, was no better than that possessed by others present at the time in the courtroom. *People v. Blackman* (Cal.) 59 Pac. 573. But for the purpose of this case it may be conceded that every statement made by the presiding judge is true, and may be treated as if contained in an affidavit. He does not deny that he was absent from the courtroom the first time for five, the second time for ten, minutes. He says he thinks he heard everything that took place during the entire argument of the prosecuting officer on both occasions, but admits not only that he was not in the courtroom, and was in the adjoining clerk's office, for the periods of time mentioned, but also that he was not then within the sight or in the presence of counsel or jury. Unquestionably the judge believes that he heard everything that occurred. There is, however, no denial by him that he did not hear the first interruption, or pass upon the objection sought to be interposed by counsel for defendant, which the latter positively swears occurred while the prosecuting officer was speaking. In *O'Brien v. People*, 17 Colo. 561, 31 Pac. 230, it was held that over the objection of defendant in a criminal trial, the absence of the judge from the presence and hearing of the jury, witness, and counsel, while the testimony of that witness was being taken, was prejudicial error; and in the opinion it was intimated that in a felony trial no substantial part thereof could be carried on properly in the absence of the presiding judge, even with the consent of the



defendant. Chief Justice Hayt, specially concurring, said that his understanding of the opinion was that the writer held it error under all circumstances for the presiding judge to absent himself from the courtroom during the argument of counsel to the jury, no matter how brief such absence might be, and with these views the Chief Justice did not concur. Possibly the understanding of the Chief Justice was his deduction from what took place in the consultation room, but there is nothing in the opinion of the court that necessarily warrants that conclusion. To the contrary this court, referring to the O'Brien Case, in *Rowe v. The People*, 26 Colo. 542, 545, 59 Pac. 57, held that the mere fact that the trial judge left his bench during the argument, and for a brief time went into his private room a few feet away, is not reversible error. It is upon this case that the Attorney General relies to sustain the present judgment, but the cause at bar does not come within its protection. For aught that appears in that case, the judge all the time was not only in hearing, but in sight, of counsel and the jury, and heard and saw what was transpiring in the courtroom; and an examination of the record shows that no affidavit was filed presenting this point, but that it inferentially appeared in an unverified motion for a new trial, but most definitely in the remarks of the trial judge in denying that motion. Here the trial judge was not only absent from the courtroom, but was not within sight or in the presence of counsel or jury, and did not hear defendant's objection to the conduct of the prosecuting officer, and was not in a position where he could discharge the duties of his office with the same effect as if he had been in the courtroom, or had been able to see as well as hear what was there taking place. In *State v. Smith*, 49 Conn. 376, the facts are quite similar to those in the Rowe Case, the court there saying that, for aught that appears to the contrary, the judge may have stepped into the anteroom, where the air was purer and fresher, and occupied a position so near the door as to enable him to see and hear as well as if he had remained inside the courtroom. To this observation, however, the court immediately added: "We all agree, and desire to have it distinctly understood, that it is the duty of the presiding judge at criminal trials, and especially where life is involved, to be visibly present every moment of their actual progress, so that he can both see and hear all that is being done. This is a right secured to the accused by the law of the land, of which he cannot be deprived. All the formalities of the trial should be scrupulously observed, so that the people present may see and know that everything is properly and rightfully done." In *Meredeth v. The People*, 84 Ill. 479, where the absence from the courtroom during the argument was prolonged, and the judge was in a room on the opposite side of the courthouse, the judgment was reversed.

The Supreme Court there said that it is the duty of the trial judge to be present all the time during the argument of the cause. In *Thompson v. The People*, 144 Ill. 378, 32 N. E. 968, the court observed that, had the presiding judge stepped out of the courtroom into his private room for a short time, where he could still hear the argument, and where he could be in a position to pass upon any question which might properly arise, error might not have been committed. But in that case, as in the one now before us, objections were made to different portions of the argument, and, on account of the absence of the judge from the courtroom, were not passed upon or decided. There the decision was that the defendant had the right to the presence of the presiding judge during the argument of the case before the jury, and so we say here. In *Turbeville v. State*, 56 Miss. 793, the court, though not reversing the judgment because of the brief absence of the judge, nevertheless said that, if the absence of a judge from the courtroom constituted even a temporary relinquishment of the control of the court and conduct of the trial, it would be reversible error. It was said that it is his duty to be able at all times instantly to assert his authority, if demanded by anything that might occur. Instances might arise which would require prompt action on his part, such as the conduct of the jurors, spectators, or officers of the court, and then instant interposition of his authority must be made, and this can be done only if he is visibly present. To enable the court to pass upon a motion for a new trial it is just as important, in some instances, that he saw, as that he heard, what was done at the trial. In *State v. Carnagy*, 106 Iowa, 483, 76 N. W. 805, it was ruled that the better practice requires the visible presence of the presiding judge, and that he be within hearing every moment during the actual progress of trials, including the arguments of counsel, in felony cases. The authorities are collected in 17 Am. & Eng. Enc. Law (2d Ed.) 719. While we do not say that every brief absence of a judge from the courtroom, where he both sees and hears all that is done, and can himself be seen and heard, necessarily constitutes reversible error, yet, to be justified, the judge during such absence must not only be within hearing, but within sight, of counsel and jury, and in such position that he may be seen and heard by them, and able instantly to interpose his authority in preserving decorum in the courtroom, and to pass upon questions as they arise, and assert and maintain that full control over the trial which is so essential a part of due process of law. The judge must be in such a position that he has as complete and immediate control of the proceedings as if he were in his proper place on the bench. Where the absence is such that the judge is not within sight of counsel and jury and the courtroom, and is not in a position to exercise full and complete control of the proceedings, though



he may be within hearing of what is said during the argument, such absence itself is error of which the defendant may complain. The judge has entire control of the trial. If any good reason exists for his absence from the courtroom after a trial is begun and before it ends, he can suspend proceedings until his return. It may be a hardship for an overworked judge to sit continuously for a long time on the bench, but his presence in the courtroom at all times while a trial is in progress is so essential to the very existence of a court, and so important to the due administration of justice, that the strict rule which requires his visible presence should be enforced, and the contrary practice on the part of trial judges discouraged. We think this case comes within the principle of the decision in the O'Brien Case, and the other cases supra.

The judgment is reversed. Reversed.

(32 Colo. 114)

**FARMERS' HIGH LINE CANAL & RESERVOIR CO. et al. v. WHITE et al.\***

(Supreme Court of Colorado. Dec. 7, 1903.)

**WATERS AND WATER COURSES—IRRIGATING DITCH—WRONGFUL DIVERSION—PARTIES—STARE DECISIS—EVIDENCE—DECREE.**

1. It may be considered as stare decisis in Colorado that there may be circumstances in which consumers of water from the same irrigating ditch may not be compelled to prorate with each other, but the appropriators may have different priorities based on the time of the several appropriations.

2. Persons asserting priorities to the water of a ditch must show in detail the facts concerning their priorities, the dates when they attached, the amount of water they are entitled to receive, and the same data with respect to the rights of the persons claimed to be inferior before a decree settling the rights of all persons claiming water from the ditch can be entered.

3. In a suit by consumers of water of a ditch against a corporation owning the ditch to restrain the corporation from compelling plaintiffs to prorate with the stockholders of the corporation asserting the right to prorate in time of scarcity the stockholders are necessary parties, and when they are not so numerous as to make it impracticable to bring them in, and their names and places of residence may be ascertained by the exercise of reasonable diligence, plaintiffs must join them as defendants.

4. The corporation cannot represent the stockholders in such a suit.

5. The fact that a defendant answers after the overruling of a demurrer for defect of parties defendant does not constitute a waiver of such defect when the omitted persons are necessary parties defendant.

6. The decree in a suit by consumers of the water of a ditch against the corporation owning the ditch to prevent the corporation from compelling plaintiffs to prorate with the stockholders of the corporation, so far as it enjoins the corporation from compelling plaintiffs to prorate with any of the stockholders who became for the first time consumers of the water subsequent to a designated year, is erroneous, in the absence of a statement in the decree who such stockholders are, or the amount of water to which they are entitled.

7. Where evidence admitted by the court over defendant's objection was material and competent, similar evidence negating it was also admissible.

8. In a suit by consumers of the water of a ditch against the corporation owning the ditch to restrain the corporation from compelling plaintiffs to prorate with the stockholders of the corporation, all the consumers similarly situated with plaintiffs should be joined as plaintiffs, or as defendants if their consent thereto cannot be had.

Appeal from District Court, Jefferson County; Allison H. De France, Judge.

Suit by Torrence White and others against the Farmers' High Line Canal & Reservoir Company and others. From a decree for plaintiffs, defendants appeal. Reversed.

George W. Taylor, J. W. Barnes, and S. A. Osborn, for appellants. Benedict & Phelps and W. A. Dier, for appellees.

CAMPBELL, C. J. In 1860 the Golden Canal was constructed to divert the water of Clear creek with which to irrigate agricultural lands. In 1872 the structure was enlarged to carry an additional supply. In 1884 in statutory proceedings brought for that purpose in the appropriate court, a first priority was awarded the canal for 39.8 cubic feet of water per second of time as of the date of original construction, and a second priority of 154 cubic feet of water per second of time as of the date of the first enlargement. In 1885 the defendant the Farmers' High Line Canal & Reservoir Company was incorporated to purchase the rights and franchises of the canal, which it acquired soon after its organization. The plaintiffs are consumers of water, which they had utilized through the medium of the Golden Canal before its purchase by the defendant company. From the allegations of the complaint it is not certain whether plaintiffs claim any part of the first priority of 1860, but the averments assert a priority not later than the year 1872, though there is uncertainty both in statement and proof as to the origin of their rights. The complaint alleges that after the defendant company acquired the canal it enlarged the same at different times, and by divers methods obtained, or claimed to have secured, for carriage therein, a large quantity of water in addition to that represented by its first two priorities; and in times of scarcity, and when the water commissioner has cut out the later appropriations, that, entirely disregarding their priority, it has compelled, and threatens hereafter to compel, the plaintiffs to prorate the water of the first two appropriations, in which they are owners, with its stockholders, whose rights attached not earlier than the spring of 1886, at the time of the second enlargement of the canal, and which are not traceable at all to either of the earlier appropriations. The plaintiffs own about 870 out of about 7,000 or 8,000 cubic inches of water per second of time belonging to the first two priorities, but they say they sue in behalf of

\*Rehearing denied February 1, 1904.

themselves and all others similarly situated. With the ditch company the plaintiffs joined as defendants some of its stockholders, and the complaint alleges that the names and places of residence of all of them are unknown to the plaintiffs, but they are so numerous that it is practically impossible to make all of them parties defendant. They ask, therefore, for an order of court, under the authority of section 12 of the Civil Code, that defendant stockholders who have been made parties shall defend for the benefit of all.

The complaint, the substance of which, so far as the questions to be determined on this appeal are concerned, has been above summarized, was attacked by a motion containing several grounds, which was in part sustained and partly overruled. The defendants then interposed a demurrer containing about all of the grounds enumerated in the Code of Civil Procedure, and when this demurrer was overruled they filed an answer substantially denying the material allegations of the complaint, and containing a number of special defenses, such as estoppel, laches, the statute of limitations, acquiescence in the prorating complained of, and waiver. Upon the trial before the court the issues of fact were found in favor of plaintiffs, and a decree rendered, which, among other things, enjoined the defendant company during a shortage of water from compelling plaintiffs to prorate the water of the first two priorities to which they are entitled with its stockholders who became users of water subsequent to January 11, 1886. It will be observed from the foregoing statement that the controversy is not one between different ditches, but between consumers of water from the same ditch. In *Farmers' High Line, etc., Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767, a similar case was considered, in which each of the three members of the court, as then constituted, wrote a separate opinion, from which it would appear that no one of the learned judges was in entire accord with either of the others as to the main question discussed. That case really went off upon a question of pleading, though in connection with the point decided each of the judges expressed at some length his views upon the constitutionality of the so-called "prorating statute of 1883"; and the majority were of opinion that the prorating it provided for, if enforced literally and irrespective of the priorities of the several consumers, was inhibited by the Constitution. Mr. Justice Helm disagreed with his associates as to the case made by the complaint, as well as in some of his views upon the subject of prorating, and declared that the question involved in the case was this: "May the Legislature provide that in times of scarcity water shall be prorated among consumers having priorities of the same date?" Upon this proposition, and in view of his construction of the complaint, he

was of opinion that the so-called prorating statute was applicable to the case as made. In *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278, it was said that a majority of the court in the Southworth Case held that appropriations of water by the consumers who received the same through the same ditch do not necessarily relate to the same time, but, on the contrary, such consumers may have different priorities of right. In *Ditch Co. v. Ditch Co.*, 22 Colo. 513, 521, 45 Pac. 444, 55 Am. St. Rep. 149, this court, speaking through Chief Justice Hayt, in summarizing certain doctrines that had been theretofore established, and which were supposed to have some bearing upon the issues then under consideration—though such statement, as well as a similar one in the *Nichols* Case, may have been obiter—said that appropriators of water from the same stream through the same ditch may have different priorities of right to the use of such water, based upon the time of the several appropriations. In *Brown v. Canal & Reservoir Co.*, 26 Colo. 66, 56 Pac. 183, in a case which seems to have been the forerunner of the case at bar, and involving practically the same legal questions, the court, speaking by Goddard, J., again in effect declared the same doctrine. It therefore may be considered as *stare decisis* in this jurisdiction that there may be circumstances in which water consumers from the same ditch may not be compelled to prorate with each other. It is upon this doctrine that plaintiffs rely, and they attempted to establish at the trial that they are not within the purview of the prorating statute, or, if so, that it is invalid as to them.

A number of objections to the decree and to the various proceedings below have been argued, with many of which we are not at present concerned. We are of opinion that the decree cannot stand upon several grounds, which we will presently proceed to consider. First, however, it is to be observed that vehement declamation and extreme and indiscriminate criticism of the rulings of the trial court are not helpful to, nor do they specially commend themselves to the consideration of, an appellate tribunal, unless grounded upon a more solid foundation than appears in the present case. Some of the objections of counsel for plaintiffs in error, however, are good, and these we now take up.

1. The evidence of plaintiffs' witnesses does not furnish sufficient definite data on which to predicate a favorable decree in a matter of such importance. Just what quantity of water belongs to the respective priorities which have been awarded to the canal and the foundation of the alleged priorities of plaintiffs may inferentially appear, but we have searched the record in vain for such satisfactory evidence. The quantity of water belonging to the respective plaintiffs may have been correctly determined, though there is not that certainty in the evidence which is

desirable; but that the time when their rights accrued, and that plaintiffs' rights are so superior to defendants' as to authorize a decree preventing the carrier from compelling a prorating in time of scarcity, have not been proved by that preponderance which should attend such a case, we are entirely clear. We are not able to say from the record just what relation plaintiffs sustain to defendant company with respect to their interests in its decreed priorities. One of the claims of defendants, to which proof was offered, was that defendant company was organized as a mutual concern by those who afterwards became its stockholders, for the purpose of acquiring this canal as a medium for conveying and supplying to them certain water which was purchased in connection with the physical ditch, and that the main purpose was not to carry water for hire for others, and not at all except incidentally, and only as that duty rested upon defendant company's grantor, with respect to early consumers, among whom are plaintiffs, or some of them, and which was assumed by the grantee, and which it declares it has always observed, and with which it is now willing and ready to comply. It is undoubtedly true that defendant company did acquire some water of the first and second priorities which it might supply to its stockholders, whose rights are at least equal to the rights of plaintiffs. Upon what evidence the court made its decree, apparently not considering—certainly ignoring and not sufficiently protecting—such rights, we are unable to conjecture, for we do not find any sufficient evidence of the facts upon which only ought an enforceable decree in plaintiffs' favor to be made. That clause of the decree permitting the delivery to the stockholders of a quantity of water out of the appropriations of 1860 and 1872 equal to that impounded and saved by it in reservoirs is not intended to and does not protect them as to interests they may have in these earlier priorities themselves. It was not incumbent on defendant company, but upon plaintiffs, to produce the necessary evidence to sustain the material allegations of the complaint.

As plaintiffs do not question the right of the defendant company to compel consumers similarly situated to prorate with each other as to the water of the first and second priorities, they assert that it is a matter of no concern to it when plaintiffs' rights attached, provided only they became vested before its acquisition of the canal. This may or may not be true; yet it would be a harsh doctrine to say that, if plaintiffs' rights attached only a few months or a year or two before the alleged enlargement of the canal in 1885 or 1886, they might not be compelled to prorate with those water consumers whose rights attached within a short and reasonable time thereafter. And so we are of opinion that such an important adjudication should

not be made upon the indefinite and insufficient data which the record presents, but that plaintiffs should lay before the court in full detail the facts concerning their priorities, the dates when they attached, the amount of water they are entitled to receive, and the same data with respect to rights of defendants which are said to be inferior, so that the court may frame an intelligent and workable decree settling the rights of all parties claiming service from the carrier.

2. In *Brown v. Canal Co.*, supra, which in all substantial respects presents the same issues as the case in hand, it was held that the parties claiming the right to prorate are necessary parties, and must be joined as co-defendants with the ditch company. In bringing this action plaintiffs did not observe the rule there laid down, but seek to escape it by alleging that the names and places of residence of all defendant company's stockholders are unknown to them, and that they are so numerous as to make it impracticable to make them all parties; and therefore they name several defendants, and ask that they be required to defend for all who are similarly situated. These allegations of the complaint, if proved as laid, would not excuse a departure from the established practice; but they were denied, and, so far as we are advised, there was no proof to sustain them. During the trial of the case the court—apparently sua sponte—made an order requiring defendant company to furnish and file with the court a list of all its stockholders, which was done; but we find no order by the court requiring those who were joined as defendants to defend for the benefit of all, or an order requiring the stockholders whose names were furnished to be made parties defendant. Though there are many stockholders of defendant company, they are not so numerous as to make it impracticable to bring them in as parties, and by the exercise of ordinary diligence plaintiffs could have readily ascertained their names and places of residence. In the view of these considerations it was so palpably erroneous for the trial court, against defendants' objections, to proceed to a decree without the presence of indispensably necessary parties, that for this mistake alone the decree must be reversed. Their interests as consumers are manifestly affected. An attempt has been made to pass upon valuable rights, and deprive parties thereof without an opportunity to be heard, and with no one before the court upon whom rested the duty of protecting the rights involved as against those making the assault. The plaintiffs, with considerable force, argue that this doctrine laid down in the *Brown* Case is wrong, and contrary to the weight of authority. We are not impressed with the argument, and are of opinion the doctrine there enunciated by Mr. Justice Goddard is right, and must be adhered to. Only a slight consideration will, we think, clearly demon-

strate it. The controversy, as was there said, is not one between independent ditch companies, but between appropriators or consumers of water from the same ditch. Certainly plaintiffs would be the last ones to say that the defendant ditch company was under less obligation to protect their interests as water consumers than to guard the interests of their stockholders, who are also consumers. The defendant stockholders are concerned, not only as such in the ditch enterprise, but they also occupy the position of water consumers, and in that respect sustain towards the defendant company precisely the same relation that the plaintiffs do, and in such capacity are entitled to be heard upon the charges made in the complaint. The legal duty of defendant company is to all its water consumers, whether stockholders or merely holding contracts from it for service as a carrier. In such a controversy as this it can no more represent water consumers who are stockholders than it can represent the plaintiffs, who are water consumers and not stockholders. It ought not to take sides in the domestic dispute. This defect of parties defendant was sufficiently urged in the trial court by motion, by demurrer, by answer, by motion for nonsuit, and at every stage of the trial where it was proper to make the suggestion. The fact that defendant company answered over after demurrer does not waive the point, for the reason that its stockholders were necessary parties defendant, without whose presence the court ought not to have proceeded to a trial; and a decree that would be binding on them cannot be rendered in their absence, and for the additional reason that in the complaint the attempt was made, by the allegations referred to, to obviate the objection of defect of parties defendant, which could be met by answer, rather than demurrer. Had we affirmed this judgment, the defendants not made parties would not be bound by it, but might, in a subsequent action, litigate the claim which plaintiffs have here asserted. Courts should not try actions piecemeal.

3. It is the practice for the prevailing party to draft a decree to be presented to the court for approval, and according to the statement made upon oral argument, plaintiffs, as the successful parties, prepared the decree which the court afterwards signed. If there are defects in it, the plaintiffs are, in a measure at least, responsible for them. Their request, therefore, that, if this court should consider the decree defective, or not sufficiently definite, it waste through the record and make a good decree, does not appeal to us with much force. That the decree is indefinite we think is manifestly true. Indeed, plaintiffs themselves suggest as an excuse therefor the novelty of the controversy and the lack of precedent. One of its provisions wherein we think it radically defective is that it enjoins the defendant com-

pany from compelling plaintiffs to prorate with any of the stockholders who became for the first time users and consumers of water from the ditch subsequent to the enlargement of 1886. This would seem to indicate that there may be some stockholders whose rights accrued prior to that date; but there is no finding or statement in the decree who such stockholders are, or the amount of water to which they are entitled. Plaintiffs should have produced evidence from which such findings of fact could be made. That such findings were not made is doubtless due to the omission of the necessary proof. In view of the fact that the decree reserved to the plaintiffs the right to have the cause redocketed for the purpose of having such further action taken as was necessary and proper for its enforcement and for the protection of any rights of the parties, such insufficiencies entail upon defendant company the necessity for ascertaining, at its peril, who such stockholders are, and thus impose a burden and hardship from which a properly drawn decree should exempt it. A party ought not to be thus enjoined without some provision in the decree to guide him.

As the case must be reversed, a few additional general remarks may be appropriate. Plaintiffs in error vigorously assert that the court made a number of erroneous rulings in the admission and rejection of testimony. It would be futile to consider them in detail, but in general it may be said that it does appear from the abstract of the record that the court refused to permit defendants to introduce evidence of the same character as that admitted in behalf of plaintiffs. It is difficult to understand why defendants should be restricted from negating plaintiffs' evidence upon any controverted issue. If the evidence which the court, over defendants' objections, permitted the plaintiffs to produce, was material and competent, certainly similar negative evidence in behalf of the defendants should have come in. Some latitude in admitting and rejecting evidence is allowed where the case is tried by the court; and the presumption is sometimes indulged that, if the court had admitted improper evidence, the same will be disregarded when it makes its findings. But, as we view this record, some of the rulings of the trial court in declining to hear competent and relevant evidence of the defendants were wrong.

Objection seems not to have been made that there was a defect of parties plaintiff. In view of another trial, we are of opinion that all the water consumers similarly situated with the plaintiffs should be joined as plaintiffs, but, if their consent thereto cannot be had, they should be joined as defendants, so that in one action there will be had an adjudication which settles the rights of all the water consumers from this canal. The records of this court show that disputes between these stockholders and water con-

sumers have been prolific of litigation, and possibly have already consumed a disproportionate share of the court's time. This multiplicity of suits has been due, in part at least, to the failure strictly to enforce the rules of established practice requiring the presence in one proceeding of all those whose rights to the use of water from the same ditch are involved. We repeat that the court should require the production of evidence showing in detail and fully the respective rights of all water consumers, when the priority of each consumer or class of consumers attached, with the quantity of water belonging to each. We are led to these observations by the fact that in the decree it seems to be taken for granted that those who became consumers after 1886 necessarily have no rights of an earlier date. It may be true, but it does not necessarily follow, that some particular stockholder or water consumer, who himself began to utilize the water later than 1886, has no rights of an earlier date; but this is not a necessary conclusion. For aught that appears from this record, it may be true—indeed, we think the record shows it to be true—that the rights of some such go back as far as 1860, or 1872, the respective dates of the first two appropriations; but there is lacking the definite information upon these, as well as other, material issues that the court should have before entering a decree.

In reaching our conclusion we have gone upon the assumption that the evidence in behalf of plaintiffs upon the main question is not controverted. What the facts may be when the case is tried as it should be we do not anticipate, as, of course, we could not, in justice to the rights of the respective parties. We intimate no opinion as to the special defenses, such as estoppel, statute of limitations, and laches, if for no other reason because the defects in plaintiffs' proof equally apply to the defendants'.

The decree is reversed, and the cause is remanded. Reversed.

(32 Colo. 92)

McCONAGHY v. DOYLE et al.

(Supreme Court of Colorado. Oct. 5, 1903.)

MINES AND MINING—PLACER CLAIMS—LOCATION—KNOWN VEINS—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY—PATENTS—ADVERSE CLAIMS—GENERAL DENIAL—EVIDENCE ADMISSIBLE—AMENDMENT OF PLACER PATENTS—ABANDONED CLAIMS—EFFECT.

1. Under Rev. St. U. S. § 2333 [U. S. Comp. St. 1901, p. 1433], providing that patent to a placer shall not convey title to veins included within the boundaries thereof, known to exist at the time application for patent for the placer is made, a "known vein" within the limits of a placer, when the question is raised collaterally, is one known, at the time application is made for patent for such placer, to exist, and to contain minerals in such quantity and quality as to justify expenditure for the purpose of extracting them.

2. The burden of proof is on the claimant of a lode located within the limits of a prior placer

patent to establish by clear and convincing testimony that the veins which he claims as exempt by operation of law from placer application are of a character which will render them known veins.

3. Mere outcroppings or other indications of a vein within the limits of a placer, or evidence of the existence of a vein which might be sufficient to support a lode location as against a conflicting lode claim, or as against a subsequent placer location, in an adverse proceeding, are not sufficient to establish the existence of a known vein or lode within the boundaries of a placer prior in point of time, and which has been patented.

4. In an action by a subsequent lode claimant, evidence held insufficient to show that a known vein existed within the limits of a placer at the time a patent thereto was applied for.

5. Under a general denial filed to a complaint in support of an adverse claim against an application for a patent, and which averred that plaintiff's lode was located on unappropriated mineral land, defendant could introduce any testimony, such as a prior placer patent, tending to prove that plaintiff's lode was not located upon land subject to location.

6. In a suit to establish an adverse claim against an application for a patent, defendant could show by a patent that plaintiff's lode was located on an appropriated placer claim, without thereby assuming a position inconsistent with his defense that his own claim was located on unappropriated mineral land, though the limits of plaintiff's and defendant's claims were identical, where the discovery upon which plaintiff's claim was based was within the placer boundaries, while defendant's discovery was without such boundaries.

7. A contention that an application for a placer patent could not be so amended as to take in a lode discovery shaft was without merit, where the amendment did not embrace additional territory, but merely reduced the area of the original placer tract, which, as it originally stood, embraced the place where the lode was afterwards located.

8. An abandoned lode claim does not affect the validity of a subsequent placer patent, where no mineral was disclosed in any vein on the lode claim which would justify expenditure for the purpose of extraction.

Appeal from District Court, Teller County; Edward C. Stimson, Judge.

Action by J. M. Doyle and others against John McConaghy. From a judgment for plaintiffs, defendant appeals. Reversed.

Bruce Glidden and Potter & McCarthy, for appellant. J. Warner Mills, for appellees.

GABBERT, J. The subject-matter of controversy between the parties to this appeal is mining premises claimed by appellant as the Conejos, and the appellees as the Victor Addition, lode. Appellees, as the owners of the Victor Addition, brought suit against appellant, as defendant, in support of their adverse against the application of the latter for patent to the Conejos lode. From a judgment in favor of plaintiffs, the defendant appeals.

The boundaries of the respective claims are identical. The Conejos is the older location; having been located in November, 1893. There is no question about its validity originally. The only attack made upon it at the trial was that the assessment for 1895 had not been performed. The performance of the assessments for the subsequent years

is not questioned. In February, 1896, the Victor Addition was located; the discovery and location being made upon tract C of a placer claim known as the "Eldorado." Application for patent on this placer was made on September 24, 1894, and thereafter prosecuted to completion. The patent therefore includes the tract upon which the discovery and location of the Victor Addition were made. The right so to do on the part of the claimants of the Victor Addition lode is asserted upon the ground that the vein upon which the discovery and location are based was known at the time of the application for patent upon the Eldorado placer. This proposition is controverted on the part of the claimant of the Conejos, the contention in his behalf being that the vein upon which the Victor discovery and location are based was not known at the time application for patent on the Eldorado placer was made. It is immaterial, therefore, whether the assessment was performed upon the Conejos for 1895 or not, if it should appear, as contended by counsel for appellant, that the vein which is the basis of the location of the Victor Addition lode was not known to exist at the time of the application for patent on the Eldorado, for the reason that if the location of the Victor Addition was of no validity, because made within the boundaries of a prior valid placer location, it could not prevail over the Conejos. The real question, therefore, presented for determination, is, what constitutes a "known vein," within the limits of a placer at the time application for patent therefor is made, when that question is a collateral issue between a placer and a subsequent lode location? This was one of the litigated questions determined below, and it becomes necessary to briefly notice the testimony bearing on this question, for the purpose of ascertaining whether or not it was sufficient to sustain the finding of the jury that the vein located by the Victor Addition, by virtue of which the premises in controversy are claimed by appellees, was known at the time application for patent was made upon the Eldorado placer.

Tract C of the placer in question, within the boundaries of which the Victor Addition discovery shaft was sunk, and location notice erected, is 20 feet square, and is located something over 200 feet south of the discovery shaft of the Conejos, and a little to the west of the center of the premises in dispute. There was testimony to the effect that the vein upon which the discovery and location of the Conejos is based passes through tract C, and may be the same vein disclosed in the discovery shaft of the Victor Addition; that a vein was disclosed within a few feet of the northwest corner of tract C of the placer; and that, at the time application for patent for the placer was made, there were indications of the outcrop of a vein within tract C. This vein, however, was not claimed as the Victor Addition, nor was any work

done upon it until after the application for patent on the placer had been made. The shaft then excavated disclosed some mineral, but there is no testimony whatever of the existence of a vein within the limits of tract C, or that the vein upon which the Victor Addition claim was located contained or disclosed mineral of a quantity or quality which would justify its being operated as a mine. In short, the testimony is to the effect that while there may be evidence of the existence of a vein within the limits of tract C of the placer, and upon which the Victor Addition location is based, the shaft does not disclose, nor was any mineral in a vein within the limits of this tract ever disclosed, in quantity or value which would justify expenditure for the purpose of extraction.

Section 2333, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1433], provides, in substance, that patent to a placer shall not convey title to veins included within the boundaries thereof known to exist at the time application for patent for the placer is made, but that unknown veins embraced within the limits of a placer pass to the placer patentees. Known veins are thus exempted from patent applications on placers by operation of law, but unknown veins are not. The purpose of this statute was twofold: (1) To prevent title to known veins from being obtained by placer patents; and (2) to protect the placer patentee in his title to all mineral and other deposits within the boundaries of his claim not known to exist at the time application for patent therefor was made.

The earlier decisions on the subject of what constitutes "known veins" within the limits of a placer are not altogether clear or harmonious, but, without attempting to enter into any extended discussion of the question at this time, it is sufficient to say that it is now settled that, as between placer and subsequent conflicting lode locations, a known vein within the limits of a placer, when that question is raised collaterally, is one known to exist at the time of application for patent for such placer, and to contain minerals in such quantity and quality as to justify expenditure for the purpose of extracting them. *Iron Silver M. Co. v. Mike & Starr G. & S. M. Co.*, 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201; *Montana Central Ry. Co. v. Migeon (C. C.)* 68 Fed. 811, affirmed in 77 Fed. 249, 23 C. C. A. 156; *Brownfield v. Bier (Mont.)* 39 Pac. 461; *Casey v. Thievleige (Mont.)* 48 Pac. 394, 61 Am. St. Rep. 511; *U. S. v. Iron Silver M. Co.*, 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; *Largey et al. v. Black*, 10 Land Dec. Dep. Int. 156; *Butte & B. M. Co. v. Sloan (Mont.)* 40 Pac. 217; 2 *Lindley on Mines*, § 781.

It is also settled that the burden of proof in such circumstances is upon the lode claimant to establish by clear and convincing testimony that the vein or veins which he claims are exempted from the placer application by operation of law are of the char-

acter which will render them known veins, as above defined. *Mon. Central Ry. Co. v. Migeon*, supra; 1 *Snyder on Mines*, § 666; *Cripple Creek Gold Min. Co. v. Mt. Rosa Mining, Milling & Land Co.*, 26 Land Dec. Dep. Int. 622.

These decisions are based upon the proposition that one claiming land as a lode location, as against a prior placer location upon which patent has issued, must establish that the ground so claimed was known to be valuable to operate as a lode mining claim when application for patent was made upon the placer, and that, unless this does appear as a fact, he will not be permitted to take it from another who has previously located it as a placer claim, and obtained patent therefor. Mere outcroppings or other indications of a vein within the limits of a placer, or evidence of the existence of a vein which might be sufficient to support a lode location as against a conflicting lode claim, or sustain a lode location as against a subsequent placer location in an adverse proceeding, are not sufficient to establish the existence of a known vein or lode within the boundaries of a placer prior in point of time, and which has been patented.

The testimony in this case wholly fails to establish a state of facts which would justify the conclusion that a "known vein" existed within the limits of tract C of the *Eldorado* placer at the time the patent was applied for, or at any subsequent date. There may be a vein within this tract which shows mineral in appreciable quantities, but it does not appear that it is of such quantity or quality as would justify expenditures for the purpose of extracting it.

Since this cause was tried below, we have had occasion to consider the relative rights of locators of mineral claims of one class, as against subsequent locators of another class, in the case of *Cleary v. Skiffich*, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207, which we cite as an additional authority supporting our conclusion that the evidence in this case wholly fails to establish the existence of a known vein within the limits of tract C of the *Eldorado* placer.

In discussing the location of the *Victor Addition*, which was within the boundaries of tract C, we must not be understood as recognizing that the locators of the lode had the right to enter upon tract C, and there prospect for the purpose of discovering a vein. That question is immaterial in this case, for two reasons: (1) The testimony fails to establish the existence of any vein in tract C which was exempt from the operation of the patent; and (2) the work claimed as the discovery shaft of the *Victor Addition* did not disclose a known vein, within the meaning of the law, as applied to the facts of this case.

Counsel for the only appellee who has entered an appearance in this court advances three propositions, which will now be con-

sidered. (1) That, under the pleadings, the patent to the *Eldorado* placer should not have been received; (2) that the *Eldorado* placer applicants could not amend their application so as to take in the *Victor Addition* discovery shaft; and (3) that, under the doctrine announced in *Noyes v. Mantel*, 127 U. S. 148, 8 Sup. Ct. 1132, 32 L. Ed. 168, the *Eldorado* placer patent is void.

The complaint filed by appellees contained the averments usually made in support of an adverse claim against an application for patent, and averred, among other things, that the *Victor Addition* lode was located on unappropriated mineral land. For answer, the defendant interposed two defenses: (1) A general denial; and (2) the discovery and location of the *Conejos* lode upon mineral land subject to location—and averred that the premises described in the complaint were part and parcel of the *Conejos* lode mining claim. To this second defense a replication was filed. It is claimed that, under this state of the pleadings, there was no issue which rendered the patent for the placer admissible as evidence. Under a general denial a defendant is not limited to the introduction of testimony merely negative in its nature; that is, simply contradicting that which the plaintiff may have introduced. For this purpose, testimony, though of an affirmative character, is admissible under a general denial when its effect is merely to contradict—and nothing more—that which the plaintiff may have offered in support of the issues tendered by his complaint. In other words, testimony affirmative in its nature is competent under a general denial when its effect is simply to establish that the testimony offered by the plaintiff in support of the averments of his complaint is not true. *Pomeroy's Rights & Remedies*, § 671. Plaintiffs averred the location of their claim upon unappropriated public domain. This was denied. In order to establish the validity of their claim, it was incumbent upon them, when the issue was made, to establish a discovery and location upon mineral land subject to location. Consequently, when that question was in issue, it was competent for the defendant to introduce any testimony which would tend to prove that the location of the *Victor Addition* lode was not upon land subject to location as such. *Girard v. Carson*, 22 Colo. 345, 44 Pac. 508.

It is contended that, because of the averments in the answer to the effect that the premises in dispute had been located upon unappropriated mineral land as the *Conejos* lode, the defendant was estopped from introducing any testimony which would tend to prove that this was not the fact. In other words, it is argued that the defense, to the effect that the premises in controversy were located upon unappropriated mineral domain as the *Conejos* lode, amounts to an assertion that such premises were subject to location, and the defendant cannot assume different



positions which are mutually destructive of each other, and leave him without any standing in court. Under the facts of this case, and the pleadings, neither proposition is tenable. The effect of the two defenses, whatever the second may be termed, was to plead that the location of the Victor Addition was not upon unappropriated mineral land, and that the Conejos was. The effect of introducing the patent to the Eldorado placer in connection with other proof was merely to invalidate the location of the Victor Addition lode, because the discovery upon which it was based was within the boundaries of tract C of the placer. Such proof, however, did not invalidate the location of the Conejos, because its discovery was without the boundaries of that tract. Hence the offer of the patent did not place defendant in an inconsistent position. On the contrary, this evidence was competent to establish his claim as pleaded—that the Victor Addition was an invalid location, and the Conejos a valid one.

The contention that the application for patent of the Eldorado placer could not be amended so as to take in the discovery shaft of the Victor Addition lode is clearly without merit. This amendment, in so far as it has any bearing on the case, only reduced the area of tract C, and therefore did not embrace any additional territory. Consequently the relative rights of the placer and lode were in no manner changed, because tract C, as originally described in the patent applied for, included the Victor Addition shaft. The fact that such application was amended after location of the Victor Addition lode is not material, in the circumstances of this case. At the time the original application for patent on the Eldorado placer was filed, the vein within the limits of tract C was not a "known vein," and its character in this respect had not been changed at the time the placer application for patent was amended.

The Conejos lode, and also a claim known as the "Unexpected," were located prior to the application for patent on the Eldorado placer. In both instances the ground embraced within these lodes included tract C. The location of each lode claim was duly perfected. For these reasons, it is asserted that, according to the decision in *Noyes v. Mantel*, it must be held that, when patent was applied for upon the placer, the patentee was charged with notice of the existence of a known vein within the limits of tract C. The Unexpected was abandoned prior to the issuance of patent for the placer, and, as no mineral was disclosed in any vein upon this claim which would justify expenditure for the purpose of extraction, the fact that the Unexpected was once an existing lode location is of no moment. *Migeon v. Mont. Central Ry. Co.*, 77 Fed. 249, 23 C. C. A. 156. Whether or not the placer mentioned in *Noyes v. Mantel* was located subsequent or prior to the lode claim conflicting therewith is not expressly stated, but, as we read that

case, it appears the lode was the prior location, for it was held that the statute—section 2333, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1433]—did not apply to lodes or veins within the boundaries of a placer which had been previously located. The test, then, in applying the law as announced in *Noyes v. Mantel*, is not the relative dates of the location of the lode and application for patent on the placer, but the relative dates of the respective locations. What might now be the law, in case it appeared the Conejos was located prior to the Eldorado placer, it is not necessary to determine, for that question is not presented, and we express no opinion on that proposition.

From the record now before us, it does not appear that the Victor Addition lode was located upon a vein exempted from the operation of the patent issued on the Eldorado placer. Consequently, its validity as a lode location was not established.

The judgment of the district court is reversed, and the cause remanded for a new trial. Reversed and remanded.

(32 Colo. 140)

#### PECKHAM v. PEOPLE.

(Supreme Court of Colorado. Feb. 1, 1904.)

STATUTE — PASSAGE — CONSTITUTION — ATTACK ON STATUTE — PROOF — APPEAL — ADMISSION — RAPE — INSTRUCTIONS — CORROBORATION — EVIDENCE.

1. The fact that a motion to quash an indictment on the ground that the statute on which the prosecution was based had not been passed in accordance with the Constitution was not answered or demurred to did not render it error to overrule the motion.

2. When a statute is claimed to be unconstitutional because not passed in accordance with the Constitution, it is not incumbent on the trial court to inspect the legislative journals; but the party claiming unconstitutionality must present the facts on which he relies.

3. On appeal, facts relied on to show unconstitutionality not being in the bill of exceptions, the appellate court will not inspect the legislative journals for the purpose of ascertaining whether the Constitution has been complied with.

4. On a prosecution for rape it is not incumbent on the state to show defendant over 14 years of age.

5. Where, on a prosecution for statutory rape, it was shown that prosecutrix had given birth to a child, the court's refusal to instruct that such fact was not evidence of defendant's guilt was not error, as the jury could not have been misled.

6. It was not error, inasmuch as the requested instruction was argumentative.

7. On a prosecution for statutory rape a witness testified that the defendant on many occasions entered the room of the prosecuting witness in the evening, and that on one occasion, when she was in bed, he endeavored to uncover her. Another witness testified that on one occasion he had seen the defendant embrace the girl. Another witness said she heard the defendant's voice in the girl's bedroom very early in the morning. *Held*, that it was proper to refuse to instruct that evidence of opportunity will not amount to corroboration, and that the jury must find corroboration beyond a reasonable doubt.



8. The facts shown, together with the positive testimony of prosecutrix, warranted a conviction.

Error to District Court, Morgan County; Christian A. Bennett, Judge.

Arthur M. Peckham was convicted of statutory rape, and he brings error. Affirmed.

H. E. Churchill and L. C. Stephenson, for plaintiff in error. N. C. Miller, Atty. Gen., and H. J. Hersey, for the People.

STEELE, J. The information charges the defendant with the crime of rape upon one Anna Nelson, "a female person under the age of eighteen years." The defendant moved to quash the information upon the ground that the statute commonly known as the "Age of Consent Law" is unconstitutional and void, and in his motion sets forth facts which he claims render the law unconstitutional. The district attorney did not answer the motion nor file demurrer thereto. The court, after argument, overruled the motion. The jury found the defendant guilty as charged in the information, and the defendant asks that the judgment of conviction be reversed, first, because the court erred in overruling the motion to quash; second, because the court erred in giving and refusing certain instructions. The specific objections to the instructions will be considered in the opinion.

It is contended by the defendant that the effect of the failure of the district attorney to answer or demur to the motion to quash was an admission that the facts set forth in the motion were true; and it is further contended that the courts take judicial notice of the contents of the original journals, and that, when a law is attacked as being unconstitutional, the court should determine from an inspection of the journals whether the Constitution has been observed by the Legislature in the passage of the statute. Authorities are cited by counsel which appear to hold that courts will take judicial notice of the contents of the legislative journals, and that it is the duty of the court, when a statute is claimed to be unconstitutional for reasons appearing in the journals, to examine them, and determine the question; but the authorities cited are not from this state. The question has been settled here, and decided contrary to the contention of counsel. In the case of *Marean v. Stanley*, 21 Colo. 43, 39 Pac. 1086, it was said: "While courts take judicial notice whether a statute is or is not valid when the same is in dispute, yet they will not, on the mere assertion of counsel that a statute is invalid because of noncompliance with some constitutional requirement in its passage, examine the journals of the respective houses to ascertain how that fact may be; and, although it is not necessary to plead the unconstitutionality of a statute, the party seeking to question its validity must in some way present the facts upon which he relies to the trial court; and, if he desires to have the decision of that court reviewed,

he must, by bill of exceptions, make such proof a part of the record, and cannot, in the first instance, and without its being properly in the record, have the question considered in the appellate court." It is not within the power of counsel to enter into a stipulation the effect of which will render a law void, nor will a law be held to be invalid because counsel have failed to deny the facts alleged concerning the entries in the legislative journals, even if the allegation, if true, would compel the court to declare the act unconstitutional; and the court will not consider admissions of a party that a law has not been passed in accordance with the Constitution, nor an admission of facts as to the contents of the legislative journals, for the purpose of inquiring into the validity of a statute found in the office of the Secretary of State, or published under his authority, and the only way that an alleged noncompliance with the Constitution in the passage of an act can be determined by the trial court is that pointed out in the case cited; and, when the decision is sought to be reversed, the proof offered before the trial court must be made a part of the record by bill of exceptions. No proof was made before the trial court of the facts alleged in the motion to quash, and we shall therefore not inspect the legislative journals for the purpose of ascertaining whether the Constitution has been complied with in the passage of the act in question.

The defendant requested the court to instruct the jury that, unless the evidence or behalf of the state established the fact that the defendant was at the time the offense was alleged to have been committed a male person over the age of 14 years, he must be acquitted; but the court refused the request, and instructed the jury, in substance, that the state need not prove that the defendant was over the age of 14 years, and that, in the absence of proof to the contrary, the defendant was presumed to be over the age of 14 years. The giving of this instruction and the refusal to give the instruction offered by the defendant is assigned as error.

The court did not err. It was not necessary to have alleged in the information that the defendant was over the age of 14 years. "The incapacity of a party, by reason of his tender years, to commit the crime charged upon him, may be a good defense on the trial, as it may negative effectually the charge; but this capacity is not required to be stated in the indictment, and its omission furnishes no ground for arresting the judgment, after a verdict against the accused." *Commonwealth v. Scannel*, 11 Cush. 547; *People v. Ah Yek*, 29 Cal. 575; *State v. Knighten*, 39 Or. 63, 64 Pac. 866, 87 Am. St. Rep. 647; *Mitchell v. People*, 24 Colo. 532, 52 Pac. 671.

The fact that the prosecuting witness had given birth to a child was shown without objection from the defendant. The defendant offered an instruction to the effect that the fact that the prosecuting witness had given

birth to a child was not evidence which the jury could consider in determining whether the defendant had committed the offense. The court refused the instruction, and the refusal of the court to so instruct the jury is alleged to be error.

We think that no error was committed in refusing this instruction. The jury could not have been misled by the failure to so instruct, and the defendant in no event is entitled to have argumentative instructions given.

The other assignments of error discussed relate to the refusal of the court to give instructions Nos. 12 and 13. Number 12 is, in substance, that the law will not tolerate a conviction in this character of cases upon the uncorroborated testimony of the prosecutrix, and that evidence of opportunity will not corroborate the principal fact. Instruction No. 13 states that conviction is seldom allowed upon the uncorroborated testimony of the prosecutrix, and the jury is instructed that, unless it finds beyond a reasonable doubt that the statements of the prosecutrix are corroborated as to the alleged acts of intercourse, the defendant should be acquitted. In the case of *Fager v. State*, 22 Neb. 332, 35 N. W. 195, it is held that in a prosecution for rape it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. The court said: "It is insisted by plaintiff in error that there is no proof of rape, or even of contact, except that of the prosecutrix. While this is true, yet in the sense in which corroborating circumstances may aid the prosecution it is not true. We do not understand the rule in such cases to require corroborating testimony to the particular fact of the rape. If such were required, convictions could seldom be had, even in the most flagrant cases. Men engaged in the commission of offenses of this kind seldom call in witnesses to the fact, or attack women who are not alone and within their power." And in *Bueno v. People*, 1 Colo. App. 232, 28 Pac. 248, the court said: "We do not wish to be understood as declaring that no conviction for the crime of rape can be sustained where it rests upon the evidence of the prosecutrix alone, and uncorroborated, but that such cases should be rare, indeed. No general rule can be laid down. Each case must depend upon its own merits and surrounding circumstances, and, to a great extent, upon the character of the prosecuting witness." Upon the authority of the foregoing, the court correctly refused the instructions offered. There was testimony corroborating the prosecuting witness in many particulars. A witness testified that the defendant on many occasions entered the room of the prosecuting witness in the evening. On one occasion, when she was in bed, he endeavored to uncover her. Another witness testified that on more than one occasion he had seen the defendant embrace the girl. Another witness said she

heard the defendant's voice in the girl's bedroom very early in the morning. The defendant is a married man, and the foregoing facts, in connection with the positive statements of the prosecutrix, fully warranted the verdict, and we shall not disturb it.

Affirmed.

(32 Colo. 209)

**NEEDLE ROCK DITCH CO. et al. v. CRAWFORD-CLIPPER DITCH CO.**

(Supreme Court of Colorado. Feb. 1, 1904.)  
**IRRIGATION LAWS—APPEAL—DISMISSAL—STATUTORY CONSTRUCTION.**

1. Mills' Ann. St. § 2432, providing that, in appeals under the irrigation statutes, appellant must file with the clerk of the Supreme Court, within 60 days after the making of the order appealed from, proof of the service and publication, as required by previous sections, and that, if such proof is not filed, the Supreme Court shall, on motion of appellee, at any time after such default in filing the proof, and before the same shall be filed, dismiss the appeal, is mandatory.

2. Mills' Ann. St. § 2429, providing that, in appeals under the irrigation statutes, the appellant shall file a transcript of record of the district court with the clerk of the Supreme Court at any time within six months after the appeal is allowed, and section 2432, providing that, if such transcript is not filed within that time, such appeal shall on motion be dismissed, are mandatory.

3. Mills' Ann. Code, § 397, providing that the dismissal of an appeal may, by order of the court, be made without prejudice to another appeal or writ of error, has no application to an appeal in an action predicated on the irrigation statutes.

4. Mills' Ann. Code, § 388a, providing that whenever the Supreme Court shall dismiss an appeal for lack of jurisdiction to entertain the same, and it appears that the court would have jurisdiction if the action had come up on writ of error, the court shall order the clerk, without additional fees, to enter the action as pending on writ of error, has no application to an appeal in an action predicated on the irrigation statutes.

Appeal from District Court, Delta County; Theron Stevens, Judge.

Controversy between the Needle Rock Ditch Company and others and the Crawford-Clipper Ditch Company. Motion to vacate order dismissing the appeal denied.

Milton R. Welch, George Stephan, and R. M. Logan, for appellants. A. R. King and C. H. Stewart, for appellee.

**PER CURIAM.** Motion to vacate order dismissing the appeal, and to reinstate the same. The decree appealed from was rendered under the irrigation statutes affecting water rights. Section 2427, Mills' Ann. St., contains directions for appealing from such a decree, and, among other things, enjoins upon the district court or judge the duty of making an order allowing the appeal, and fixing the amount of the appeal bond. Section 2428 requires this order to be entered of record, a certified copy of which the appellant must serve upon the appellee, and cause the same to be published in a newspaper. By section 2432 appellant must file with the clerk

of the Supreme Court, within 60 days after the making of the order of appeal, proof of the service and publication thereof; and, if such proof is not filed, the Supreme Court shall, on motion of appellee, at any time after such default in filing the proof, and before the same shall be filed, dismiss the appeal. Section 2429 requires appellant to file a transcript of record of the district court with the clerk of the Supreme Court at any time within 6 months after the appeal is allowed; and section 2432 says that, if such transcript is not filed within that time, such appeal shall, on motion, be dismissed.

These provisions with reference to the filing of transcript and proof of service and publication are mandatory. They are plain and explicit, and interpret themselves. They are jurisdictional requirements. If the proof of service is not filed within the time, and a motion of the appellee to dismiss for such default is made before such proof is filed, the appeal must be dismissed. So, also, if the transcript of record is not filed within the time limited by the act, the appeal must be dismissed upon motion, and there is no discretion in the Supreme Court in the matter.

There was a failure in this case upon the part of the appellants in both particulars. The transcript was not filed within the time limited by the act, and proof of service was not made within the 60 days, and seems not to have been made at all. The showing by appellants in explanation of their failure in these respects is immaterial. Section 397, Mills' Ann. Code, applies to the review of judgments rendered in civil actions, and not to decrees made in the special proceeding provided by the act we are now considering. We cannot dismiss the appeal without prejudice, for another appeal would not lie. Neither can the cause be redocketed on writ of error under Mills' Ann. Code, § 388a, because this court would have had jurisdiction to entertain this appeal, had it been properly perfected; and so it does not come within the purview of that class of cases that may, under this section, be redocketed on error when the appeal is dismissed for entire lack of jurisdiction of this court to entertain it. The motion to vacate the order of dismissal and to reinstate the appeal must therefore be denied.

Motion denied.

(32 Colo. 85)

**FALKE v. TERRY et al.\***

(Supreme Court of Colorado. June 1, 1903.)

FOREIGN EXECUTRIX—CONVERSION OF ASSETS—RIGHTS OF LEGATEES—FOREIGN REAL ESTATE—TITLE—ACTIONS—LEGISLATION—PERSONAL JUDGMENT.

1. A will bequeathed to a foreign executrix a life estate in her husband's property, with power of disposal, except that on remarriage such parts of the estate as would have descended to testator's children in case he died intestate should be set apart for their use, and be paid to

them on their arrival at 25. *Held*, that a complaint alleging that such executrix remarried after having converted the assets of the estate to her own use without filing an inventory, and removed from the state where she was appointed, with such assets, to Colorado, where she had repudiated the rights of plaintiffs, testator's children, and held the assets of the estate in fraud of their rights, was sufficient to give the Colorado courts jurisdiction to grant plaintiffs relief.

2. An action against a foreign executrix for a conversion of assets in fraud of the rights of plaintiffs could not be maintained in the absence of evidence that the executrix had brought any of the assets belonging to the estate within the state.

3. Where a will gave to testator's widow a life estate in all his property, and provided that if she remarried she should set apart a portion of the estate for the benefit of testator's children, which should be paid to them on their arrival at the age of 25, on the widow's remarriage and repudiation of the children's claim without ever having filed an inventory of the estate or an accounting of her acts as administratrix in the foreign state where she was appointed, a personal judgment could not be rendered against her for the interests of such children in an action brought by them before they had arrived at the age of 25.

4. In an action by legatees against a foreign executrix charged with the wrongful application of the personal assets alleged to have been brought by her within the state, and converted to her own use, in fraud of the rights of such legatees, the court had no jurisdiction to adjudicate the title of certain real estate situated in another state standing in the name of the executrix to be the property of the legatees, and to be held by her in trust for them.

Appeal from District Court, Arapahoe County; Booth Malone, Judge.

Action by Eva Terry and others against Amanda L. Falke. From a decree in favor of plaintiffs, defendant appeals. Reversed.

L. E. C. Hinckley and Robert E. Foote, for appellant. W. T. Rogers and J. F. Mail, for appellees.

CAMPBELL, C. J. The material facts, as set forth in the complaint, are that plaintiffs are children and heirs at law of Juan B. C. Phillips, deceased. In 1892 their father died in the city of Brooklyn, N. Y., leaving a will, in which the defendant, Amanda L. Falke, formerly wife of Mr. Phillips, was named executrix, and John H. Springer executor. The will was duly presented for and admitted to probate in the surrogate's court of the city of Brooklyn, and letters testamentary issued to defendant as executrix (the executor not qualifying), and thereupon she took possession of all the property of the estate, and thereafter has had exclusive possession of it. No inventory of the assets of the estate was filed in the surrogate's court, and no accounting thereto by the executrix has ever been made. Soon after the testator's death the defendant married Henry Falke, and in the year 1894 removed with him to the state of Colorado, bringing with her funds and assets of the estate of great value. Their father's will, although it gave to the wife, the defendant herein, a life interest in all of the property, with the power to sell and dispose of

\*Rehearing denied February 1, 1904.

the same, or any part thereof, as she deemed best, during such period of time, further provided that, in case she married again, his personal representatives should set apart and invest in the names of his children, including these plaintiffs, such parts of the estate as would have been theirs by law in case he died intestate, the same to become their absolute property when they respectively reached the age of 25 years. Disregarding the provisions of the will and her duty as executrix, the defendant denies the right of plaintiffs to any share of the estate of their father, although she married again after his death, and long before the action was begun, and has converted to her own use a large part of the property of the estate belonging to them, and holds the same in this state in fraud of their rights. There are other allegations of mistreatment of the plaintiffs by defendant, a denial of their legitimacy, and certain other allegations, which are not material to this decision. The court assumed jurisdiction of the cause, finding the issues in favor of the plaintiffs, adjudging title to certain real estate situate in the state of New York, standing in defendant's name upon the records, to be the property of the plaintiffs, and decreed that the same should be held by her in trust for them. The cause was then referred to a referee to take an accounting of defendant's acts and doings as executrix of the estate from the time she took possession and assumed control of the assets. The referee found that defendant was indebted to the plaintiffs in the sum of about \$2,400, and his report was confirmed by the court, then presided over by a different judge from the one who ordered the accounting, and a personal judgment against the defendant was rendered for that sum in favor of plaintiffs. The defendant brings the case here by appeal.

1. The general doctrine is that executors and administrators are not liable to actions as such in a state where they have obtained no letters of administration, but that they are amenable for their executorial acts only to the proper tribunals of the state from which they obtained their appointment. The appellant insists that this doctrine applies to this case, and that the court is wholly without jurisdiction of the subject-matter. The general rule for which appellant contends is sustained by a large number of authorities, among which are *Woodruff v. Young*, 43 Mich. 548, 6 N. W. 85; *Spoon v. Baxter*, 31 Mich. 279; *Story on Conflict of Laws* (7th Ed.) § 514; 1 *Woerner on The American Law of Administration* (2d Ed.) c. 17, and additional authorities therein cited. If this action were against the defendant, in her capacity as executrix, to enforce the performance of her official duty, it would not lie. Appellant misconceives the real scope of the action. It is based upon the proposition that a trust fund in the possession of a defendant has been improperly used, and is in danger of being still further misapplied, and the protec-

tion of the court is sought by the ones entitled thereto in order to protect it from loss. In his valuable work on the *Conflict of Laws*, at section 514b, Judge Story declares that the doctrine is fully established that, if a foreign executor or administrator brings or transmits to another state property which he has received under administration abroad, or if he is personally present, he is not, either personally or in his representative capacity, liable to a suit in such other state. Several cases are cited in its support. Notwithstanding this opinion of the learned jurist, we think the principle upon which the jurisdiction of the court in this case rests has been firmly established by many respectable authorities. In the case of *Tunstall v. Pollard's Adm'r*, 11 Leigh, 1, in an able opinion by Tucker, P. J., in which he reviews and comments upon the authorities referred to by Judge Story, the conclusion was reached that an executor who has qualified and received assets in a foreign country and brought them into the state of Virginia is liable to be sued and to be compelled to account in her courts, though he never qualified as executor in Virginia, and may have received no assets there. In *Hedenberg v. Hedenberg*, 46 Conn. 30, 33 Am. Rep. 10, it was held that a foreign executor who comes into another state to reside, and brings with him property belonging to the estate, cannot be made liable in the latter state, upon suit of a local creditor of the testator, to the extent of the property brought therein, but may be to the extent of the property already there. This, in a measure, sustains the text of Judge Story. The leading case in America in support of the principle upon which jurisdiction herein can be maintained is *McNamara v. Dwyer*, 7 Paige, 239, 32 Am. Dec. 627. Others are *Montalvan v. Clover*, 32 Barb. 190; *Patton v. Overton*, 27 Tenn. 192; *Colbert v. Daniel*, 32 Ala. 314; *Dillard v. Harris*, 2 Tenn. Ch. 196; *Bryan v. McGee*, 2 Wash. C. C. 337, Fed. Cas. No. 2,066; *Spradling v. Pipkin*, 15 Mo. 118; *Clopton v. Booker*, 27 Ark. 482; *McCabe v. Lewis*, 76 Mo. 296. Other authorities are collected in 8 Enc. Pl. & Pr. 714 et seq.; *Schouler's Executors & Administrators* (2d Ed.) § 173; 1 *Woerner's Amer. Law of Adm'n* (2d Ed.) § 164. The complaint therefore stated a case within the jurisdiction of the district court.

It was necessary, however, for the plaintiffs, among other things, to prove that the defendant brought into this state funds and assets belonging to the estate of the testator. The only witness produced by plaintiffs upon this controverted issue was the defendant herself. Her testimony does not establish it. Indeed, it appears therefrom that she brought no property belonging to the estate from New York to Colorado, unless it is a gold watch, which, some time before the hearing, had been returned to the former state, and concerning whose ownership at the time there was a dispute. If the defendant has pos-

session or control of any property belonging to the estate, it is, for aught that appears from this record, in bank, or in the form of investments or real estate, all in the state of New York. In her brief appellant challenged appellees to point out in the record any evidence whatever that any of the assets of the estate was brought into this state by the executrix. In their brief appellees have not referred to any portion of the record where this proof is disclosed. Considering the voluminous record, we would have been justified in assuming for the purposes of the opinion that none such exists. We have, however, examined the abstract, and are unable to find sufficient evidence of this essential fact upon which the jurisdiction of the court depended. Proof not being made of this essential fact, necessary in this kind of a case to give the courts of this state jurisdiction, it follows that the trial court, upon the showing made, should have dismissed the action.

2. The absolute money judgment awarded to plaintiffs cannot, in any event, be sustained. The will expressly provides that, if the testator's wife marries again, the executor and executrix shall set apart for, and invest in the names of, the children such portion of the estate as they would have inherited had he died intestate, the same to become their absolute property only when they have respectively reached the age of 25 years. Although the widow had remarried at the time of the hearing, neither of the plaintiffs (children of the testator) had reached the age of 25 years. The court had power to direct that, if money or assets which belonged to the children were thus brought into Colorado from the state of New York, it should be properly safeguarded or invested, as the will provides, or disposed of as the laws of that state require. It is conceded that no inventory of the assets of the estate was filed in the court granting the letters, and no accounting therein had. It may be that the debts of the estate will consume the entire assets. Whatever may be the rights of a local creditor as to property already within this state to secure which the foreign executor came here, as between the parties to this action at least, the nature and extent of the liability of the defendant with respect to assets in her possession, whether received in New York or in Colorado, are to be determined according to the laws of the state of New York, from which she derived her authority to administer. They must ultimately be applied to the payment of debts or distributed to the legatees and devisees under the will, or invested as that instrument directs, and as though this action had been brought in the courts of the state of New York. *McNamara v. Dwyer*, supra. Neither can the action of the court in trying and adjudicating the title of real estate situate in the state of New York be upheld. In the nature of things, that property was never

within the territorial jurisdiction of the courts of this state; and while in some cases it has been held that the courts of one state may enforce specific performance of a contract relating to real property situate in another jurisdiction, we know of no decision, and are cited to none, that authorizes the courts of a state other than that of the domiciliary jurisdiction to try the title of real estate situate in the latter, where the action is one between legatees under a will and a foreign executrix who is charged with wrongful application of the personal assets of the estate which she has thus transmitted. The conclusion reached renders unnecessary any consideration of the action of the court in reference to the accounting.

At the oral argument on the petition for rehearing it was made known to us that the appellant (defendant below) is now living in the state of New York, and in the county the surrogate's court of which granted to her letters testamentary. It would be an unnecessary proceeding, and unjust to both parties, to permit this action to proceed further in the courts of this state.

The judgment must be reversed for the errors pointed out, and the cause is remanded, with instructions to the district court to dismiss the action without prejudice to the right of appellees to proceed against appellant in the proper court of the state of New York. Reversed.

(32 Colo. 211)

### HARRIS v. PEOPLE.

(Supreme Court of Colorado. Feb. 1, 1904.)

HOMICIDE — SELF-DEFENSE — INSTRUCTIONS — APPLICABILITY TO EVIDENCE — ERRORS IN INSTRUCTIONS — EFFECT OF GIVING CORRECT INSTRUCTIONS.

1. Instructions on a prosecution for murder, where the defense is self-defense, that, in the absence of malice, the killing of another is manslaughter, unless done "in necessary self-defense," and that, when the killing is done with a deadly weapon, malice may be inferred, in the absence of proof that "the act was done in necessary self-defense," are not erroneous, as denying the right of the person defending himself to act from appearances, when followed by an instruction that the right of self-defense enables a person to defend himself when it reasonably appears that his life is in danger.

2. Where, on a prosecution for murder, defendant pleaded self-defense, and there was no evidence of a combat, other than that which occurred at the time of the fatal shooting, nor any evidence that, supposing deceased was the aggressor, the attack had been repelled by defendant before the fatal shot was fired, or that deceased had declined further combat, instructions that the right of self-defense is the right to defend one's self from attack, and, when the attack is repelled, or when the assailant has declined further combat, the assailed has no right to kill his adversary, is erroneous, as being outside of the evidence.

3. The common-law doctrine of "retreat to the wall" is applicable only where defendant voluntarily entered into the fight, or the parties engaged in a mutual combat, or where defendant was the assailant, and had not declined further struggle.

4. As it is wrong for a court to instruct as to the law in the absence of facts to which it is

applicable, it is erroneous to state abstract propositions of law, each applicable to different state of facts, and apply one doctrine to a given claim, and say nothing about its application to contrary claims.

5. The fact that the court gave correct instructions requested by defendant does not render harmless the giving by the court, of its own motion, of erroneous instructions on the same point.

Steele, J., dissenting.

Error to District Court, Mesa County; Theron Stevens, Judge.

Joseph Harris was convicted of voluntary manslaughter, and brings error. Reversed.

J. S. Carnahan, F. C. Goudy, and L. F. Twitchell, for plaintiff in error. N. C. Miller, Atty. Gen. (Henry J. Hersey, of counsel), for the People.

CAMPBELL, J. In the district court of Mesa county an information was filed charging defendant with the deliberate murder of Charles R. Sieber. Defendant admitted that he intentionally and fatally shot Mr. Sieber, but says he did so in defense of his own life. He was convicted of voluntary manslaughter, and sentenced to the penitentiary for a term of years. Three rulings made by the trial court are relied upon for a reversal: First, that one of the members of the jury which tried the case was unfair and prejudiced against defendant; second, the assistant to the district attorney, in his closing speech to the jury, made use of abusive language, to the hurt of defendant; third, the court erred in its instructions to the jury.

The judgment must be reversed because of errors in the court's instructions to the jury. The first two assignments pertain to matters that will probably not be presented if another trial be had, so they will not now be discussed.

As throwing light on the instructions attacked by defendant, the salient facts of the case will be helpful. The deceased, Sieber, was the president of a cattle company which owned a large number of cattle. The defendant, whose home ranch is just across the Colorado state line, in the state of Utah, was the owner of about 50 head of cattle which ranged upon the public domain. Some feeling existed between Sieber and defendant because the company, in driving its herd across his ranch, gathered up some of his cattle, and drove them from their accustomed range, and branded them with its brand. Upon the day when the homicide occurred, defendant and Sieber met, with no others present, about a mile distant from a pasture where the company's herd was being rounded up, and cattle were being cut out for shipment. They were on horseback, and, after some disputatious conversation relating to their differences, which led to no definite results, on the invitation of Sieber they rode side by side from the point where they met to this pasture, for the purpose of talking with Mr. Jones, the foreman of the

company, about the same difficulties. When they arrived there, Jones' back was turned to them, and Sieber asked him if he was counting the cattle, to which an affirmative answer was given, whereupon Sieber, without saying anything to any one, turned his horse, and rode a distance of 400 or 500 feet to one Emory Knowles, an employé of the company who was assisting in the round-up; and, during this ride, Harris turned back into the herd a steer that tried to escape therefrom, and then remained on his horse, which was not moving, until after Sieber reached Knowles. The defendant then, as theretofore that day, had on his person a revolver, a portion of which protruded from his pocket in which it was carried, and it was seen by Sieber before they reached the pasture. Dunnan, another employé of the company, was stationed between Jones and Knowles; and, in passing him, Sieber remarked that that man (referring to Harris) drew a gun on him. Knowles was carrying, inclosed in a scabbard, a small Winchester rifle, which could be used with one hand. Sieber, without first saying anything to Knowles, reached over and pulled the gun from the scabbard, and, after securing the same, asked if it was loaded, and, upon being informed that it was, threw the weapon across the saddle, in front of him, and at once started back to the place where Harris was still sitting on his horse. As to the foregoing there is no conflict, and, for the purpose of the assignment directed against the instructions, it is necessary to consider further only the testimony of the defendant himself, and to point out the only conflict in the evidence as to the situation of the parties after Sieber got the gun. Defendant testifies that Mr. Sieber did not say a word to him when he left him and went in the direction of Knowles, but that he saw Sieber draw the gun from the scabbard and start towards him. Several of the employés of the cattle company were carrying guns or revolvers, which were visible to the defendant, and he says that when he saw Mr. Sieber coming towards him he apprehended trouble, and that, for his own safety, he at once started his horse on a walk towards deceased. As each one advanced, defendant says that deceased took his gun in one hand from the saddle where it had been lying, and pointed it in his direction. Defendant thereupon started his horse into a trot, and, as the parties approached nearer each other, Sieber drew the Winchester rifle down upon defendant, and, when they had come within 10 or 20 feet of each other, defendant threw his own revolver down on the deceased. Sieber thereupon exclaimed twice, "I am not going to hurt you," to which the defendant says he replied, "Drop it, drop it," but, as Sieber did not do so, he (the defendant), believing his own life in danger, and to save himself, fired in rapid succession three shots, the result of which was the death of Sieber.

The case is remarkably free from serious conflict in the evidence as to its material points, so far as the same pertains to the instructions to be considered, and substantially the only difference is as to Sieber's demeanor and manner, and the position in which he held or carried the gun after leaving Knowles and starting towards defendant. Defendant and some of the people's witnesses say that Sieber held the gun in front of him, pointed some of the time in the general direction of defendant, while other eyewitnesses say that the gun was held down by Sieber's side, at least most of the time. But for our present purpose this conflict is not important.

1. Bearing in mind that the plea of self-defense was interposed, we proceed to consider the three instructions of which complaint is made. Instructions Nos. 8 and 9 given by the court, so far as they are pertinent to the objections here urged, are as follows:

"(8) The distinguishing feature between murder and manslaughter is the ingredient of malice. Malice aforethought is as essential an ingredient of murder as the act of killing. In the absence of malice, either express or implied, such killing is manslaughter, unless you should find from the evidence that such killing was done in necessary self-defense. \* \* \*

"(9) The jury are further instructed that when the killing is done with a deadly weapon, or a weapon calculated to produce, and actually producing, death, malice may legitimately be inferred, in the absence of proof that the act was done in necessary self-defense, or upon sufficient provocation and cause; and the presumption in such case will be that the act was voluntary, and committed with malice aforethought."

It is said that the material error in these instructions consists in denying the right of the person defending himself to act from appearances. The argument is that it is not necessary, under the law, that the defendant, to justify the killing, should have acted in necessary self-defense. It is sufficient that he acted in apparent self-defense. It is the law that a defendant may be justified in taking human life if it appeared to him at the time, and would have so appeared to a reasonably prudent person in the same circumstances, that his life was in danger, although he was in fact not in danger. These two instructions are not substantially different from the provisions of our Criminal Code. It is true that nothing is said therein about appearances, as might well have been done; but in the very first sentence of instruction No. 10 the jury are told that the defendant may act upon appearances, and in other instructions given by the court at the request of defendant it is most clearly and fully pointed out that the defendant, acting as a reasonably prudent person, had the right, honestly and in good faith, to act upon what

the appearances were to him at the time. This is not a case where the court in one instruction has laid down the law correctly, and in another instruction incorrectly. Instructions, 8, 9, and the first sentence of 10, taken together, as they should be, state the law as to appearances as defendant himself contends for.

Instruction No. 10 given by the court is as follows:

"The jury are further instructed that the right of self-defense is only given in emergencies to enable persons who are attacked, and to whom it may reasonably appear that their lives or bodies are in danger of great bodily injury, to defend themselves; that this right is based upon what reasonable persons, having due regard for human life, would do under similar circumstances, and the actions of the defendant in this case must be measured by this rule. (The right of self-defense is the right to defend one's self from such an attack, and when the attack is repelled or warded off, or when the assailant has declined further combat, the person assailed has no right to follow up his adversary and kill him after the attack has ceased, or after such time as it must have reasonably appeared to the person attacked further danger to life or body has passed.) [A slayer must use all reasonable means to avoid doing a fatal act, and cannot voluntarily put himself in a position to meet a combatant, knowing that by so doing a combat is liable to occur, which will be fatal to one of them, and then plead self-defense to an information for killing his opponent in a fight. The killing, in order to be justifiable, must reasonably appear to have been the last resort for safety on the part of the party killing, and if the slayer, who has once extricated himself from a position of impending danger at the hands of another, voluntarily re-enters that position, he cannot claim that it was done in necessary self-defense.]"

We do not pause to pass upon the first sentence of this instruction, for no complaint is made of it. But that portion immediately following, and by us included in parentheses, is said to be wholly inapplicable to the facts of this case, and also wrong in so far as it attempts to state the doctrine of "retreat to the wall," while the portion in brackets, erroneously and without qualification, states to the jury what is generally known as the "common-law doctrine of retreat to the wall," which is said to be wholly inapplicable in this state, under the facts. We are not required to say that the portion of the instruction in parentheses is not applicable to the facts of some other case, but there is some doubt about its being germane to the facts which this record discloses. There is no evidence here of a former attack or combat, or of any attack or combat, if combat there was at all, other than that which occurred at the time the fatal shooting took place. If, however, the reference in the parentheses



and in the bracketed part of this instruction is to the attack which immediately culminated in the fatal shooting, there is no evidence that, supposing deceased was the aggressor, such attack had been repelled or warded off by the defendant before the fatal shot was fired, or that the deceased had declined further combat, unless it can be said that defendant fired the fatal shot or shots after deceased was disabled, and before he was killed, and thus had warded off the attack, or unless it can also be said that the conduct of the deceased in procuring the gun and starting towards defendant was merely, and nothing more than, a challenge to a combat, which was voluntarily accepted by defendant. But if the evidence does present such a state of facts, the court, instead of laying down the broad, unqualified doctrine of retreat to the wall, as though it applied to the case of self-defense clearly made out by defendant, if he told the truth, as well as to the case claimed to have been made by the people, should, by apt language, have confined the doctrine to the latter. The common-law doctrine of retreat to the wall, as this court has said in *Babcock v. People*, 13 Colo. 515, 22 Pac. 817, *Boykin v. People*, 22 Colo. 496, 45 Pac. 419, and *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 384, has been modified by the more recent decisions, and is applicable in this jurisdiction only to such cases as where the defendant voluntarily enters into a fight, or where the parties engage in mutual combat, or where the defendant, being the assailant, does not endeavor in good faith to decline any further struggle before firing the fatal shot, and possibly to other similar cases. Trial courts should be careful to restrict it to them only; and had the court done so in instruction No. 10 by saying, in substance, to the jury, that if they believed from the evidence in the case that the defendant voluntarily entered into the fight, or the parties were engaged in mutual combat, or that the defendant was the assailant, and had not declined further struggle, the instruction would not have been prejudicial, provided the facts, from the people's standpoint, justified it. We do not have to say, in holding this instruction erroneous, that there was no testimony whatever in the record, and no theory of the case, to which it might not be applicable; but it is sufficient merely to say that the doctrine, stated broadly, as it is in this instruction, must inevitably have misled the jury, and induced them to think that the defendant's conduct, even if his own testimony was true, was to be measured by the rule thus laid down. It is wrong for a court to instruct as to the law in the absence of facts to which it is rightly applicable, and it is just as erroneous to state abstract propositions of law, each applicable to a different state of facts, follow it up by applying one doctrine to a given hypothetical case, and say nothing to the jury about the application of the other and opposing doc-

trines. Such a method of advising a jury must result in injury. And here emphasizing the abstract doctrine of retreat to the wall, though the court does not try to apply it to the facts, must nevertheless have led the jury to believe that the court would not have stated the doctrine, had it not been applicable to the case; and, since the court called their attention to it, and no direction whatever was given to them how or in what cases to apply it, but, on the contrary, they were left to apply it to the facts as disclosed by the defendant's own evidence, injury may have resulted, and probably did result, to him. *State v. Miller et al.* (Or.) 74 Pac. 658. The fact that the court, in other instructions requested by the defendant, gave correct instructions upon the theory of self-defense, would not render harmless the giving of this contradictory instruction. Instruction No. 10 was given by the court of its own motion, while attached to these other instructions was a statement that they were given at the request of the defendant. The jury might well believe that it was their duty to resolve the conflict between these instructions in favor of the one given by the court. We desire again to call to the attention of trial courts that, whenever they speak of the duty of a defendant to retreat to the wall, they should make it definite and plain to the jury in what circumstances the doctrine is applicable, and not lay down the broad doctrine, as in this instruction, without limiting it to cases where it belongs. There is also ground for saying that the parts of this instruction objected to are contradictory and inconsistent with each other, and, because of such vice, necessarily misled and confused the jury; but, as the argument of counsel on both sides was confined to the specific objections heretofore noted, we deem it best to limit our decision to them.

For the error of the court in the giving of instruction No. 10, the judgment is reversed, and the cause remanded for a new trial. Reversed.

STEELE, J., dissents.

(12 Wyo. 218)

SMITH et al. v. HEALY et al.

(Supreme Court of Wyoming. Feb. 18, 1904.)

REVIEW—RESERVED QUESTIONS—SUFFICIENCY OF ORDER—TEMPORARY INJUNCTION—DISOLUTION—MOTION IN SUPREME COURT—JURISDICTION.

1. Rev. St. 1899, § 4276, provided that, when an important or difficult question arose in an action in the district court, the judge might cause the same to be reserved for the Supreme Court. This was amended by Laws 1903, p. 78, c. 72, by restricting it to constitutional questions, provided that all cases pending when the act took effect in which other than constitutional questions had been theretofore reserved for the Supreme Court should be conducted to a decision. *Held*, that an order, made prior to the amendatory act, finding that difficult and new questions had arisen in a suit, and ordering that the clerk prepare and cer-



tify the record and the questions involved to the Supreme Court, but failing to state what the questions were, was insufficient to bring the case within the proviso of the amendatory act.

2. Rev. St. 1887, § 2932, continued in Rev. St. 1899 as section 4051, provides that, when an injunction has been granted, a party may, before trial, apply to the Supreme Court, or a judge thereof, to vacate or modify the same. *Held*, that this provision was repealed by the adoption of Const. 1899, art. 5, § 2, conferring general appellate jurisdiction on the Supreme Court, with a general superintending control over inferior courts, and section 3, restricting its original jurisdiction to quo warranto and mandamus as to state officers, and habeas corpus, since a motion to vacate an injunction would be addressed to the original jurisdiction of the court; the superintending control over inferior courts not being exercisable in that fashion.

**Reserved Questions from District Court, Weston County; Joseph L. Stotts, Judge.**

Suit by Frank Smith and others against Patrick Healy and others. On reserved questions, and on motion to dissolve temporary injunction. Case stricken from docket, and motion denied.

M. B. Camplin and W. S. Metz, for plaintiffs. E. E. Lonabaugh, for defendants.

**POTTER, J.** In this case it appears that suit was brought by the plaintiffs in the district court against the defendants, and a temporary injunction was ordered by the district court commissioner, as prayed for in the petition, restraining the defendants from entering upon certain lands with sheep, and grazing sheep thereon, or watering them from the waters on said lands. It further appears that on the 3d day of January, 1903, the cause was brought on for hearing before the district court upon a motion to require the petition to be made more definite and certain, which motion was granted, and the amendment made, whereupon on the same day the cause came on further to be heard upon the demurrer of the appearing defendants to the first cause of action contained in the amended petition. On consideration of said demurrer, the court ordered that certain lands be released and discharged from the operation of the restraining order, and that, as so modified, said restraining order be continued in force until the further order of the court. And thereupon the court found, as shown by the record, "that difficult and new questions have arisen in the consideration of said demurrer herein, and that said new and difficult questions should be certified to the Supreme Court of Wyoming for its determination," and it was ordered as follows: "It is hereby further adjudged and ordered that the clerk prepare and certify the record herein upon the demurrer filed herein, and the difficult and new questions involved therein, to the Supreme Court of this state, for its answer and determination." On the 8th day of January, 1903, an order was entered, *nunc pro tunc* as a part of the order of January 3d, dissolving the injunction as to certain

lands, and continuing it in force as to other lands. In this condition the record remained until September 7, 1903, when the following entry was made: "The above-entitled cause coming on for hearing upon the motion of defendants that the cause be dismissed, and the court being fully advised in the premises, doth deny said motion, and doth order that the questions of a new and difficult nature, heretofore ordered certified to the Supreme Court, be prepared, and that said cause be duly certified to said Supreme Court in pursuance of said mentioned former order of this court." On the 24th day of September, 1903, there appears to have been filed with the clerk of the said district court an order, signed by the judge, purporting to state the difficult questions upon which the decision of the Supreme Court was required. That order shows that the issue before the court arose upon a general demurrer to the first cause of action, and then proceeds as follows: "It is considered by the court that the issue thus formed raises an important and difficult question, far-reaching in its effects. Wherefore, upon the court's own motion, the matter is reserved to, and the same is hereby ordered to be sent to, the Supreme Court of the state of Wyoming for its decision thereon; each of said parties to pay one-half the docket fee, and the costs which each may incur. It is further ordered by the court that the clerk of this court transmit the original papers in the case involving the questions reserved to the clerk of the Supreme Court, there to be dealt with as the law provides." The order then proceeds to state the questions reserved. It is unnecessary to here repeat them. It is sufficient to say that, as conceded by counsel for both parties, they are not constitutional questions.

When the order of January 3, 1903, was made and entered, the statute for the reservation of questions for the decision of this court was as follows: "When an important or difficult question arises in an action or proceeding, pending before the district court in any county of this state, the judge of said court may, on motion of either party, or upon its own motion, cause the same to be reserved and sent to the Supreme Court for its decision." Rev. St. 1899, § 4276. By an act of February 21, 1903, which took effect on that date, said section was amended to read as follows: "When an important and difficult constitutional question arises in an action or proceeding, pending before the district court in any county of this state, the judge of said court may, on motion of either party, or upon his own motion, cause the same to be reserved to the Supreme Court for its decision. Provided, that all cases pending when this act shall take effect, in which other than constitutional questions shall have been heretofore reserved for the decision of the Supreme Court, shall be conducted to a decision of such questions in said Supreme Court in all respects as now

provided by law." Laws 1903, p. 78, c. 72.

It may be conceded, without deciding it, that, had an order been regularly made, lawfully reserving any questions to this court for its decision, so as to confer power or jurisdiction upon this court to act upon and determine them, the case might be considered as "pending," within the meaning of the proviso of the act of 1903, although the papers had not reached this court at the time of the enactment of said amendatory statute. By the amended statute the jurisdiction of this court to consider and decide important and difficult questions arising in an action or proceeding, upon the reservation of such questions before judgment, is limited to constitutional questions. The questions reserved in this cause being other than constitutional in character, the serious question arises whether, upon the record, this court is possessed of jurisdiction to hear and decide them. We have no disposition to avoid a decision of the questions reserved in this or any other case, if the power to do so is conferred upon the court; but, on the other hand, this court has no right or authority to assume a power it does not have, and which has been expressly and intentionally taken from it. The questions suggested by the learned district judge are important, and, no doubt, difficult, and the convenience and interest of the parties might possibly be better subserved if they could be decided in this proceeding. Yet we must refuse to consider them unless jurisdiction to do so has been vested in the court.

It will be observed that the order of January 3, 1903, fails to designate the questions arising in the case deemed by the court to be important and difficult, and they are not stated in any form, except in the order filed in the office of the clerk of the district court September 24, 1903. In the earliest case arising under the statute authorizing the reservation of questions to the Supreme Court for its decision, decided in September, 1888, it was held that, in the absence of a statement of the questions, the Supreme Court was without jurisdiction. In that case the order of the district court certified that there were difficult and important questions involved, but it failed to state what those questions were. The court said: "We conceive it to be indispensable to any action by this court that the question which is conceived to be difficult or important should be specially stated by the district court, and without such statement this court has no power to consider any questions which may arise in the case. It is therefore the opinion of the court that there is nothing before them on which the court may act." *Corey v. Corey*, 3 Wyo. 210, 19 Pac. 443. And in line with that decision the court has held in several cases that, under the statute aforesaid, questions, and not cases, are brought to this court for decision. Hence such general questions as whether a petition states facts sufficient

to constitute a cause of action, or whether a demurrer ought to be granted or overruled, or what judgment should be entered, have been held to be questions without the purview of the statute. *Grand Island & N. Wyo. R. Co. v. Baker*, 6 Wyo. 369, 45 Pac. 494, 34 L. R. A. 835, 71 Am. St. Rep. 926; *Rasmussen v. Baker*, 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 773; *State ex rel. Perkins v. Board*, 7 Wyo. 161, 51 Pac. 204; *Kelley v. Rhoads*, 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 504, 75 Am. St. Rep. 904; *Foot v. Smith*, 8 Wyo. 510, 58 Pac. 898; *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; *Jenkins v. City of Cheyenne (Wyo.)* 73 Pac. 758. In *Board of Commissioners of Carbon Co. v. Rollins*, the decision in *Corey v. Corey* was directly approved. And we then said: "The statute does not contemplate that this court shall sift the record or proceedings to ascertain the possible questions arising in the case. The district court should distinctly state the question found to have arisen in the case, and deemed to be either important or difficult, or both." In that case, however, there was an agreed statement of facts, in which was set forth the question involved, and it was held that the order of the court was to be construed as referring to that question, and that question only was considered.

We think it entirely clear, therefore, that the order of the district court of the 3d of January, 1903, did not confer any jurisdiction upon this court. Had the papers been sent here upon that order, we would have been compelled to refuse consideration, and to require the papers to be returned without action. At the time the subsequent orders were made, attempting to reserve the questions and to state them, the district court was without authority to reserve such questions for the decision of this court, and no authority resided in this court to consider or decide them upon such a reservation. The case does not come within the protection of the proviso of the act of 1903, for the obvious reason that no questions had theretofore been reserved for the decision of this court. An essential feature necessary to confer jurisdiction upon this court was entirely lacking from the January order, and the case remained in the district court for its determination of the demurrer, the same as though a reservation of the questions had not been suggested or attempted. It is clear, therefore, that the order of September, 1903, obtained no validity by reason of the previous January order. We are constrained, therefore, to hold that this court is without jurisdiction, and the case will be stricken from the docket, and the papers ordered returned to the district court.

It seems proper that we state our views as to the jurisdiction of this court upon another matter that has been brought into the case incidentally. The defendants have filed

a motion in the case asking this court to dissolve the temporary injunction allowed in the district court. We have heretofore, since the admission of Wyoming as a state, and the taking effect thereby of the Constitution, declined orally to entertain a mere motion filed or attempted to be filed in this court before trial for the vacation of an injunction issued out of a district court, when the cause itself was not here, and could not be here, by virtue of appellate proceedings. In view of the fact that there has been continued in our statutes a provision authorizing such a motion to be filed and considered here, we have deemed it advisable that our view of the question be made matter of record.

It is provided by section 4051, Rev. St. 1899, that, when an injunction has been granted, a party may, at any time before the trial, apply to the court in which the action is pending, or a judge thereof, or to the Supreme Court, or a judge thereof, to vacate or modify the same. That section was formerly section 2932, Rev. St. 1887, and was an enactment of the territorial Legislature. By the act of congress organizing the territory, it was provided that the jurisdiction of the several courts should be as limited by law, with certain restrictions that are unimportant in this connection. It was doubtless lawful, therefore, for the Legislative Assembly of the territory to confer the power named upon the Supreme Court and its judges, and the power was exercised under the territorial form of government in at least one case. *McCray v. Baker*, 3 Wyo. 192, 18 Pac. 749. The jurisdiction of the Supreme Court is, however, now fixed by the Constitution. It possesses general appellate jurisdiction, co-extensive with the state, in both civil and criminal causes, and is vested with a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law. Const. art. 5, § 2. By section 3 of the same article, original jurisdiction is conferred upon the Supreme Court in certain matters. It is given original jurisdiction in quo warranto and mandamus as to all state officers, and in habeas corpus; and it is vested with authority to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. It is clear that a mere motion filed or presented before trial in this court for the vacation of an injunction granted in a district court asks the exercise by this court of original jurisdiction in the cause. And we think it equally clear that the court does not possess such jurisdiction. The superintending control vested in the Supreme Court over inferior courts is to be exercised in a different way than by regulating or determining an action or proceeding pending in a district court upon a mere motion to vacate some order made by that court, especially when such order is within the jurisdictional authority of such court.

75 P.—28

See *State v. Ausherman* (Wyo.) 72 Pac. 200. A motion such as we are now considering can only be addressed to the court upon the assumption that it has original jurisdiction in the premises. That assumption is erroneous. It follows, therefore, that the statute, although effectual when enacted, and until the taking effect of the Constitution, is now void, in so far as it attempts to authorize this court to act in the manner indicated. See *Pittsburg, Ft. W. & Chi. Ry. Co. v. Hurd*, 17 Ohio St. 144; *Griffith v. Commissioners*, 20 Ohio, 009.

The motion will therefore be denied on the ground that this court is without jurisdiction to entertain it.

CORN, C. J., and KNIGHT, J., concur.

(12 Wyo. 225)

STATE ex rel. HYND S v. CAHILL, County Clerk, et al.

(Supreme Court of Wyoming. Feb. 18, 1904.)

STATUTES—PASSAGE—SIGNING BY SPEAKER OF HOUSE—ENTRY ON JOURNAL—CONSTITUTIONAL PROVISION—COMPLIANCE—ENROLLED ACT—PRESUMPTIONS—REVIEW—RESERVED QUESTIONS—STATUTE PUNISHING GAMING—CONSTITUTIONALITY OF PASSAGE.

1. A case in which questions were reserved by the district court for the Supreme Court's decision, docketed in the latter court before the act of 1903 (Laws 1903, p. 78, c. 72) limiting the right to so reserve questions to those of a constitutional character, is properly before the Supreme Court for determination.

2. Questions as to whether Const. art. 3, § 23, relative to the reference of legislative bills to committees, and section 23, relative to a journal entry of the signing of bills by the presiding officers of each house, are mandatory; and whether they and section 24, relative to the title to bills, have been complied with, are constitutional questions, within the act of 1903 (Laws 1903, p. 78, c. 72) limiting the right of the district court to reserve questions for decision by the Supreme Court to such as are constitutional in character.

3. Legislative journals are competent evidence concerning any procedure expressly made by the Constitution a matter of journal record, and an affirmative showing by them, in reference thereto, that a bill was not passed in a constitutional manner, rebuts the presumption of regularity arising from the enrolled act.

4. In determining whether an entry in a legislative journal is a sufficient compliance with Const. art. 3, § 23, requiring the presiding officer of each house, in its presence, to sign all bills passed immediately after their titles have been read, and providing that "the fact of signing shall be at once entered upon the journal," the enrolled act, exhibiting the proper signature, is to be looked to, and the favorable presumption arising therefrom is not to be overthrown unless it clearly appears, despite an effort to sustain the entry by every reasonable construction, that it is insufficient.

5. Const. art. 3, § 28, requires the presiding officer of each house of the Legislature, in its presence, to sign all bills passed, immediately after their titles have been read, and provides that "the fact of signing shall be at once entered upon the journal." The House journal, under the caption "Signing Bills," recited: "The Hon. Speaker announced that he was about to sign the following H. E. A.'s." Then followed a list

¶ 3. See Statutes, vol. 44, Cent. Dig. § 334.

of House enrolled acts, which it was customary in the journals of both houses to designate by these initials; Senate enrolled acts being designated as "S. E. A." Following these, and without further explanation, came the entries, "S. E. A. No.," etc.; covering a list of Senate enrolled acts. The journal entries preceding and following showed that the House was in session, and it appeared that the matters embraced under the caption constituted a single entry. In various parts of the journal the signing of both House and Senate enrolled acts was included under the same caption. The Senate journal recorded the signing of the acts in question on the same day, and nowhere else in the House journal was their signing noted. *Held*, that the entry was not objectionable, as insufficient for the Senate enrolled acts, because the Speaker's announcement that he was about to sign related only to House enrolled acts.

6. The fact that the entry made the Speaker announce that he was "about" to sign, instead of that he was signing or had signed, did not render it insufficient, in view of the caption of the entry, "Signing of Bills," and the actual signing, as exhibited by the enrolled bill itself.

7. Laws 1901, p. 68, c. 65, punishing persons conducting gambling games, including faro and roulette, and repealing Rev. St. 1899, §§ 2179, 2181, 2182, 2185, 2186, authorizing the licensing of such games, is constitutional, as properly passed by the Legislature.

Reserved Case from District Court, Laramie County; Richard H. Scott, Judge.

Mandamus by the state of Wyoming, on the relation of Harry P. Hynds, against Joseph A. Cahill, as county clerk and ex officio register of deeds of the county of Laramie, and others. On reserved questions.

C. W. Burdick, for relator. Walter R. Stoll, for respondents. William B. Ross, amicus curiæ.

POTTER, J. February 21, 1902, the petition of the relator was filed in the district court for the county of Laramie, praying for a writ of mandamus to require the respondents, the county clerk, treasurer, and sheriff, respectively, of said county of Laramie, to prepare, issue, and deliver to the relator two licenses authorizing him to carry on in a certain place designated in the city of Cheyenne, in said county, the games of faro and roulette for the period of three months from the 21st day of February, 1902. It was alleged in detail that all the things required to be performed by the relator to entitle him to such licenses under the provisions of sections 2151, 2152, 2179, 2181, 2182, and 2185 of the Revised Statutes of 1899 had been done and performed, and that said provisions were in full force and effect. It is further alleged that the respondents had refused to perform their respective duties in the premises, and gave as the reason for their refusal that the laws theretofore authorizing the licensing of such games had been repealed by the provisions of chapter 65, p. 68, of the Laws of 1901, being an act entitled "An act to amend and re-enact sections two thousand one hundred and seventy-eight, two thousand one hundred and eighty, and two thousand one hundred and eighty-three of the Revised Statutes of eighteen hundred and

ninety-nine, and to repeal sections twenty-one hundred and seventy-nine, twenty-one hundred and eighty-one, twenty-one hundred and eighty-two, twenty-one hundred and eighty-five, and twenty-one hundred and eighty-six of the Revised Statutes of eighteen hundred and ninety-nine, relating to gambling." The original respondents were Dallas R. Cowhick, as county clerk, John Schuneman, as treasurer, and Edwin J. Smalley, as sheriff, of the county of Laramie. Joseph A. Cahill, the present county clerk, has been substituted in place of Dallas R. Cowhick, deceased; and John E. Vreeland, present county treasurer, has been substituted for John Schuneman.

The petition sets forth that chapter 65 of the Laws of 1901 was and is wholly void, and was never enacted by the Legislature, for the alleged reasons that before the same was considered, and before its passage, the bill was not referred to a committee, as required by the provisions of section 23 of article 3 of the Constitution, and that neither the act, nor the bill therefor, was ever signed by the Speaker of the House of Representatives in the presence of the House, as required by the provisions of section 28 of said article, and that the fact of such signing was not entered upon the journal of the House, as required by the provisions of said section 28. Separate answers were filed by the respondents, setting forth the proceedings had and taken in the House of Representatives in respect to the matters complained of, and admitting that, if such proceedings did not amount to a compliance with said constitutional provisions, then there had been a failure to comply with them.

The cause was submitted to the district court upon an agreed statement of facts, the material parts of which are as follows: "That the official duties of the said respondents, referred to in paragraphs 3, 4, and 5 of relator's petition, are the official duties prescribed in sections 2151, 2152, 2179, 2181, 2182, and 2185 of the Revised Statutes of Wyoming of 1899. That on the 21st day of February, A. D. 1902, the relator requested said respondents to prepare, countersign, and issue to him two licenses—one for a game of faro, and one for a game of roulette—authorizing the said relator to carry on said games in a room located in the city of Cheyenne, and that respondents refused to comply with the said request of relator. That chapter 65 of the Laws of Wyoming, A. D. 1901, was introduced in the Senate of the Sixth Legislature of Wyoming under the caption of 'Senate File No. 42,' and is referred to in the journals of the Senate and House of Representatives of the Sixth Legislature of Wyoming as 'Senate File No. 42,' and as 'Senate Enrolled Act No. 26.' That the enrolled copy of said Senate Enrolled Act No. 26, duly signed by the President of the Senate and the Speaker of the House of Representatives, and approved by the Gover-

nor, is now on file in the office of the Secretary of State, and that the printed copy of said act, as it appears in the printed and bound volume of the Session Laws of the Sixth State Legislature of Wyoming, under the title of 'Chapter 65,' is a true and correct copy of the original enrolled act on file with the Secretary of State, excepting that said printed copy does not show the signatures and indorsements appearing on said enrolled act. That the record of legislative procedure pertaining to said Senate File No. 42 appears in the duly approved original Senate and House Journals of the Sixth State Legislature of Wyoming, now deposited in the office of the Secretary of State, and in the printed copy of said journals printed and issued under the direction of the Secretary of State; and said journals are hereby made a part of this agreed statement of facts." Upon the submission of the cause on May 27, 1902, the district court, finding that important and difficult questions arose in the case, ordered that the cause be reserved and sent to this court for its decision upon the following questions: First. Does chapter 65 of the Laws of the Sixth State Legislature of Wyoming contravene the provisions of section 24, art. 3, of the Constitution? Second. Are the provisions of section 23, art. 3, of the Constitution, directory or mandatory? Third. Was the reference of Senate File No. 42, being chapter 65 of the Laws of the Sixth State Legislature, to the committees of the whole of the Senate and House of Representatives, and to the Senate and joint committee on printing, and to the Senate committee on engrossment and enrollment, as said references appear of record in the journals of the Senate and House of Representatives of the Sixth State Legislature, a sufficient compliance with the requirements of section 23, art. 3, of the Constitution? Fourth. Are the provisions of section 28, art. 3, of the Constitution, directory or mandatory? Fifth. If the provisions of section 28, art. 3, of the Constitution, are mandatory, do the journals of the Senate and House of Representatives of the Sixth State Legislature show that Senate File No. 42 was enacted in compliance with such mandatory requirements? Sixth. Is chapter 65 of the Laws of Wyoming for the year 1901, being Senate File No. 42, and Senate Enrolled Act No. 26, a valid and constitutionally enacted statute of Wyoming? Seventh. Are sections 2151, 2152, 2179, 2181, 2182, and 2185 of the Revised Statutes of Wyoming, 1899, now in full force and effect?

The said questions were reserved and the cause docketed in this court prior to the act of 1903 (Laws 1903, p. 78, c. 72) limiting the right of the district court to reserve questions to this court to such as are constitutional in character. Hence the case would be properly here, did it not involve constitutional questions. But the questions involved are constitutional, and come strictly within

the act authorizing the reservation of questions as now in force.

On the argument in this court no contention was made that chapter 65 of the Laws of 1901 was invalid because of any failure to comply with the provisions of section 23 of article 3 of the Constitution, or of any violation of section 24 of the same article, but all objections in respect to the requirements of those sections were expressly abandoned. The objection to the validity of the act was distinctly confined to the alleged failure of the journal of the House of Representatives to show affirmatively a compliance with section 28 of said article. Hence it will be unnecessary for us to consider either the first, second, or third questions stated in the order of the district court.

The right of the relator to the relief demanded by his petition depends altogether upon the alleged invalidity of the act known as chapter 65 of the Laws of 1901. By that act it was declared that "every person who shall deal, play, carry on, open, or cause to be opened, or who shall conduct, either as owner or employee, whether for hire or not, any slot machine, game of faro, monte, roulette, \* \* \* or any other game played with cards, dice or other device of whatever nature, for money, checks, credits, or other representatives of value, shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than three hundred nor more than one thousand dollars, or by imprisonment of not less than three months nor more than one year, or by both." And the sections of the statute theretofore in force providing for the licensing of certain games, including the games of faro and roulette, were declared to be repealed.

It is contended on behalf of the relator that the provisions of section 28 of article 3 of the Constitution were not complied with in respect to said act, and that, in consequence thereof, the said act is void, and the sections continue in force which it purported to repeal. The constitutional provision referred to reads as follows: "The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the Legislature immediately after their titles have been publicly read, and the fact of signing shall be at once entered upon the journal." It is conceded, and such is unquestionably the fact, that the act in question bears the signature of the presiding officers of the Senate and House of Representatives, and of the Governor approving the same; and it is deposited in the office of the Secretary of State, and has been published among the other laws of that session as one of the duly passed and approved laws of the state. The presumption, therefore, would be that it was regularly passed; and the enrolled act in the office of said Secretary, authenticated as aforesaid, is to be taken as prima facie evidence that the act was duly and regularly passed pursuant to all the constitutional pro-

visions affecting the enactment of laws, and duly and properly authenticated and approved. But the act is challenged on the ground that the journal of the House of Representatives fails to show the fact of signing. It is contended that, as the Constitution expressly requires the fact of signing to be entered on the journal, the latter record, when the validity of the authentication by the presiding officer is questioned, constitutes the only evidence as to compliance with the provision of the section of the Constitution under consideration. It is argued that, if the journal is silent respecting the fact of signing, the presumption is justified that the requirement was not carried out in the prescribed manner, and that, the Constitution having designated how the evidence of signing shall be perpetuated, viz., by an entry on the journal, it is not within the province of the courts to look elsewhere for evidence of compliance, nor to indulge a presumption of compliance from the presence upon the enrolled act of the signature of the proper officer. It is conceded, however, that, as the only journal entry required is of the fact of signing, when such an entry appears it will be presumed therefrom that the signing occurred in the presence of the body over which the officer presided, and after the title of the act had been publicly read. Indeed, since the journal is a record of only those acts and proceedings which occur in the presence of the legislative body, and while it is in session, it is a reasonable and logical conclusion that a journal entry showing the signing of a bill by the presiding officer shows thereby that the signing occurred in the presence of the House or Senate, as the case may be. But the concession of counsel, as we understand it, is based not alone upon that presumption, but also upon the proposition that the constitutional requirement of a journal entry in this respect extends only to the fact of signing, and that an entry showing more than that is not required.

In support of the contention of relator, it is maintained, first, that it is competent for the courts to consult the legislative journals in reference to those matters which are expressly required by the Constitution to be therein recorded concerning the procedure in the enactment of laws, and that such journals may be used to impeach the enrolled act; second, that the journals imply verity, and cannot be impeached by parol evidence, or by an entry of a later date, or by the minutes or memoranda kept by the clerk; third, that the provisions of section 28 aforesaid are mandatory; and, fourth, that the fact of signing the act in question by the Speaker of the House of Representatives was not entered upon the journal of the House.

It was held in *Brown v. Nash*, 1 Wyo. 85, by the Supreme Court of the territory, that the courts have power to examine the journals of the Legislature to ascertain whether or not there has been an observance of the

requisite procedure in the passage of laws. In *State ex rel. v. Swan*, 7 Wyo. 166, 51 Pac. 209, 40 L. R. A. 195, 75 Am. St. Rep. 889, this court held that it is competent for the courts to consult legislative journals in reference to a matter expressly required by the Constitution to be recorded therein concerning the constitutional procedure for the passage of a legislative enactment, and that where it affirmatively appears upon such an examination, in respect to such requirements, that a bill did not in fact pass the Legislature, or did not receive the constitutional majority, the journals may be used to impeach the enrolled act. In that case the journals were resorted to, and it was held that it affirmatively appeared therefrom that the act then under consideration had not in fact been passed by the Legislature. It was said in the *Swan Case* that "when the keeping of legislative journals is enjoined by the Constitution, and that instrument also attaches certain conditions to the enactment of a valid law, and the facts showing a compliance therewith are required to be entered upon the journals, the decided weight of authority in this country favors the resort to such journals to determine whether the law has been enacted in a constitutional manner." And a large number of cases were cited. We did not then hold, nor do we now hold, that the journals are competent evidence to impeach the enrolled act in respect to every particular required even by the Constitution as a part of the procedure in the passage of bills, nor is it necessary to consider that broad question. But we are satisfied, both upon reason and authority, that they are competent evidence concerning any procedure which the Constitution expressly declares shall be made a matter of journal record; and, as decided in the *Swan Case*, an affirmative showing by the journals in reference to such procedure that the bill was not passed in a constitutional manner is competent to overthrow the ordinary presumption arising from the enrolled act. It is difficult to perceive any sound reason for a provision in the Constitution commanding that the journals shall record the action of the Legislature upon certain essential matters of procedure in the passage of laws, unless they are to be regarded as evidence for some purpose of such action. Otherwise, though stated in the most positive or prohibitive language, the constitutional command that certain procedure shall be followed would operate in practice as a mere check upon the conscience of the Legislature, to be obeyed or not at pleasure, without interference by the courts.

The arguments of counsel have been largely directed to the questions whether the constitutional provision aforesaid respecting the signing of every bill by the presiding officer, and the journal record thereof, is mandatory or directory, and whether the entry, as made, constitutes a sufficient compliance with such

provision. The authorities are not harmonious upon the question whether this particular provision and provisions of the same general character are to be regarded as mandatory. Judge Cooley, in his work on Constitutional Limitations, quite freely expresses his view that constitutional provisions concerning the procedure in the enactment of laws are imperative and mandatory. Referring generally to the question, that eminent author and jurist says: "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a Constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done, and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims and fix those unvarying rules by which all departments of the government must at all times shape their conduct, and, if it descends to prescribing mere rules of order in essential matters, it is lowering the dignity of such an instrument, and usurping the proper province of ordinary legislation. \* \* \* If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only, and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end." *Const. Lim.* (3d Ed.) 78, 79. And further on he states his full concurrence with the statement of Mr. Justice Emmot in *People v. Lawrence*, 36 Barb. 186, that "it will be found, upon full consideration, to be difficult to treat any constitutional provision as merely directory, and not imperative." *Id.* 82. And with reference to the frequent provision for the entering of the yeas and nays upon the journal on the final passage of every bill he says: "Such a provision is designed to serve an important purpose in compelling each member present to assume as well as to feel his due share of responsibility in legislation, and also in furnishing definite and conclusive evidence whether the bill has been passed by the requisite majority or not." *Id.* 140. And again, as though intended to conclude the whole matter: "The fact is this: That whatever constitutional provision can be looked upon as directory merely is very likely to be treated by the Legislature as if it was devoid even of moral obligation, and to be therefore habitually disregarded. To say that a provision is directory seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so, must be conceded; that it is so, we have abundant reason and good authority for saying. If, there-

fore, a constitutional provision is to be enforced at all, it must be treated as mandatory. And if the Legislature habitually disregard it, it seems to us that there is all the more urgent necessity that the courts should enforce it." *Id.* 150.

It is said in *Sutherland on Statutory Construction* that, "in a large majority of the states in which the question has arisen, the courts have held constitutional provisions in reference to parliamentary procedure in legislation to be mandatory." *Suth. Stat. Const.* § 41. In the able and exhaustive brief of counsel for the relator, a large number of cases are cited and reviewed, showing that in 27 states constitutional requirements have been held to be mandatory. In some of the cases the provision considered contained negative or prohibitive words, and in others the language of the provision was merely in the form of a positive mandate. We deem it unnecessary to review the authorities. Although there is to be found respectable authority to the contrary in respect especially to those provisions which do not contain negative or prohibitive words, it seems to be held generally by the preponderating weight of authority that constitutional requirements are mandatory, rather than merely directory. Counsel appearing as *amicus curiæ*, in support of the validity of the statute in question, has industriously collected the cases wherein certain provisions relating to procedure in enacting and authenticating laws have been held to be directory merely. Some of them will be presently referred to. It is to be observed, also, that in a few states, where the theory of mandatory construction is adopted, the courts refuse to go behind the enrolled act to discover whether constitutional requirements have been observed in its passage. This is notably so in Montana as to ordinary legislation, though a different rule seems to have been adopted in respect to proposed constitutional amendments. In Colorado the requirement that the presiding officer shall sign every bill in the presence of the House, and that the fact of signing shall be entered on the journal, was held to be directory. *In re Roberts*, 5 Colo. 525. And the same conclusion was reached in Missouri. *State ex rel. v. Mead*, 71 Mo. 266. The reason upon which those decisions were based was that the provision did not contain negative or prohibitive words, such as "no bill shall become a law, unless," etc., which were found in connection with other provisions. In Montana the silence of the journal as to signing, under a similar constitutional provision, was held insufficient to invalidate an act upon the ground that the journal was not competent to impeach the enrolled act. In Nebraska a statute was upheld, although not signed by the President of the Senate. A journal entry of the fact of signing was not required. But the court held that the required signing was a mere authentication for the information of the ex-



ecutive. *Taylor v. Wilson*, 17 Neb. 88, 22 N. W. 119. See, also, *Cottrell v. State*, 9 Neb. 125, 1 N. W. 1008. In later Nebraska cases, constitutional requirements seem to have been regarded generally as mandatory. *Webster v. Hastings*, 59 Neb. 563, 81 N. W. 510; *State v. B. & M. R. Co.*, 60 Neb. 741, 84 N. W. 254. And in that state the rule is that the journals, by an affirmative showing that an act was not constitutionally enacted, are competent to impeach the enrolled act. *State ex rel. v. Frank*, 61 Neb. 679, 85 N. W. 956. In *State v. B. & M. R. Co.*, supra, it was said: "If the entries found in the journals expressly and unequivocally contradict the evidence furnished by the enrolled bill, the former will prevail." And in *Colorado* a provision other than the one considered in the case of *In re Roberts*, supra, relating to the procedure required in the enactment of laws, was held to be mandatory. *In re House Bill 250* (Colo. Sup.) 57 Pac. 49. In *Kansas* the failure of the Lieutenant Governor, as presiding officer of the Senate, to sign an act as required by the Constitution, was held not to render the act invalid. It was argued in the opinion that, if such a failure operated to invalidate an act, it gave, in effect, to the presiding officer a greater veto power than was possessed by the Governor. *Com'r's v. Higginbotham*, 17 Kan. 74. No journal entry was required. On the other hand, in *Texas* a provision similar to the one we are considering, was held to be mandatory. *Hunt v. State*, 22 Tex. App. 396, 3 S. W. 233.

The largest number of cases dealing with this question seem to have arisen in reference either to a constitutional amendment, a provision for entering on the journal the yeas and nays on the final passage of a bill, or a provision that no bill shall be passed containing more than one subject, which shall be clearly stated in the title. And as to those matters, the weight of authority seems to be that the provisions are mandatory. The evident purpose of section 28 and its requirements may be said to furnish some cogent reasons for holding it to be mandatory. It is obviously intended that the final act, before the bill goes to the Governor, shall be done publicly, and not privately, and that the house shall be apprised of the fact that a certain measure receives the authenticating signature of its presiding officer. Hence, should there be a valid objection, either because of mistake or otherwise, an opportunity would be offered for its presentation. In a certain sense, the act of signing is an act of the body itself, although the signature appended is that of the officer, since the latter in that matter represents the body whose presiding officer he is, and no objection is interposed to his performance of the required act. Under this provision, the officer may not lawfully append his signature to the bill during a recess or adjournment of the body. He may not do so after it has

adjourned finally, and its labors have terminated. That he shall do so in the manner prescribed, it is provided that his act be noted on the journal, which contains a record of only those proceedings occurring while the body is in session. A construction that the provision is merely directory, so far as interference by the courts is concerned, would permit the officer to sign any and all bills in his room, out of the hearing and presence of the house, and even during recess or after final adjournment, and the safeguard intended by the provision might be entirely overthrown. It is a matter of legislative history in this state that during a prolonged struggle in the attempt to elect a United States senator, immediately after the close of a joint session for that purpose, the House of Representatives, upon motion of a member, evidently offered and adopted without reflection, was suddenly adjourned, and that at the time several enrolled acts were upon the Speaker's table, awaiting his official signature. His power to sign them had ceased, and he did not attempt to do so. It is not necessary to enter upon a discussion of the possible result, had the Speaker signed the bills after such adjournment, and had they been delivered to and approved by the Governor, should the constitutional requirement be held directory merely. It may be urged, indeed, that, as the acts had in reality passed the Legislature, no injury could have resulted to the people. But a provision solemnly constituted a part of the fundamental law would have been violated, and it is doubtful whether it could lead to other than disastrous consequences. We are not suggesting that any presiding officer would willfully disobey a plain mandate of the Constitution. Our purpose merely is to refer to the possibility of such an occurrence.

Notwithstanding this discussion of the construction to be given to a constitutional provision, it is not intended to commit the court upon any proposition not essential to the determination of the question before us. And, unless the entries in the journal shall be found insufficient to amount to a compliance with the Constitution in the respect complained of, it will not become necessary to decide whether the provisions of section 28 are mandatory or otherwise. We have deemed it not improper to show the condition of the law as resting upon the adjudged cases, sufficiently, at least, to suggest that, in all events, the far safest course for the Legislature to pursue is to see to it that the requirements are in every particular obeyed. For our present purpose, in continuing the consideration of the questions presented, it may be assumed, without deciding it, that section 28 is a mandatory provision of the Constitution.

As will be observed when we come to an examination of the journal, it is not altogether silent respecting the action of the Speaker in regard to signing the act in controversy, although it is but fair to say that



counsel for the relator so construes the entry in dispute as to practically render it silent as to the signing of that particular act. We think, however, that it must be admitted that there was an attempt, even as to that act, to make an entry in regard to signing. The question therefore arises, what kind of an entry is necessary or sufficient to answer the requirement? Upon this point it is very properly conceded that the entry must amount to a substantial compliance with the constitutional provision, and counsel for relator argues that, to constitute a substantial compliance, the entry must of itself convey to the mind "the fact of signing"; and he says that, if there appears such an entry, then from that record it may be presumed that the signing occurred in the presence of the House after the title of the act had been publicly read. Legislative journals are usually prepared from "loose memoranda made in the pressure of business, and amid the distractions of a numerous assembly." They are not generally prepared by persons skilled in the technical construction of laws. The Constitution itself does not prescribe the language to be employed in noting upon the journal "the fact of signing." It is not reasonably to be expected, therefore, that every one who may be selected to keep the journal will make the entry in the same words, nor perhaps with the same particularity. In construing an entry of this character, it is incumbent upon the court to continue to indulge the general presumption of the regularity of the passage of the act assailed, and the authenticity of the signatures thereto attached. Upon an inspection of the enrolled act, it is found that the Speaker of the House has signed it, and it is admitted that he did sign it. Indeed, the agreed statement of facts stipulates that it was "duly" signed, and counsel who presented this case as *amicus curiæ* lays some stress upon that stipulation. A strict interpretation of the admission possibly might bear out his contention that it covers compliance with the constitutional provision as to manner and time of signing. But we are not inclined, in this very important matter, to rest a conclusion upon an admission as to the performance of a constitutional requirement, when the proof thereof is to be found in a record, of which the courts doubtless ought to take judicial notice, especially when the same is called to their attention, and, notwithstanding a possible admission, the latter is claimed to misrepresent the facts. But the Speaker did sign the enrolled act, and it was approved by the Governor, and deposited in the office designated by law. Hence the legal presumption follows, until overthrown by competent evidence, that it was signed as required by the Constitution, and that the formalities required accompanied such signing.

With these observations, we will proceed to consider the journal entry. At the outset, let it be remarked that the House and Senate

journals show affirmatively that the act in controversy passed the respective bodies by a constitutional majority, and no complaint is made that it was not passed in the form and manner prescribed by the Constitution, and with the proper entries in the journals, until it came to be signed by the Speaker of the House. The bill for the act was introduced in the Senate as "Senate File 42." After its passage and enrollment, it was known as "Senate Enrolled Act No. 26." Bills introduced in the Senate are known as "Senate Files," and those introduced in the House as "House Bills," each file and bill being designated by a certain number. The usual custom observed in the journals of both houses was to refer to them by the use of initials, viz., "S. F." for Senate file, and "H. B." for House bill; and the enrolled acts were similarly designated, viz., "H. E. A." for House enrolled acts, and "S. E. A." for Senate enrolled acts.

The following entry appears in the House journal, at page 474 of the printed copy, as a part of the proceedings of February 16, 1901, which was the last day of the session.

#### "Signing of Bills.

"The Hon. Speaker announced that he was about to sign the following H. E. A.'s: H. E. A. No. 56, entitled House Bill No. 102, by C. E. Shaw—A bill for 'An act to amend and re-enact Sections 891 and 894 of the Revised Statutes, 1899, relating to water commissioners.'" Laws 1901, p. 107, c. 102.

Then follow six other paragraphs, mentioning in each an "H. E. A." by number and title, as well as by number of original bill. And then appears the following, without further explanation:

"S. E. A. No. 20, entitled S. F. No. 26, by Mr. Thomas.

"S. E. A. No. 25, entitled Senate File No. 45, by Mr. Sullivan.

"S. E. A. No. 16, entitled S. F. No. 15, by Mr. Thomas."

Then follow, in the same manner, references to eight other Senate enrolled acts, and then appears the following:

"S. E. A. No. 26, entitled S. F. No. 42, by Mr. McGill—A bill for 'An act to amend and re-enact Sections two thousand one hundred and seventy-eight, two thousand one hundred and eighty, and two thousand one hundred and eighty-three of the Revised Statutes of Eighteen Hundred and Ninety-Nine, and to repeal Sections twenty-one hundred and seventy-nine, twenty-one hundred and eighty-one, twenty-one hundred and eighty-two, twenty-one hundred and eighty-five, and twenty-one hundred and eighty-six of the Revised Statutes of Eighteen Hundred and Ninety-Nine, relating to gaming.'" Laws 1901, p. 68, c. 65.

The entry immediately preceding the heading "Signing of Bills" is a report from the House committee on enrollment, showing the due enrollment of several House bills; and

immediately following the entry as to Senate Enrolled Act No. 26 is an entry showing that, on motion of a member, the House resolved itself into a committee of the whole for the consideration of bills and resolutions on the general file. And the record of proceedings continues for several pages, until final adjournment is recorded. It thus appears that at the time of the announcement of the Speaker, recorded as above mentioned, the House was in session.

Two points are urged against the sufficiency of this entry: First, that a statement that the Speaker announced that he was "about to sign the following," etc., without more, is not a statement or entry of the "fact of signing"; and, second, that the announcement recorded is that he was about to sign the "following H. E. A.'s," and that the entry fails to connect any announcement or act of the Speaker with the Senate enrolled acts which are referred to, following the description of the House enrolled acts.

It must be confessed that the argument possesses considerable force, and that the question is a serious one, and of no little difficulty. In the first place, let us inquire what intention is manifested by the entry? It is evident that the words commencing with the heading "Signing of Bills," and ending with the mention and description of S. E. A. No. 26, are intended as one entry, and upon one subject. This is apparent not only from the context, but from the entries immediately preceding and following it. Throughout the journal the various entries are explained by headings indicating in a general way the subject or matter that is to follow. For example, whenever the House resolved itself into a committee of the whole, the entry thereof is preceded by the heading, "Committee of the Whole." And so we find the following headings: "Privileged Reports," "Introduction, Reading and Reference of Bills," "Communication from the Senate," "Second Reading of Bills," "Bills on Final Passage," etc. And usually, it may be said, the various entries are separated and distinguished by characteristic captions. Immediately preceding the disputed entry appear two reports from the committee on enrollment, under the explanatory title, "Privileged Reports." Directly following the entry in question is the heading "Committee of the Whole." Moreover, in various places in the journal, under the title "Signing of Bills," House enrolled acts and Senate enrolled acts are included in the same announcement, and the entry thereof. At page 472, under such a heading, it is recorded that "Mr. Speaker announced that he was about to sign," and then follows the description, by number and title, of one S. E. A. and several House enrolled acts. It was not the custom, therefore, for the clerk to keep the record of the signing, or the announcement of the Speaker that he was about to sign, the bills originating in the House, in entries separate from those orig-

inating in the Senate. The Speaker may have announced that he was about to sign the following House enrolled acts, and then, as he signed them, read their title and number, and, without any reiteration of his intention, proceeded to announce or read Senate enrolled acts by number and title, after finishing signing those of the House; and, if so, it cannot be doubted but that the House would have naturally understood that he was signing the Senate acts so mentioned. And, in regard to this entry, while it is open to the technical objection that it does not, in so many words, state that the Speaker announced his intention of signing the said list of Senate enrolled acts, such is the natural and reasonable interpretation of the entry. And there is nothing elsewhere in the journal to disturb that interpretation. The list of acts is not associated in that place with any other procedure. No other entry records their signing, or any announcement thereof in the House, and there is absolutely nothing upon which to found any misunderstanding of the record. And, moreover, the Senate journal shows the signing of the same acts on the same day by the president of the Senate.

Therefore we understand and construe the journal as showing by the entry aforesaid that the Speaker announced that he was about to sign, among other bills, Senate Enrolled Act No. 26. What, then, is the force and effect of the entry in respect to the constitutional requirement? An examination of the House journal discloses that under the same title or heading, "Signing of Bills," the action taken was recorded in one of two ways: Either that "the Speaker announced that he was about to sign," or that "the Speaker announced the signing" of, certain described bills or enrolled acts; and the former expression is the one more frequently employed. Now, it is argued with much force that the statement of the announcement that the Speaker is about to sign cannot convey to the mind the fact of signing; that such a statement mentions no more than an announced purpose or intention, which may or may not be carried out; and that the court is not permitted to indulge any presumptions from such an announcement, or the journal entry thereof. And it is argued, also, that the entry is not aided materially by the caption "Signing of Bills." In determining what will constitute a substantial compliance with the requirement, it is difficult, if not impossible, to draw a line of distinction between sufficient and insufficient entries. But the substance should not be sacrificed to the shadow. The journal entry required is not the substance. It is the evidence merely of compliance with the form which has been prescribed by the Constitution. The material things which the Constitution requires is that each bill shall be signed by the presiding officers, and that it shall be so signed in the presence of the respective bodies over which

they preside, and after its title shall have been publicly read. We have already adverted to the objects of this requirement. We know that the bill in question was signed. In the absence of the provision for a journal entry, the presumption would follow that the signing occurred in the required place and manner. It is the manifest design of the requirement to prevent the surreptitious authentication of any measure as the act of the Legislature. This is accomplished by a public reference to the act to be authenticated, and the signing thereof in the presence of the body over which the officer presides. It is impossible to escape the conclusion that when the Speaker announced that he was about to sign a bill, referring to it by number and title, the house was then as fully informed, for all practical purposes, as it would have been by a statement that he was signing or had signed the bill. The act is thereby relieved of all privacy. All opportunity for fraud or deception in regard to the matter is gone, and the beneficent purpose of the substantial requirement is fulfilled. Hence we conceive that the courts should not apply a technical construction to an entry evidently intended as a compliance with the Constitution. Again, we think it is not permissible for the court to eliminate all consideration of the fact that the Speaker's signature appears upon the enrolled act. We are convinced that the court should not discard such an essential and important item of evidence, that will strongly appeal to the ordinary mind, when we come to interpret the effect of the journal entry. And we think this is so without disputing the proposition that the journal is the ultimate and conclusive evidence as to the fact of signing at the time and place required. But the entry itself is to be examined, and its force determined in the light of surrounding circumstances.

As to the mere fact of signing, we think the journal entry is neither the ultimate nor conclusive evidence. The signature attached to the document is the best and most satisfactory evidence of that fact. The journal entry is for a different purpose. The object of the requirement for a journal entry of the fact of signing is clearly the perpetuation of record evidence of the highest character of the time and place when the signing occurred, thus showing that it occurred in compliance with the Constitution. It might be conceded that, in the absence of the Speaker's signature to the enrolled act, the journal record of an announcement that he was "about to sign" would be insufficient to prove that it had been signed. And it might even be conceded that, upon a strict and technical reading, it would not necessarily imply that the announcement was followed by the act of signing. But the word "about" is a relative term. "It may indicate one thing when applied to one state of facts, and another under different circumstances." Von

Lingen v. Davidson (C. C.) 4 Fed. 346. In the case cited, "about to sail," applied to a ship, was held to mean "about ready to sail," and the meaning of the word was held dependent largely upon the understanding and expectation of the parties. And the court said: "Since 'about' may mean a longer or shorter period, according to circumstances, these circumstances tend to show what limitation the parties put upon it in this transaction." That was a case arising under contract, and the word had reference to length of time. Various definitions are given the word. Generally it imports nearness in time, quantity, quality, number, or degree. Bouvier's Law Dict. (Rawle's Revision). But it is also defined by the lexicographers as "concerned in; engaged in; as, what is he about?" Century Dict. "In concern with; engaged in; intent on." Webster's International Dict. If the sufficiency of the entry depends upon the significance of the word "about," the meaning must be determined by reference to the subject-matter. Had the entry stated that the Speaker was about signing the bills, omitting the preposition "to," it would not be difficult to apply the above definitions, as indicating not only a purpose of the Speaker, but his present acts, viz., that he was then engaged in signing the bills. Yet the same language might also indicate that he was merely ready to sign. Now, it may be admitted that to a casual reader there appears to be a slight difference between "about signing" and "about to sign," and that the latter expression is more apt to convey the impression that the act, though immediately contemplated, has not been performed. But it certainly means, if no more, that the act is in immediate contemplation. In the connection where we find it, the expression signifies at least that the Speaker was then (that is to say, immediately, without delay) going to sign. The journals elsewhere disclose that the bills named were then ready for signature, having duly passed both bodies, and been duly and correctly enrolled. Applied to the subject-matter, and considering the caption of the entry, viz., "Signing of Bills," it occurs to us that it is not a strained construction to say that the record denotes that the Speaker was at that time engaged in the act of signing the several bills described in the entry. The caption may not of itself be sufficient to evidence the fact of signing, although it would seem to be persuasive of such fact. Nevertheless, it should not be altogether disregarded. In our opinion, it is to be considered as explanatory of the entry. It tends strongly to unfold the meaning of the words that follow, or the sense in which they were employed.

The case then presents this situation: It is admitted that the enrolled act bears the Speaker's signature, and it appears that with due formality the bill passed both houses by a constitutional majority. It duly reached the Governor and obtained his approval. The

intent is evident to comply with the constitutional requirement of section 28, art. 3, as to journal entry; and the entry made corresponds with the entries made in respect to a large majority of the acts of that Legislature, clearly indicating a knowledge of the requirement, and a belief that it had been complied with. No form of entry is prescribed by the Constitution, and substantial compliance is all that is necessary. The object of the requirement as to entry of the fact of signing on the journal is not so much to furnish evidence of signing, as that the bill was signed at the time and place required. The plain purpose of the provision as to time and manner is the prevention of private or surreptitious action on the part of the presiding officer. In view of the well-settled principle that the contrary must be made clearly to appear before the presumption of regularity arising from an enrolled act, appearing to have been properly signed and approved, can be overthrown, and the conditions under which legislative journals are usually prepared, they ought not to be construed technically, but they should be sustained as sufficient whenever it is possible to reasonably so construe them. In view of the facts, and for the reasons aforesaid, we think that the journal entry in question must be held to amount to a substantial compliance with the Constitution.

It is always a matter of very grave importance to decide upon the constitutionality of an act of the Legislature, and a statute should be held void only where it is shown that there has been a clear violation of the Constitution. Where there is any doubt, it is to be resolved in favor of the law. We have shown that the intention manifested by the journal record in dispute is to show the fact of signing. To overthrow the entry, we are urged to apply a technical interpretation to certain words, so as to render it something less than was intended. The spirit, at least, of the constitutional provision, has been complied with, and we conceive it to be our duty to give every reasonable presumption to the record made by the Legislature. It was said in a Kansas case, "If there is any room to doubt as to what the journals of the Legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid." *State v. Francis*, 26 Kan. 731; *Chesney v. McClintock*, 61 Kan. 94, 58 Pac. 993. The Constitution of Alabama required the fact of signing to be entered on the journal of the House. A Senate message was sent to the House, informing that body that certain bills had been signed by the President of the Senate, and requested thereto the signature of the Speaker of the House. Following the record of the message, under the caption, "Signing Bills," it was entered that the Speaker, in the presence of the House,

immediately after their titles had been publicly read by the clerk, "signed the bills whose titles are set out in the foregoing Senate message." Immediately following that entry was a report of the House committee on enrollment, showing the correct enrollment of divers House bills. And directly following the report appeared the following: "Signing Bills. The Speaker of the House, in the presence of the House, and immediately after their titles had been publicly read by the clerk, signed the bills whose titles are set out in the foregoing message from the Senate." No mention whatever was made of the bills included in the report of the committee. But the court held that as a previous entry had been made, showing the signing of the bills in the Senate message, and, after the report of the committee, no message from the Senate was before the House, but the report of the enrollment committee preceded the disputed entry as to signing bills, the description of the bills signed as those mentioned in the Senate message was an evident clerical misprision, and that the journal entry should be read as if the words "report of the committee on enrolled bills" had been used instead of the words "message from the Senate." And it was said that the journal corrected itself. *O'Hara v. State*, 121 Ala. 28, 25 South. 622. Now, it is evident that it might have been, and doubtless was, argued that the entry there in controversy was a mere repetition of the previous entry as to the Senate bills, and that there was an omission to state the fact of signing as to the bills included in the report of the committee. But the court read the entry in the light of the surrounding circumstances, and so as to carry out what was conceived to have been the intention of the clerk. And the conclusion of the court was stated to be that the journal affirmatively showed the fact of signing a bill in controversy, which was one of those embraced in the report of the committee. In *Miesen v. Canfield*, 64 Minn. 513, 67 N. W. 632, the court said that the courts will give to the entries in the journals the reasonable construction most favorable to the validity of the act, in recognition of the well-settled rule that the evidence must be very strong to overcome the presumption that a bill duly authenticated was constitutionally passed.

For the reasons above set forth, it is not necessary to decide the reserved questions numbered 1 to 4, inclusive.

Upon the fifth question, the decision of the court is that the journals of the Senate and House of Representatives of the Sixth State Legislature show that Senate File 42 was enacted in compliance with the requirements of section 28 of article 3 of the Constitution.

Upon the sixth question, the decision of the court is that chapter 65 of the Laws of 1901 is a valid and constitutionally enacted statute of Wyoming.

The seventh question is answered in the

negative, for the reason that the sections of the Revised Statutes of 1899 named in said question were repealed by said chapter 65 of the Laws of 1901.

CORN, C. J., and KNIGHT, J., concur.

(12 Wyo. 239)

YOUNGER v. HEHN, Warden.

(Supreme Court of Wyoming. Feb. 18, 1904.)

STATUTES—ENACTMENT—SIGNING—LEGISLATIVE RECORD—HABEAS CORPUS—SCOPE—QUESTIONS REVIEWABLE.

1. Laws 1901, p. 114, c. 109, amending Rev. St. 1899, § 3350, relating to the holding of terms of the district court in Big Horn county, and providing for the drawing of jurors to attend such court, was enrolled and signed by the officers of the Senate, whereupon, as shown by the House journal, the Speaker of the House announced that he was about to sign the Senate enrolled act, describing the same. From other entries it appeared that the House was then in session, and that the session was that held on February 4, 1901, and in the journal of both houses a subsequent entry showed a communication from the Governor announcing that he had approved the act. *Held*, that such entries sufficiently showed that the act was in fact signed by the Speaker of the House, as required by Const. art. 3, § 28.

2. Under Rev. St. 1899, § 5496, providing that on habeas corpus it is not permissible to question the correctness of the action of a grand jury or of a petit jury in the trial of a cause, etc., a petitioner for a writ of habeas corpus could not thereunder question the regularity of the method adopted by the court in drawing and summoning the jury by which he was convicted.

3. The attack on a judgment by habeas corpus being collateral, the judgment cannot be impeached for any error or irregularity not affecting the power of the court to act in the case.

Habeas corpus by Ed Younger to obtain his discharge from incarceration as a convict in the State Penitentiary. Writ dismissed.

E. E. Enterline, for plaintiff. J. A. Van Orsdel, Atty. Gen., for respondent.

POTTER, J. This is a habeas corpus proceeding instituted in this court by Ed Younger, who alleges that he is unlawfully restrained of his liberty by the warden of the State Penitentiary at Rawlins, in this state. The writ was issued, and the cause was heard upon the petition and the return of respondent to the writ.

It is admitted that the petitioner is confined in said penitentiary, and that the cause of his restraint is a mittimus issued out of the district court in and for Big Horn county upon a judgment entered in said court on the 2d day of November, 1901, at a term of said court begun and held in said county on the 21st day of October, 1901, in and by which said judgment, the petitioner was sentenced to be confined in the penitentiary for the period of 3½ years. It appears by the allegations of the petition, which are admit-

ted by the return to be true, that on October 18, 1901, an information was filed in the office of the clerk of the district court in and for Big Horn county, charging the plaintiff, Younger, with the crime of grand larceny; that on October 21, 1901, the judge of said court convened the same under and pursuant to an act of the Sixth Legislature, as amendatory of section 3299 of the Revised Statutes of 1899, said act having been known in the proceedings of said Legislature as "Senate File No. 12," and being chapter 6, page 6, of the Session Laws of 1901; that on said last-mentioned date the plaintiff was brought before said court, and an order was made assigning counsel to defend him; that on the following day the plaintiff was again brought before said court, and he entered a plea of not guilty to the information aforesaid; that he was thereafter, during said term of court, tried before a jury impaneled from a trial jury drawn and selected as hereinafter stated, and a verdict of guilty was returned by said jury.

It is further alleged and admitted that prior to October 21, 1901, the judge of said court, by an order entered in vacation, directed a jury to be drawn and summoned by the sheriff, county treasurer, and the clerk of said court, under the provisions of an act of said Sixth Legislature amending section 3350 of the Revised Statutes of 1899, said act being chapter 109, page 114, of the Published Laws of 1901, and having been known as "House Bill No. 60."

It is further alleged in the petition that said legislative acts under which said term of court was held, and the jury therefor drawn and summoned, are unconstitutional and void, and that the said court, in consequence thereof, had no jurisdiction to try and sentence the plaintiff. Those allegations are denied. The validity of said statutes is challenged on two grounds, viz.: First, that the presiding officer of the House of Representatives did not, in the presence of the house, sign the said act; and, second, that the fact of signing was not entered upon the journal of said House. It is admitted by the return that as to chapter 109, which was known as "House Bill No. 60," and was amendatory of the law respecting the drawing of juries, no notation of the signing by the Speaker of the House appears upon the journal. But it is alleged in and by said return that all the proceedings in the convening of said court, and in drawing, summoning, and impaneling the jury, were and are constitutional and valid, and that the statutes authorizing such procedure were in full force and effect. Chapter 6 of the Laws of 1901 provides for the holding of two regular terms of the district court each year in the county of Big Horn, viz., one beginning on the third Monday in April, and one beginning on the third Monday in October. Under the statute previously in force but one term in each year

¶ 1. See Habeas Corpus, vol. 26, Cent. Dig. § 25.

was provided for, which was authorized to be held beginning the third Monday in July. The provision of chapter 109, under which the court acted in drawing the jury for the term, expressly authorizes the judge, in vacation, prior to the convening of a term of court, to make an order directing a trial jury to be drawn and summoned to attend on the first day of the ensuing term. The section of the Revised Statutes sought to be amended by that act did not contain that express authority; but it was provided that "whenever the business of the district court requires the attendance of a trial jury, \* \* \* and no jury is in attendance, the court may make an order directing a trial jury to be drawn and summoned to attend before said court." Rev. St. 1899, § 3350. Hence the contention that, if the amendatory statutes are invalid, the term of court at which plaintiff was tried was not held by authority of law, and the jury was drawn and summoned at a time and in a manner not authorized by the statute then in force. The act known as chapter 6, aforesaid, providing for the holding of the terms of court, was introduced in the Senate of the Sixth State Legislature, and designated as "Senate File No. 12," and was entitled "A bill for an act to amend and re-enact section 3299 of the Revised Statutes of Wyoming, relating to terms of court in the Fourth Judicial District." The act is challenged because, as alleged, the House journal does not show the fact of signing by the Speaker as required by section 28 of article 3 of the Constitution. The enrolled act in the office of the Secretary of State shows that it was in fact signed by the presiding officers of the Senate and House, and approved by the Governor. The journal is not entirely silent respecting its signing in the House. At page 217 of the published house journal appears the following entry: "Signing of Senate File. The Hon. Speaker then announced that he was about to sign Senate Enrolled Act No. 1 entitled: S. F. No. 12 by Mr. Thomas—'A bill for an act to amend and re-enact section 3299 of the Revised Statutes of 1899 of Wyoming, relating to terms of court in the Fourth Judicial District.'" It clearly appears from the preceding and succeeding entries that the House was at the time in session. The entry appears in the session held February 4, 1901. In the Senate journal among the proceedings of that day, it appears that the Senate committee on enrollment reported said bill as correctly enrolled, and that the same was signed in the presence of the Senate by the presiding officer of that body. And in the journal of each body a subsequent entry shows a communication from the Governor announcing that he had approved said act. The sufficiency of an entry in the same language as the one in question to show the fact of signing was considered in the case of *State ex rel. Hynds v. Cahill*, County Clerk,

et al. (this day decided) 75 Pac. 433, and it was held that the entry amounted to a substantial compliance with the constitutional provision invoked, and that the entry did show the fact of signing as required. The question is fully discussed in the opinion in that case, and we refer thereto for a more thorough statement of our views and the reasons therefor. We are of the opinion that the House journal shows the fact of signing, and therefore, so far as anything has been brought to our attention, there is no ground for holding the act invalid or unconstitutional. The act being a valid enactment of the Legislature, the term of court at which the prisoner was tried, convicted, and sentenced was held at a time authorized by law.

It is neither essential nor proper in this case for the court to consider whether the entire failure of the journal to note the fact of signing by the Speaker of the House will invalidate chapter 109, page 114, of the Laws of 1901, relating to the selection of a trial jury. It is not the right of the plaintiff in this proceeding to question the regularity of the method adopted by the court in the drawing and summoning of the jury. The statute provides that on habeas corpus "it is not permissible to question the correctness of the action of a grand jury in finding a bill of indictment, or a petit jury in the trial of a cause, nor of a court or judge when acting within their legitimate province, and in a lawful manner." Rev. St. 1899, § 5496. "The writ of habeas corpus is not in the nature of, nor is it to be used as a substitute for, proceedings in error. A finding or decision of the inferior court, no matter how erroneous, if it does not affect its jurisdiction, is not subject to attack in this collateral proceeding. The office of the writ is to determine the legality of the particular imprisonment, and the facts to be considered in determining that question are jurisdictional facts." *Miskimmins v. Shaver*, Sheriff, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831. In the case of *Ex parte Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513, it was held, in response to the contention of the prisoner that he was indicted by an illegal grand jury in that it was composed of only 15 persons when 17 was the smallest number allowed by law, that the defect did not vitiate the entire proceedings, so that they could be challenged collaterally on habeas corpus, but that it was only a matter of error, to be corrected by proceedings in error. In *McFarland v. Donaldson*, 115 Ga. 567, 41 S. E. 1000, it was said that, even if certain questions raised as to procedure and practice were meritorious, the judgment was not void, but they should have been presented before or during the trial, and the petitioner could have had any adverse rulings thereon reviewed by certiorari. "The writ of habeas corpus does not operate as a writ of certiorari,

and after trial and conviction petitioner cannot complain, in a petition for habeas corpus, of matters to which he could have excepted on the trial." It is so well settled that, the attack on a judgment by habeas corpus being a collateral one, the judgment cannot be impeached for any error or irregularity that does not affect the power of the court to act in the case, it seems unnecessary to cite from or review the abundant authorities on the question. Various errors and irregularities which have been held not reviewable in such a proceeding are set forth in *Church on Habeas Corpus*, at section 364. Among them is the matter of error in the selection of the grand jury, or whether the indictment was ever in fact found by a grand jury. See *Church on Habeas Corpus*, §§ 362, 364. In a case where on appeal it was contended that a grand jury had been selected under an unconstitutional law, the Supreme Court of the United States say: "Some importance is attached to the fact that the court followed an unconstitutional law, or one assumed to be such. We do not see that this is in any wise different from the case in which the court misconstrues the law. The result is the same: Certain persons, under a misconception of the court, are excluded from the grand jury who are qualified to serve on it; but the jury, as actually constituted, is unexceptionable in every other respect. In either case, whether the court is mistaken as to the validity of a law or as to its interpretation, the objection relates so little to the merits of the case that it ought to be taken in the regular order and due course of proceeding." *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857. Suppose that the district court had construed the statute as it appears in the Revised Statutes, so as to permit an order for a jury for the term to be made prior to the convening of the term; and assume such a construction to be erroneous: in relation to the right of plaintiff to here raise the question, would the case be any different under such a state of facts than under the claim now presented, that an alleged invalid law was consulted in making the order? In either event the action of the court might be erroneous, and upon proper objections the prisoner could have preserved his exceptions and had the matter reviewed on error.

The judgment here complained of has already been before this court on appeal, and no complaint as to the jury, or the method or time of its drawing or selection, was made, nor did it appear that any such objection was interposed before or at the trial. It is clear that the objection does not affect the jurisdiction of the court pronouncing the judgment.

For the reasons aforesaid, we think the prisoner is not entitled to be discharged from custody

CORN, C. J., and KNIGHT, J., concur.

(12 Wyo. 299)

RUTHERFORD et al. v. LUCERNE CANAL & POWER CO. et al.

(Supreme Court of Wyoming. Feb. 18, 1904.)

IRRIGATION—ABANDONMENT OF RIGHT—RESTORATION—INJUNCTION—COSTS.

1. Though plaintiffs acquired priority over defendant in a right of way for an irrigation ditch, yet their abandonment of the land for the irrigation of which they appropriated water is an abandonment of the appropriation of water for such land, which is not restored by their subsequent acquisition of other land, not contemplated at the time of the appropriation; so that defendant's use of an irrigation ditch conflicting with such irrigation ditch will not be enjoined.

2. Under Rev. St. 1899, § 3792, providing that the court may apportion costs as it may adjudge right and equitable, refusal to award costs to either party will not be disturbed unless abuse of discretion is shown.

Error to District Court, Laramie County; Richard H. Scott, Judge.

Suit by Alexander Rutherford and others against the Lucerne Canal & Power Company and D. A. Wurcheher, water commissioner. Judgment was adverse to plaintiffs, and they bring error. Affirmed.

W. R. Stoll, for plaintiffs in error. Gibson Clark, for defendants in error.

CORN, C. J. For the sake of convenience, the plaintiffs in error are spoken of as the "plaintiffs" and the defendant in error the Lucerne Canal & Power Company as the "defendant," the action having been dismissed as to the other defendant. The controversy is concerning a right of way over a strip of ground now occupied by the Lucerne canal of the defendant, and through which defendant is conveying water from the North Platte river to irrigate certain of its lands. The prayer of the plaintiffs' petition is that the defendant be restrained from flowing or using any water from the North Platte river in or by means of its said Lucerne canal, and from keeping possession of, or claiming any title or right of way to, any portion of the Burbank ditch (the name by which plaintiffs' ditch is known), or its right of way, at any and all places or points of conflict between it and the said Lucerne canal; and to compel the defendant to yield up the control and possession of the said Burbank ditch and the said right of way to the plaintiffs at any and all such conflicting points and places. The district court denied the relief sought, dismissed the action, and decreed that the plaintiffs and defendants each pay their own costs. Both the plaintiffs and defendant except to the decision of the court; the latter upon the ground that the court erred in refusing to give judgment in its favor for costs.

Prior to 1889 one Henry Burbank partially constructed what he recorded as the Platte Bluffs ditch upon a line substantially identical with the course now pursued by the ditch of plaintiffs. In 1889 Burbank left

the country, the ditch being incomplete, and water never having been turned into any part of it. Being indebted to George A. Draper, then a merchant in Cheyenne, he turned over to Draper his property and interests in that section, and Draper claims that such transfer included the ditch, water right, etc.; and he testifies that, to the best of his recollection, he received some instrument in the nature of a bill of sale from Burbank evidencing the transfer to him of the property, including the ditch and water right. But the instrument was not in evidence, no effort was made to prove its contents, the plaintiffs do not attempt to trace their title to Burbank, and the Platte Bluffs ditch is conceded to have been abandoned, and is treated by all the parties to this action as an abandoned ditch. On November 6, 1891, Draper filed in the office of the state engineer an application to appropriate water from the North Platte river through a ditch called the "Burbank Ditch," the course of the proposed ditch as described in the application, though being in the same locality, and having the same general direction, not being substantially or approximately upon the same line as the old Platte Bluffs ditch of Burbank. Indeed, John Hunton, the surveyor who ran the line and who drew the application for Draper, testifies that it did not cover, and was not intended to cover, the line of the latter, and that it did not approach very near to it except at the point of controversy between plaintiffs and defendant, where it was some 30 to 40 feet from it horizontally and about 13 feet vertically above it. But there was subsequently filed in the engineer's office a plat which it is claimed located it along the line of the Platte Bluffs ditch. Who filed this plat, or when it was filed, does not clearly appear from the evidence. But from the memoranda in the engineer's office it seems to have been filed in pursuance of the Draper application, and, in view of the file marks upon it, in connection with what was shown to be the practice of the office in such matters, it was perhaps fair to infer that it was filed not longer, or not much longer, than six months from the time of the filing of the Draper application on November 6, 1891. And the court below, in its written findings, found that it was filed on or about May 6, 1892, as part of the Draper application of November 6, 1891, and that it covered in part, and was intended to cover in part, the line of the Platte Bluffs ditch; but the court did not find what part it covered or was intended to cover. The law as it stood at the time of the transaction did not require a plat to be filed with the application, but permitted it to be filed within six months afterwards. Subsequent to the filing of this application, Draper sold to Alexander Rutherford all his title and interest in this so-called Burbank ditch; Rutherford and members of his family, the plaintiffs in this action, having in the meantime

acquired possession of certain lands along its course by entry made under the homestead and desert land laws of the United States. And the plaintiffs base their rights in this action on this purchase from Draper. Rutherford claims, and so testifies, that he bought from Draper on November 8, 1891. But all the evidence tending to show that he made the purchase prior to February 17, 1893, is of very doubtful character, and much of it is open to very grave suspicion. In support of his statement he introduced in evidence his check to Draper for \$75, which he stated was the first payment on the purchase price of \$325. This check was dated November 8, 1891; and he also introduced in evidence a receipt of the same date, purporting to be signed by Draper, and reciting the receipt of that amount "in part payment for the Burbank ditch." The exhibits themselves, instead of a copy or transcript, under our practice, are before us in this court, and it requires only a slight examination of this check to show conclusively that it was dated November 5th, the 5 having been carefully converted into an 8; and the stamp of the bank shows that it was paid on November 5th. There was evidence tending to show that the signature to the receipt was not Draper's at all, though Draper himself thought it was. Rutherford testified in detail as to the giving of the check and receipt; that it was at the desk at the back part of Draper's store, who was then in the hardware business in Cheyenne; that the store was open for business, and others going in and out; and that he was about the streets on that day, and that the banks and other business houses in town seemed to be open for business. And yet the evidence showed that the 8th of November was Sunday, upon which day banks, stores, and other like business places were notoriously and invariably kept closed.

The manufacturing of evidence in support of a claim does not necessarily prove the claim to be fraudulent. But November 5th, the day the check was given, was the day before Draper made his application, and before he had any ownership or interest in any ditch named the "Burbank." There is no intimation anywhere in the evidence that the application was made as a result of, or with a view to, or in connection with the sale to Rutherford. But Rutherford testifies that before he paid the money to Draper they went together, and examined the records in the office of the state engineer, and he found that Draper had some claim and right to the ditch. As Draper's application was not filed until November 6th, it must be inferred that such examination was after that time. As it is established by the evidence that on November 5th Rutherford did purchase from Draper some improvements, and the latter did relinquish a timber culture entry for his benefit, and as Draper testifies that Rutherford always paid by check, so far as he can recall,



It seems probable the check introduced in evidence was in payment for the improvements, and had no connection in any way with the sale of the ditch. And, if so, the apocryphal receipt of November 8th (Sunday), in which is recited a payment on the ditch, is left suspended without any support whatever. Moreover, John Hunton, who ran the line of the Burbank ditch upon which Draper's application was based, who wrote the application, and who was interested with Draper in the matter, testifies that Rutherford never claimed, in his presence, to own the Burbank ditch, prior to February 23, 1893; that on that day Rutherford told him he had bought it from Draper. And Rutherford admits that he never told any one he owned the ditch prior to the execution of the bill of sale by Draper. And although the Lucerne canal people had made a preliminary survey in the early part of 1892, and in October, 1892, had made another survey, finally locating the canal along the line where it was subsequently constructed, and which included the points in controversy in this case, and although they had cross-sectioned the line in February, 1893, preparatory to the construction of the canal, Rutherford having full knowledge of their movements, yet, as he admits, he never notified them in any way that they were interfering with his right of way until in March, 1893, after he had obtained the bill of sale from Draper. The plaintiffs, in 1891, had obtained a possessory right under the laws of the United States to lands lying under the old Platte Bluffs ditch, and in 1892 had done some slight work in cleaning out portions of the ditch. In November, 1892, they also had a survey made, but only of the upper portion, and entirely west of the points of conflict in this case. The evidence indicates very clearly that at this time the plaintiffs were proposing to provide a ditch to convey water to their lands, but until some time in February, 1893, when they had a survey made of the entire line, the evidence is very slight and unsatisfactory that they made any claim to ownership of the Draper appropriation, or claimed any superior or exclusive right to the line occupied by the abandoned Platte Bluffs ditch, or any ownership of the right of way at the points of conflict. In the meantime, about the 1st of April, 1892, James H. Pratt, or the Pratt & Ferris Cattle Company, had the line of the Lucerne canal surveyed and marked by stakes. This line included and covered the points of conflict now in controversy, and the canal was subsequently constructed along this line practically without change. In the following October the line was cross-sectioned. Work was begun some time prior to the 13th of December in the same year, and diligently prosecuted until the water was finally turned in about the 5th of July, 1894. On the 21st day of February, 1893, James H. Pratt filed an application to divert water through a ditch or canal

described in the application as the Lucerne Canal & Power Company, and on April 21, 1893, the certificate of incorporation of the Lucerne Canal & Power Company was filed, Pratt being one of the incorporators. In the articles the permit to Pratt is described, and the object and purpose of the incorporation stated to be to utilize such permit. Pratt never executed any conveyance of this water right to the company, and, so far as the evidence shows, never even verbally sold, gave, or in any way transferred it to them. The plaintiffs insist that the company therefore are not shown to be the owners of any water right, have no occasion for any ditch or right of way, and have no standing in court whatever in this case. But we look upon the omission as unimportant, and as at most a mere irregularity. Pratt was a mere trustee. He held at most the mere legal title. The purpose for which the permit was obtained, and that it was utilized as intended, are clearly shown in the application itself, in the articles of incorporation, and in the acts of all the parties to the transaction. The state, which confers the right to appropriate, has not complained, or shown any disposition to declare a forfeiture because Pratt has not in person complied with the terms of his permit by the construction of the proposed canal within the time limited, but has acquiesced in the method by which he and his associates utilized his appropriation. That the mere legal title rests in Pratt as between him and the company is not a circumstance of which the plaintiffs can take any advantage. In November, 1892, the plaintiffs had made a survey of the upper end of their ditch, and some time in February, 1893, they made a survey of the entire length of the line of the abandoned Platte Bluffs ditch, including the points of conflict. Prior to this, in October, 1892, the defendant had permanently located its line over the points of conflict; but, while its work was progressing on other parts, it had done no work at the points of conflict when the February survey of plaintiffs was made. But in March work was begun at these points, and was prosecuted with such diligence along the whole line that the canal was completed and water conveyed through it early in July, 1894. It appears also that the defendant in June, 1894, complied with the provisions of the statutes of the United States with reference to obtaining a right of way over the public lands, and that in December the map filed as a part of the proceedings was approved by the Secretary of the Interior. Certain of the lands of plaintiffs proposed to be irrigated by means of their ditch lie entirely above and to the west of the points of conflict. Their ditch was completed and water conveyed through it in 1896 to these lands, and they were still so irrigated at the time of the trial of this cause. In the summer of 1893 and the following winter the plaintiffs attempted to construct their ditch, at points

where the conflict occurred, to convey water to their lands lying below and to the east of the conflict in section 32, township 26, range 63, but were unable to do so by reason of the fact that the strip of ground in dispute was already occupied by the Lucerne canal and in the possession of the defendant. Subsequently, and prior to July 17, 1899, the plaintiffs abandoned any attempt to irrigate their lands in section 32, relinquished all claim to them, and they reverted to the government of the United States.

Upon the evidence, thus recited at some length, we think it is at least doubtful if the plaintiffs acquired any priority over the defendant in the right of way in controversy. The court below found, however, that the plaintiffs did acquire such priority, and that the construction of the canal of defendants at the points of conflict was in violation of the rights of the plaintiffs, but decided that the abandonment and relinquishment of the lands below the points of conflict operated as an abandonment of so much of the water as was required for the irrigation of such lands, and, as against the defendant, of so much of their right of way as was to be used by them only for the purpose of conveying the water to such abandoned lands, which comprehended all the right of way in controversy; and that the plaintiffs were not entitled to the relief sought. And, accepting the finding of the district court, which we think is the view most favorable to the plaintiffs that could reasonably be taken under the evidence, we think it was impossible for the court to escape the conclusion reached. Conceding, therefore, that the plaintiffs were entitled to the right of way, and that their failure and inability to convey water to their lands in section 32 was solely due to the unauthorized acts of the defendant, we think it is apparent that by the abandonment of such lands they also abandoned the appropriation of water for the purpose of their irrigation, and at the same time any right of way for the conveyance of the water to such lands. An action for damages would be a complete and adequate remedy for the alleged injury. It is not a case of repeated and continuing trespasses upon the possession of plaintiffs, but the injury was complete. Moreover, the plaintiffs having abandoned their lands and their appurtenant water right, neither an injunction against the defendant nor a restoration to the plaintiffs of the disputed right of way would afford any relief to the plaintiffs, as it would not restore to them either their lands or their water right. The evidence shows that by the canal of the defendant 4,200 acres of land, otherwise valueless, have been reclaimed and made productive, and now supply homes for from 80 to 100 persons. We cannot conceive that a court of equity would, by its decree, shut off the water from these lands, relegate them to their desert condition, and destroy the homes that depend upon this canal for their existence, in order

to restore to plaintiffs a right of way, which, even though wrongfully taken from them in the first place, they can no longer utilize in compliance with the conditions under which it was obtained and held. It is true that in 1899, prior to the institution of this suit, but some three years after the relinquishment of their lands in section 32, the plaintiffs obtained title to other lands in that vicinity, and which, as we infer from the evidence, can only be reclaimed by water brought over the right of way in controversy. But upon no principle can the subsequent acquisition of these lands, in the absence of any proof that such acquisition was contemplated at the time of the appropriation, be held to restore the appropriation or right of way of plaintiffs forfeited in 1896. The obtaining of a water right and right of way for the reclamation of such after-acquired lands presents a new question, entirely outside of the issues in this case.

The defendant complains that the court refused to give judgment in its favor for costs. But we think this suit comes fairly within the provisions of section 3792, Rev. St. 1899, which authorizes the court to award and tax costs and apportion them between the parties as it may adjudge to be right and equitable; and we cannot say that its disposal of the question was such an abuse of discretion as would justify the interference of this court.

The judgment will be affirmed. Judgment affirmed.

POTTER, J., concurs.

(12 Wyo. 315)

**FIDELITY SAV. ASS'N v. BANK OF COMMERCE et al.**

(Supreme Court of Wyoming. Feb. 18, 1904.)  
BUILDING AND LOAN ASSOCIATION—LOANS—  
PREMIUMS—STOCK DUES—INEQUITABLE CONTRACT—FINES.

1. Whether a premium which a building and loan association requires a member who borrows of it to pay in monthly installments for the privilege of receiving the loan is part of the interest is immaterial, no usury statute being violated.

2. A member of a building and loan association, who assigns to it his shares of stock in it as collateral security for the loan from it, still continues to be a member of it; so that payments of dues on stock are not ipso facto partial payments on the loan, with the result of periodically reducing the interest to be paid thereon.

3. A contract by which a member of a building and loan association borrows and receives of it \$1,500, agreeing to pay interest and premium, amounting to \$108 a year, besides the dues on his shares, profits being credited to shares, is not so inequitable and unconscionable that it will not be enforced.

4. Fines provided by the by-laws and certificate of stock of a building and loan association and by the note of a borrowing member, while part of the liability of the member, do not become part of the mortgage debt, so as to make the mortgage property subject thereto, in the absence of provision therefor in the mortgage.

5. Fines against stock of a building and loan association for default in payment of stock dues.

if reasonable, are allowable to the association, in determining the withdrawal value of the stock, to be credited on a mortgage debt to it, they being made by the by-laws a lien on the stock.

6. Fines for default in payments of dues on stock of a building and loan association may not be deducted in determining the withdrawal value of the stock, it merely appearing that certain defaults occurred and that fines were charged, but not being shown for what they were charged.

7. Under the by-laws of a building and loan association, providing that a failure to pay monthly dues on stock prior to a certain day of the month shall subject the members to a fine of 10 cents for each share in arrears for every month thereafter during delinquency, stock cannot at one time be subject to fines for default in payment of the dues for several months.

Error to District Court, Sheridan County; Joseph L. Stotts, Judge.

Suit by the Bank of Commerce against the Fidelity Savings Association to redeem from a mortgage, Anna L. Wrighter and another being made parties on the association filing a cross-petition for foreclosure. Judgment was adverse to the association, and it brings error. Reversed.

Lonabaugh, Blake & Hamilton and Erastus W. Smith, for plaintiff in error. W. S. Metz, for defendants in error.

POTTER, J. The Bank of Commerce, a corporation organized under the laws of this state, brought this suit against the Fidelity Savings Association, a corporation organized under the laws of the state of Colorado, to redeem from a mortgage held by the defendant upon certain real estate in Sheridan county, in this state, which property had been conveyed to the plaintiff by Anna L. Wrighter and William D. Wrighter, the mortgagors. Prior to the suit plaintiff had tendered to defendant, in payment of the indebtedness secured by the mortgage, the sum of \$750, and demanded a discharge of the indebtedness and release of the mortgage, which tender was refused. Upon the filing of an answer and cross-petition praying for the foreclosure of the mortgage, the debtors, Anna L. Wrighter and William D. Wrighter, were ordered to be brought in as parties to the action, and service was obtained upon them by publication, they having become nonresidents of the state. They did not appear, and were adjudged to be in default.

It appears that the defendant below, plaintiff in error here, was originally incorporated in 1889, under the laws of Colorado, by the name of "The Fidelity Building & Loan Association." The objects of the association, as recited in its certificate of incorporation, were "for the purpose of assisting its members in saving and investing their money by issuing to them the stock of this association and receiving payment therefor in full or in installments in such manner as may be provided by the by-laws, and loaning them the funds thus accumulated for the purpose of

buying, building upon and otherwise improving real estate, or for other purposes; such loans to be secured by a trust deed, or mortgage, which shall be a first lien upon real estate or upon the stock of the borrowing members, or upon both as the case may be." The capital stock was fixed at \$2,000,000, to be divided into 20,000 shares of \$100 each. The principal place of business was stated to be the city of Denver, in the state of Colorado.

In 1896 certain amendments to the certificate of incorporation were filed. The name was changed to that of "The Fidelity Savings Association," and the objects were amended to read as follows: "The objects for which our said association is formed and incorporated are for the accumulation and loan of funds for the purpose of assisting shareholders in saving and investing their money on the plan of issuing to them shares of the capital stock of this association, and permitting such shareholders to pay therefor in full at the time of purchase thereof, or by permitting payments therefor in part or in installments at such times and in such manner and on such plan as to the payment, and as to the plan and extent to which said shares shall participate in the profits of the association, as shall be provided in the by-laws of the association and in the certificate for such shares of stock, as issued by our said association; our said association shall have the power to purchase, lease, sell and convey real estate, to receive money on loan or deposit, to borrow money on long time or on short time, to lend money to its shareholders on the basis of first liens upon real estate, or upon the shares of the capital stock of the association, or upon either or both of such securities, or upon such other securities as by the by-laws provided or by the board of directors determined; and do all other things authorized to be done by corporations known as building and loan associations; and also to do all things and possess all other powers and privileges as may hereafter be authorized by law." The capital stock was increased to \$10,000,000, each share being of the par value of \$100.

From certain sections of the statutes of the state of Colorado introduced in evidence, it appears that it was provided by the laws of that state as follows: "That all associations organized under the general incorporation laws of this state, for the purpose of accumulation and loan of funds, the erection of buildings, the acquiring of homes, and the purchase, lease and sale of real estate for the mutual benefit of its members, shall be permitted to conduct such business with its members, exclusively, and may receive money in payment for its shares of stock in such manner and upon such terms as are prescribed by its by-laws; may receive money on loan or on deposit, and may lend money to its members upon the stock of such corporation, upon real estate or upon such other security

as by the by-laws provided, or by the board of directors determined; and all contracts between such companies and their members shall be deemed valid and binding in law." Mills' Ann. St. Colo. § 279.

The next succeeding section of the Colorado statutes (section 280) provided that the shares of stock of such a corporation shall not be more than \$200 each, installments of which stock shall be paid at such time and at such place as the by-laws shall appoint; "every share of stock shall be subject to a lien for the payment of unpaid installments and other charges incurred thereon under the provisions of the charter and by-laws, and the by-laws may prescribe the form and manner of enforcing such lien. New shares of stock may be issued in lieu of the shares withdrawn or forfeited; the stock may be issued in one or successive series, in such amounts as the articles of incorporation or the board of directors may determine, and any shareholder wishing to withdraw from said corporation shall have power to do so by giving thirty days' notice of his or her intention to withdraw, when he or she shall be entitled to receive the amount provided by the by-laws or determined by the board of directors, less all fines and other charges: provided, that at no time shall more than one-half of the funds in the treasury of the corporation be applicable to the demands of withdrawing shareholders, without the consent of the board of directors, and that no shareholder shall be entitled to withdraw whose stock is held in pledge for security."

Provision is made for the liquidation of the stock of deceased shareholders (section 281), and by section 282 it is provided that "shares of stock upon which a loan has been made may be paid in full by the borrower in such manner and upon such terms as provided in the by-laws; and when so paid such share or shares of stock may be cancelled and such indebtedness liquidated, to the amount in value of said share or shares of stock so paid."

Section 2253 of the Colorado statutes on the subject of interest was also introduced in evidence, viz.: "The parties to any bond, bill or promissory note, or other instrument of writing, may stipulate therein for the payment of a greater or higher rate of interest than eight per centum per annum, and any such stipulation may be enforced in any court of competent jurisdiction in the state."

The by-laws of the association were put in evidence, and from them we find the following provisions, among others:

#### "Article I.

"Section 1. Any person, male or female, may become a member of the Fidelity Building and Loan Association by subscribing for, or in any manner becoming the legal holder of one or more of the shares of stock issued by the association.

"Sec. 2. Every stockholder shall enjoy all the rights and privileges of membership for and during the period such share or shares shall remain in force.

#### "Article II.

"Section 1. Monthly Payment Stocks. The board of directors may, from time to time provide by resolution for the issue of such monthly payments and other shares to be paid for in regular periodical installments as they shall find best intended to advance the interests of the association. All certificates for shares of stock issued under the provisions of this section shall contain a brief statement of the terms of issue and of the withdrawal value at any time before, as well as at the period of maturity. All such stock shall be deemed fully matured when the credits thereto, with earnings added, shall equal the face value of the stock."

"Sec. 3. Stock Assigned. Any member may sell and assign the shares subject to the lien of the association for any balances or charges due, on the form furnished by the association therefor, by returning the certificate to the association for transfer upon the books of the association, and paying a transfer fee of \$1.00 for each certificate. Provided, that the borrowers can only transfer their stock to a purchaser of the real estate securing the loan, and provided further, that no transfer will be valid unless made on the books of the association."

"Sec. 5. Fines. Should any member fail to make the monthly payments on stock held by him for any month prior to the tenth day of month after due, such member shall be fined ten cents for each share in arrears, and the same for every month thereafter during such delinquency. Provided that all stock shall be subject to a lien for the payment of unpaid fines, and the same may at any time be charged off against the stock and deducted from the credits thereon."

#### "Article IV.

"Sec. 2. Dividends. All the earnings of the association, after paying interest, losses, if any, in excess of contingent fund, and the guaranteed dividends on non-participating stock, shall be distributed among and credited to the several classes of participating stock, giving to each share its proportionate amount of the profits earned, taking into account the amount earned and standing to the credit of such stock, and the time the association has had the use of the money.

"Sec. 3. Contingent Fund. This fund shall consist of such money as may be set aside therefor out of the expense fund; of all advance cash premiums charged on loans, and an amount not to exceed one per cent. per annum of the amount of loans outstanding, as shall be set aside by the board of directors as a contingent fund, to be used to pay losses, if any, and such bills, costs, damages

or liabilities for which the other funds of the association shall be inadequate or make no provision.

"Sec. 4. Expense Limited. The expense fund shall consist of all fees charged by the association and an amount equal to one and one-fifth per cent. per annum of the par value of all prepaid and installment shares paying sixty-five cents or more per share, and of one per cent. of the par value of all monthly payment stock paying a less sum per month per share. Which annual expense shall be charged in such manner that each share will contribute pro rata.

#### "Article V.

"Section 1. Real Estate Loans. All money in the loan fund shall be loaned under the supervision of the board of directors to those members offering ample real estate security. No loan shall be made to exceed 50 per cent. of the value of the security offered. Every member obtaining a loan shall hold and assign to the association at least one share for every \$100.00 of the loan granted, and shall be required to make the regular payments thereon promptly as the same become due, which stock shall be held as collateral security until the loan is paid. The maturity of such stock shall cancel the loan and the excess of stock held by the member, if any, shall be paid to the holder of the certificate. The rate of interest shall be six per cent. per annum. Each borrower shall also pay a monthly premium in such amount as the note and mortgage or trust deed shall provide. The minimum rate of premium and the premium plan may from time to time be established by the board of directors. Interest and premium shall be due and payable monthly in advance at the home office of association, on or before the last day of each month from the date of the loan until fully paid. Loans shall be made in the order the applications are filed with the secretary, provided that the security is sufficient. No loan shall be made unless approved by a majority of the board of directors."

"Sec. 3. The borrower shall comply with all rules and regulations required by the board of directors and pay the expenses of making the loan, furnish an abstract of title showing the lien of the association to be the first and best lien against the property, together with the certificate of the attorney of the local board, showing search of record and the condition of the title. The member shall pay all recording fees and other necessary expenses of closing the loan, together with a fee of \$5.00 on every loan less than \$500.00 or of \$10.00 on every loan of \$500.00 or more, for each abstract examined, to cover cost of preparing papers and examining title at the home office. Provided that the board of directors may from time to time provide that an advance cash premium in such an amount as they shall elect may be charged

on all loans and paid into the contingent fund."

"Sec. 5. Loan Fines. Should a borrowing member fail to meet the payments of interest or premium, a fine shall be charged of ten cents for every \$100.00 borrowed per month, for each month during delinquency.

"Sec. 6. Stock Assigned. No borrowing member shall be permitted to withdraw the shares assigned as collateral to the loan until the loan or advance shall have been repaid to the association. Borrowers can only assign the shares held by the association as collateral, to a purchaser of such shares and of the property securing the debt due the association, and no such assignment of stock shall be accepted by the association until the assignee shall have agreed to assume and pay such indebtedness on the form furnished by the association.

"Sec. 7. Foreclosures. The Board of Directors may at any time after a loan has been in default for one month for non-payment of the interest or premium, fines or dues, direct the Attorney to at once commence proceedings for the collection of the debt and foreclosure of the mortgage or trust deed securing the same."

#### "Article X.

"Sec. 6. The certificates and terms and conditions of shares of this association, the by-laws and applications for membership, with the resolution of the board of directors providing the terms of any stock issue, shall form the contract. Provided, further, that all executed papers connected with any loan form a part of the contract.

"Sec. 7. In case of the neglect of any borrower to insure the improvements on property or pay taxes on realty pledged to this association as security for advances, the secretary may withdraw from the funds standing to the credit of the shares transferred as security a sum sufficient to cover such insurance or taxes and the expense of paying the same.

"Sec. 8. Payments to the association shall be applied first to pay fines, interest, premiums, losses and other charges past due, if any; next, to the payment of dues on stock; and, lastly, as advance payments."

August 24, 1894, William D. Wrighter, of Sheridan, in this state, became the owner of 15 shares of monthly payment stock of said defendant association, evidenced by a certificate of that date numbered 9,446. The certificate stated that said Wrighter was the holder of the said number of shares, and a member of said association. Under the date of September 21, 1894, said Wrighter, by a writing upon the certificate, or on the back thereof, assigned and transferred all his right, title, and interest in said shares unto Anna L. Wrighter. A certificate dated August 24, 1894, was issued for the same number of shares to said Anna L. Wrighter, and

that certificate bore the same number as the original certificate to W. D. Wrighter. There can be no doubt, under the evidence, that this certificate was issued in place of and as a substitute for the certificate issued to W. D. Wrighter, and for the same shares; and, although the assignment was not actually made according to its date until September 21st, the new certificate was given the same date as the one assigned. The assistant manager of the defendant association testified that an application in writing for the shares was originally made by W. D. Wrighter, and it was admitted in evidence as "Defendant's Exhibit No. 4," but it is not incorporated in the record, doubtless through some inadvertence. The same witness testified that the application was accepted, and a certificate issued in regular form. That certificate was admitted in evidence, and is in the record. He further testified that said certificate was subsequently transferred to Anna L. Wrighter, and that a new certificate for the same stock was issued to said assignee, and that document was also admitted in evidence.

Each certificate of stock contained stipulations pursuant to the by-laws. The shareholder agreed to pay the association 50 cents per month on every \$100 of the face value of the certificate (the face value being \$1,500), commencing with the month after the date of the certificate; and it was provided that, whenever the payments aggregated \$45 per share, no further payments need be made, except, however, that the regular monthly payments were required until maturity if the shares should be pledged as collateral to a loan, unless waived by the board of directors at a regular meeting. This provision, doubtless, had reference to a by-law provision as to prepaid stock; but it is immaterial to this controversy, since the shares were pledged. It was further provided, on the face of the certificate, that a failure to make payments when due would subject the stock to a fine of 10 cents per share each month during delinquency; that the shares could be withdrawn by paying a reserve fee of \$2.50 per share at any time on 30 days' notice, whereupon the holder would receive all money paid on the stock (except fines), with 6 per cent. interest if withdrawn within three years, or with 7 per cent. interest if withdrawn within five years, or with 8 per cent. interest if withdrawn thereafter before the period of maturity, and at maturity with full profits earned and standing to the credit of the stock. It was, however, provided that only one-half of the receipts of the association for any month could be used to pay withdrawals without the consent of the directors. It was also stipulated on the face of the certificate that the stock might be transferred at any time by returning the certificate to the home office for transfer on the books of the association, and

in no other manner; and that the certificate giving the terms and conditions of the shares, the by-laws, and the application for membership constitute the contract, and that all executed papers connected with any loan form part of the contract.

August 27, 1894, the said Anna L. Wrighter subscribed and made oath to a paper entitled "Application for City Real Estate Loan." In that instrument she applied to the defendant association for a loan of \$1,500, as a member of the association, to be payable in monthly installments, and bear interest and premiums as provided by the rules and by-laws of the association. As security she agreed to assign 15 shares of stock in the association, and deliver the certificate to the association to be held as collateral to the loan; and also to give a first mortgage or trust deed, in satisfactory form, on certain real estate therein described, which was represented as occupied by the applicant and used as a residence. It appears from the evidence that the application was accepted, and Mrs. Wrighter received \$1,500 from the association, and on September 28, 1894, she and her husband, William D. Wrighter, executed and delivered to defendant association a promissory note or contract, as follows: "\$1500.00. Denver, Colorado, Sept. 26th, 1894. On or before Ten Years after date, We, promise to pay to The Fidelity Building and Loan Association, at its principal office in Denver, Colorado, the sum of Fifteen Hundred Dollars, with interest thereon at the rate of six per cent. per annum; together with a monthly premium on said sum of sixty cents on every hundred dollars thereof; interest and premium being payable monthly on the last day of each and every month until this note is fully paid. This note is given in consideration of a loan made by the payee to the maker hereof, who is a member of said Association and the holder of 15 (M. P.) Shares of Stock in said Association, evidenced by certificate No. 9446, which are hereby assigned as collateral to the said loan. Now Therefore, the maker hereof covenants and agrees to pay the interest and premium upon said sum, and the monthly payments upon said shares promptly, as the same becomes due and payable in installments of not less than Twenty four (24.00) Dollars per month, payable in advance on the first day of every month, commencing with Date and hereafter, until at the maturity of said shares the proceeds thereof shall be applied to repay the loan. If any interest or premium, evidenced by this note, or monthly payment upon the shares herein described, shall remain unpaid for sixty days after the same becomes due and payable, then the principal sum, as evidenced hereby, may at once, without notice, become due and payable at the option of said Association. And if any payment evidenced hereby is not paid when due, fines shall be added

as provided by the By-laws of The Fidelity Building and Loan Association, aforesaid, together with all costs of collection, including an attorney's fee of ten per cent., if collected by an attorney, foreclosure proceedings, or by suit at law. [Signed] Annie L. Wrighter. William D. Wrighter." On the same date said parties executed to the defendant association a mortgage covering the premises in controversy. The mortgage contains a provision authorizing foreclosure at public sale in case of default; and out of the proceeds the association is authorized to retain the principal, premium, and interest, costs and expenses of sale, and an attorney fee of \$100; and said attorney fee, it is provided, shall be taxed as costs in any proceeding in equity to foreclose the mortgage.

The cause was tried to the court in February, 1901, and a decree was entered March 11, 1901, by which the court found upon the facts substantially as follows: That Annie L. Wrighter was the owner in fee simple of the real estate in question on September 26, 1894, and that she, with William D. Wrighter, on that date made, executed, and delivered to the defendant association the note and mortgage aforesaid. That prior thereto said Annie L. Wrighter made application to the association for a loan, and that the entire contract in evidence between her and the association was solely a contract of loan, and that thereby the association agreed to loan said money to her at the rate of 6 per cent. per annum. That the association pretended to issue to her 15 shares of stock, but that they were solely the means to secure the loan, and that the said stock was at all times in the possession of the association, and was never delivered to her, and was at all times the property of the association, and that the premium bid was for the sole purpose of securing the loan. That prior to the loan William D. Wrighter had applied for membership in the association, and obtained a certificate for 15 shares of stock, which was assigned by him to his wife, and a new certificate issued in her name; said stock providing for the payment of 50 cents per share, in addition to payments of interest and premium, making a total monthly payment of \$24. That the aggregate of all payments made by said Annie L. Wrighter prior to August 15, 1899, was \$1,478.30. That said loan, with interest at 6 per cent. per annum to date of decree, amounts to \$2,085, to which should be added \$14 paid by the association for insurance, and as interest thereon \$2.30. That the plaintiff the Bank of Commerce purchased the property from said Annie L. Wrighter and husband February 20, 1900, and has since been the owner of the same. The fact of tender of \$750, April 19, 1900, is found, and also that before the introduction of any evidence in the case the plaintiff tendered \$1,200, and offered to pay all costs up to that time in full settlement, and the delivery to the plaintiff of the stock pretended to be issued, which tender

was refused. That the stock so held by the association and belonging to it is of the value of \$540, and that the \$750 tendered exceeds the sum actually due to the defendant. As conclusions of law the court found that the application for loan, issuance of stock, premium, and interest constitute a transaction of loaning money; that Annie L. and William D. Wrighter are entitled to credit for all payments made by them, either as so-called "stock payments," premium, or interest, allowing the association 6 per cent. per annum interest on said loan; and that credit should be given for interest on monthly payments, except on the interest payments, for the average time the same have been paid. That the claims advanced by the association are unconscionable and inequitable. That the plaintiff is entitled to redeem from the mortgage lien, and, having tendered \$750, the association is entitled to judgment against plaintiff for that sum, and is entitled to retain the stock and its value of \$540. Judgment was thereupon rendered in favor of the association for said sum of \$750 against the bank, said sum having been deposited in court; and the association was authorized to receive it upon receipting in full in discharge of the judgment. It was further ordered that, upon failure of the association to accept the said sum and satisfy the judgment and discharge the mortgage, the clerk of court should as special master release the mortgage, and the decree should stand as a full satisfaction of the judgment. Exceptions were reserved to the findings both of law and fact and to the decree, and the case is brought here by the association on error.

On the trial of the case two witnesses only were examined. B. F. Perkins, president of the plaintiff bank, testified in behalf of the plaintiff, and Charles T. Springer, assistant manager of the defendant association, testified in its behalf. The testimony of Mr. Perkins was largely confined to proof of the ownership of the premises by the plaintiff, and the making of the tender of \$750 in April, 1900. He testified that although the deed conveying the property to the bank bears date February 20, 1900, it was not delivered until some time in April. The deed contains the following covenant, among others: "and that they [the premises] are free from all incumbrances whatsoever, except a mortgage of \$1,500, to the Fidelity Savings Association of Denver, Colorado, on which about one-half ( $\frac{1}{2}$ ) of the principal has been paid." The association was not a party to that deed. The witness stated, in regard to the tender, that shortly after the delivery of the deed he authorized a bank in Denver to make a legal tender to the association of \$750, being the balance of the principal of the loan, as he understood from the deed, and that the tender was rejected. He also stated that prior to the conveyance to the bank there had been paid on the mortgage \$1,478.30, but it appeared that his testimony on that subject

was merely his understanding based upon what the representative of the association had said; and he admitted on cross-examination that he understood said amount to be the total sum paid, and would not say that the representative had declared the entire amount to have been paid on the mortgage. It clearly appeared that as to payments he did not testify, nor claim to do so, from personal knowledge.

The bill of exceptions contains the following statement concerning the tender made in court before the introduction of evidence: "The plaintiff bank tenders the sum of \$1,200 to the Fidelity Savings Association, and offers to pay the costs of the action, but not including attorney's fees, which tender is refused by the defendant association." Mr. Springer, testifying as a witness for the defendant, identified the various documents introduced in evidence for the defense, and testified that Mr. Wrighter had applied for membership; that a certificate of stock for 15 shares was issued to him; that the same was by him assigned to his wife, and a new certificate for the same shares issued to her; that she afterwards applied for a loan, and that the same was made in the sum of \$1,500, for which the note and mortgage aforesaid were taken; that the last payment thereon had been made December 11, 1899, for the month of July, 1899; that of the monthly payments required, \$7.50 was applied to stock dues, \$7.50 to interest, and \$9.00 to premium; that there had been \$450 paid on account of stock, and \$975 as interest and premium; that none of the principal debt had been paid; and that there was due on the note \$1,869.70, which amount was arrived at by the following computation: Original loan \$1,500; insurance paid, \$14; interest on insurance payment, \$2.30; interest and premium unpaid for 18 months from and including August, 1899, to and including January, 1901, \$297; balance of fines against the loan, \$56.40. The witness further testified that the withdrawal value of the stock was \$472.50, which, credited on the note, would leave a balance due of \$1,397.20. The value of the stock was arrived at by the witness as follows: The dues paid, \$450. Interest thereon at 8 per cent. per annum up to December 11, 1899, date of last payment, \$90; interest on \$450, from December 11, 1899, \$42—making total interest on stock payments \$132. Deducting fines, \$72, and a reserve of \$2.50 per share, shows the balance \$472.50. On cross-examination the witness testified that the actual objects of the association were not changed by the amendments to its articles of incorporation, but that it was a building and loan association; that it received subscriptions to its stock, and reloaned the money to members, and no one could become a borrower who was not a member; that Wrighter agreed to pay on the loan a premium of 60 cents a month on each \$100 borrowed, amounting to \$9 per month, and \$7.50 per month interest, aggregating

\$198 each year; and that there had been paid for all purposes—on stock, loan, and fines—\$1,478.30. It appeared in his direct examination that of the \$72 loan fines \$15.00 had been paid. The witness further testified that the stock was assigned as collateral. It appeared that the dividends earned on the stock up to the time payments ceased amounted to \$84.75. With reference to the nature of the transaction, premium, etc., the witness testified on cross-examination that the premium is the amount which a borrower in a loan association is willing to bid for the present use or possession of the value of his shares; that he is not required to pay the premium for the use of the money, but that the association gives him the full value of his stock at once, although it may be 10 or 12 years before he would otherwise be entitled to receive it, and he is willing to offset against his dividend certain payments for the privilege of getting the use of the money; that if the shareholder does not carry his stock through to the end he receives interest upon surrender instead of dividend. It appeared further from the testimony of this witness that the premium bid in this case was the minimum premium at that time. The witness admitted on cross-examination that the interest and premium is paid for the use of the money, less dividends on the stock. Interest was paid 60 months, but not always promptly, as required. It further appeared that the payments, amounting to \$1,478.30, had been applied as follows: To dues, \$450; fines, \$15.00; commission items, \$30; insurance, \$7; and interest and premium, \$975.70. The insurance payment credited is explained in this manner: The association paid \$21 insurance, and the debtor subsequently repaid \$7 on that account.

There is no conflict in the evidence, and, as we are unable to agree with the trial court in some of the findings of fact, we think it proper in the first place to state our views in relation to them. The finding that the certificate of stock issued in the name of Mrs. Wrighter was never delivered to her, and that its issuance was a mere pretense, is not supported by the evidence. No witness so testified, directly or indirectly, nor does the evidence furnish any ground for questioning the genuineness of that transaction. It is clear and undisputed that Mr. Wrighter applied for and received a certificate for 15 shares, and that he assigned the same to his wife, which assignment was recognized and accepted by the association; whereupon she clearly became the owner of those shares. It is further conclusively shown that a new certificate bearing a like number was issued to her for the same shares; and she recited the fact of her ownership of the shares, and her membership in the association, in her written application for the loan, as well as in the note signed by her; and she is not now denying that the certificate was issued and delivered to her.



Moreover, the plaintiff bank, in its petition in this case, alleges that the "mortgagors duly assigned to said defendant a certificate of the shares of stock of the defendant association, No. 9,446, to the said defendant, as collateral security for said loan of \$1,500"; and, further, that said mortgagors "duly transferred to the plaintiff the interest the said Annie L. Wrighter and William D. Wrighter possess in said certificate of stock in said defendant association," and that the plaintiff is ready and willing "to surrender to the said defendant said certificate of stock of said defendant association, so held as collateral by said defendant." These admissions of plaintiff's pleading are in no manner qualified by the evidence; and it is apparent that the plaintiff understood that Mrs. Wrighter was the owner of the shares, and that they were held by the defendant association as collateral security under assignment for that purpose. The court further found that the association agreed to loan the money at the rate of 6 per cent. interest per annum. So far as the use of the word "interest" is concerned, that is true. But the payment of 6 per cent. interest was not by any means the sole consideration for the loan, and the finding is not supported by the evidence if it intended to cover the entire contract. In her application Mrs. Wrighter agreed not only to pay interest, but also premium, as provided by the rules and by-laws of the association; and the note contains a promise to pay not only interest at the rate of 6 per cent. per annum, but also a monthly premium of 60 cents on every \$100 of the loan, and to pay interest and premium monthly; and that agreement is in terms referred to in the mortgage. There is absolutely nothing in the evidence to show, or even tending to show, that the contract does not accurately express the agreement of the parties, nor is there the slightest indication in the evidence, nor any claim, of fraud, deceit, or misrepresentation. The contract is plain and unambiguous, and no attempt was made to dispute the agreement contained in the note or contract.

Whether the contract ought to be enforced according to its terms is a question that awaits consideration. But upon the evidence it is an undisputed fact that the mortgagors agreed to pay the principal debt, interest, and premium provided in the note and mortgage. So far as the record discloses, the debtors are not in any way complaining of the transaction.

Again, we are unable to find support in the evidence for the finding that the shares of stock were issued solely as a means to secure the loan. It might be inferred possibly that Mrs. Wrighter took an assignment of her husband's shares for the purpose of applying for and obtaining a loan; but there is no evidence to that effect, and we do not understand how it can be said, upon the evidence, that the shares would not have been

taken or subscribed for had a loan not been contemplated by both parties. Certainly nothing is disclosed to show that, when Wrighter subscribed for the shares, he anticipated making a loan either immediately or at any time. Whatever transpired in the way of oral negotiations between the parties is not disclosed. While we think the finding not sustained by the evidence, we are not to be understood as holding that the rights of the parties would have been affected had it appeared that Mrs. Wrighter subscribed for the shares for the purpose solely of qualifying herself to negotiate a loan with the association.

The district court, in effect, credited all payments of premium upon the principal debt, and allowed the creditor for the use of the money merely the interest at the agreed rate of 6 per cent. per annum, and disregarded the contract of the parties in every other particular. It is evident, therefore, in view of the facts, that, unless some legal or equitable principle should intervene to prevent the enforcement of the contract made by the parties, the judgment must be reversed as erroneous.

There are a multitude of decisions emanating from the courts of the different states covering a great variety of questions growing out of loaning transactions of building and loan associations, and in respect to many, if not all, of such questions, there is more or less conflict of authority. It is impracticable, without unduly extending this opinion, to fully review the authorities, nor do we deem it necessary, since in a majority of cases the determination has been based upon peculiar statutory provisions. It may be said generally that by the clear weight of authority the exaction of a premium from a member in consideration of the privilege of receiving the par value of his stock in advance of its maturity as a loan or as an advance, however the transaction is considered, is upheld, at least when the statute authorizes it, and such a transaction is more usually held not to be usurious when the provisions of the statute have been complied with. As the question of usury does not enter into this case, it is not necessary to consider those cases where the only or chief question involved was whether or not the contract was usurious. It is clear that the contract was not usurious under the laws of Colorado, and indeed it is not suggested that the contract violated the usury laws of that state or of this state. There was no usury statute in this state until the act of February 11, 1895 (Laws 1895, p. 55, c. 30), adopted after the making of the contract here involved. When the note and mortgage in question were executed, the statutes of this state on the subject of interest provided that any rate of interest agreed upon between parties, for the loan or forbearance of money, goods, or things in action, shall be valid, provided that, if such agreement be for a higher rate of interest than 12 per cent. per annum,

the same shall be in writing. Rev. St. 1887, § 1310. And the legal rate of interest, in the absence of contract, was 12 per cent. per annum. Id. §§ 1311, 1316. Hence, irrespective of the nature of the premium agreed to be paid to the association, but treating it as an extra interest charge for the use of the money, it is evident that it cannot be held invalid, in the absence of fraud, deceit, or misrepresentation, or some equitable reason rendering it oppressive and unjust.

The premium demanded and received by a building association is defined by Endlich as follows: "The premium is a bonus charged to a stockholder wishing to borrow, for the privilege of anticipating the ultimate value of his stock, by obtaining the immediate use of the money his stock will be worth at the winding up." Endlich on Building Associations, § 399. And in the American and English Encyclopedia of Law the premium is said to be the amount charged a stockholder for the privilege of receiving a loan, or the conventional difference between the par value and the present real value of stock. Volume 4, p. 1067. The various definitions of the term, although differing slightly in language, seem substantially to agree. See 6 Cyc. 147, and cases cited. And the definitions given above fairly state the generally recognized character and purpose of the charge known as "premium." Various methods are employed in taking the premium and determining the amount, depending upon the rules or by-laws of the particular association, or the statutory regulations under which it operates. And where the statute permits a premium to be charged or fixed in a certain manner, it has been held in a number of cases that, if the statutory plan be not followed, the contract will be usurious, provided the premium, added to the regular interest charge, exceeds the rate of interest allowed by law. One method is known as the "gross premium plan," whereby an amount or a certain percentage determined on is deducted from the par value of the stock at the time of the loan, and the difference or balance is handed over to the borrower. This amount so deducted is often determined by receiving bids from various members who are desirous of anticipating the value of their stock by borrowing from the association some of its funds on hand. Another method is that where the borrower agrees to pay periodically a sum or percentage in addition to interest and the dues on his stock; and this is called the "installment premium plan," and is that adopted by the parties in the case at bar. It may be conceded for the purposes of this case, but without deciding the question, that the premium thus agreed to be paid in monthly installments is to be considered as increasing the interest paid for the use of the money. As already indicated, this will not invalidate the contract on the ground of usury under the laws of this state or of the state of Colorado. It is also to be observed that the exaction of a premium

was not, at the time the contract was entered into, a violation of any declared policy of this state. The act of March 7, 1890, in force when this loan was made, governing mutual loan and building associations organized under our laws, authorized them to collect from members stated dues, fines, interest on loans, and premiums bid by members for the right of precedence in taking loans, as the corporation by its by-laws might adopt. Laws 1890, p. 46, c. 29, § 2. And by an act of January 10, 1891 (Laws 1890-91, p. 363, c. 86), provision was made for authorizing such an association organized under the laws of another state or government to do business in this state; and no complaint is made on this record of any violation of, or failure to comply with, that statute on the part of the plaintiff in error here.

But the chief contention in behalf of defendant in error is that the contract is inequitable and unconscionable, and is so oppressive and unjust that a court of equity will not sanction its enforcement. This is the view adopted by the trial court; and that court expressly declared the contract to be inequitable and unconscionable. The conclusion was evidently based upon the theory that the borrower was not in fact a stockholder, but that the shares standing in her name belonged in reality to the association, and that the stock issue was fictitious, and a mere subterfuge, whereby the association was enabled to charge a premium in addition to an agreed rate of interest, and to receive monthly payments on the principal in the way of stock dues without diminishing in the meantime the amount of interest required to be paid monthly; and the court found that the transaction was simply one of loaning money.

We think it quite immaterial whether the transaction consisting of the transfer to Mrs. Wrighter of the sum of \$1,500, and her execution of the note and mortgage, and assignment of her certificate of stock as collateral security, is to be considered as a loan of money, or as an advance upon her stock of its par value anticipating its maturity. It may be admitted that so much of the transaction is to be considered as a loan of money. See *Albany Mut. Bldg. Ass'n v. City of Laramie*, 10 Wyo. 54, 65 Pac. 1011. But we are not prepared to yield our assent to the proposition that this constituted the entire transaction between the parties, and that the only relation of Mrs. Wrighter to the association was or is that of a borrower. Where the borrower is the owner of certain shares of stock in the association, although they are assigned to the latter as collateral security for the loan, he sustains a dual relation to the association, viz., that of stockholder and borrower. And this dual relation is generally recognized by the authorities. Endlich on Building Associations, §§ 121-125; Thompson on Bldg. Associations, § 167; 4 Ency. L. (2d Ed.) 1057-1058; 6 Cyc. 126. We are aware that in a very few states the courts have adopted

the theory that the assignment of the member's stock to the association as collateral for the loan or advance made to him operates as an absolute surrender of the same, and terminates the relation of stockholder. *Bird v. Kendall*, 62 S. C. 178, 40 S. E. 142; *White v. Mechanics' Bldg. Fund Ass'n*, 22 Grat. 233; *Cason v. Seldner*, 77 Va. 297; *Overby v. Fayetteville B. Assoc.*, 81 N. C. 56. But this view is opposed to the great weight of authority, and is not, in our opinion, the logical or reasonable deduction from the contract between the parties. Moreover, it violates the essential feature of the building and loan association scheme, viz., that of perfect mutuality and equality of all the members of the association. Referring to this principle of mutuality, which Mr. Endlich terms the "elementary working principle of the building association scheme," that author says: "It follows, with logical cogency, that whatsoever accommodation any individual member may receive, some equivalent, beyond the mere repayment of money, must by him be returned to the society, and that in the discharge of his obligation he is again entitled to his proportionate share, by way of relief, in the advantages which may accrue to the society from other sources. From this self-evident proposition flow all the rights, as well as all the distinctive obligations, of borrowers in building associations, and it at once defines and settles the status of such members in them; for that borrowers necessarily remain members, at least in the sense of continuing entitled to share in the profits of the enterprise, it is impossible, in practice, to deny, whatever may be the theory held with regard to this subject." *Endlich on Bldg. Assoc.* § 122. It is to be observed, moreover, that even in those states, or at least in some of them, where the view is maintained that the relation of stockholder ceases when the member becomes a borrower, he is not released from the obligations contained in his contract of indebtedness to make his regular payments of stock dues; and the writer of a later case in South Carolina than that of *Bird v. Kendall*, *supra*, while accepting the doctrine of that case, said that he had always inclined to the view mentioned in an earlier case, that a borrowing stockholder occupied a dual relation as stockholder and borrower, and that, in all settlements between borrowing members and the association, the duties, privileges, and liabilities appertaining to each relation should enter into the settlement, and that "this view would necessarily require the borrowing stockholder to comply with the proper rules of the association; pay his proportion of the expenses, bear his part of the losses, and receive his share of the profits." *Interstate B. & L. Assoc. v. Holland et al.* (S. C.) 43 S. E. 978.

As a necessary result of the principle that a borrowing stockholder continues to be a member of the association, and to be the primary owner of the shares in his name, the

prevailing doctrine is that payments of dues upon stock are not *ipso facto* payments upon the debt, and are not to be regarded as partial payments operating as a *pro tanto* reduction of the mortgage debt so as to periodically reduce the interest agreed to be paid. *Endlich on Bldg. Assoc.* §§ 385, 477, & seq.; 4 *Ency. L.* 1057-1068; 6 *Cyc.* 154; *Thompson on Bldg. Assoc.* § 210. Such payments are, it is true, sooner or later to be used toward the extinguishment of the debt, or, to state the rule with greater accuracy, the borrower is entitled to a credit upon his indebtedness of the value of his shares whenever he undertakes to redeem from the mortgage, to be determined according to the reasonable rules and by-laws of the association; and ordinarily the understanding and contract, as well as the expectation, is that the stock payments with accumulated profits will cause the stock ultimately to mature and equal in value the amount of the indebtedness, whereupon the former will be appropriated by the association and the debt become extinguished.

We are aware that on this question, also, the authorities are not harmonious, and that some courts refuse not only to recognize the dual relation sustained by the borrowing member to the association, but regard the issuance of stock as a mere fiction, and as a subterfuge adopted in an attempt to evade the usury laws, and treat not only the premium, but also the stock dues, as a payment upon the debt, and in a few cases the enforcement of particular contracts has been denied on the ground that they were oppressive and unconscionable. In most of such cases the dues as well as premium have been regarded as merely an expedient to collect exorbitant interest. *Mills v. Salisbury B. & L. Assoc.*, 75 N. C. 292; *Howells v. Pacific States Sav. L. & B. Co. (Utah)* 60 Pac. 1025, 81 Am. St. Rep. 659; *People's B. L. & Sav. Assoc. v. Fowble (Utah)* 53 Pac. 999; *Sawtelle v. North Am. Sav. L. & B. Co.*, 14 Utah, 443, 48 Pac. 211; *Fidelity Sav. Assoc. v. Shea (Idaho)* 55 Pac. 1022; *Pacific Bldg. Co. v. Hill (Or.)* 67 Pac. 103, 56 L. R. A. 163, 91 Am. St. Rep. 477; *Hale v. Stenger*, 22 Wash. 516, 61 Pac. 156; *U. S. Sav. & L. Co. v. Parr*, 26 Wash. 115, 66 Pac. 109. In a majority of these cases the borrower paid at the outset a premium of 50 per cent. of the loan, receiving in money one-half of the amount of his note and mortgage, assigning to the association absolutely one-half of his shares, and agreeing to pay thereon the regular stock dues; and there does not seem to have been any showing of specific fraud, deceit, mistake, or misrepresentation. The same conclusion was reached in the federal court for the District of Oregon in the case of *Pacific States Sav. L. & B. Co. v. Green (C. C.)* 114 Fed. 412. But the judgment was reversed in the Circuit Court of Appeals (123 Fed. 43), and that court, in referring to the theory of the trial court that the transac-

tion was one of loan and nothing else, and that in equity the association can be permitted to receive only its loan and interest, and cannot collect installments or premiums required to be paid in order merely to qualify the debtor to borrow money from the association, said: "This theory has been sustained in some of the decisions in the state courts cited by appellees, notably in Utah, in Washington, and in Oregon [citing the cases]. But the objection to it is that the courts, in order to sustain this view, ignore the contract freely and voluntarily entered into by the parties, with full knowledge of all the conditions that might arise if the interest and premiums were not promptly paid, and make a new contract of a different character between the parties." And in the course of the opinion the court said further: "Whether the association offers a good and safe investment to all of its subscribers is a question not here necessary to discuss. Enough has been shown to make it clear that the borrower investigated the business methods of the association, and with full knowledge thereof executed the contract, and, in the absence of any fraud, misrepresentation, deceit, mistake, or undue influence, ought to be bound by it, because without such a showing a court of equity ought not to disregard the contract which the parties deliberately made, and make a new contract for them."

In the case of *United States Sav. & L. Co. v. Shain* (N. D.) 77 N. W. 1006, the Supreme Court of North Dakota had occasion to consider several questions arising out of a building association contract. The association was a Minnesota corporation. The borrower took a loan of \$1,500, agreeing to take 30 shares of stock, and continue the monthly payments thereon until the stock should mature or the loan be paid, and to pay a premium of 50 per cent. of said shares, and assign 15 shares to the association as collateral. It was urged that the contract was usurious and unjust. On that subject the court said: "It is urged by counsel, and has sometimes been held, that every payment on account of stock must be treated as a payment, pro tanto, of the money loaned, and the principal must be reduced by the amount of such payment, and the principal would thus grow less from month to month, until towards the end it would be reduced to a very small sum, and finally to one month's payment; and, as the monthly interest payments remain the same, it is claimed that the rate of interest becomes enormously usurious, amounting towards the close of the term to several hundred per cent., and it is claimed that this makes the contract not only usurious, but so harsh, exacting, and unjust that a court of equity should relieve from it. In our judgment, this view entirely excludes the fact that all money that is paid into the treasury of the corporation upon stock installments is, in theory at least, and gener-

ally in practice, immediately advanced to other borrowing stock subscribers, at the same rate of interest, and at a large premium, thus tending at once to increase the value of the stock of the member who pays the money into the treasury, or, in other words, hasten the day when payments on account of stock subscriptions can cease. In this manner every member receives a profit upon the money he pays upon stock installments. Now, a man cannot use his money to pay his debts, and yet use it to bring a profit to himself. The two things embody a contradiction. The stockholder in a building and loan association who insists upon having his stock installment payments applied at once in reduction of the amount advanced to him must, in fairness, renounce all claims to share in the profits of the association. But that is contrary to the whole theory and spirit of building and loan associations, and directly opposed to the intentions of all parties who become members. And these remarks suggest another thought, that answers respondent's contention that the payment of the large premium renders the contract harsh and oppressive. If any subscriber suffers unduly in consequence of the premium he pays, it is because his necessities are such that he is willing to pay a larger premium than other subscribers pay. If all subscribers pay the same premium, and all the money paid in be kept continually loaned, then there can be no hardship, however great the premium may be; and herein we find the causes that operated upon the legislative mind, and induced it to declare that no amount of premium paid should render the contract usurious."

In *Cover v. Merc. Mut. B. & L. Assoc.*, 93 Mo. App. 302, it was held, in view of a statute which permitted the collection of premiums by building and loan associations, that a charge of 40 cents per \$100 as premiums in addition to interest at the rate of 7½ per cent. is not so extreme as to be called extortionate or unconscionable, considering the object of such associations and the disposal of the profits thereof for the benefit of the borrowing member.

An interesting and instructive case arose in West Virginia, where an association incorporated under the laws of the state of Michigan was a party, and against whom a decree was sought restraining the sale under mortgage of certain real estate to satisfy the amount claimed to be due upon a loan. The question involved was the right of the association to recover the full amount contracted to be paid. The statutes of West Virginia permitted foreign associations to do business in that state upon compliance with certain statutory provisions, and they were then expressly given the same rights, and made subject to the same regulations and restrictions, as similar domestic corporations. Such associations were authorized to charge and collect premiums in addition to interest

without being subject to the laws against usury, but the premium was required to be a fixed sum, and as thus fixed it might be made payable in periodical installments or deducted in advance. The by-laws of the Michigan association, however, without basing it on a fixed total amount, provided for a monthly payment of premium until the maturity of the shares or the repayment of the loan; and the court held that this plan so differed from the scheme allowed by law that it was not excepted from the usury statute. The borrowing shareholder had paid \$220 interest and \$240 premium. The court, however, said that, while the contract could not be enforced according to its terms because it did not follow the statutory regulations, it was not so unenforceable because of any want of equity between the borrower and investor, which was perhaps no greater than might occur in an association conforming to the statute, and they set no limit upon the ratio between dues and premium, from which the inequitable result flows; nor because under the contract the amount due was far beyond the amount borrowed, an inevitable result, the court says, in every building association contract where default continues for a long time; nor because of any improper motives on the part of the association, as there was not a scintilla of evidence of that nature. *Floyd v. National L. & Inv. Co.* (W. Va.) 38 S. E. 653, 54 L. R. A. 536, 87 Am. St. Rep. 805.

The case of *Houser v. Hermann Bldg. Assoc.*, 41 Pa. 476, is cited by defendants in error as supporting the judgment in this case. But the decision in that case holding the premium uncollectible was based solely upon a violation of the statutes against usury. Under later statutes authorizing the charging of premiums by building associations such contracts have uniformly been upheld and enforced in Pennsylvania. And in one case the premium enforced was 52 per cent. of the loan. There is no support in the Pennsylvania authorities for disregarding the contract where it is not usurious, nor for holding it unconscionable and inequitable where it is not prohibited by statute. In that state, also, it is well settled that stock payments are not *ipso facto* payments upon the debt. *Watkins v. Building & L. Assoc.*, 97 Pa. 514; *Link v. Building Assoc.*, 89 Pa. 15; *Bennett v. Building & L. Assoc.*, 177 Pa. 233, 35 Atl. 684, 34 L. R. A. 595, 55 Am. St. Rep. 723.

The Nebraska case of *Randall v. National B. L. & Pro. Union*, 42 Neb. 809, 60 N. W. 1019, 29 L. R. A. 133, is occasionally cited as an authority against the validity of these contracts. But it is evident, especially from the more recent decisions in that state, that the case has been misunderstood. Yet in that case the court apparently approves the doctrine that payment of dues are not *ipso facto* payments upon the mortgage debt, so as to extinguish the same *pro tanto*. In *Livingston L. & B. Assoc. v. Drummond*, 49 Neb.

200, 68 N. W. 375, it was held that interest might be reserved at the highest rate permitted by law on the face of the loan, although a premium was deducted from that amount, and the difference only paid to the borrower. In *People's B. L. & Sav. Assoc. v. Gilmore* (Neb.) 90 N. W. 108, the judgment of the lower court was reversed where the stock feature of the transaction had been disregarded, and all payments had been credited upon the loan as of the date they were made. In that case, and in *McDowell v. Pioneer Sav. & L. Co.* (Neb.) 90 N. W. 111, where the contract provided for 5 per cent. annual interest and 5 per cent. annual premium, the following rules were laid down for the application of payments made to a foreign association: "(1) The transaction is to be treated as a loan, and the borrower has the right to have the value of his stock applied to reduce the indebtedness of the mortgage if he so chooses. (2) Any dividends declared or earned on the stock will inure to the borrower's credit, and this may be credited on the mortgage. (3) The stock is to be taken as worth the amount that has been paid on it, in absence of evidence as to its actual value. (4) Payments made on account of operating expenses and fines belong to the company, and should not be credited on the mortgage. (5) Payments made on the stock are not to be applied as payments on the loan until the borrower has elected to have them so applied, and credit for the value of the stock should be given at the time of such election, and not as of the date when the payments were made. (6) Payments made for premium and interest, if not usurious, are not to be credited on the principal of the mortgage debt."

A Texas case is cited. But the rule enforced in that state is merely that, if the interest and premium together exceed the rate of interest allowed by law, it is usurious. *Abbott v. Loan Assoc.*, 86 Tex. 467, 25 S. W. 620. And in *Interstate B. & L. Assoc. v. Goforth*, 94 Tex. 259, 59 S. W. 871, it was held that the monthly payments upon shares did not constitute a present payment of the debt, and that the contract was not *prima facie* usurious, because, in addition to full legal interest, it provided for monthly payments upon the borrower's shares in the concern; such plan being analogous to that for discharging indebtedness through a sinking fund, and not invalid unless shown to be a device for evading the usury laws.

The case of *Fidelity Savings Association v. Shea* (Idaho) 55 Pac. 1022, is much relied on by counsel for defendant in error. It was held in that case that a similar contract was usurious. That conclusion was reached by not only adding the interest and premium together, for, as we understand the case, the sum so found would not have exceeded the rate authorized by the statutes of Idaho, but the collection of monthly payments on account of stock dues without reducing the in-

terest from time to time was held objectionable, in opposition to the very great weight of authority on that subject; and the transaction was treated as though the borrower was not the owner of any shares in the association. As already shown, we view the transaction in a different light.

The authorities are so numerous sustaining contracts of this character, when not in violation of some positive usury statute, that it would be useless to attempt an exhaustive citation of the cases. The following are cited as fairly representing the prevailing views upon some of the questions herein discussed: *Bullman v. Citizens' L. & B. Assoc.* (Wis.) 90 N. W. 199; *Pac. States Sav. L. & B. Co. v. Green* (C. O. A.) 123 Fed. 43; *Post v. Building & L. Assoc.*, 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201; *Briggs v. Iowa S. & L. Assoc.*, 114 Iowa, 232, 86 N. W. 320; *Columbia B. & L. Assoc. v. Junquist* (C. C.) 111 Fed. 645; *Manship v. New South B. & L. Assoc.* (C. C.) 110 Fed. 845; *People's B. & L. Assoc. v. Billing*, 104 Mich. 186, 62 N. W. 373; *Cover v. B. & L. Assoc.*, 98 Mo. App. 302; *Bedford v. Eastern B. & L. Assoc.*, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834; *McNamara v. Oakland B. & L. Assoc.* (Cal.) 63 Pac. 670.

In *Manship v. B. & L. Association*, supra, Judge Niles, in the course of the opinion, says: "Liberty to contract is one of the essential elements of freedom, and one of the most valuable rights incident to our institutions, and it is very difficult for me to see any reason in law or morals why a party desiring to become a member of a building and loan association may not do so; and if he desires that a part of his contribution shall be credited upon the amount borrowed by him, and that a part shall go to swell the loan fund of the association, to be loaned to his fellow members of the association, and in this way swell the profits and increase the value of his stock therein, and thereby hasten its maturity, I see no reason why he should not be permitted to do so, and why his contract might not be enforced according to his agreement; and furthermore I fail to see what right the court, which may be called upon to enforce such contract, has to appropriate his stock payments or his payments of premiums in any other way than he agreed by his contract that they should be appropriated."

We have not specially considered the question whether the contract is to be governed by the laws of Colorado, where the money was by the contract made payable, or by the laws of this state, where enforcement of the contract is sought, because the question has seemed to us to be immaterial, since, in the view we take of the case, the contract is not invalid under the laws of either state. It might be said, however, that the general rule is that contracts are to be governed by the law of the place of performance. *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N.

W. 141; *Bennett v. B. & L. Assoc.*, 177 Pa. 233, 35 Atl. 684, 34 L. R. A. 595, 55 Am. St. Rep. 723; *Bedford v. Eastern B. & L. Assoc.*, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834; *Manship v. B. & L. Assoc.* (C. C.) 110 Fed. 845. We are not here concerned with the question whether the existence of a fraudulent purpose to evade the laws of the forum would alter the principle or render it inapplicable. No such purpose is disclosed in the case at bar, nor did the contract violate the statutes of this state.

It is perfectly clear that, however the transaction is to be considered, it was not invalid as a violation of any statute upon the subject of interest. It remains to be briefly considered whether its terms, upon a proper interpretation thereof, were so oppressive and unjust as to render the contract inequitable and unconscionable. Judge Story, in his work on *Equitable Jurisprudence*, said that the mere fact that a bargain is a very hard or unreasonable one is not generally sufficient, per se, to induce courts of equity to interfere. But the rule laid down by him is that if, upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, then courts sometimes interfere and grant relief, although they are very cautious of interfering unless upon very strong circumstances. They must be of such a nature as naturally lead to the presumption of fraud, imposition, or undue influence. 1 Story's *Eq. Jur.* §§ 244, 331; *Matthews v. Crockett's Adm'r.*, 82 Va. 394; *Phillips v. Pullen*, 45 N. J. Eq. 5, 16 Atl. 9. Mrs. Wrighter was a stockholder as well as a borrower in the association, and it is clear upon both reason and authority that her payments of stock dues cannot be regarded as payments ipso facto upon her indebtedness, so as to reduce it pro tanto, and permit the claim that she was required to pay interest upon the original indebtedness while it had been largely reduced. Her payments for stock dues as well as all the payments of all other members into the same fund assisted to increase the value of her stock, as contemplated by the contract and the rules and by-laws of the association. These payments, then, cannot be treated in any sense as increasing the amount of interest or compensation agreed to be paid by her for the use of the money loaned. The premium agreed to be paid may, for the purposes of this discussion, be considered as analogous to interest, and as an additional compensation paid by her for the use of the principal sum. It is to be observed, however, that there is a clear conflict in the authorities as to this matter, and it is not essential that we pass directly upon the question. Now, the borrower received the face of the loan, viz., \$1,500, and agreed to pay interest at the rate of 6 per cent. per annum, amounting to \$90 annually, and the further sum of 60 cents per share monthly, amounting annually to the sum of \$108, thus making a

total annual payment of \$198, which amounts to 13½ per cent. upon the principal sum. It seems to us, therefore, that the declaration that the contract is inequitable and unconscionable is equivalent to the statement that the exaction of 13½ per cent. annual interest upon a loan of money was in 1894 in this state so exorbitant and oppressive, and so shocking to the conscience, as to render the transaction presumptive evidence of fraud, imposition, or undue influence, and hence so inequitable and unconscionable that a court of equity should refuse to enforce it. A judicial declaration to that effect from this court would hardly be warranted in view of the statute then and for many years in force, establishing the legal rate of interest upon contracts not in writing, and upon open accounts and judgments, at 12 per cent. per annum, and declaring valid any rate of interest agreed upon in writing in excess of the legal rate. And it is doubtless no exaggeration to say that, at the time the contract in question was entered into, the rate of interest charged in many sections of this state, upon money loaned in the ordinary manner, as often exceeded the legal rate, and the rate above specified, as otherwise. The courts have frequently enforced contracts made previous to February 11, 1895, calling for higher rates of interest than 13½ per cent. per annum, without a suggestion, so far as we are aware, that they were inequitable or unconscionable. In 1895, after the making of this contract, the Legislature repealed the former statute regulating interest, and placed the legal rate at 8 per cent. per annum, but provided that any rate might be agreed upon, not exceeding 12 per cent. per annum, which might be taken yearly, or for any shorter period, or in advance. Laws 1895, p. 55, c. 30.

In this discussion we have considered the questions involved as though the borrower was here complaining of the transaction and seeking relief. But that is not the case. The complaining party was not a party to the contracts, and upon the record has not become a party thereto. The bank is the grantee of the mortgaged premises, taking them subject to the mortgage, but it does not appear that it assumed or agreed to pay the mortgage debt so as to render itself personally liable therefor. It seeks to redeem from the mortgage as such grantee, but questions the amount claimed to be due. The general rule seems to be that the plea of usury is personal to the debtor. Whether that is the rule to be applied under our present statutes it is unnecessary for us to determine. But many cases holding these contracts usurious where the premium charged is not expressly authorized by statute refuse to consider such defense in favor of any person other than the debtor. We have not deemed it necessary to inquire into the right of the bank to assail the contracts as inequitable, for the reason that we do not think the contract

open to reasonable objection on that ground by the debtors themselves.

Counsel for defendant in error maintains that at the rate this debt has been reduced it would require many years to discharge the indebtedness, but he omits any reference to the fact that for 18 months no payments had been made, while the interest continued to accumulate, and, according to the contract, fines for the delinquency had been imposed, all of which could have been avoided had payments been continued in compliance with the contract. In any case of a loan of money the debt must be expected to increase, rather than diminish, if no payments are made upon either interest or principal. Had the debtors not defaulted, but had they promptly met their obligations, the fines would have been absent, the additional sum of \$133 would have been paid on the stock, so that the stock value subject to credit upon the debt would have materially increased, and there would have been no unpaid interest or premium.

This disposes of all the material questions except the method of ascertaining the amount due. Before coming directly to that question, we ought to state our conclusion as to the allowance of the fines charged by the association in its statement of the account. The by-laws provide that a failure to make monthly payments on stock for any month prior to the 10th day of the month after due shall subject the member to a fine of 10 cents for each share in arrears, and the same for every month thereafter during delinquency; and the certificate of stock contains a similar provision. The by-laws also provide for a fine of 10 cents for every \$100 borrowed per month for each month during delinquency, upon a failure of a borrowing member to meet the payments of interest or premium; and the note provides that, if any payment is not paid when due, fines shall be added as provided by the by-laws. The mortgage, however, makes no mention of fines. The condition of that instrument is, in substance, that if the parties of the first part shall pay or cause to be paid unto the party of the second part the sum of \$1,500 on or before 10 years after date, with interest, premium, and installment of dues, as provided by said note, in monthly payments, payable on or before the last day of each month, of not less than \$24, according to the conditions of said note, and shall pay all taxes on the property, and keep the buildings insured for the benefit of the said second party, then the mortgage shall cease and be null and void; and a subsequent clause provides that in case any installment of principal, or any part thereof, or any interest, premium, or installment moneys, or any part thereof, shall remain due and unpaid for 60 days, then the whole principal sum, together with interest and premium, shall, at the option of the second party, become due and payable forthwith. In the clause containing the power of



sale it is provided that out of the money arising upon a sale of the premises the mortgagee may retain the principal, premium, and interest, together with costs and expenses of sale, and \$100 for attorney, solicitor, or counsel fees, and that the overplus, if any, shall be paid to the mortgagors, their heirs or assigns.

There was no personal service of process upon either Mr. or Mrs. Wrighter, and hence no personal judgment is permissible against them for any delinquency. The amount found to be due may be satisfied as far as the proceeds will go out of the mortgaged premises. The defendant in error bank does not seem to have constituted itself personally liable for the indebtedness, except possibly to the extent of its tenders; but they were made to secure a release of the mortgage. Hence, in this suit, the amount due is material only as it determines the amount for which the mortgage stands as a lien upon the premises covered thereby. The rule is laid down that, while accrued fines are an essential part of the liability of the member, they do not become part of the mortgage debt unless made so by the mortgage. *Endlich on Bldg. Ass'n's*, § 416; *Thompson on Bldg. Ass'n's*, § 181; *Bowen v. Lincoln B. & L. Ass'n*, 51 N. J. Eq. 272, 28 Atl. 67. This consideration disposes of the item charged for fines upon the loan for defaults in payments of interest and premium adversely to the association, so far as the indebtedness is secured by the mortgage. In regard to the fines charged against the stock for defaults in payment of stock dues, the certificate provides that upon withdrawal the holder shall receive all money paid for stock dues (except fines), with interest at fixed rates according to the time of withdrawal—in this case at 8 per cent. per annum. And it is provided in the by-laws that all stock shall be subject to a lien for the payment of unpaid fines, and that the same may be at any time charged off against the stock, and deducted from the credits thereon. Fines against the stock, therefore, if reasonable, would be allowable to the association in determining the withdrawal value of the stock. But the only evidence in relation to such fines is that they amounted to \$72. No explanation of the method employed in charging them, nor the time or times when the defaults occurred and the charges were made, is attempted. The only defaults shown in the testimony are in the payment of the dues due in July, 1899, which were not paid until December following, and the entire failure to make any payments for dues accruing after July, 1899. The fine provided for is 10 cents per month on each share during the period of delinquency. It is apparent that \$1.50 per month, which is 10 cents per share on 15 shares, will not amount to \$72 in 18 months, which was the period of delinquency shown on the trial. The courts uniformly refuse to permit the re-

peated imposition of the same fine, increased every month upon the principle of arithmetical progression. *Endlich*, § 424. To support these fines charged, there should have been some evidence to show that defaults had occurred authorizing their imposition. It is not enough for the assistant manager of the association to say that they were charged. Liability for such fines depends upon default of duty in paying dues, and the facts should be shown as a basis for the liability. Again, in the absence of such testimony, it is impossible for the court to know how they were computed, and whether, as charged, they were reasonable, since it is impossible even to determine that they were computed at the rate and in the manner permitted by the by-laws and in the contract. While it appears that there were defaults for 18 months immediately preceding the trial, the fines chargeable for such defaults would amount only to the sum of \$27. But as the charges testified to are not at all explained, and it is not even stated that they were charged for the defaults above named, we think the charge should not be allowed.

Interest and premium are recoverable to the date of the decree, March 11, 1901. *Racer v. International B. & L. Ass'n* (Ind. App.) 63 N. E. 772; *Union B. & L. Ass'n v. Masonic Hall Ass'n*, 29 N. J. Eq. 389; *Cantwell v. Welch* (Ill.) 58 N. E. 414. In stating the account, therefore, the debtors should be charged the principal sum, \$1,500, with interest and premium due and unpaid up to March 1, 1901, which amounts to \$313.50, being 19 months at \$16.50 per month; insurance paid by the association, \$14, and interest thereon, \$2.30. This all amounts to \$1,829.80. From this must be deducted a credit of the withdrawal value of the stock. This is shown by the evidence to be as follows at time of trial, omitting fines: Amount of dues paid, \$450; interest added, \$132—making \$582. To this should be added one month's interest to date of decree, amounting to \$3, making \$585. Deducting a withdrawal fee of \$2.50 per share, or \$37.50, leaves a balance of \$547.50, which constitutes the withdrawal value. When this amount is credited upon the debt, the remainder gives the amount due at the date of decree, viz., \$1,282.30. Neither of the tenders made by the defendant in error was sufficient to cover the amount due at the time the tenders were made, and hence they were insufficient to throw the costs upon the plaintiff in error. The latter is also entitled to a judgment for \$100 as an attorney's fee, as provided in the mortgage, in addition to the sum above named and the other costs.

The judgment of the district court is reversed, and the cause will be remanded with directions to that court to render a judgment of foreclosure on the cross-petition of the plaintiff in error (defendant below) for the sum of \$1,282.30, with interest thereon at the rate of 8 per cent. per annum from March 11,



1901 (the date of the former decree), and for the further sum of \$100 as an attorney's fee in addition to the other costs.

CORN, C. J., and KNIGHT, J., concur.

(68 Kan. 445)

**CITY OF WICHITA et al. v. ROCK ISLAND LUMBER & MFG. CO. et al.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**RES JUDICATA.**

1. The question of the ownership of a fund garnished, having been once litigated and determined against an interpleading claimant, is res adjudicata as to those who took part in the adjudication, and cannot be reopened and retried at the instance of a garnishee who asserts that the fund in hand belongs to such interpleading claimant.

(Syllabus by the Court.)

Error from District Court, Harvey County; M. P. Simpson, Judge.

Action by the Rock Island Lumber & Manufacturing Company and others against the city of Wichita and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

A. E. Helm and Earl Blake, for plaintiffs in error. S. B. Amidon, for defendants in error.

CUNNINGHAM, J. This action has been considered by this court once before. It is reported in 63 Kan. 768, 66 Pac. 1024. Only such facts will herein be noted as are necessary, in addition to those found in the former report, to the full understanding of the questions now raised.

The order of this court in the former case was that the judgment which the lower court had rendered, discharging the bank as garnishee, be reversed, and farther proceedings had in and about that matter. It must be borne in mind that the judgment of the lower court had been against the city's right to recover upon its interplea. To reverse this judgment, no action was taken, and it remained unaffected by the former judgment of this court. The case having been returned to be considered upon the issue between the lumber company and the bank, there was tendered an amended answer on behalf of the bank, and also one on behalf of the city, with motions that the same be allowed to be filed. These motions were denied by the court, and this action is now relied upon as ground of error.

George K. Spencer and J. M. Furnish, who, with S. E. Jocelyn, constituted the board of police commissioners at the time the money garnished came to the hands of Jocelyn, interpleaded, and were permitted to file an answer in their own behalf. Upon the trial the court held the bank liable as garnishee, and directed the application of the funds in its hands to the payment of the claim which the lumber company has against Jocelyn. Spencer and Furnish are here alleging this

as a ground of error in their own behalf. So far as they are concerned, their answer discloses no right in themselves, either as a board or as individuals, to the fund in question. That answer disclosed the fact that the board had been dissolved, and no longer was in existence. So, if it ever had any right to the fund in question, it certainly did not at the time of the filing of their answer. So far as they are concerned, we need spend no time upon the question of the correctness of the court's ruling against them. We will pass, then, to a discussion of the claimed error on behalf of the bank and of the city.

These questions are necessarily much intermingled, and we find it best to discuss them together. Upon the first trial the issues were formed, as between the lumber company, the bank, and the city, in the following manner: The bank had filed a general denial; that is, it denied having any funds whatever belonging to S. E. Jocelyn. Upon this question the lumber company took issue. When the investigation of this issue had progressed far enough to show that the bank had funds on deposit belonging to S. E. Jocelyn, the city interpleaded, claiming that these funds had been collected by the board of police commissioners, of which board Jocelyn was president, and that the same were deposited by him as president, and "were and are funds belonging to the city of Wichita," being in the hands of Jocelyn only in course of transmission to the city treasurer. To this interplea the lumber company replied, admitting that Jocelyn had deposited the funds, but denied that they belonged to the city, denied that they were collected as a fine for the violation of any ordinance of the city, or as license fees collected under any ordinance of the city; and averred that they were moneys belonging to Jocelyn, and subject to garnishment. After the filing of this interplea and answer, the bank replied, neither admitting nor denying that the funds on deposit belonged to the city of Wichita, but requested that the city be required to make strict proof of the fact, in order that the bank might be amply protected in the matter. It was upon these issues that the former judgment of the court was entered, by which it was found that the city was not entitled to the funds, and upon which judgment was entered in favor of the bank for its costs. The amended answer which the bank tendered denied its liability as garnishee, for the reason that the funds in hand were deposited by Jocelyn as president of the police board, and had been subject to his check; that they belonged to the board of police commissioners while it was in existence; that after the former judgment in this case it had paid over those funds to the city of Wichita as the successor in office and interest of the board of police commissioners, said board having been abolished; and that the city of Wichita now claimed the rightful ownership of the same. The answer tender-

ed by the interplea of the city of Wichita but repeated these allegations, and was substantially what had been contained in its former interplea, with the addition that the board of police commissioners had been abolished, and that it, as successor to that board, was entitled to the fund, and had received it from the bank. It further appears that the board had been abolished for a considerable time prior to the former trial, and that whatever rights that fact might have conferred upon the city existed, and might have been pleaded and relied upon, at the time of the former hearing. The substantial question, then, is whether the issues presented under the answers tendered by the bank and the city were substantially different from those already passed upon and adjudicated against the city.

Under our present procedure in garnishment, a judgment rendered is of the same nature, governed by the same rules, and is as binding upon the parties thereto, as a judgment rendered in a more formal proceeding. *Hardware Company v. Klippert* (Kan.) 74 Pac. 254. We are of the opinion that the tendered answers raised no different question, as between the city and the lumber company, than had been already presented and decided by the court. Under the former answers, the city was insisting that the funds in question rightfully came into the hands of the police board through its president, Jocelyn, and that the board was but the agent of the city in such collection, and was holding the funds for it while they were in transmission to its treasurer—in short, that the funds belonged to the city. On the other hand, the lumber company was insisting that the police board had no authority whatever to collect any funds—much less, any authority to collect the funds in question; that they were not collected in behalf of the city, but came to the hands of Jocelyn, whether acting as a member of the police board or otherwise, in such a manner and from such a source as, in law, to make them his individual funds, and not those of the city; and that as such they were liable to garnishment. This issue thus presented was decided against the city, which judgment remains unreversed and unappealed from. Had the police board been then in being (which it was not) would cut no figure in the issue. That the funds had subsequently been paid over by the bank to the city, in despite of the judgment of the court, against the rights of the city, would be equally ineffectual to confer any rights upon the city. The tendered interplea of the bank was nothing more than an iteration of the claim of the city, and necessarily the bank could not be permitted to litigate for the city a claim which had already been decided against the city upon its own plea. There was no issue of merit tendered by the amended answers sought to be filed beyond what had already been tried out, and we are of the opinion that the court be-

low did not err in its refusal to permit them to be filed.

In view of the fact that we find no authority for the police board during its existence to make the collection of the money in question, we are not disposed to take issue with the intimation found in the former opinion of this court that neither the city nor the bank had any right to the funds in question as against Jocelyn or his garnishing creditor, and find nothing in the case of *State v. Patterson*, 66 Kan. 447, 71 Pac. 860, in opposition to this view. So, from any standpoint, we conclude that the court below committed no error, and hence affirm the judgment. All the Justices concurring.

(68 Kan. 479)

#### FELDKAMP v. KANSAS CITY.

(Supreme Court of Kansas. Feb. 6, 1904.)

CITIES—DANGEROUS VIADUCT—WARNING TO PEDESTRIANS.

1. A viaduct was in a condition that it could not be safely used for the passage of teams and vehicles, but could be by pedestrians. Its entrance was guarded by a barricade easily passed by footmen. It was passed by such in large numbers, and for a long time. Subsequently the viaduct became dangerous for the passage of even persons on foot. There was no additional warning of this changed condition given at the entrance. *Held*, that the court cannot say as a matter of law that the barricade was sufficient warning to one who, without knowledge of the increased danger, went upon the viaduct and was injured, so as to charge him with contributory negligence.

2. The question of the sufficiency of the barricade as a warning of the dangerous condition of the viaduct under all the circumstances was a question of fact, and should have been submitted to the jury.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; W. G. Holt, Judge.

Action by Mary Feldkamp against the city of Kansas City. Judgment for defendant, and plaintiff brings error. Reversed.

Silas Porter and I. F. Madlem, for plaintiff in error. J. W. Dana and M. J. Reitz, for defendant in error.

CUNNINGHAM, J. The plaintiff in error, who was plaintiff below, brought her action to recover from the city for the death of her husband, occasioned, as she alleges, by its negligence. The facts appearing in the evidence are substantially these: South James street is one of the principal public streets of Kansas City, Kan., running in a southeasterly direction through a populous district near the stockyards, crossing the state line, and extending into Kansas City, Mo. James street is crossed at a point about the state line between Kansas and Missouri by numerous tracks of the Missouri Pacific Railroad Company. To permit the free passage of travel along James street, there had been erected over these tracks a viaduct some 3,000

feet long, some 1,800 feet of which was in Kansas City, Kan., and the balance in Kansas City, Mo. The viaduct crossed the state line at a sharp angle, so that the planks forming the roadway upon it where the line crossed were part in Missouri and part in Kansas. The roadway was about 22 feet wide, and elevated about 25 feet above the tracks below. There were no separate ways for foot travel, but pedestrians and teams alike used the entire width. In October, 1898, some 200 feet of the viaduct immediately over the railroad tracks was knocked down by a passing train, and made impassable, in which condition it remained for some two years, during which time a barricade was erected and maintained at either end, and travel of all kinds was entirely suspended. After the broken spans were restored in July, 1900, foot travel only was resumed, the floor in the Missouri portion not being in such a condition that it could be used with safety for teams. The barricade mentioned above was still maintained, and consisted of a stick of timber two inches by four inches, either end lying upon the outside railing and supported in the center by a piece of the same dimensions, and was about four feet above the roadway. Large numbers of people came and went on foot across the viaduct, in so much that different witnesses spoke of the stream of travel as being "many hundreds," as being "a constant stream," as being "so many that they could be seen walking over it at any time of day from morning until dark." Pedestrians coming to the barricade would stoop sufficiently to pass under it, and otherwise gave it no attention. It was thus used up to early in September, 1901, when the authorities of Kansas City, Mo., preparatory to repairing that end, removed the planks at the east Kansas end entirely; thus, owing to the angle at which the viaduct crossed the state line, leaving an open triangular space west of the state line, and in Kansas City, Kan. While the plaintiff's husband had frequently used the viaduct in passing to and from his work during the year from July, 1900, he had not used it for some little time before the floor was torn up as noted above, and did not know that the hole was there. On October 6, 1901, about 8 o'clock in the evening, he started to return home from his work, and for that purpose passed under the barricade at the Kansas end, and went along the viaduct until he came to the place where the plank flooring had been removed. It was dark, and no lights had been provided, so that he was unaware of the dangerous conditions existing, and thus stepped into the open space, and was precipitated upon the tracks below, causing an injury from which after a few weeks he died. No other or different barricade had been erected or warning given after the planks had been removed and while the hole was there than had existed from the first; that is, some time in October, 1898. At the close of the plaintiff's testimony,

which developed the above facts, the court sustained the city's demurrer thereto, and gave judgment against the plaintiff for costs. This is the ruling here complained of.

The plaintiff in error contends that the only question here presented is, "was the deceased guilty of contributory negligence in going upon the viaduct and not heeding the barricades?" while the city claims that the barricade was such a notice to the public that its existence relieved the city from the duty of maintaining the viaduct in a safe condition for public travel; or, in other words, that the closing of the viaduct by the means used suspended the obligation of the city to keep the same safe for public travel during the time it was being repaired and until it should be reopened by the city. There is little difference in these two statements. The city's claim assumes the sufficiency of the barricade as a notification to the traveling public of the defective condition of the viaduct. The plaintiff's statement questions this, or at least claims that the sufficiency of the barricade for that purpose is a question of fact to be submitted to the jury, and not one of law, as the trial court must necessarily have considered it to be, in that it withdrew the question from the consideration of the jury.

That the city was bound to guard the traveling public from the dangers incident to the leaving of the opening in the viaduct by a warning reasonably sufficient to notify the public of those dangers, there can be no question. In the absence of actual knowledge on the part of the deceased of the dangerous condition, it was the duty of the city to inform him of it by some means reasonably adequate to that end. A mark across the viaduct, or a mere string laid upon the planks, would hardly be deemed sufficient; while a tight fence, which could not be overthrown or scaled, might have been an extreme of precaution not required. Had the danger been slight, the precaution to be observed with reference to the notice to the public might have been proportionately lessened. All of these questions are clearly ones of fact, and appropriate for the consideration of the jury. Again, that this barricade had been disregarded for so long a time and by so large a number of people, and that it was so readily passed by pedestrians, might reasonably lead to the conclusion that the city knew of such disregard by foot passengers, and that it was established solely for the purpose of preventing teams from crossing, and was not intended as a warning to those on foot. This had evidently been the view taken of it by the plaintiff's husband, as well as by the public at large. The city, knowing this, as it must be presumed to have known it from the extensive and long continued use made of the viaduct as a footway in disregard of the comparatively slight warning given by it, ought, when the danger was increased by the entire removal of portions of the floor and the cre-

ation of a death trap, as it were, to have increased the notification to the public of the increased danger by the erection of other additional and more effective barricades or other warnings. By long use the slight barricade four feet high, easily passed under, had come to be regarded by foot passengers as no notification of danger whatever as to them. By frequent use of the viaduct it was found that there was no danger in crossing it on foot prior to the tearing up of the planks leaving a hole there, through which the plaintiff's husband was precipitated. In many respects the conditions were the same as in the case of *Price v. Water Company*, 58 Kan. 557, 50 Pac. 450, 62 Am. St. Rep. 625, where a reservoir had been inclosed by a fence, and it was claimed that that should have been sufficient warning of the danger within. Boys had, however, habitually disregarded this warning, and had been permitted to play about the reservoir. In that case it was said: "Whatever merit such precautionary measure might have under other circumstances, it is sufficient to say that in this case they were not reasonably effective, because it was the daily habit of trespassing boys to mount the fence and frequent the reservoirs on the inside; and this habit was known to the company's responsible agent, and was not only tolerated, but went unrebuked by him. Knowing the fence to be ineffective either as a barrier or warning, it was the duty of the company to expel the intruders or adopt other measures to avoid accident. Whatever advantage the defendant in error might have gained from the erection of a reasonable effective barrier or warning is neutralized by the fact of its knowledge that the boys did trespass, and its permission to them to do so." In *Wetmore Township v. Chamberlain*, 64 Kan. 327, 67 Pac. 845, where it was claimed that a notice of the defective condition of a bridge and the sufficiency of a barrier upon the approach to a defective bridge should, as a matter of law, be held sufficient to give notice of the defective conditions thereof, this court said: "Whether the warning and barriers were sufficient was a matter for the determination of the jury, and for like reasons contributory negligence was a question for the jury under the instructions of the court. Under the testimony a withdrawal of the case from the jury, or an instruction in favor of the defendant, would have been gross error." We are of the opinion that this quotation fairly expresses the law applicable to this case. A barrier had been erected. Whether, under all the circumstances, it was sufficient to carry notice of defective conditions, is a question of fact, which the court should have submitted to the jury.

It is further suggested by defendant in error that plaintiff's husband was guilty of such contributory negligence in disregarding this barrier and going under it as to preclude recovery. This, of course, is but another

presentation of the same question, and is a question of fact for the jury.

A claim is also made that there was no evidence from which the jury might conclude that the place where the deceased fell was in Kansas City, Kan., rather than Kansas City, Mo. Upon this matter we disagree with defendant in error, and find sufficient evidence in the record to justify the conclusion, had the jury reached it, that the place where he fell was in Kansas City, Kan.

We think the court was in error in sustaining the demurrer to the evidence, and direct a reversal of the case, and remand it for further proceedings. All the Justices concurring.

(68 Kan. 436)

## BUOY v. CLYDE MILLING & ELEVATOR CO.

(Supreme Court of Kansas. Feb. 6, 1904.)

NEW TRIAL—DEMURRER TO EVIDENCE—INJURY TO EMPLOYEE—DANGEROUS APPLIANCES.

1. A ruling on a demurrer to the evidence is a decision of law occurring at the trial, which is subject to reconsideration on a motion for a new trial.

2. Where a new trial is allowed upon the sole ground that error was committed in overruling a demurrer to the evidence, after having denied the motion on other grounds, including one that the findings and verdict were not sustained by sufficient evidence, the case is in the same attitude, and the court governed by the same rules in passing upon the evidence, as when the demurrer was originally considered and decided; and, if there was substantial evidence tending to sustain the cause of action stated in plaintiff's petition, the granting of the motion was erroneous.

3. When considering that ground of the motion, the court could not weigh the evidence for the purpose of settling conflicts in it, and could not allow the motion unless it was able to say that, admitting every fact proven which was favorable to plaintiff, and admitting everything which was fairly inferable from the evidence most favorable to the plaintiff, he had failed to make out some one or more of the material facts of his case.

4. The furnishing of a safe place to work, and safe appliances with which to do the work, are among the absolute duties of the master; and unless the servant's attention is drawn to defects, or the dangerous conditions of the place or the appliances furnished, or he should have known of them, he is not required to make an investigation, but may rest upon the assumption that the master has performed his duties in these respects.

5. Under the facts of the case, it cannot be said that the defendant was not negligent in the erection of a scaffold, the fall of which injured the plaintiff; neither can it be said that the plaintiff knew, or should have known, of the defects and dangers of the situation.

(Syllabus by the Court.)

Error from District Court, Cloud County; Hugh Alexander, Judge.

Action by James Buoy against the Clyde Milling & Elevator Company. Verdict for plaintiff. From an order granting a new trial, plaintiff brings error. Reversed.

Caldwell & Wilmoth, for plaintiff in error. Pulsifer & Smith and Frank P. Harkness, for defendant in error.

¶ 1. See New Trial, vol. 37, Cent. Dig. § 56.

JOHNSTON, C. J. James Buoy, an employé of the Clyde Milling & Elevator Company, who was assisting in the construction of a warehouse, was injured by the fall of a negligently constructed scaffold. Engaged in the work at the time was Richa, a carpenter, receiving \$2.50 per day, and Buoy, a man of all work, who received only \$1.15 per day. Miller, the general manager of the company, employed Richa to complete the building, and told him he would send Buoy around to help him. According to plaintiff's testimony, Richa had worked some time, and had practically completed the scaffold, when Buoy arrived at the building. Buoy inquired if the scaffold was safe, and the reply of Richa was that it could not be pulled down with a team. Plaintiff went upon the scaffold with Richa, and within a few minutes it fell to the ground, and the plaintiff was seriously injured. In this action for damages the plaintiff alleged that the injury was caused by the negligence of the defendant and its employés in the unsafe and defective way in which the scaffold was built; that plaintiff had nothing to do with the construction of the scaffold, and had no knowledge of its defective and insecure condition. The defendant pleaded that the injury was the result of plaintiff's negligence, and not that of the defendant, and, further, that his injury had been greatly increased by the failure to take proper care in the treatment of his injury. There was conflicting testimony as to the experience of plaintiff, his knowledge of existing conditions, and whether he was subordinate to Richa, the carpenter. There was conflict, too, as to whether plaintiff assisted in the erection of the scaffold, and should have known of its defective condition. When plaintiff had introduced his testimony, a demurrer thereto was interposed by the defendant, which the court, after consideration, overruled. The defendant's testimony was then introduced, and also some by the plaintiff in rebuttal, when the court submitted the case on instructions, with special questions, which the jury were required to answer. The jury found in favor of the plaintiff, awarding him \$1,069 as damages, and returned answers to the special questions as follows:

"(1) Were not the brackets, the braces, the pickets, and the plank or planks used as flooring on the scaffold in question, all of good, safe, sound material, and fit for the purpose for which they were used? A. Yes."

"(3) Was not the plaintiff present and assisting in completing the erection of the scaffold in question? A. No.

"(4) Did not the plaintiff have ample opportunity to examine and inspect the scaffold as erected, and every part thereof, to ascertain as to its condition, and the manner in which it was erected and was standing, before going to work thereon? A. Yes.

"(5) Was any officer or agent of the de-

fendant corporation present at the time the scaffold was erected, and before the accident? A. Yes.

"(6) If you answer the preceding question in the affirmative, state what officer of the corporation? A. Richa, vice principal.

"(7) Was not the witness Richa an experienced, competent, and skillful mechanic or carpenter? A. Yes."

"(9) Did the witness Richa have any supervision or control over the plaintiff in the work that they were doing on the day of the accident? A. Yes.

"(10) If you answer the last question in the affirmative, state what supervision or control said Richa had of the plaintiff, and from what source or authority he procured the right to such supervision or control? A. Vice principal, from Miller.

"(11) Did not the plaintiff receive his orders as to the work done or to be done on the day of the accident from Miller, the manager of the defendant, and from no other person? A. Yes.

"(12) Did either the plaintiff or the witness Richa have any authority or control over the other? A. Yes.

"(13) If you answer the last question in the affirmative, then state what such authority or control was, and from what source it originated? A. As vice principal, from Miller.

"(14) Did the defendant, or any of its officers or agents, in any way direct, superintend, or have charge of the erection of the scaffold in question? A. Yes.

"(15) If you answer the previous question in the affirmative, then state which officer of the defendant, and what such officer did towards directing, controlling, or superintending the erection of the scaffold in question? A. Vice principal Richa erected the scaffold.

"(16) Was not such scaffold, erected in the manner in which this scaffold was erected, an ordinarily safe place upon which to perform the work necessary to be done at that time? A. No.

"(17) If you answer the preceding question in the negative, in what respect was such scaffold unsafe? A. Defective in bracing.

"(18) Did not the defendant and its officers and agents use all proper and reasonable care in providing for the safety of the plaintiff in doing the work that he was to do on the day of the accident? A. No.

"(19) If you answer the preceding question in the negative, then state fully in what respect you find the defendant or its officers guilty of negligence? A. In defective bracing of scaffold.

"(20) Under the instructions under which the plaintiff and the witness Richa was working on the day of the accident, was it any more the duty of one than the other to erect any scaffold that might be needed for use in the work which they were to do? A. Yes.

"(21) If you answer the preceding ques-

tion in the affirmative, then state which one, and why? A. Richa, vice principal.

"(22) Was it not necessary, in order to do the work which plaintiff and the witness Richa had been ordered to do on the day of the accident, that a scaffold be erected? A. Yes.

"(23) If you find for the plaintiff, state how much, if any, you allow for medical attendance and treatment; how much, if any, you allow for physical suffering; how much, if any, you allow for mental suffering; how much, if any, you allow for loss of time; and how much, if any, for permanent injuries? A. First, \$5.90; second, \$100; third, \$50; fourth, \$69; fifth, \$844.10; total amount allowed, \$1,069.

"(24) Was not the plaintiff just prior to the accident, standing on the plank beyond and outside of the west bracket? A. No."

The defendant objected to the answers made to several questions, which were all overruled, except as to No. 10, which, under the direction of the court, was reconsidered, and a modified answer returned, striking out, "Vice principal, from Miller," and inserting, "By being a superior workman." The defendant asked that certain of the findings be set aside because they were not sustained by the evidence, not responsive to the questions, and were contrary to the law and the instructions of the court. This motion was overruled, whereupon they asked for judgment in favor of the defendant on the findings, but this motion was likewise overruled. A motion for a new trial was then made on six different grounds, one of which was that the verdict and special findings were not sustained by sufficient evidence, and were contrary to law; also errors of law occurring at the trial. The motion for a new trial was allowed, as is recited in the entry, "on the ground following, and for no other ground: That the court committed error in refusing to sustain the demurrer filed and presented by the defendant to the evidence introduced by plaintiff; the court holding that, under the evidence presented, the plaintiff was not entitled to recover, and that the case should not have been submitted to the jury."

The order granting a new trial is assigned for error. Ordinarily courts hesitate to disturb an order granting a new trial where both parties are afforded another opportunity to have a fair and impartial trial of the case on its merits. So it has been said that a much stronger case for reversal must be made where a new trial is allowed than where it is refused. A trial court has quite an extended discretion in the granting of new trials, and such an order will not be set aside unless it can be said that the court committed error with reference to some pure, simple, unmixed question of law. Where several grounds are alleged, and the trial court does not state upon what particular ground the motion is allowed, the Supreme

Court will sustain the order if it can be done upon any of the grounds assigned. Most of the statutory grounds were alleged in the motion, but the court stated the particular ground upon which the motion was allowed, namely, that error was committed in the refusal to sustain the defendant's demurrer to plaintiff's evidence. To remove any possible question, a recital was added that it was sustained for no other ground. The court having refused to set aside the findings because they were not sufficiently supported by the testimony, and also having refused to enter a judgment thereon in favor of the defendant, and having overruled all other grounds of the motion for a new trial, except the single one which has been mentioned, its order rests on a question of law alone. The court, in effect, held that the findings of the jury were sustained by sufficient evidence; that these findings did not warrant a judgment in favor of the defendant; that they did not conflict with each other, nor with the verdict; that there was no irregularity in the proceedings; no misconduct of the jury or the plaintiff; that the damages were not excessive or given under the influence of passion or prejudice; that the verdict and findings were not without support in the testimony; and that no errors of law occurred at the trial, except the refusal to sustain a demurrer to plaintiff's evidence. Manifestly, the court held that the whole testimony, including that of plaintiff and defendant, made a case against the defendant, and supported the findings and verdict, but that when the plaintiff rested, and when the demurrer to the evidence was introduced, there was not sufficient testimony to warrant a submission of the case to the jury. The ruling on the demurrer to the evidence is a decision of law occurring at the trial, and is not available as error unless raised by a motion for a new trial. It was so raised in this case, and, when presented in that way, the case was in the same attitude, and the trial court was governed by the same rules in measuring the evidence, as it was when the demurrer was originally considered and decided. If the demurrer should not have been sustained, a new trial should not have been granted because of the decision overruling the demurrer. Was there substantial testimony tending to sustain the cause of action stated in plaintiff's petition? In determining the question, the court could not weigh evidence, nor settle conflicts in it. The demurrer admitted the facts which the evidence most favorable to plaintiff tended to prove, and all that might be fairly inferred from those facts. A very different question would be presented if the ground for a new trial was that the verdict was not sustained by sufficient evidence. There the court might weigh the conflicting evidence, and, if the verdict did not meet with its approval, its duty would be to set it aside and grant a new trial. But before the court can take a

case from the jury on a demurrer to evidence, it must be able to say that, admitting every fact proven which is favorable to plaintiff, and admitting everything which is fairly inferable from the evidence most favorable to plaintiff, he has utterly failed to make out some one or more of the material facts of his case. *Brown v. Railroad Co.*, 31 Kan. 1, 1 Pac. 605; *Christie v. Barnes*, 33 Kan. 317, 6 Pac. 599. Measured by these rules, the case should have been submitted to the jury, and therefore the ruling submitting it to the jury afforded no ground for a new trial. There was testimony tending to sustain the averments of the petition—testimony from which the jury might have inferred that the scaffold was carelessly built, and that Richa, who built it, and was in charge of the work when plaintiff went to his assistance, was culpably negligent. The furnishing of a safe place to work, and safe appliances with which to do the work, are among the absolute duties of the master. From the testimony, a fair inference may be drawn that these duties were not performed. It is said, however, that plaintiff had an opportunity to examine, and must have examined, the scaffold, before using it. According to the testimony, he was told to go to the assistance of the carpenter; and, when he went, he found a scaffold erected upon which he was expected to work. Unless there was a very obvious defect, he had a right to assume that it was properly built. *Kelley v. Railway Co.*, 58 Kan. 161, 48 Pac. 843. He took the precaution, it seems, to ask Richa if it was safe, and was told that a team could not pull it down. We cannot say that he should have known of the insecurity of the scaffold. Unless his attention was drawn to defects or to the dangerous conditions, he was not required to institute an investigation, but might rest on the assumption that the company had performed its duty. The posts and braces which supported the brackets of the scaffold rested on the track of a railroad recently built. The ground upon which the braces stood was somewhat loose, and the braces reached the ground over and across a rail of the track, which acted as a fulcrum when there was a weight on the platform of the scaffold. When the men and material rested on the scaffold, the effect was to spring the braces over the rail, tipping up their ends, and thus rendering the structure insecure. It does not appear that his attention was drawn to this feature of construction, nor to the danger to which he was exposed. As we have seen, the scaffold was not built by him, and the accident occurred within a few minutes after he began work on it. It cannot be arbitrarily said that he knew, or should have known, of the danger to which he was exposed. Under the law, it is not only necessary that the employé shall know of the facts constituting the negligence of the master, or have opportunity to know them, but, in addition to

these facts, he must have known, or by the use of ordinary observation ought to have known or understood, the danger to which he was exposing himself by reason of those conditions.

It follows that the court erred in granting a new trial on the ground stated, and therefore its judgment must be reversed, with directions to enter judgment upon the findings and verdict. All the Justices concurring.

(68 Kan. 424)

**KANSAS CITY-LEAVENWORTH R. CO.  
v. GALLAGHER.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**STREET RAILROADS—INJURY TO PEDESTRIAN  
—PRESUMPTIONS—CONTRIBUTORY  
NEGLIGENCE.**

1. In the absence of evidence to the contrary, a jury may infer from the universal instinct of self-preservation that a person about to cross an electric street railway track both looked and listened before venturing to do so.

2. It is the duty of a pedestrian upon a city street, who is about to cross the track of an electric street railway company, to exercise his faculties of sight and hearing, and in other respects to take ordinary precautions to avoid collision with the cars. If he do look and listen, he will be held to an apprehension of that which should have been seen and heard, and, if he fail to look and listen, he will be charged with the same liability in case of disaster as if he had done so. But a traveler may cross an electric street railway track in front of an approaching car which he plainly sees and distinctly hears, and not be negligent. If, in view of his distance from the car, the rate of speed of its approach, and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury.

(Syllabus by the Court.)

Error from District Court, Leavenworth County; J. H. Gillpatrick, Judge.

Action by Margaret Gallagher against the Kansas City-Leavenworth Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Atwood & Hooper, for plaintiff in error. Jno. T. O'Keefe and Benj. F. Endres, for defendant in error.

**BURCH, J.** A street sweeper of a city street, while engaged in the performance of his duties, at night, was run down and killed by an electric street railway car. The car was running at a speed of from 20 to 25 miles per hour, while the rate allowed by the ordinances of the city was but 12 miles per hour. The track was "sweaty," and because of its slippery condition a moving car was difficult to control. The conductor and motorman in charge of the car discovered the employé of the city when 100 feet distant from him. He was then upon the track between its rails, and in the act of walking across it. The car conductor shouted to him, but the bell was not sounded or other warning given. Two

¶ 2. See *Street Railroads*, vol. 44, Cent. Dig. § 203.

railway engines were standing a short distance beyond the place of accident, one of which was taking water and the other noisily emitting steam, while the wind blew from the direction of the engines toward the pedestrian and the car. When the man was observed the motoneer set the brakes, which locked the car wheels, but not so quickly as if the brakes had been in good repair. The proper method of overcoming the momentum of the car would have been to apply sand to the track, but the apparatus for the use of sand was out of repair, and that expedient was not adopted at all. The car was properly lighted, and some street lights were burning in the vicinity, and, if it had been properly equipped, operated, and controlled, the car could have been stopped within a distance less than that intervening between the man and the car when he was discovered to be upon the track. The deceased was struck by the corner of the car on the side of the track toward which he was walking, and by force of the collision his body was thrown still farther away from the track. He was in good health and had good eyesight and good hearing. He was familiar with the track and the manner and mode of running cars upon it along the street in question, and knew about how often cars passed the place of injury. He had an unobstructed view of the railway track for 610 feet in the direction from which the car came. There was nothing to prevent his seeing the car as it approached him if he had looked, and, if he had heard or heeded the shouting of the conductor, he then had time to leave the track and avoid the collision, and had the ability to do so. But there is nothing to show either that he did or did not look for an approaching car, or that he did or did not see or hear the one which struck him. Under these circumstances, was the deceased guilty of such contributory negligence that his widow may not recover from the company operating the car the damages occasioned by his death?

The defendant company argues the case as if the deceased man either looked and listened for an approaching car or did not do so; that he was negligent if he failed to take so much precaution for his own welfare; that he must be held to have noted the proximity of the car if he did look and listen; and that a reasonably prudent man, after looking and listening, would have avoided a collision. It is true that a traveler upon a city street, who is about to cross the track of an electric street railway company, should exercise his faculties of sight and hearing, and in other respects take ordinary precautions to avoid collision with the cars. If he do look and listen, he will be held to an apprehension of that which should have been seen and heard, and, if he fail to look and listen, he will be charged with the same liability in case of disaster as if he had done so. These principles meet the tests both of reason and of practical application to the affairs of men. Burns

v. Railway Co., 66 Kan. 188, 71 Pac. 244. But a jury may infer ordinary care and diligence on the part of an injured person from the love of life, the instinct of self-preservation, and the known disposition of men to avoid injury. *Dewald v. K. C., Ft. S. & G. Ry. Co.*, 44 Kan. 586, 24 Pac. 1101. And, in the absence of evidence to the contrary, it will be presumed that a person about to cross a railroad track both looked and listened before venturing to do so. *C., R. I. & P. Ry. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993. "There was no error in instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked, and listened. The law was so declared in *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 366, 41 L. Ed. 186, 192, 16 Sup. Ct. 1104. The case was a natural extension of prior cases. The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation; none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience that have surer foundation than that expressed in the instruction objected to." *Baltimore & P. R. Co. v. Landrigan*, 24 Sup. Ct. 137, 48 L. Ed. —.

Since the evidence in this case gives no account of the street sweeper on the night of the fatality until he was suddenly seen in a place of peril on the railway track, with the enginery of death bearing swiftly down upon him, these presumptions should be indulged in his favor, and the case determined as if he had chosen his gait in crossing the track with reference to an observation of his surroundings. Conceding, then, that the traveler looked for whatever was to be seen and listened for whatever was to be heard, and duly apprehended the report of his senses, still he cannot be summarily condemned. A man may cross an electric street railway track in front of an approaching car which he plainly sees and distinctly hears, and not be negligent. Hundreds of people do so every day, and yet satisfy every demand for care and caution which the law imposes upon them. The requirement of the law that a man shall look and listen means no more than that he shall observe and estimate with reasonable accuracy his distance from the car and the speed of its oncoming. He is then to make a calculation and comparison of the time it will take the car to come and the time it will take to cross the track, and if, under the same circumstances, a reasonably prudent person would attempt to cross at a given rate of speed, he will not be negligent in doing so. It is true that a reasonably prudent man may be mistaken or be deceived, but, if so, and if his conclusion from the facts as they appear to him be erroneous, and an injury result, he is nevertheless guiltless of contributory negligence, for the law does



not measure human conduct in such cases by any higher standard of care than that which such a man would exercise; and whether or not a prudent man would accept the hazard is generally a question of fact for the jury. "It is consistent with the facts proved that Lawler saw the approaching car, and without negligence on his part failed to observe from his position the unusual speed at which it was running, so that his conclusion that he could safely cross was not an unreasonable one. Clearly, it is not negligence in law for one to cross a street railway track in front of an approaching car which he has seen, and which does not appear to him to be dangerously near, and which would not have been so in fact had it been running at its ordinary rate of speed. Whether one who has observed an approaching street car should have also apprehended that it was approaching at such a speed as to reach him before he could cross the track, is generally a question of fact to be determined upon the circumstances of each particular case." *Lawler, Adm'r, v. Hartford Street Ry. Co.*, 72 Conn. 74, 82, 43 Atl. 545. "He who puts himself in the way of runaway horses who have escaped from the driver's control must know that he is taking a risk. But a jury may well say that he who crosses in front of a trolley car provided with a motorman may assume that it is furnished with the means of stopping or reducing speed. Then there was a question for the jury in this case whether a prudent man, upon such an assumption, might not judge it safe to cross in front of a trolley car three hundred feet away, although coming at great and illegal speed. Upon the assumption of the existence of means to reduce speed and to stop, and of a servant employed to make use of such means, it would be absurd to say that one was bound to refrain from crossing for fear the servant would not make use of the means." *Consolidated Traction Co. v. Lambertson*, 59 N. J. Law, 297, 299, 36 Atl. 100. "It would be palpable negligence for the driver of a wagon or carriage to recklessly drive upon a crossing in a race with an approaching car. In all such cases it should be held that the driver of the vehicle takes his chances of a collision, and he ought to have no remedy if an accident occurs. But no principle of law or common sense requires that the driver of a vehicle should stop his team, and await the passing of an approaching car, if he discovers the car on the line at such a distance as that, in the exercise of reasonable care and prudence, he may safely proceed on his way, and cross the track. Much is said in argument about the question whether the rule requiring a person about to cross the track to stop and look and listen for an approaching car, and whether the rule applicable to a railroad operated by trains and steam locomotives, should apply to an electric railroad. That question is not in this

case. There is no claim that plaintiff did not see the approaching car. He saw it when it was three hundred feet away from the crossing. The question is, did he use proper care and caution in determining whether he could safely cross the track? That was a fair question, under the evidence, for the jury to determine." *Patterson v. Townsend & Son*, 91 Iowa, 725, 726, 59 N. W. 205. See, also, *Schmidt v. Burlington, C. R. & N. Ry. Co.*, 75 Iowa, 606, 39 N. W. 916; *Gratiot v. Mo. Pac. Ry. Co.*, 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; 2 Thompson, Neg. § 1450.

What, then, was the situation of the street sweeper in this case? The car was hurtling through space at a rate of speed far in excess of that allowed by the city law. An observation of it would not have indicated peril, and would not have dictated haste in crossing, unless this high and dangerous rate of speed were appreciated. The sweeper had the right to rely upon a compliance with the law on the part of the company, and to believe the speed of the car to be within 12 miles per hour, and under the control of the motoneer. The mingling lights and shadows of the night necessarily rendered vision inaccurate and uncertain. The man was not bound to regard a shout as a street car signal, and other sounds were opposed to the noise of the flying car. Under these circumstances an unexpected and unlawful acceleration of speed might well deceive a reasonably prudent and careful man, and delude him into danger; and, if he were cognizant of the true rapidity of the car's motion, he might nevertheless feel secure that it would be reduced to the lawful rate by a vigilant motorman in command of efficient appliances in good repair, before it could overtake him. So considered, the facts already narrated, which seem especially to militate against a belief in the carefulness of the deceased, are not irreconcilable with a liability on the part of the company. In the light of such facts different minds might arrive at different conclusions as to what might, under all the circumstances, have been done without blame. The question, therefore, is not one of law, but is one of fact, and the general verdict against the company is conclusive.

Some complaint is made of instructions given and refused at the trial. Under the view of the case taken above, the instruction given relating to reciprocal rights upon the streets could not have been prejudicial. In the next instruction given the allusion to the safety of passengers occurs in a recital of duties evidently taken from the city ordinance granting the defendant the right to use the streets, and could not have misled the jury; and the objection that this instruction permitted a recovery if the defendant "negligently failed and neglected in any manner to care for the safety of the life and personal safety of the plaintiff's in-

testate" ignores the succeeding words "as alleged." The subject-matter of two of the instructions refused, referred to in the defendant's brief, was covered by instructions given, and the third conflicts with the views set forth above.

Since no material error appears to have been committed by the district court, its judgment is affirmed. All the Justices concurring.

(68 Kan. 403)

**SUPREME FOREST OF WOODMEN CIRCLE v. STRETTON.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**DEMURRER TO EVIDENCE—WAIVER—BENEFICIARY ASSOCIATION—ASSISTANT CLERK—PAYMENT OF DUES—MISCONDUCT OF JURY.**

1. If, after a demurrer to plaintiff's evidence has been overruled, the defendant enter upon a trial of the very matters which he claims the plaintiff failed to prove, introduce evidence respecting them which the plaintiff rebuts with further evidence, and take the verdict of the jury upon them, the status of the proof at the close of the plaintiff's case is rendered immaterial.

2. The by-laws of a fraternal beneficiary society provided that subordinate lodges so desiring might have an assistant clerk. For some two months, both in the presence and absence of its clerk, a member of a subordinate lodge habitually received and receipted for dues and beneficiary assessments in the name of the clerk, in regular meetings of the lodge, with its knowledge and acquiescence. During a period of almost a month, in the absence of the clerk, she performed the latter's duties in taking down and recording the minutes of meetings, collecting assessments and dues, entering payments made by members on the books of the lodge, and making reports to the supreme clerk, all with the knowledge and acquiescence of the lodge; and she assisted a new clerk, who subsequently took office, in making up her report and in performing other duties. *Held*, that such conduct was sufficient to constitute such person an assistant clerk, so that payments of dues and assessments to her by a member would bind the order, whether such payments finally reached the supreme body or not.

3. The misconduct of a juror which does not affect the verdict is not ground for a new trial.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by John H. Stretton against the Supreme Forest of the Woodmen Circle. Judgment for plaintiff. Defendant brings error. Affirmed.

Brown, Harding & Brown, for plaintiff in error. McAnany & Alden, for defendant in error.

**BURCH, J.** The defendant is a fraternal beneficiary society. During the lifetime of Mary Stretton, and while she was a member in good standing of one of the defendant's subordinate branches or lodges, it issued to her a beneficiary certificate payable at her death to the plaintiff, her husband. After her decease the plaintiff brought an action

for the enforcement of the certificate. The petition alleged in general terms, together with other appropriate facts, that all conditions and requirements of the certificate and of the by-laws of the society had been complied with. The answer denied this allegation, and asserted that the decedent was not at the time of her death a member in good standing, and pleaded a forfeiture. On the trial the plaintiff proved the death of the former member, introduced his certificate, and rested. A demurrer to the evidence was interposed and overruled, and the defendant then undertook to make proof of the facts relied upon for a forfeiture. The plaintiff endeavored to meet this proof by rebutting evidence. The jury made special findings of fact upon certain questions submitted to them, and returned a general verdict for the plaintiff, upon which judgment was entered. A motion for a new trial having been overruled, the defendant prosecutes error in this court.

It is insisted that under the provisions of the certificate and of certain by-laws of the society the plaintiff was required to prove the good standing of the deceased in the society at the time of her death as a condition precedent to recovery; that no presumption from the issuance of the certificate could supply such proof; and hence that the demurrer to the evidence should have been sustained. Under the language of the instruments mentioned it is doubtful if this be true. They seem to require the performance of certain stated things as conditions precedent to the vitality of the certificate, and the delivery of the certificate itself appears to be evidence of a compliance with such conditions; but the matter can now be of no practical importance whatever, since, after the demurrer to the evidence was overruled, the defendant immediately entered upon a trial of the very facts which it claimed the plaintiff had failed to prove; and, having brought on a trial of the omitted facts, instead of standing upon the demurrer, and having taken the verdict of the jury upon them, the status of the proof at the close of the plaintiff's case in chief is now immaterial.

On the trial it appeared that, if a payment made upon April 3, 1900, related to the dues and assessments of that month, the deceased was in good standing; but that, if it were made for the month next preceding, all rights under the beneficiary certificate were forfeited. The evidence upon this question, and the matters collateral to it, is quite unsatisfactory, but on the whole it is best interpreted by the findings of fact which the jury made and the general verdict which they returned, and it was not error to refuse to set them aside for want of sufficient support as various motions by the defendant demanded.

On the trial the authority of a Mrs. Allerton to discharge the duties usually and regularly performed by the clerk of the lodge

¶ 2. See New Trial, vol. 27, Cent. Dig. § 112.

was questioned. It appeared that during the months of January, February, and March, 1900, both in the presence and in the absence of the clerk, Mrs. Allerton habitually received and receipted for dues and beneficiary assessments in the name of the clerk, in regular meetings of the lodge, and with its knowledge and acquiescence; that during a period of time extending from February 22 to March 13, 1900, in the absence of the clerk, she took down and recorded the minutes of meetings, collected assessments and dues, entered payments made by members on the books of the lodge, and made reports to the supreme clerk, all with the knowledge and acquiescence of the lodge; and that she assisted a new clerk, who took office March 13, 1900, in making up her report and in performing her duties as such clerk. The by-laws of the order provide that subordinate lodges so desiring may have an assistant clerk, and in submitting the cause the court instructed the jury that conduct of the kind exhibited by Mrs. Allerton with the knowledge and acquiescence of the lodge was sufficient to constitute her an assistant clerk, so that payments of dues and assessments to her by a member would bind the order, whether such payments finally reached the supreme body or not. The by-laws contain no other definition or limitation of the duties of assistant clerk than such as may be implied by the name itself. The functions of that officer must, therefore, be confined to the field of the clerk's duties. But such functions must also be coextensive with that field. If the assistance the clerk requires should pertain to the keeping of records, the reception of dues and assessments, the giving of proper vouchers therefor, and the making of remittances to the supreme lodge, the assistant clerk may render it. Such authority necessarily follows from the power given the subordinate lodge by the laws of the supreme body to have an assistant clerk. It is in entire consonance with the requirements of the laws of the order that assessments and dues be paid to the clerk; that records be kept by the clerk, and that reports and remittances be made by the clerk; and it does not result from any delegation of power by the clerk. The question as to whether a subordinate lodge shall have an assistant clerk is left solely to its own desire. If it so will, no one can gainsay its action. The only question, therefore, is whether or not it is necessary to go behind the conduct, custom, and practice of the lodge and its members, and ascertain if due formality had been observed in the treatment of a matter over which they had complete control, namely, the selection of an assistant clerk. The case is not like one in which some volunteer undertakes to perform some function for the accommodation of members in a capacity not recognized by the laws of the order, as in *Lazensky v. Sup. Lodge, etc.* (City Ct. N. Y.) 3 N. Y. Supp. 52. There the

interfering party was purely a supernumerary and he and the lodge by their conduct virtually attempted to create the office of assistant financial reporter in opposition to the provisions of the by-laws of the order. Here the laws provide for the office, and by necessary intendment bring within its scope the conduct disclosed in this record, and without such office and a person to discharge its duties the chief business of the lodge must stop while the clerk is away, members must forfeit all rights under their certificates for want of an officer to whom they may pay their assessments and dues, and the supreme body must be deprived of the funds to which it is entitled. This case therefore is more nearly analogous to that of *Anderson v. Supreme Council Order of Chosen Friends* (N. Y.) 31 N. E. 1092, the syllabus of which is as follows: "The constitution of a subordinate council of a society with a relief fund feature provided that the secretary of the subordinate council should receive assessments of members entitled to relief benefits; that he should be under bonds; and that the subordinate council might permit him to select an assistant, for whose acts he should be responsible. Held that, it being the uniform practice of the members to make payments to the wife of the secretary, who had no office, at his house, in his absence, and her authority not having been questioned, she would be treated as an assistant, so that a payment to her would prevent forfeiture." Since the lodge itself, with authority to fill the office of assistant secretary in the first instance, accepted and adopted the continued service of Mrs. Allerton in that capacity, and, together with the members, recognized her as holding the office and discharging the duties of an assistant secretary, it would be unconscionable to permit the defendant now to question the regularity of her designation in order to enforce a forfeiture of its contract to pay. Therefore the instruction to the jury was correct.

In view of the foregoing it is not necessary to discuss the requests for instructions which were refused, or the giving of other instructions which were objected to.

The misconduct of a juror, consisting in the expression of opinion in the progress of the trial, is alleged as a reason for the reversal of the judgment of the district court. The remark made by the juror related to the identity of signatures in dispute, and is quite analogous to that referred to in *State v. Dickson*, 6 Kan. 209. The trial court, after a hearing upon the question, has determined that no prejudice resulted from the conduct of the juror. It was not of such a flagrant character that prejudice will be presumed, and from the record this court is unable to declare that the verdict was affected by it; hence the refusal to grant a new trial on this ground will not be disturbed.

The judgment of the district court is affirmed. All the Justices concurring.

(68 Kan. 421)

**OSBORNE et al. v. SCHLICHENMEIER.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**JUDGMENT BY PUBLICATION—VALIDITY.**

1. A judgment rendered in an action on service by publication, or personal service of summons, outside the state, where there had been no affidavit for publication filed, is void, and will be set aside upon proper and timely application by the defendant.

(Syllabus by the Court.)

Error from District Court, Geary County; O. L. Moore, Judge.

Action by D. M. Osborne and others against Jacob Schlichenmeier. Judgment for defendant, and plaintiffs bring error. Affirmed.

Thomas Dever, for plaintiffs in error.  
Roark & Roark, for defendant in error.

**GREENE, J.** This proceeding is prosecuted to reverse an order of the district court setting aside a personal judgment previously obtained by the plaintiffs in error against the defendant in error. It appears that D. M. Osborne & Co. obtained a judgment against Jacob Schlichenmeier in the district court of Geary county upon a promissory note. The defendant lived in Jackson county, Mo. When the action was commenced, the plaintiffs filed an affidavit for attachment, upon which an order was issued, and levied upon real estate owned by the defendant in Geary county. No affidavit was filed for service by publication, nor personal service had upon the defendant, other than that had by issuing a summons to the sheriff of Jackson county, Mo., which was served upon the defendant by such sheriff, and returned with an affidavit thereto showing that the summons had been personally served. The defendant did not appear at the trial, nor at any subsequent proceedings, except as herein stated. The cause was tried, a personal judgment rendered against the defendant, and an order to sell the attached real estate. The land was sold, and purchased by the plaintiffs. A certificate of purchase having been issued to them, they assigned it to the other plaintiff in error, Mary R. Seymour, who caused the sale to be confirmed, and a deed made to her. Within a year thereafter the defendant filed a motion and served notice upon the plaintiffs and Mary R. Seymour to set aside the judgment and all proceedings had thereunder, alleging that the court had no jurisdiction of him in the action. After this motion was filed, the plaintiffs and Mary R. Seymour made a motion, and filed with it an affidavit for publication, asking that it be permitted to amend or supplement their affidavit in attachment with this affidavit for service by publication. Upon the hearing of this application, the defendant refused to appear.

The court overruled the motion, and refused to permit the amended affidavit to be filed. Defendant's motion to set aside the judgment and sale of the real estate was sustained, and the deed made by the sheriff to Mary R. Seymour canceled.

It is claimed by the plaintiffs in error that the court erred in overruling their application to amend or supplement their affidavit for service by publication, and also erred in sustaining the defendant's motion. We are of the opinion that the court below was correct in both such rulings. Section 4507, Gen. St. 1901, provides that, "before service can be made by publication, an affidavit must be filed stating that the defendant or defendants are non-residents of the state of Kansas, and that personal service of summons cannot be had upon said defendant or defendants within the state of Kansas \* \* \* and showing that the case is one of those mentioned in the preceding section. \* \* \*" Section 4510 provides that, "In all cases where service may be made by publication, personal service of summons may be made out of the state by the sheriff of the county in which such service may be made. Provided, that such service when made and proved as aforesaid shall have the same force and effect as service obtained by publication, and no other or greater force or effect." The affidavit for the attachment did not contain sufficient facts to conform to the requirements of the statute as an affidavit for service by publication. Service by publication without the statutory affidavit is void, and all proceedings thereunder are also void, and may be set aside. *Shields v. Miller*, 9 Kan. 390; *Harris v. Clafin*, 36 Kan. 543, 13 Pac. 830; *Lieberman v. Douglass*, 62 Kan. 784, 64 Pac. 590; *Grouch v. Martin*, 47 Kan. 313, 27 Pac. 985.

The contention that the court erred in overruling plaintiffs' application to amend or supplement their affidavit by filing an affidavit for service by publication cannot be sustained. This is not a case where there was a defective affidavit for publication, or a defective service, but an entire absence of any affidavit for such purpose. There was therefore nothing to supplement or amend.

Some contention is made in the brief and oral argument of plaintiffs in error that defendant's appearance to raise the jurisdictional question was a general appearance. We think this is not well taken. His motion was a special appearance, and he asked no affirmative relief. He refused to appear on the hearing of plaintiffs' motion to file an amended or supplemental affidavit. His appearance was for the one purpose of raising the jurisdictional question.

The orders and judgment of the court below were correct. The judgment is therefore affirmed. All the Justices concurring.

(68 Kan. 432)

## MEAD v. PHOENIX INS. CO.

(Supreme Court of Kansas. Feb. 6, 1904.)

## INSURANCE—ACTION ON POLICY—CONTRACT—LIMITATION.

1. A dwelling house, owned by a minor 12 years of age, was insured in his name. In May, 1894, it was destroyed by fire. The policy contained a condition that no suit or action for the recovery of any loss should be maintainable unless commenced within 12 months after the fire. In 1902, when the insured reached his majority, he brought an action on the policy to recover the amount of his loss. *Held*, that the contract limitation controlled the general statute of limitations, and that the action was barred.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by Kenneth Mead against the Phoenix Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Carroll, Monahan & Warren, for plaintiff in error. McAnany & Alden, for defendant in error.

SMITH, J. In March, 1894, Kenneth Mead was a minor 12 years of age, and the owner of two lots on which there stood a frame dwelling. The building was destroyed by fire on May 11, 1894, while insured for \$600 in the defendant in error company. Soon after the loss the mother of the insured settled with the company for \$475, through her attorney, C. C. Dail. On May 26, 1902, after Kenneth Mead became of age, he brought this action against the insurance company to recover the amount of the policy, with interest. The petition sets out the fact of the fire, notice of the loss to the company, and the date and number of the policy, and avers that plaintiff on his part had performed all of its conditions. The petition had attached to it as an exhibit a copy of the policy, with an allegation as follows: "The plaintiff further says that shortly thereafter, to wit, August 2, 1894, through and by a conspiracy between defendant and another person, one C. C. Dail, the said policy, No. 4,930, was surreptitiously obtained from this plaintiff, then still a minor, and for a small consideration from defendant to said Dail delivered unlawfully and wrongfully to defendant, and by it canceled so that, if the copy of said policy which is hereto attached marked 'Exhibit A,' and made part hereof, is not an exact copy, the failure thereof is attributable to the cancellation of the same by defendant. Plaintiff further says that at said time, nor until the year 1896, he did not have any guardian to represent his interests in that or any other respect, and that only on about the 15th day of May, 1902, did he, when he became of full age, acquire the right to do so himself, and, if any default has accrued in premises

against him, he pleads his minority against the same." The answer of the defendant below contained three defenses: First, a general denial; second, breach of covenant to give immediate notice of loss and make proof within 60 days; third, a failure to bring an action on the policy within 12 months after the fire. To these defenses plaintiff below replied that after the fire he had done all things required by him by the conditions of the policy, and that "through and by a conspiracy between said defendant and one C. C. Dail, for a small sum as in payment of said loss so covered by said policy, said defendant unlawfully and wrongfully obtained said policy from the said C. C. Dail, and converted said policy to its own use, and canceled the same, whereby it waived all the conditions of said policy required to be complied with by said plaintiff if they had not been complied with by him, which plaintiff asserts had been done." A trial was had before the court resulting in a judgment for the defendant below.

The policy contained this condition: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire." It is clear that the action was based on the contract of indemnity to recover the loss. The allegation in the petition respecting a conspiracy between the company and Dail was made to excuse plaintiff in his failure to set up a true copy of the policy. The action was not founded on the conspiracy. It did not sound in tort. In the plaintiff's reply he alleged that the conditions precedent to a recovery by him had been waived by the insurance company in wrongfully obtaining the policy from Dail, thus confessing that he was bound by all the provisions in the insurance contract except the conditions pleaded in the answer. The action of plaintiff below was barred by the limitation of time fixed in the policy for the commencement of an action, which was 12 months from the time of loss. When the policy was issued and the loss occurred, the agreement limiting the time within which an action to recover on the insurance contract might be commenced was not illegal. *McElroy v. Insurance Co.*, 48 Kan. 200, 29 Pac. 478. By chapter 91, p. 182, Laws 1897, such contracts are no longer permitted. Gen. St. 1901, § 4446, subd. 7. The contract limitation in the policy controls the general statute of limitations, and is good even against minor beneficiaries. *Suggs v. Insurance Co.*, 71 Tex. 579, 9 S. W. 676, 1 L. R. A. 847; *O'Laughlin v. Union Central Life Ins. Co.* (C. C.) 3 McCrary, 543, 11 Fed. 280. See, also, *Riddlesbarger v. Hartford Insurance Co.*, 7 Wall. 386, 19 L. Ed. 257. In *McElroy v. Insurance Co.*, *supra*, the dismissal of an action brought within the time required by the policy was

¶ 1. See Insurance, vol. 23, Cent. Dig. § 1547.

held not to extend the time to begin another within a year, under section 4451, Gen. St. 1901.

The judgment of the court below will be affirmed. All the Justices concurring.

(68 Kan. 373)

**WEHE et al. v. MOOD et al.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEDENT—DEMURRER TO EVIDENCE—CONTEST OF WILL—DISMISSAL.**

1. In an action brought by the heirs at law against the devisee and executrix to contest a will, the heirs are not competent witnesses to testify in their own behalf concerning communications had personally with the deceased testator.

2. In considering and deciding a demurrer to plaintiffs' evidence in a case tried to the court, the same rule obtains as in cases tried to a jury. The court cannot weigh conflicting evidence, nor regard the case as though submitted by the defendant upon the plaintiffs' showing, but must consider as true all portions of the evidence which tend to prove the allegations of the petition. *Wolf v. Washer*, 4 Pac. 1036, 32 Kan. 533; *Farnsworth v. Clarke*, 62 Pac. 655, 62 Kan. 264.

3. In an action by the heirs at law against the legatee and executrix to contest a will, before the case had been finally submitted, one of the plaintiffs filed a motion to dismiss, as to her, without prejudice. *Held* error for the court to refuse to sustain said motion.

(Syllabus by the Court.)

Error from District Court, Shawnee County; *Z. T. Hazen*, Judge.

Action by *Ida M. Wehe* and others against *Jane S. Mood*, individually and as executrix of the will of *Robert Mood*, deceased. Judgment for defendants, and plaintiffs bring error. Reversed.

*Jetmore & Jetmore*, for plaintiffs in error.  
*J. J. Schenck*, for defendants in error.

**ATKINSON, J.** *Robert Mood* died testate at his late residence in the city of *Topeka* on the 28th day of *December*, 1897. The last will and testament of deceased, executed on the 20th day of *May*, 1896, was duly admitted to probate on the 15th day of *January*, 1898, and his widow, *Jane S. Mood*, was on said day duly appointed executrix. At the time of his death, *Robert Mood* left as his heirs at law his widow, *Jane S. Mood*, and three daughters, *Ida M. Wehe*, *Jennie Wehe*, and *Iola Bennett*. The said widow of deceased, to whom he had been married for more than 30 years, is the stepmother of the said daughters of deceased, and has no children of her own. By the terms of his last will and testament, *Robert Mood* devised and bequeathed all his property, real and personal, shown to be of the value of about \$25,000, to his widow, absolutely, except premises in the city of *Topeka*, shown to be of the reasonable value of \$6,000, which were devised to said daughters, share and share alike, with a life interest therein to the widow. On *July 21*, 1899, the said daughters of deceased filed their petition in the district court of

*Shawnee county* against the widow, *Jane S. Mood*, and *Jane S. Mood*, executrix, to contest the said will, charging that the execution of the same had been induced and procured by the fraud and undue influence of defendant *Jane S. Mood*. The case on *March 28*, 1902, was tried before the court without a jury, and, after plaintiffs had concluded their evidence, the court sustained defendants' demurrer thereto, and rendered judgment against plaintiffs for costs. Plaintiffs allege error, and bring the case to this court for review.

Upon the trial, plaintiffs were not permitted to testify as to communications had personally with the testator, *Robert Mood*. The trial court held that plaintiffs were not competent to testify in their own behalf as to communications had personally with deceased under section 4770, Gen. St. 1901. So much of said section, being section 322 of the Civil Code, as is necessary to be considered, is as follows: "No party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person where they have acquired title to the cause of action immediately from such deceased person." The contention of plaintiffs is that said section 322 does not apply to them; that the widow only claims as devisee under the will; that plaintiffs repudiate the alleged will, and claim as heirs of the testator, under the statute of descent and distribution; that plaintiffs, as such heirs, do not acquire the title from the testator, but that the law casts it upon them without any regard to their wish or election; that, for the reasons stated, they are not claiming title immediately from the deceased. With this contention of plaintiffs we cannot agree. The heirs of a deceased person acquire title immediately from such deceased person, within the spirit and meaning of section 322 of the Code. Plaintiffs, upon the trial, were incompetent to testify in respect to communications had personally with the deceased. *Rich v. Bowker*, 25 Kan. 7; *Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. 620. The court committed no error in excluding this testimony.

Plaintiffs assign as error that the court sustained defendants' demurrer to the evidence. The practice of allowing demurrers to evidence in cases tried to the court, the same as in jury cases, has been recognized by this court. *Lumber Co. v. Savings Bank*, 52 Kan. 410, 34 Pac. 1045. We have carefully read the record in this case. Upon the question of whether or not the will of *Robert Mood* had been induced and procured by the fraud and undue influence of defendant *Jane S. Mood*, plaintiffs offered the testimony of numerous witnesses. The evidence offered was conflicting. There was some evidence tending to establish the claim

of plaintiffs. The trial court could not, upon demurrer, review the evidence, as though the merits of the case had been submitted on the evidence of plaintiffs. We, however, express no opinion as to the effect of the evidence, had the case been submitted on its merits, instead of upon demurrer. In the case of *Wolf v. Washer*, 32 Kan. 533, 4 Pac. 1036, Mr. Justice Valentine, upon the question of a demurrer to the evidence in a case tried to the court, said: "In order to sustain a demurrer to the evidence, the court must be able to say, as a matter of law, that the party introducing the evidence has not proved his case; and the court cannot, upon conflicting and contradictory evidence, say that, as a matter of fact, the preponderance of the evidence shows that the party introducing it has not proved his case. If in the present case no demurrer to the evidence had been interposed, and the case had been submitted to the court upon the evidence introduced, for a decision upon the merits, and as to what the conflicting and contradictory evidence in fact proved, and the court had decided the case in favor of the defendants and against the plaintiff, the decision, in all probability, would be right, for in such a case the court would have weighed the conflicting and contradictory evidence, and would have decided the case upon the preponderance of the evidence; but the court cannot do such a thing where a demurrer to the evidence is interposed, and where the court decides the case as a question of law upon the demurrer." The court committed error in sustaining the demurrer.

On January 4, 1901, plaintiff Jennie Wehe filed the following motion: "Now comes Jennie Wehe, one of the plaintiffs in the above-entitled action, and moves the court to dismiss the action as to herself, without prejudice." The court on March 11th overruled said motion, over the objection of plaintiff, and denied to plaintiff the right to dismiss. Section 7967, Gen. St. 1901, provides that an action to contest a will may be brought at any time within two years after the probating of the will by any person interested in the will or in the estate of the deceased. Section 4846, Gen. St. 1901, Code, § 397, provides that an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. The right of plaintiff Jennie Wehe in this case to dismiss without prejudice is fixed by statute, and does not rest in the discretion of the trial court, as suggested by counsel. Section 4464, Gen. St. 1901, Code, § 36, provides a means of bringing into a case, as defendants, all parties necessary to a complete determination or settlement of the questions involved. There was error in not sustaining the motion of plaintiff to dismiss.

The judgment below is reversed, with direction to sustain motion of plaintiffs for a

new trial, and the motion of plaintiff Jennie Wehe to dismiss. All the Justices concurring.

(68 Kan. 474)

## SUPREME COURT OF HONOR v. UPDEGRAFF.

(Supreme Court of Kansas. Feb. 6, 1904.)

### LIFE INSURANCE—SUICIDE OF INSURED.

1. A life insurance policy provided that it should be incontestable after two years from its date. The insured, who held the policy, which was payable to his wife, committed suicide after the two-years period had elapsed. *Held*, that the beneficiary was entitled to recover the amount.

(Syllabus by the Court.)

Error from District Court, Reno County; M. P. Simpson, Judge.

Action by Florence L. Updegraff against the Supreme Court of Honor. Judgment for plaintiff. Defendant brings error. Affirmed.

Prigg & Williams and Wm. B. Risse, for plaintiff in error. Geo. A. Vandever and F. L. Martin, for defendant in error.

SMITH, J. This was an action on a certificate of membership in a fraternal order held by George C. Updegraff at the time of his death, in October, 1901. The action was brought by defendant in error, wife of the deceased, who was the beneficiary named in the certificate.

The insured came to his death by suicide more than two years after the date of his certificate of membership, which certificate was in effect a policy of life insurance for the sum of \$2,000, conditioned on the insured complying with the constitution, rules, and by-laws of the order. The certificate provided that the company should not be liable if the insured should die in violation of section 2, art. 10, of the constitution, which was made a part thereof. It reads: "This order will not pay the benefits of members who commit suicide, whether sane or insane, except it be committed in delirium resulting from illness, or while the member is under treatment for insanity, or has been judicially declared to be insane; but in all cases not within said exceptions, the amount of money contributed to the benefit fund by such members, shall be returned and shall be paid to the beneficiaries out of said fund in lieu of the benefit."

A section of the constitution of the Supreme Court of Honor in force when the benefit certificate was issued, and at the date of the holder's death, is as follows;

"Sec. 99. After two years certificates of membership shall be incontestable for any cause except fraud, violation of the constitution or laws of this order, or a failure to pay the assessments for the benefit and general funds as provided by the laws."

Defendant in error had judgment in the court below.

The sole question involved is whether the

provision in the benefit certificate which renders it incontestable after two years is void when it appears that the insured took his own life. Counsel for plaintiff in error rely on the case of *Ritter v. Mutual Life Insurance Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693, which in effect holds that where there is no provision in a policy of insurance respecting suicide it will be avoided by the death of the insured by his own hand; that public policy requires that self-destruction should avoid the policy. That case was decided on the facts presented in the record, which showed an absence of any agreement in the policy respecting death by suicide. It was concluded that in such cases there is an implied agreement that the insured will not destroy himself. It cannot be denied that much of the argument of the learned justice who delivered the opinion is applicable to the case before us. We must, however, look at the facts on which the conclusion of the court rested, and see how near they coincide with the facts in the present case in order to determine the force of the decision as an authority to be followed. As before stated, in the *Ritter Case* there was no stipulation in the policy respecting suicide. The amount of the insurance was payable at death to the estate of the insured, and not to any particular person as beneficiary. Missouri has a statute excluding suicide as a defense to an action on an insurance policy unless it can be shown that self-destruction was contemplated by the insured at the time of making the application. This statute has been held to be valid without apparent question that it contravenes public policy. *Knights Templars' Indemnity Co. v. Jarman*, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139; *Haynie v. Knights Templars' & Masons' Indem. Co.*, 139 Mo. 416, 41 S. W. 461; *Christian v. Ins. Co.*, 143 Mo. 460, 45 S. W. 268; *Logan v. Fidelity and Casualty Co.*, 146 Mo. 114, 47 S. W. 948.

In *Patterson and others v. The Natural Premium Mutual Life Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 890, it is said: "The fact that insurance companies have almost universally deemed it necessary to insert in their policies provisions exempting them from liability in case of suicide, 'sane or insane,' may perhaps also be considered as showing the general trend of opinion upon the subject in insurance circles; but, whether this deduction is to be properly drawn or not, we think it certain that the fact that life insurance policies universally contain this provision is of weight in determining the construction to be placed upon a policy which omits all specific reference to suicide, and also ostentatiously contains a clause providing that it shall be absolutely incontestable for any cause save for nonpayment of premiums or misstatement of age. What would an applicant for insurance be entitled to think was the meaning of such a policy, when presented to him, garnished with the usual and customary commenda-

tions of the average solicitor of insurance? Certainly he would not think that its legal effect was the same as that of a policy containing the usual provisions against suicide, sane or insane."

It was further held in the decision quoted from that the interest of the named beneficiary is a vested interest, which passes to the administrator of the beneficiary in the case of his death, and falls within the New York and Minnesota rule, which is, as against such a beneficiary, suicide by the insured while sane is not a defense, in the absence of a provision to that effect in the policy. The court said: "Nor would the application of that principle to this case necessarily conflict with the *Ritter Case*, where the policy was in favor of the estate of the insured. It may well be in such a case that the intentional suicide of the insured while sane would prevent a recovery of his personal representatives, and yet not prevent a recovery in case of a policy in favor of beneficiaries who had a subsisting, vested interest in the policy at the time of the suicide, and who could not, if they would, prevent the act of the insured. \* \* \* The incontestable clause would seem to effectually bar this defense. If this clause be not altogether a glittering generality, put in for no purpose except to induce men to insure, it would seem that it must cover such misstatements or omissions as are here alleged. Such clauses have been upheld by various courts. *Wright v. Mut. B. L. Ass'n*, 118 N. Y. 237 [23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749]; *Simpson v. Life Ins. Co.*, 115 N. C. 393 [20 S. E. 517]; *Goodwin v. Provident S. L. Assur. Ass'n*, 97 Iowa, 226 [66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411]; *Kline v. Nat. B. Ass'n*, 111 Ind. 162 [11 N. E. 620, 60 Am. Rep. 703]."

In *Royal Circle v. Achterath*, 68 N. E. 492, a late decision by the Supreme Court of Illinois, the precise question involved is decided against the contention of counsel for plaintiff in error. The case of *Goodwin v. Provident S. L. Assur. Ass'n*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411, takes the same view. See, to same effect, *Mareck v. Mutual Reserve Fund Life Ass'n*, 62 Minn. 39, 64 N. W. 68, 54 Am. St. Rep. 613. We deem it unnecessary to say more than has been expressed in the decisions favorable to defendant in error which we have quoted from and cited. They fully cover the case, and meet with our approval.

The judgment of the court below will be affirmed. All the Justices concurring.

(68 Kan. 369)

ATCHISON, T. & S. F. RY. CO. v. LLOYD.

(Supreme Court of Kansas. Feb. 6, 1904.)

INJURY TO EMPLOYE—EVIDENCE—PRESUMPTIONS.

1. In an action to recover damages for injuries sustained by a locomotive fireman by reason of a defective apron to a coal chute, where there is evidence tending to prove that the



apron was out of repair six months before the accident, and evidence on the part of the defendant tending to prove that the chute had been in constant and daily use during this entire period, the court, in applying the rule that a condition or state once shown to exist is presumed to continue until the contrary is shown, should inform the jury that such presumption is one of fact only, and may be rebutted by circumstantial as well as direct evidence.

(Syllabus by the Court.)

Error from District Court, Atchison County; W. T. Bland, Judge.

Action by Thomas W. Lloyd against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. A. Hurd and O. J. Wood, for plaintiff in error. Henry Elliston and Waters & Waters, for defendant in error.

GREENE, J. Thomas W. Lloyd sued the Atchison, Topeka & Santa Fé Railway Company to recover damages sustained by him while attempting to use an apron on a coal chute which was alleged to be either defectively hung or out of repair. It appears that the plaintiff was a locomotive fireman employed by the defendant; that on the 23d day of November, 1898, while firing on the California Limited, it became necessary to take coal. At Thatcher, Colo., there were a number of coal chutes, situated on a slight up grade northeast to the southwest. These chutes are numbered from 1 to 6. On the day of the accident the train upon which the plaintiff was firing was going west, and at Thatcher the engineer pulled up to coal chute No. 2 for the purpose of taking coal. They passed chute No. 1, so they could slack back to it if they found No. 2 empty. The plaintiff climbed onto the oil box on the west side of the engine, near the cab, and pulled down the apron to coal chute No. 2. It was discovered there was no coal in this chute, and plaintiff so advised the engineer. Plaintiff then undertook to shove up the apron, and the engineer, supposing he had accomplished it, released the air, and the train immediately slacked back. The apron did not respond, and the plaintiff was caught between it and the cab, and severely injured. He recovered judgment because of the negligence of defendant in permitting the apron to the coal chute to become and remain out of repair. Defendant prosecutes error.

There are several alleged errors, but upon examination we do not find any prejudicial to the defendant, except as hereinafter stated.

The court instructed the jury as follows: "No. 26. You are instructed that a condition or state, when shown to exist, is presumed to continue until rebutted by evidence of plaintiff or defendant. Some evidence has been introduced by the plaintiff tending to show that some of the coal chutes at Thatcher, Colorado, including the one in

controversy, were out of order prior to May 22, 1898; and the plaintiff claims that such condition continued until the time of the accident to him, and that at such time the said coal chute was by the negligence of the defendant, or its employes, in a defective condition, and that such negligence contributed directly to produce the alleged injury; and if you find from the evidence that defendant was guilty of negligence with reference to said coal chute, as claimed by the plaintiff, and that such negligence, if any, contributed to plaintiff's injury, the plaintiff would be entitled to recover therefor. On the other hand, evidence has been introduced by the defendant tending to show that subsequent to May 22, 1898, and prior thereto, said coal chutes, including the one at which the accident occurred, were inspected at different times, and were repaired and in reasonably safe working order, not only prior to May 22, 1898, but also subsequent to that date, and up to the time of the injury complained of by the plaintiff; and if you so find, then the plaintiff cannot recover in this case on the ground of claimed defective coal chute; or, if you find from the evidence that defendant exercised reasonable and ordinary care to inspect said coal chutes and to repair and keep the same in a reasonably safe condition, then the plaintiff in this case cannot recover."

Objection is urged that the rule that where the existence at one time of a certain condition or state of things of a continuous nature is shown the presumption arises that such condition or state continues to exist until the contrary is shown by circumstantial or direct evidence was incorrectly stated, in that it failed to state that such presumption may be rebutted by circumstantial as well as direct evidence. The plaintiff's evidence tended to prove that in May, prior to the injury, the chute was out of repair and dangerous. This was the basis for the application of this rule. Defendant offered evidence tending to prove that this particular chute had been in constant and daily use from that date up to and including the day plaintiff received his injury. The length of time from the date plaintiff contends the chute was out of repair and the injury and the constant use of the chute during that time are very strong circumstances tending to prove that the repairs had been made. The court in stating this rule should have incorporated into the instruction that such presumption may be rebutted by circumstantial as well as direct evidence. It is very doubtful if the rule, even when properly stated, is applicable in this case. The presumption only applies to conditions once shown to exist, which in their nature are continuous. The evidence in this case tended to prove that an attempt to use this appliance when out of repair was dangerous to human life. It also tended to prove that this coal chute was intended for constant and daily use.

Can a defective condition of such a dangerous instrumentality intended for constant and daily use be presumed to be continuous? The natural and almost universal practice is to repair and keep in safe working order such appliances. The instruction as given does not correctly state the rule, and is misleading and prejudicial to the rights of the defendant in the particulars herein stated.

For these reasons the judgment of the court below is reversed, and the cause remanded. All the Justices concurring.

(68 Kan. 450)

**WARNE, WILLIS & CO. v. MORGAN.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**SUBROGATION—WHEN GRANTED.**

1. Where one loans money which is actually used in paying off a valid incumbrance on property, whether real or personal, exempt or otherwise, with an agreement with the borrower that he shall have a valid mortgage on such property, and a mortgage is given which afterwards proves to be void because of a faulty execution, such mortgagee is entitled, upon application, to be subrogated to the rights of the mortgagee whose mortgage he paid to the amount paid by him for the release.

(Syllabus by the Court.)

Error from District Court, Greenwood County; G. P. Alkman, Judge.

Action by Warne, Willis & Co. against A. W. Morgan. Judgment for defendant, and plaintiffs bring error. Reversed.

Fuller & Jackson, for plaintiffs in error. Howard J. Hodgson and Lew E. Clogston, for defendant in error.

**GREENE, J.** Warne, Willis & Co. brought this action to foreclose a chattel mortgage for \$700 on certain personal property, a portion of which was exempt. The court rendered judgment against the plaintiffs as to the exempt property, to reverse which they prosecute this proceeding. The cause was revived in this court in the name of M. W. Willis, B. G. Richmond, and A. T. Mathewson, surviving partners of the firm of Warne, Willis & Co. It appears from the record that the wife of the mortgagee did not sign the mortgage sought to be foreclosed. At the time this mortgage was given there was a mortgage amounting to \$281.20 on the same property given by the defendant and his wife to the Eureka Bank. It was agreed that the plaintiff should have a mortgage on the property mortgaged to the bank, and, for the purpose of having the bank release its mortgage and securing a first mortgage on that property, the plaintiffs, in payment of \$700 to the defendant, gave him a check for the amount of the mortgage held by the bank, payable to the Eureka Bank, which was accepted, and the mortgage released. The balance of the money was paid in cash to the defendant. The plaintiffs, by way of amendment to their petition, set out the above facts,

and asked that they be subrogated to the rights of the bank under its mortgage to the amount paid by them in satisfaction of its mortgage. The evidence shows it was agreed that a part of the money loaned was to be used in paying the bank's mortgage on that property. The money was so applied. The only question involved is, are the plaintiffs entitled to be subrogated to the rights of the bank, whose valid mortgage they paid? This question has been more than once answered in the affirmative by this court. *Yaple v. Stephens*, 36 Kan. 680, 14 Pac. 222; *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; *Farm Land Co. v. Elsbree*, 55 Kan. 562, 40 Pac. 906; *Everston v. Central Bank*, 33 Kan. 353, 6 Pac. 605; *Zinkelson v. Lewis*, 63 Kan. 590, 66 Pac. 644.

For these reasons the judgment of the court is reversed, and the cause remanded for further proceedings. All the Justices concurring.

(68 Kan. 522)

**SEEDS v. AMERICAN BRIDGE CO.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**SPECIAL FINDINGS—GENERAL VERDICT—INCONSISTENCY JUDGMENT—INJURY TO EMPLOYE—ASSUMPTION OF RISK.**

1. If the special findings are such as to require the entry of a judgment thereon notwithstanding the general verdict, a judgment entered upon such general verdict is irregular, and, as such, may be set aside at a subsequent term of court.

2. All the elements which go to make up a plaintiff's right of recovery are found in his favor by a general verdict for him. And before special findings will avail to overthrow the general verdict, they must have determined all those elements against his right of recovery.

3. Before it can be said that an employé has assumed the risks of an employment, it must be shown that he knew, or had reasonable opportunity of knowing, what those risks were; that is, he must not only know or have reasonable opportunity of knowing the dangerous conditions, but must know or have reasonable opportunity of knowing the danger growing out of those conditions.

(Syllabus by the Court.)

Error from District Court, Atchison County; W. T. Bland, Judge.

Action by Edward M. Seeds against the American Bridge Company. Judgment for defendant, and plaintiff brings error. Reversed.

P. Hayes and J. L. Berry, for plaintiff in error. Warner, Dean, McLeod & Holden and W. W. & W. F. Guthrie, for defendant in error.

**CUNNINGHAM, J.** The defendant in error was engaged in rebuilding its bridge across the Missouri river at Atchison, and, in so doing, was removing and replacing the ironwork composing it. For that purpose it had erected a false work upon piles, considerably wider than the bridge on either side.

¶ 1. See Subrogation, vol. 44, Cent. Dig. §§ 61, 62.

¶ 3. See Master and Servant, vol. 34, Cent. Dig. §§ 575, 577, 578.

A huge crane or "traveler," spanning the entire structure from side to side, movable lengthwise of the bridge upon rails on either side, was erected for the purpose of attaching a block and tackle with which to lift and adjust the iron beams as they were removed from their places. The plaintiff was employed in and about this work under a foreman. The hoisting was done by a machine denominated a "nigger head," run by an engine at a uniform rate of speed. The custom was, in moving beams, for a workman to connect the tackle to it by making a hitch about the middle of the beam, and then, upon signal, to start the nigger head so as to wind up the cable, and thus hoist the beam. On the occasion in question the workman whose duty it was to fasten the chain around a beam then being lifted, left the place too soon so that the chain became unfastened. The foreman, with some vigor and profanity, called upon the plaintiff to readjust the hitch; telling him not to be in so great a hurry to get away, but to stay until he was certain that the hitch would remain fastened; that he (the foreman) would tell plaintiff when to get away. The plaintiff made the hitch, and gave the signal to the foreman when he was ready to have the load hoisted, and the foreman directed the starting of the engine for that purpose. The ropes from the top of the traveler, which was about 50 feet above, were not perpendicular, so that, as the beam started, it was swung to one side. The plaintiff, having remained too long at the place of hitching, was unable to get to a place of safety in time to avoid the swinging motion of the beam; there being no snub line attached by means of which other workmen might control its motion. The beam, thus left to itself, swung against the loose plank on which the plaintiff was endeavoring to reach a place of safety, knocked it from under him, and he was precipitated to the ice upon the river below, and badly injured. It was for the recovery of injuries thus sustained that he brought this action. The jury returned a general verdict in plaintiff's favor, accompanied by many special findings. The defendant filed its motion for judgment upon the special findings, notwithstanding the general verdict, and also its motion for a new trial. The motion for judgment on the special findings was overruled, and the hearing upon the motion for a new trial was continued until some subsequent date to be determined by the court. At the next term of court the defendant filed its motion to vacate the judgment, and for leave to renew its motion for judgment upon the special findings. This motion was sustained, the judgment on the general verdict set aside, the second motion for judgment upon the special findings granted, and judgment rendered in favor of the defendant for its costs.

It is complained that the court was in error (1) in setting aside the judgment rendered upon the general verdict after the expira-

tion of the term at which it was rendered, it having no jurisdiction so to do; and, (2) if the court had jurisdiction to make such order at the time it did, that the special findings are not so inconsistent with the general verdict as to require this to be done. If the special findings are so inconsistent with the general verdict that both cannot stand together, then the court erred in overruling the motion in the first instance, and the judgment entered at that time was certainly irregular, and, as such, might be vacated at or after the term at which it was rendered, under section 5054, Gen. St. 1901. A judgment must follow the verdict. Any other course would be irregular. The controlling verdict is the one indicated by the special findings. It would be the court's duty to enter judgment upon the verdict, and, to this end, he might change the judgment at a subsequent term, if incorrectly entered at first. *Toble v. Commissioners of Brown County*, 20 Kan. 14. We are required, therefore, to make inquiry as to whether the special findings were such as to control the general verdict, and compel a judgment to be entered for the defendant notwithstanding the general verdict.

The negligence of the defendant, as found by the jury, consisted in not using a snub line so as to control the swinging motion of the load as it was raised, and in raising the load too fast. The jury further specially found that the plaintiff was in a position to see that there was no snub line being used, and also in a position to see that the lifting line was out of perpendicular, and therefore that the beam was liable to swing as it was lifted from its position; that, had the load gone straight up, instead of being dragged by reason of the fact that the lifting line was not perpendicular, the accident would not have happened; and that the plaintiff expected the load to be drawn straight up. It is further found that the gear which run the nigger head was such as to run it at a uniform rate of speed, determined by the speed of the engine, from which fact it is claimed that the finding of negligence, that the load was raised too fast, could not be true, or, in any event, that the plaintiff was aware of the rate of speed at which the load would be lifted.

From these facts the defendant deduces the conclusion that as the plaintiff was in a position to know, from the slant of the lifting tackle, that the beam would likely be drawn to one side, and was in a position, had he looked, to have known that there was no snub line with which to control the motion of the beam which was being lifted; that, because he knew the speed at which the nigger head was being run, and consequently the rate at which the beam would be lifted after he gave the signal to start—he assumed all of the risks in the lifting of the beam in that particular manner, and hence that he was not entitled to recover. We think that

one important element is omitted from the defendant's chain of reasoning. It is not only necessary that an employé should know of the facts which go to make up the negligence of the employer, or have opportunity to know the same, but, in addition to those facts, he must have known or understood, or by the use of ordinary observation ought to have known or understood, the danger to which he was exposing himself; that is, he not only must have known, or had reasonable opportunity to have known, the dangerous conditions existing, but must have known, or had reasonable opportunity to have known, the danger to which he was exposing himself by reason of those conditions. *A., T. & S. F. R. Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253. The last element of the equation is as much a matter of fact for the jury as is the former, and, in determining it, the jury must take into consideration all of the circumstances and surroundings. It might here be claimed that plainly the plaintiff should have grasped these details of danger, and correctly deduced therefrom the proper estimate of the risks incident thereto. We must, however, remember that this would depend not a little upon the capacity, age, and condition of the plaintiff, concerning which there is no special finding. We must further remember that he had just been hurried to the work, had been violently chided for too great haste in getting away from this place of danger, had been told to remain there until sure that the fastening was secure, and had been informed by the foreman that he would tell the plaintiff when to get away. All this would have a strong tendency to make the plaintiff less observant of the dangerous surroundings, less critical as to unsafe conditions, and less competent to judge of danger to which he was exposing himself, growing out of these surroundings and conditions. Now, while some of the elements of the problem involved were determined in favor of the defendant by the special findings, not all of them were so determined. The others, by the general verdict, were resolved in favor of the plaintiff, and hence there is not enough in the special findings to require the overthrow of the general verdict. The court therefore was in error in setting it aside.

Its judgment in doing so, and in rendering judgment for the defendant for its costs, must be reversed, and the case remanded for further proceedings. All the Justices concurring.

(68 Kan. 489)

# MISSOURI PAC. RY. CO. v. BOWMAN.

(Supreme Court of Kansas. Feb. 6, 1904.)

## NEW TRIAL—MISCONDUCT OF JURY—VIEW OF PREMISES.

1. It is of the highest importance to the administration of justice and the good of society that the unquestioned purity and unbiased char-

acter of the jury be preserved, and, where it appears that the prevailing party has for any ulterior or sinister motive attempted to tamper with or influence the jury, a verdict in his favor should be set aside, and this without a showing that such attempt has in any way influenced the jury.

2. A like result should follow where it appears that an innocent act of the prevailing party outside the issues of the case has had the effect to improperly influence the jury in his behalf.

3. It became necessary in the trial of this case that the jury should be sent to view the premises in dispute. The judge announced in open court that this would be done, and that the plaintiff had carriages ready to convey the jury. These carriages were hired from a livery stable owned by one of the jury, of whom the plaintiff was a regular customer. These facts are not sufficient to require a verdict in favor of plaintiff to be set aside.

(Syllabus by the Court.)

Error from District Court, Anderson County; C. A. Smart, Judge.

Action by Noah L. Bowman against the Missouri Pacific Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Waggener, Doster & Orr and J. G. Johnson, for plaintiff in error. Manford Schoonover and C. W. Whittington, for defendant in error.

CUNNINGHAM, J. The defendant in error was plaintiff below. His action was for the recovery of damages to a pasture field by a fire set out by defendant's locomotive. He had judgment which plaintiff in error is seeking now to reverse. The first claim is that plaintiff was guilty of misconduct in connection with the jury. At the close of plaintiff's evidence the court said: "I think we will take a recess here, and I will send the jury out to view the premises again. I sent the jury yesterday to view only a part of the farm. I think I was in error in that. Mr. Bowman has carriages here, and I will let the jury go and see the entire farm." These carriages were procured at a livery stable owned by one of the jurors, and the misconduct suggested is in two particulars: (1) The first time the jury went to look at the premises upon the suggestion of the defendant they walked; the second time the plaintiff furnished carriages for their use. This, it is claimed, would tend to influence them in favor of the plaintiff. And (2) that the juror owning the livery stable from which the conveyances were procured would certainly be influenced by reason of the same having been hired from him. The purity of the jury trial cannot be too safely guarded. It is the theory, and should be the practice, as nearly as it is possible, considering human infirmities, that a juror to whom is submitted the issues arising between litigants should be unprejudiced, and without the least inducement save that disclosed in the evidence to influence his verdict. This is required not only as a safeguard to the individual litigant's rights, but as a matter of public policy; the latter con-

¶ 1. See *New Trial*, vol. 37, Cent. Dig. §§ 97, 119.

sideration perhaps being much greater than the former, for, when confidence in the incorruptibility and impartiality of juries is destroyed, our social and judicial fabric is vastly weakened. Courts should not tolerate the slightest suspicion of improper conduct on the part of a litigant tending to corrupt or improperly influence a jury. This principle is well established, and should never be lost sight of. Its application, however, must be determined by the circumstances of each case. In this case it seems that a more extended view was to be taken by the jury on its second trip than on the first, so that it became inconvenient to make the trip on foot, if not necessary to have conveyances for them. It appears from the affidavit of the plaintiff that he had frequent occasion to use livery teams for a number of years prior to this time; that he had procured the same at the livery stable owned by the juror; that monthly bills for the use of such teams had been presented and paid by him in the regular course of business; that upon this occasion in procuring the teams used he communicated with the person in charge of the stable, and not with the juror himself, and there is no showing that the juror had any knowledge of the matter save what we might reasonably suppose would be conveyed to him by seeing the teams in use. Nothing was concealed. The arrangement was announced by the court, and received its indorsement. The obtaining of the teams at the stable belonging to one of the jurors was in accordance with a regular business custom, and not extraordinary. About the entire transaction we see no indications that the plaintiff was endeavoring to use any undue influence upon the jury, or that from it the jury was likely to be unduly influenced. Suppose the jury had been carried to the premises in one of defendant's trains—a practice not infrequent—it would be a hard rule that would require us to set aside a verdict in its favor because of this. In *Vane v. City of Evanston*, 150 Ill. 625, 37 N. E. 904, the prevailing party furnished a lunch at a hotel at its expense, and it was shown that this luncheon was without cost or charge to the jurors, and as one of them, who made an affidavit, understood it, was to be paid by the prevailing party. On the counter showing it was made to appear that the jury could not return to their usual quarters in time to get their usual dinner, and that the arrangement was made at the suggestion of the court. The court concluded that it did not affirmatively appear that the successful party was guilty of any intentional wrongdoing, the court laying down the rule "that customary offices of civility and ordinary hospitality or courtesy extended by the successful litigant, when not designed or calculated to influence the juror or jurors in their consideration of the case, and which are devoid of suspicion, will not afford sufficient ground for setting the verdict aside and awarding a new trial." In *Gale v. Railroad Company*, 53 How. Prac.

385, the facts of the alleged misconduct were that during a recess of the court one of the jurors, desiring to return home, asked permission of the plaintiff to ride with him. To this the plaintiff consented, and they rode together for some distance along with one of the plaintiff's witnesses. It was shown that the case on trial was not spoken of or discussed. Relative to the matter the court said: "If the plaintiff, with a view of influencing the juror by placing him under obligations to him, had sought this opportunity so to do, a new trial would be granted. In such a case the court should see that an attempt had been made to improperly influence, and it would not stop to inquire whether the wicked effort had or had not been successful, but would assume that the party had at least partly succeeded in that which he attempted. When, however, the court is satisfied that there has been no attempt by the successful party to unduly influence a juror, either by conversation or by placing him under obligations, and that his action has not in fact been improperly influenced, then, even though the act may have been indiscreet, the court will not disturb the verdict." In *Hilton v. Southwick*, 17 Me. 303, 35 Am. Dec. 253, the prevailing party, in going to his home, conveyed one of the jury, who lived in the same direction, in his own wagon. No conversation relative to the cause took place between them, and the act seemed to be one of neighborly kindness, not out of the ordinary course, and done without any purpose to influence the juror. The court strongly announced the principle that the purity of the jury must be guarded with the greatest jealousy, and said, "If there appeared the least attempt on the part of the plaintiff to seek to influence the juror, the verdict would be set aside;" but, concluding that no sinister motive was apparent, refused to set aside the verdict. In the case at bar much less of suspicion attaches, as there is nothing here of a covert nature. The court in *Gale v. Railroad Company*, supra, in commenting upon the *Hilton Case*, remarks: "The principle upon which the verdict in *Hilton v. Southwick* was sustained, that the act done was not an officious one, thrust by the prevailing party upon the juror for the purpose of procuring his good will, and thus influencing action, but it was the result of neighborly courtesy and kindness, without any evil intent whatever, is not only sound in reason, but it and similar reasons have frequently guided and controlled the judgments of courts." See, also, announcing the same principle, cases cited in the above-quoted cases, and also *Ford v. Holmes*, 61 Ga. 419; *Central Railroad Company v. Wiggins*, 91 Ga. 208, 18 S. E. 187.

We have been cited to many discussions where intoxicating liquors have been given or tendered as a treat to jurors. The tendency seems to be on the part of the courts, and perhaps properly so, to view this practice with much more suspicion than the ordinary

civilities due from one person to another, and these cases can hardly be accepted as determinative or very illustrative of the question in hand. We think that practice in respect to the matter under discussion ought to be very carefully guarded by trial courts, but are inclined to the view that in this case neither a wrong purpose on the part of the plaintiff nor culpable bias on the part of the jury resulting from his actions was sufficiently shown to require us to overturn the conclusion of the trial court upon the matter.

It was further claimed that conversation was had or remarks made by the plaintiff in the presence of the jury while they were viewing the premises. This, however, was denied by the plaintiff and the sheriff, and the conclusion of the trial court upon this disputed question is conclusive upon us.

Some four other assignments of error were discussed. We have given them all very careful consideration, and find no material error in them, and conclude that no general good will be accomplished by their specific discussion.

The judgment of the lower court will be affirmed. All the Justices concurring.

(68 Kan. 468)

**ROYAL LOAN ASS'N v. FORTER et ux.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**BUILDING ASSOCIATION—LOAN—USURY—CONTRACT—LEX LOCI.**

1. The facts in the case, such as the absence of competitive bidding for the loan, a level rate of interest, and premiums payable in gross installments, and circumstances indicating that the borrower did not become a member of the building and loan association, sufficiently show that the transaction was not a building and loan association contract, on which more than the legal rate of interest can be collected, but is simply a loan, which is subject to the usury laws.

2. Although the loan was made by an association organized in Missouri, the negotiations were had with an agent in Kansas, the bond and mortgage were executed in Kansas by residents of the state, the mortgage was on land in Kansas, the money borrowed was paid back to the agent in Kansas, and the recitals in the mortgage, as well as the action of the parties, indicate that the parties treated the transaction as a Kansas contract, to be interpreted in accordance with the laws of Kansas, and is therefore governed by the usury laws of Kansas.

(Syllabus by the Court.)

Error from District Court, Marshall County; Sam Kimble, Judge.

Action by Samuel Forter and wife against the Royal Loan Association. Judgment for plaintiffs. Defendant brings error. Affirmed.

Johnson, Rusk & Stringfellow and J. A. Broughten, for plaintiff in error. Theo. H. Polack, W. A. Calderhead, and W. W. Redmond, for defendants in error.

JOHNSTON, C. J. The Royal Loan Association is a corporation organized under the

laws of the state of Missouri, with its principal office located in the city of St. Joseph. It organized a local board, with a local secretary and treasurer, at Marysville, Kan. About August 14, 1895, Samuel Forter applied to John H. Cole, the local secretary and collector at Marysville, Kansas, for a loan of \$400. On his application he obtained the sum of \$382.75, and he and his wife executed a bond and a mortgage on real estate at Marysville, Kan., to secure the payment of the indebtedness. The application for the money was transmitted to the association, at St. Joseph, Mo., where the loan was allowed. The papers were there prepared for execution, and sent to Cole, the agent at Marysville, where they were executed by Forter and his wife, the money paid, and the transaction closed. On the part of the association, it is claimed that Forter became a member of the association, and that he was required to make payments on his shares according to the laws of Missouri and the by-laws of the association. The Forters claim that Mr. Forter never became a member; that no application for membership was made, and no certificate of stock was issued and given to him; that the books of the association do not show that a certificate of stock was issued; and that no membership fee, as required by the by-laws, was paid or refused. After the money was received by Forter, he subsequently made 60 payments of \$8 per month, or \$480. Having paid the amount received, with the highest rate of interest permitted under the laws of Kansas, the Forters regarded the mortgage as paid, and demanded that the Royal Loan Association should release the same. This demand was refused, and the present action was brought, under sections 4224, 4225, 4226, Gen. St. 1901, to procure a cancellation of the mortgage, and to recover damages for the refusal to enter satisfaction, as well as for a reasonable attorney's fee in prosecuting the action. A trial resulted in a decree in favor of the Forters for the cancellation of the mortgage, quieting their title as against it, and also for \$100 damages, and \$200 as attorney's fees.

The principal issue in the case was whether the transaction between the parties should be treated as a building and loan contract—one where the dues, premiums, and other charges provided for may exceed the legal rate of interest on money borrowed—or whether it should be treated as a mere loan, wherein the parties stood toward each other in the relation of creditor and debtor alone. If it be treated as a loan, it seems to be conceded that the Forters have paid the amount borrowed, with the full legal rate of interest chargeable for money in Kansas. If he became a member, and liable to pay the dues, premiums, and other charges imposed by the association, there is yet due the sum of \$142.79. The conclusion of the trial court that the contracts were usurious, the debt

fully paid, and that the mortgage should be canceled and discharged, must be sustained. There was no competitive bidding for preference at a meeting of the directors when the loan was obtained, and they had fixed an arbitrary minimum rate, both of which, it is argued, were in violation of law. If this contention be correct, the case is in the attitude of *Mutual Home & Savings Ass'n v. Worz*, 67 Kan. —, 73 Pac. 117, and the transaction is no more than the ordinary loan. It is argued that the law of Missouri was amended on June 21, 1895, dispensing with competitive bidding, and that in pursuance of the amended law the association on June 22, 1895, amended the by-laws of the association, making them conform to the new statutory provisions. This argument is met by the claim that the reorganization and enactment of by-laws under the amended law of Missouri was not valid, for the reason that under that law it was necessary to call a meeting of the stockholders upon a notice as provided by the by-laws for special or annual meetings. Such meetings required a 10-days notice. It appears that the law went into effect on June 21, 1895, and that the association amended its by-laws pursuant to the new law on June 22, 1895, only one day after the law went into effect. The notice was therefore not given for 10 days, as the by-laws require, and it is argued with much plausibility that the attempted enactment of by-laws was without force or effect.

Another point is made—that when the loan was made to Forter, in August, 1895, the code of by-laws furnished him was the one first adopted, which showed that a loan to a member could only be made on a bid for the preference of the loan in an open meeting. This was not done. Even if he were to be treated as a member, he had a right to rely on the by-laws furnished him as being the governing rules of the association, and the association would be bound in its dealings with him by those by-laws. *McKenney v. Diamond State Loan Ass'n* (Del. Sup.) 18 Atl. 905; *Sawyer v. Menominee Loan & Bldg. Ass'n*, 103 Mich. 228, 61 N. W. 521; *Peterson v. People's B., L. & S. Ass'n*, 124 Mich. 573, 83 N. W. 606. Noncompliance with these rules tended to establish that the transaction was a loan, and subject to the usury laws of Kansas.

Did the relation of association and member exist between the parties? Nothing in the case shows that Sarah E. Forter, one of the parties to the bond and mortgage, was in any sense a member of the association. As to Samuel Forter, he applied for a loan of money of Cole, the agent of the association, which was offering money to loan. He did not apply for membership in the association. Nothing in the correspondence as to the loan indicated that he must become a member, and the by-laws provided that money might be loaned to persons not members.

No certificate was issued and delivered to him, and the books of the association did not show that he became a member. It is true, the writings were on blanks used by the association, which referred to stock issued to Forter, as well as to the by-laws of the association, and a copy of the by-laws was handed to him during the negotiation. When Forter inquired of Cole, the agent of the association, whether by the execution of these papers he would become a member, the agent informed him that he did not know. But even the by-laws which were handed to him indicated that the association could make loans to persons not members, and also that in making loans to members there must be competitive bidding for the loan, and no minimum limits could be fixed for the premium; and, as neither of these provisions had been complied with, there was reason for Forter to assume that he was not in the membership class. Under all the circumstances, there was warrant for the court to hold that Forter was not a member, and that the transaction was only a loan. Considering the plan and the way in which the negotiations were carried on, the transaction has all the symptoms of a scheme to avoid the usury law. In addition to these considerations, and more important, perhaps, the transaction appears to be a Kansas contract, and is necessarily governed by the laws of Kansas. It was a Missouri corporation, it is true, but its plan and its by-laws were quite unlike the provisions of the Kansas law with respect to building and loan associations. Even if the amended law of Missouri, by which the association might dispense with bidding for loans, and might provide for a level rate of interest, and premiums payable in gross installments, is applicable, this transaction would be nothing more than a loan, and the usury laws would apply. The bond and mortgage were executed in this state, where the lands lie; the mortgagors live in the state; the borrowed money was paid to the parties in the state; and, of necessity, a portion of the contract was enforceable in Kansas, and could under no circumstances be enforced in Missouri. The mortgage must be foreclosed in this state, and, from the language of the mortgage itself, it appears that the parties contemplated that it was a Kansas contract, to be interpreted in accordance with the Kansas law, for they provide in the mortgage that the first party releases to the second all right, title, interest, and estate in the premises, resulting from or incident to the homestead laws of the state of Kansas. As the transaction is in the nature of a loan, and the relation between the parties is that of creditor and debtor, and as it was a Kansas contract, enforceable in Kansas, it is governed by the laws of Kansas, in relation to usury. As tending to support these views, we cite *Loan Association v. Thompson*, 19 Kan. 321; *Association v. Kidder*, 9 Kan.

App. 385, 58 Pac. 798; Mutual Home & Savings Ass'n v. Worz, supra; Washington National Building & Loan Ass'n v. Stanley, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793; Meroney v. Atlanta Building & Loan Ass'n, 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Rhodes v. Missouri Savings & Loan Co., 173 Ill. 621, 50 N. E. 998, 42 L. R. A. 93; National Mutual Building Association of New York v. Burch, 124 Mich. 57, 82 N. W. 837, 83 Am. St. Rep. 311; Hoskins v. Rochester Savings & Loan Ass'n (Mich.) 95 N. W. 566; Building & Loan Ass'n of Dakota v. Griffin, 90 Tex. 480, 39 S. W. 656; United States Savings & Loan Ass'n v. Scott, 98 Ky. 695, 34 S. W. 235; Fidelity Savings Ass'n v. Shea, 6 Idaho, 405, 55 Pac. 1022, People's Building & Loan Ass'n v. Fowble, 18 Utah, 206, 55 Pac. 57.

We cannot say that the attorney's fee or the damages allowed are excessive, and, finding no error in the record, the judgment of the district court will be affirmed. All the Justices concurring.

(68 Kan. 556)

#### BLANK v. POWELL.

(Supreme Court of Kansas. Feb. 6, 1904.)

SUPREME COURT—JURISDICTION—AMOUNT IN CONTROVERSY.

1. In an action of replevin by the owner to recover possession of personal property of the value of \$300, judgment was rendered for possession of the property in favor of the plaintiff, owner, and against the defendant, lien claimant, who claimed the right of possession of the property to satisfy an agister's lien for \$51.50 only. In proceedings brought to the Supreme Court by defendant lien claimant to review said judgment, *held* the amount in controversy is less than \$100, and the Supreme Court has no jurisdiction to review the case.

(Syllabus by the Court.)

Error from District Court, Lyon County; Dennis Madden, Judge.

Action by Lewis Powell against John W. Blank. Judgment for plaintiff, and defendant brings error. Dismissed.

J. Harvey Frith, for plaintiff in error. Kellogg & Madden and W. W. Brown, for defendant in error.

ATKINSON, J. This is an action in replevin, brought in the district court of Lyon county by Lewis Powell against John W. Blank, to recover the possession of certain cattle of the aggregate value of \$300. In the spring of 1901 Powell entered into a contract with Blank, whereby the latter agreed to pasture cattle belonging to the former for the pasture season of that year at an agreed price per head. In the fall following at the close of the pasture season, a controversy arose between the parties, Blank claiming of Powell the sum of \$51.50, of which sum \$5 was for the pasturing of cattle owned by one Charles Moss, the payment of which Blank claimed Powell guaranteed, and which liability the latter denied, but admitted owing

Blank the sum of \$46.60 for the pasture of cattle, less \$30, the value of a cow belonging to him, which a Mr. Jones had been permitted to take from the pasture under the mistaken belief that the cow taken belonged to Jones. Blank denied his liability to Powell for the value of the cow taken by Jones. Powell then tendered to Blank the sum of \$17, and demanded possession of his cattle. Blank refused to surrender them, claiming the right to the possession of the cattle under an agister's lien. Powell brought his action in replevin, and upon the trial was given a verdict awarding him the immediate possession of the cattle. Blank brings the case to this court for review, assigning error in the court below.

Powell filed his motion to dismiss the case, challenging the jurisdiction of this court, claiming that the amount in controversy in this court is less than \$100. There is no dispute that the cattle were owned by Powell, and that the claim of Blank was one not of ownership in the cattle, but for possession only, to satisfy a lien for \$46.50, or at most \$51.50. We believe the motion should be sustained. So far as the plaintiff in error, Blank, is concerned, the amount in controversy is the amount for which he claimed a lien upon the cattle. *Cycl. of L. & P.* vol. 2, p. 580, F; *Frost v. Rowan* (Ky.) 56 S. W. 427; *Mohme v. Livingston*, 54 Iowa, 458, 6 N. W. 717; *Stinson v. Cook*, 53 Kan. 179, 35 Pac. 1118. The appellate jurisdiction of the Supreme Court cannot be exercised in any civil action unless the amount or value in controversy, exclusive of costs, exceeds \$100, except in certain cases; and the present case does not come within any of the exceptions. *Gen. St.* 1901, § 5019; *Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114; *Loomis v. Bass*, 48 Kan. 26, 28 Pac. 1012; *Skoin v. Limerick*, 50 Kan. 465, 31 Pac. 1051. The claim of Blank could have been discharged at any time by payment of the amount for which he claimed a lien against the cattle.

As there is no jurisdiction to review the case, it will be dismissed from this court. All the Justices concurring.

(68 Kan. 519)

#### HOCKMAN et al. v. THUMA et al.

(Supreme Court of Kansas. Feb. 6, 1904.)

BONA FIDE PURCHASER—SECRET EQUITIES—NOTICE.

1. Possession of real estate by the grantor in a warranty deed does not impart notice to a purchaser from the grantee of secret equities existing in favor of the person occupying the land. The possession in such case by one who has conveyed the land indicates that he is holding the premises for a temporary purpose only—as a tenant at sufferance of his grantee. *McNeil v. Jordan*, 28 Kan. 7.

(Syllabus by the Court.)

Error from District Court, Marshall County; Sam Kimble, Judge.

Action by Oliver C. Hockman and others against Charles E. Thuma and others. Judg-



ment for defendants, and plaintiffs bring error. Affirmed.

Hlass & Polack and W. W. Redmond, for plaintiffs in error. Mann & Hemphill and James Falloon, for defendants in error.

SMITH, J. In February, 1890, Oliver C. Hockman, an unmarried man, was the owner of 160 acres of land, and occupied the same with one Cynthia Yohe, with whom he was living. The land was incumbered with a first mortgage to one Conrad for \$1,500 and interest, and by a second mortgage to one Koester for \$324 and interest. For the purpose of raising money to pay these debts, plaintiff in error conveyed the land to his father, Daniel Hockman, by warranty deed; and thereafter he and his father executed to George S. Hooker a note for \$2,000, secured by a first mortgage on the land, and a note and second mortgage to Koester for \$200. At the same time Daniel Hockman and wife, parents of Oliver C. Hockman, entered into a written agreement with the latter to reconvey the premises to him on his payment within 10 years of the two last mentioned notes, secured by mortgages on the land. The agreement provided for the appointment of Oliver C. Hockman as agent for Daniel Hockman, and authorized the latter to select another agent if he desired to rent the land, and apply the profits to the payment of said debts. The contract was left with Charles F. Koester, a banker, for safekeeping. It was not recorded. On March 2, 1892, Oliver C. Hockman, who had occupied the premises since the transactions above mentioned, was arrested, and, along with his alleged wife, charged with illegal sales of intoxicating liquors, taken into custody, and lodged in the county jail. On the morning of that day the house they occupied on the farm was burned down. Hockman and the woman were convicted, and remained in custody until November 1, 1892. After the destruction of the house, there was left on the place, in a condition of abandonment, a discarded harvesting machine, a broken plow, a metal cylinder called a "feed cooker," and a frameless grindstone. On October 21, 1892, Charles E. Thuma bought the land from Daniel Hockman, receiving a warranty deed, in which the consideration was expressed at \$3,200. This consideration was made up by an assumption of the \$2,000 mortgage on the land, and the sum of \$1,200 was to be paid Daniel Hockman, as evidenced by three notes, of \$400 each. Before buying, Thuma went over the land, and also inquired of Mr. Koester whether the title was good, to which question he received an affirmative answer. Thuma occupied the land through a tenant, built a house on it, and made other improvements. In January, 1901, plaintiff in error

took forcible possession of the premises, and two months later brought this action to quiet this title. He was defeated in the court below.

There are many assignments of error but it is sufficient to discuss only one or two of them. We have, however, given consideration to all the points raised by plaintiff in error. As to those not mentioned, we hold against him. The important question in the case is whether the possession of plaintiff in error, as indicated by his farming implements left on the land, imparted notice to Thuma, the purchaser, of the rights of the occupant. Conceding that they were indicia of possession, we will treat the case as if Oliver C. Hockman, the grantor in the warranty deed to his father, had been living on the land at the time Thuma purchased. The great weight of authority sustains the rule that, when a vendor of real estate remains in possession after he has conveyed the property, he will not be allowed to assert secret equities in his favor respecting the land, for by his deed he has declared to the world that he has no right to possession. In *McNeil v. Jordan*, 28 Kan. 7, 16, Chief Justice Horton, speaking for the court, said: "A purchaser from the grantee of the party in possession need not inquire whether such party has reserved any interest in the land conveyed. So far as the purchaser is concerned, the actual occupant's deed is conclusive upon that point. The object of the law in holding possession constructive notice is to protect the possessor from the acts of others who do not derive their title from him, not to protect him against his own acts, not to protect him against his own deed. Therefore, where a grantor executes and delivers a deed of conveyance to go upon record, he says to the world: 'Though I am yet in possession of the premises conveyed, it is for a temporary purpose, without claim of right, and merely as a tenant at sufferance of my grantee.'" Also, see *Sellers v. Crossan*, 52 Kan. 570, 35 Pac. 205; *Groton Savings Bank v. Batty*, 30 N. J. Eq. 126, 133; *Newhall v. Pierce*, 5 Pick. 450; *Scott v. Gallagher* and another, 14 Serg. & R. 333, 16 Am. Dec. 508.

Counsel for plaintiff in error contend that the possession of one Conrad was notice to Thuma of their client's rights under the contract. The court found, on evidence amply sufficient, that Conrad was the tenant of Daniel Hockman, the grantor of Thuma. It may be conceded that the court below erred in excluding the testimony of T. H. Polack, an attorney who conversed with plaintiff in error, in the presence of his father, at the county jail. The offered proof, however, concerned the unrecorded contract, of the existence of which Thuma was ignorant.

The judgment of the court below will be affirmed. All the Justices concurring.

(68 Kan. 517)

EDINBURGH LOMBARD INV. CO., Limited,  
 v. COOPER et al.

(Supreme Court of Kansas. Feb. 6, 1904.)

APPEAL—JURISDICTION—AMOUNT IN CON-  
 TROVERSY.

1. Plaintiff recovered from defendants a judgment for \$515.66, with interest at 10 per cent. per annum, costs of suit, and foreclosure of mortgage. Defendants filed motion to correct journal entry. Upon hearing, motion was sustained, and from plaintiff's recovery was taken the judgment for interest and costs. In proceedings brought to the Supreme Court by plaintiff to review said order, *held*, that the amount in controversy was the loss of the interest sustained by plaintiff in the correction of said journal entry, and, being less than \$100, the Supreme Court has no jurisdiction to review the case.

(Syllabus by the Court.)

Error from District Court, Rooks County;  
 Chas. W. Smith, Judge.

Action by the Edinburgh Lombard Investment Company, Limited, against Emma Cooper and others. Judgment for plaintiff. From an order correcting a journal entry, plaintiff brings error. Dismissed.

Cook & Gossett, for plaintiff in error. W. B. Ham, for defendants in error.

ATKINSON, J. The Edinburgh Lombard Investment Company, Limited, filed its petition of foreclosure in the district court of Rooks county on the 11th day of May, 1900, against Emma Cooper et al., to foreclose a mortgage upon premises in said county. Defendants answered, claiming a set-off. Upon the trial in the district court defendants were allowed a set-off against the claim of plaintiff, and plaintiff recovered judgment against defendants for the sum of \$515.66, with interest at 10 per cent. per annum, costs of suit, and foreclosure of mortgage. Plaintiff prosecuted error to the Supreme Court, and the judgment of the trial court was affirmed. Edinburgh Lombard Investment Company, Limited, v. Emma Cooper et al., 64 Kan. 888, 68 Kan. 1127. On June 25, 1902, and after the mandate of the Supreme Court had been filed in the district court, defendants filed their motion to correct the journal entry in said cause. A hearing was had upon said motion, which was by the court sustained, and the court made its order correcting said journal entry to show plaintiff should not recover interest and costs on said judgment of \$515.66. To this order of the court correcting said journal entry plaintiff excepted, and brought proceedings in error to the Supreme Court. We have carefully examined the record filed in this court. The amount in controversy, exclusive of costs, would be the amount of loss in interest plaintiff sustained by the order of said court correcting said journal entry. This amount is less than \$100. The appellate jurisdiction of the Supreme Court cannot be exercised in any civil action unless the amount or value in controversy, exclusive of costs, exceeds \$100, ex-

cept in certain cases; and the present case does not come within any of the exceptions. Gen. St. 1901, § 5019; Coal Co. v. Barber, 47 Kan. 20, 27 Pac. 114; Loomis v. Bass, 48 Kan. 26, 28 Pac. 1012; Skoin v. Limerick, 50 Kan. 465, 31 Pac. 1051.

As there is no jurisdiction to review the case, it will be dismissed from this court. All the Justices concurring.

(68 Kan. 558)

## STATE v. DYCK.

(Supreme Court of Kansas. Feb. 6, 1904.)

BILL OF EXCEPTIONS—SETTLING—EXTENSION  
 OF TIME.

1. Ordinarily, when time is given beyond the term for the making of a case or the settling of a bill of exceptions until a date named, the doing of either on such day is not within the time limited. This rule is subject, however, to the exception that, where it is the manifest intention of the parties to include the day named, it will be included. Such is the manifest intention where a day certain is named—for example, "until Christmas," or "until the 5th day of the regular June term of court."

(Syllabus by the Court.)

Appeal from District Court, Marion County.

John J. Dyck was convicted of crime, and appeals. Dismissed.

Keller & Dean, for appellant. C. C. Coleman, Atty. Gen., and R. L. King, for the State

CUNNINGHAM, J. We find we have no jurisdiction to pass upon the merits of this case. Appellant's motion for a new trial was overruled at the February term, 1903, "and he was given until May 4, 1903, within which to prepare and have settled a bill of exceptions." On May 4th an order was made by the judge extending this time for 10 days, and on May 13th the bill of exceptions was settled. The time originally given—being until May 4th—expired with the expiration of May 3d. Consequently, on May 4th, when the additional time was given, the court had lost jurisdiction to make such extension. This is strictly within the case of Croco v. Hille, 66 Kan. 512, 72 Pac. 208, which case receives our approbation. It is contended, however, upon behalf of the appellant, that a different principle has been announced in State v. Bradbury (Kan.) 74 Pac. 231. An examination of these two cases will disclose no discrepancy between them. The Croco Case announces the rule, "Where time is given beyond the term for filing a bill of exceptions until a date named, the filing of the bill on such a day is not within the time limited." This rule, however, is subject to the exception that, where it is the manifest intention of the parties to include the last day, such intention would be given effect. In the Bradbury Case, time was given until the 5th day of the regular June, 1902, term of the court. So in that case this specification was held to be a day certain, upon which

the bill of exceptions was to be settled, and thus brought within the exception noted in the Croco Case. It was as though the date named had been, for example, until Christmas, or until the next market day, in either of which cases the intention would clearly be to include the day named.

The appeal will be dismissed. All the Justices concurring.

(68 Kan. 528)

LINN et ux. v. ZIEGLER et al.

(Supreme Court of Kansas. Feb. 6, 1904.)

ESTOPPEL—MORTGAGE—FORECLOSURE—  
LIMITATIONS.

1. One who pleads that a tract of land was occupied at a certain time by himself and family as their homestead—such claim having reference to the complete title to the land, and not merely to an undivided fractional interest therein—is thereby estopped to assert that such tract was at the same time the homestead of another.

2. A cause of action for the foreclosure of a mortgage does not accrue upon the death of the mortgagor, and the allowance by the probate court of the note secured by the mortgage as a demand against the estate, without regard to the maturity of the mortgage debt; and such allowance does not set the statute of limitations in operation against such action.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by Lewis W. Ziegler and others against James Logan Linn and wife. Judgment for plaintiffs, and defendants bring error. Affirmed.

S. B. Isenhardt and W. F. Schoch, for plaintiffs in error. Bergen & Dana, for defendants in error.

MASON, J. Lewis W. Ziegler brought an action against James L. Linn and wife to foreclose a real estate mortgage executed by Harriett Matney, and recovered judgment, which defendants now ask this court to reverse. The trial court made detailed findings of fact, some of which plaintiffs in error claim are not supported by evidence. An examination of the record has resulted in the conclusion that this complaint is not well founded, and the findings will be accepted as conclusive without further discussion, except in connection with one to the effect that at the date of the mortgage the property covered was not the mortgagor's homestead. This, on account of its importance in the determination of the case, and because it, of necessity, partakes somewhat of the nature of a conclusion of law, will be considered together with the other legal questions involved.

The first objection urged against the mortgage, which was made by a married woman without her husband's consent, is that it is void because it covered a part of the home-

stead. The mortgaged tract was the south half of a quarter section of land, an undivided seven-eighths of which was owned by Harriett Matney, the mortgagor; the remaining undivided one-eighth being owned by James L. Linn, her son. There was located on the north half of the quarter section the family dwelling house of Mrs. Matney and her husband, with the barns, orchard, and other buildings pertaining thereto. Linn and his wife occupied the south half as their homestead. Linn farmed parts of both tracts, paying rent therefor to Mrs. Matney. The question is not, do these considerations compel the conclusion that the south half was not a part of Mrs. Matney's homestead? but, do they compel the conclusion that it was? In *Hay v. Whitney* (Kan.) 51 Pac. 896, it is said: "There cannot be two homesteads in a single tract of land, belonging to different persons, at the same time." But this language was used where one of the two persons claiming a homestead right held under the other, his estate being carved out of the other's. In Kansas the owner of an undivided interest in real estate may assert a homestead right to the extent of that interest—in no wise, however, to the prejudice of his co-tenant. *Tarrant v. Swain*, 15 Kan. 146. And no reason is apparent why the co-tenant may not likewise enjoy the same protection as to his interest. *Megular v. Burr*, 81 Ky. 32. But in order for this south 80 acres to have been a part of the Matney homestead, it must have been actually or constructively occupied as a part of the home place, and regarded as such. It would not of necessity become a part of the homestead by the mere fact of contiguity, regardless of the use made of it, or the attitude of the owners towards it. "In order that anything shall be a part of the homestead, it must not only be connected therewith as one piece of land is connected with another to which it adjoins, but it must also be used in connection therewith, and as a part thereof. In legal phrase, it must be appurtenant thereto." *Ashton v. Ingle*, 20 Kan. 670, 681, 27 Am. Rep. 197. "The fact that it is adjacent, and that the ground covered by it, together with the farm, does not exceed 160 acres, does not change the character of the use." *Mouriquand v. Hart*, 22 Kan. 594, 596, 31 Am. Rep. 200. It is true that, upon the facts so far stated herein, there might appear to be a sufficient common use of the property to warrant a claim of homestead in the entire tract of 160 acres. Granting that the mere physical conditions are not inconsistent with such a claim, the important inquiry remains as to how the parties in interest regarded the matter. The law does not require that every part of a homestead shall be in actual use by the owner, but it does require that the whole tract must be devoted to the purposes of a homestead, and not to any other purpose inconsistent therewith. *Morrissey v. Dono-*

¶ 1. See *Estoppel*, vol. 19, Cent. Dig. § 2.

hue, 32 Kan. 646, 648, 5 Pac. 27. Here the defendants pleaded in their answer, which was a part of the pleadings upon which the case was tried, that from a time prior to the making of the mortgage they continuously occupied the mortgaged property as their homestead. It is especially to be noted that this allegation is an assertion of a homestead interest, not merely to the extent of the undivided one-eighth interest of James L. Linn in the quarter section, but to the extent of the entire title to the south half. This distinctly appears from the language of the answer, which alleges that they occupied this tract as owners by title acquired from Mrs. Matney, although the court finds that they occupied it in the expectation that she would devise it to Linn. The Linn's are in court, asserting that the mortgaged property at the time the mortgage was made was their homestead. They cannot be heard to question that fact. And the land cannot have been their homestead in the sense in which this claim is made, and at the same time have been the homestead of the Matneys. "The word 'residence,' like the word 'homestead,' is not confined merely to the dwelling house, but it may also include everything connected therewith used to make the home more comfortable and enjoyable. But the words 'homestead' and 'residence' cannot be intended to include some other and independent family's home and residence." *Ashton v. Ingle*, supra. Under the pleadings, as well as under the findings, it must be said that all of the parties concerned elected to consider the south 80 acres as the Linn homestead, and to confine the Matney homestead to the north 80. This was their privilege. The law did not force the Matneys to occupy the full 160 acres as their homestead. It was competent for them, as suggested in *Hoffman v. Hill*, 47 Kan. 611, 614, 28 Pac. 623, to totally abandon the south half, by making it another person's homestead. This they did, and it results that the mortgaged property was not the homestead of the mortgagor, and that the mortgage was valid. In *Matney v. Linn*, 59 Kan. 613, 54 Pac. 668, the same property was involved, and the entire quarter section was treated as the homestead of the Matneys. This was in accordance with a stipulation there made, but, as *Ziegler* was not a party to that action, he was not affected by it.

The following facts are relied upon as estopping plaintiff from recovering upon this mortgage: Harriett Matney having died, *Ziegler* exhibited his note to the administrator, and had it allowed by the probate court. Thereafter, being informed and believing that at the time of the execution of the mortgage the land covered by it was a part of the Matney homestead, and finding the estate to be insolvent, he executed a satisfaction of the mortgage on the margin of the record, and began an action in the district court against James L. Linn, to whom Mrs. Mat-

ney had conveyed the land; asking to have the conveyance set aside, and the land subjected to the payment of his claim, as a demand against the estate. In this he was defeated. Learning afterwards that the property had not been a part of the mortgagor's homestead, he brought the present action, alleging that he had executed such release and brought such suit under a mistake of fact. The presentation and allowance of the claim in the probate court do not prevent a resort to the foreclosure of the mortgage. "Neither the presentation of the claim in the probate court, nor the failure to present it, precludes the foreclosure of the mortgage lien until the mortgage debt has been paid or extinguished." *Andrews v. Morse*, 51 Kan. 30, 32 Pac. 640. The signing of the satisfaction of the mortgage, reciting a payment of the debt, was without any significance, and presents no difficulty. Nothing was in fact paid. The mortgagee derived no benefit from it. The owner of the land was in no way prejudiced. No rights of third parties intervened. It was made through a mistake of fact, and the court properly held it to be without effect. *Loan Co. v. Garrity*, 57 Kan. 805, 48 Pac. 33. The former action was not a bar to the present one. No question of the rights of plaintiff under the mortgage was then litigated. The two causes of action were not the same. The grounds of relief in the two are so far inconsistent that the election to pursue the first, if made with a full knowledge of all the facts, would doubtless bar the subsequent resort to the second. But to conclude the plaintiff, the election must have been made with knowledge of all the facts, whereas he was mistaken in the most important matter affecting his rights. 2 *Story on Equitable Jurisprudence*, § 1097; *Wells, Fargo & Co. v. Robinson*, 13 Cal. 133; 7 *Am. & Eng. Encyc. of P. & P.* 366.

It is claimed that the statute of limitations had barred the remedy. This contention is based upon the fact that the demand against the estate had been allowed more than six years before the commencement of this action; the argument being that the note was merged in the judgment in the probate court, and that action on the judgment was barred in five years. The allowance of a demand against an estate by the probate court has some of the attributes of an ordinary judgment, but not all of them. The statute requires all claims that are to be asserted against the general assets of the estate to be presented within a stated time, no exception being made in the case of immature obligations. But the fact that they must be presented before due does not mature the obligation. The right to foreclose the mortgage in this case did not accrue until the maturity of the note, and the action was brought within five years from that time.

The judgment is affirmed. All the Justices concurring.

(63 Kan. 465)

**STEWART v. WINNER et al.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**MORTGAGE—FORECLOSURE—REDEMPTION.**

1. The right to redeem and the mode of redemption of real estate after sale by the sheriff upon execution, special execution, or order of sale, is fixed by statute, being chapter 109, p. 188, Laws 1893.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by Martin Stewart against Willard E. Winner and the board of trustees of Park College. Judgment for defendants, and plaintiff brings error. Affirmed.

Carroll, Monahan & Warren, for plaintiff in error. McFadden & Morris, for defendants in error.

**ATKINSON, J.** On August 4, 1902, Martin Stewart filed his petition in the district court of Wyandotte county against Willard E. Winner and the board of trustees of Park College, an educational institution located at Platte county, Mo. No proceeding has been brought to this court from the judgment in favor of defendant Winner. The averments of plaintiff's petition, in so far as it relates to defendant the board of trustees, and in so far as is necessary for a full understanding of the facts, are as follows:

On the 28th day of February, 1896, plaintiff, being then the owner and in possession of real estate therein described, situated in said county of Wyandotte, executed and delivered to the said board of trustees his note for the sum of \$20,000, bearing interest at the rate of 8 per cent. per annum. To secure the payment of said note he executed and delivered to said board of trustees his mortgage upon said described premises. Thereafter, default having been made upon said note and said mortgage, the said board of trustees foreclosed said mortgage in the district court of said county. The sheriff of said county, under an order of sale issued out of said court on the 26th day of November, 1900, sold said premises at foreclosure sale for the sum of \$25,165. The said board of trustees purchased said premises at said foreclosure sale. Thereafter said sale was by the court confirmed, and a certificate of sale, as provided by statute, ordered by the court to issue to the purchaser of said premises. Said sheriff on the 3d day of December, 1900, executed and delivered to the said board of trustees, as such purchaser, a certificate of purchase of said premises.

Plaintiff in said petition further averred that frequently before the expiration of the 18 months from the date of said sale he went from the state of Kansas to the place of business of said board of trustees in Missouri with a certified check for the full amount of said judgment and interest thereon, and with the full amount in legal tender to

pay said judgment and interest, and ready and willing to pay the same over to the said board of trustees, the defendant purchaser of said premises, with a view and for the purpose of redeeming said premises from said foreclosure sale. Plaintiff in said petition averred that in each and every such effort made by him for the purpose of redeeming said premises he notified said board of trustees in advance of the fact that he would call and make such redemption, and that in each and all of such cases said board of trustees failed to be present, that the said premises might be so by him redeemed, and the certificate of sale of said land held by the defendant corporation surrendered to plaintiff; that after said period of redemption had expired, and on the 6th day of June, 1902, the sheriff of said county of Wyandotte executed and delivered to said defendant corporation, the purchaser at said sheriff's sale, a sheriff's deed for said described premises, and the same was filed for record and recorded in the office of the register of deeds of said county of Wyandotte on the 7th day of June, 1902. Plaintiff in said petition then averred his readiness and willingness to pay into court the full amount of principal and interest, costs and taxes due said corporation on redemption of said premises from said sale, at any time the court shall make its order that the same be done. Plaintiff then prayed judgment that the court decree that said corporation reconvey said premises to him on the payment of the full amount of principal and interest, costs, and taxes to the clerk of said court; that said clerk deliver to plaintiff a deed to said premises, duly executed and acknowledged by said defendant corporation, on the payment of said money; and for such other and further relief in the premises as plaintiff in justice and equity should be found entitled to.

To said petition each of said defendants filed a demurrer, and upon the hearing the court sustained the demurrer of each of said defendants. Plaintiff elected to stand upon his petition as to the defendant the board of trustees, and brings the case to this court, claiming error of the court below in sustaining the demurrer of said defendant.

The only question in this case is, did the court commit error in sustaining the demurrer to plaintiff's petition? We think not. The right to redeem and the mode of redemption of real estate, after sale by the sheriff on execution, special execution, or order of sale, is fixed by statute, being chapter 109, p. 188, Laws 1893. Section 2 of said chapter 109 (Gen. St. 1901, § 4928), provides that the defendant owner may redeem at any time within 18 months from the date of sale, at the amount premises sold for, together with interest, costs, and taxes. Section 14 of said chapter 109 (Gen. St. 1901, § 4940), provides that the money to redeem shall be paid into the office of the clerk of the district court for the use of the person thereunto entitled, and

the clerk shall give a receipt for the same, stating the purpose for which it is paid. Plaintiff in this case did not comply with the statutory provisions, and in fact made no effort to do so. We have carefully examined the averments of plaintiff's petition, and find therein no grounds for equitable relief as claimed. Chapter 109, p. 188, Laws 1893; *Rothwell v. Gettys*, 30 Tenn. 135; *Hyman v. Bogue* (Ill.) 26 N. E. 40; *Ex parte Bank of Monroe*, 7 Hill, 177, 42 Am. Dec. 61; *Griffin v. Coffey*, 50 Am. Dec. 519.

The judgment of the court below is affirmed. All the Justices concurring.

(68 Kan. 410)

### NEVINS v. NEVINS.

(Supreme Court of Kansas. Feb. 6, 1904.)

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTION—EVIDENCE—DAMAGES.

1. In an action for the alienation of the affections of a husband or wife, a statement in the petition of the ultimate facts of the alienation and separation is enough, without pleading the acts done and artifices used to accomplish the alienation.

2. Testimony which tends to show the motive of the defendant in the efforts made to induce the separation of a husband from a wife may be admitted.

3. The declarations of the husband, although not a party to the litigation, as to his estrangement and separation from the plaintiff, are competent to show the effect of the wrongful interference of the defendant and of his attempt to induce a separation.

4. In such an action, if the acts done and influences used by the defendant were the controlling cause of the separation, the plaintiff may recover from the defendant, although other causes may have contributed in some degree to the result.

5. Mental anguish, mortification, and injury to the feelings are a natural and necessary consequence of the alienation and separation, and a recovery may be had therefor under the general allegation of damages sustained.

6. In cases like this, which involve malice and oppression, exemplary damages may be allowed. (Syllabus by the Court.)

Error from District Court, Atchison County; W. T. Bland, Judge.

Action by Ella D. Nevins against William C. Nevins. Judgment for plaintiff. Defendant brings error. Affirmed.

W. W. & W. F. Guthrie and Crane & Woodburn Bros., for plaintiff in error. C. D. Walker and J. L. Berry, for defendant in error.

**JOHNSTON, C. J.** On February 13, 1901, after an acquaintance of five years and a courtship of one year, Jacob W. Nevins was married to Ella B. Hargis. At that time he was about 21 years old, and her age was about 18. Although they appeared to be strongly attached to each other, and the marriage gave promise of happiness, a separation occurred on April 2, 1901. Very soon after the marriage his parents manifested marked hostility

toward Ella, and she charges that her husband became estranged from her by the active and persistent efforts of William C. Nevins, her father-in-law. She brought an action against him, alleging that he wrongfully, maliciously, and for the purpose of separating her from her husband, enticed and procured him to become alienated in feeling and affection for her by representing to his son, commonly known as Will Nevins, that Ella was unfit for his wife; that she was trifling and good for nothing; incapable of loving him; was quarrelsome, vicious, and unwomanly; that she was untruthful and deceptive, and that he should abandon her, and that if he persisted in living with her he would disinherit and disown him; and by means of these and other like misrepresentations and inducements the defendant alienated the affections of Will for Ella, and compelled him to take her to the home of her parents against her consent, and that by reason thereof she has been driven from her home and has not been permitted to return. The answer of the defendant was a denial of the averments of the petition, and an allegation that the separation was due to the fault of Ella and the members of her family. Upon the issues joined a trial was had, which resulted in a judgment in favor of the plaintiff below for \$2,500.

One of the errors assigned is based on an order permitting the plaintiff to amend her petition before entering upon the trial. The amendment consisted in the interlineation of words which it was averred the defendant had stated to his son with a view of alienating his affections, to wit, "that the plaintiff was and had been before her marriage unchaste in her conduct with other men." An objection was made to the amendment, but when it was allowed no application for a continuance or postponement was made or suggested by the defendant. It was enough for the plaintiff to have pleaded the ultimate facts as to the alienation of her husband's affections by the defendant, and the acts done and artifices used to accomplish the alienation are not required to be pleaded. Indeed, these are largely matters of evidence by which the ultimate facts are to be proved. That being true, the additional averment of another method by which the defendant accomplished his wrongful purpose cannot be regarded as prejudicial. *Nichols v. Nichols*, 134 Mo. 187, 35 S. W. 577; *French v. Deane*, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784; *Brown v. Kingsley*, 38 Iowa, 220; *Hodges v. Bales*, 102 Ind. 494, 1 N. E. 692. It was an advantage to the defendant to have a recital of the evidence by which the facts might be proved or from which they might be inferred, and it would not seem that he regarded the additional averment as a disadvantage, as no postponement of the trial was asked for by him because

¶ 1. See *Husband and Wife*, vol. 26, Cent. Dig. § 1123.

of being unprepared to meet the new phase of the case. Aside from these considerations, the matter of amending pleadings is committed largely to the discretion of the court, and, since there appears to have been no abuse of discretion, we cannot in any view treat the amendment as error.

Complaint is made of rulings on the admission of testimony. It was alleged, and there was testimony tending to show, that the defendant, with a view of affecting a separation, had stated that Ella sent her sister to Dr. Collins and from him obtained medicine to prevent conception. It was shown that defendant had made statements of this kind to the young husband in the presence of Ella, and, when she made a denial, the defendant, with much profanity and vile language, declared repeatedly that the statements were true. She testified that they were without foundation, and introduced Dr. Collins, who testified that she had not obtained such medicine from him. The testimony tended to show the animus of the defendant, and to that extent was competent. The doctor lived and practiced in the neighborhood, and from him the defendant could have learned the truth. Ella told him that the charge was unfounded, but instead of inquiring as to the fact from the doctor, who could have given him correct information, he recklessly persisted in spreading poison by repeating the falsehood to his son and to others in the neighborhood.

There is objection also to the testimony of the witness Doyle, who had undertaken to effect a reconciliation between the young people. He gave the statements made by Will and Ella when he interceded, and there is objection that these statements were made in the absence of the defendant. The declarations of the young husband, although not a party to the suit, were admissible to show the effect that his father's wrongful interference and misrepresentations had upon his mind. It was competent not only to show the active and persistent efforts of the defendant to alienate his son from Ella, but it was also both proper and necessary to show the effect of such efforts upon the son. For this purpose the testimony was competent. *Williams v. Williams*, supra.

There is complaint that statements made by Will to the same witness, showing the state of his feelings and a disposition to try to live with his wife again, were excluded. It appears that the statements were made some time after the action was brought, and may have been made in preparation for the trial which was soon to occur. The state of his feelings after the separation and after the bringing of the action was not valuable testimony on any issue in the case, and its exclusion was not error. Immediately following the ruling, however, the court admitted testimony showing that the same statement was made by Will to his wife, and the conversation then had between Will and Ella

was detailed at considerable length, so that if the declarations had been admissible the ruling would have been without prejudice.

Testimony as to the statements of the defendant to his son were properly excluded within the rule of *Eagon v. Eagon*, 60 Kan. 697, 57 Pac. 942. None of the other objections to the testimony are deemed to be prejudicial nor material.

The charge of the court, although attacked, fairly presented the case to the jury. Complaint is made of the refusal of several instructions, stating that even though they found the defendant had committed acts tending to alienate the plaintiff's husband from her, yet she would not be entitled to recover if her own acts contributed to such alienation of affection. It was not a fit occasion and place for introducing the doctrine of contributory negligence. Of course, no recovery could be had unless the alienation and separation was caused by the acts done and influences exerted by the defendant. If his efforts were the controlling cause, however, and without which no separation would have been had, she might still recover, although other causes may have contributed in some degree to the result. *Rath v. Rath* (Neb.) 89 N. W. 612. The court, however, did not overlook these requests, and in its charge directed the jury that before the plaintiff could recover it must be found that the defendant caused the separation, that it was done intentionally and knowingly by some of the causes alleged in the petition, and that even if he did cause a separation it would not be sufficient to warrant a recovery, unless there was a further finding that he did so maliciously. The jury were also instructed that the law recognizes the right of the father to advise his son as to his domestic affairs, and that he might so advise his son without incurring liability for alienation, if the advice was given in good faith and from worthy motives; that there would be no liability in such case, even if his advice influenced a separation; and that in such case the motives of the defendant are presumed to be good until the contrary is made to appear from the evidence in the case. We find no reason to criticize the instructions given with reference to an attempted reconciliation between the young people, nor as to the measure of damages.

It is said that the court erred in telling the jury that in assessing the damages they might take into consideration the mental anguish, mortification, and injury to her feelings. It is contended that these are special damages, which cannot be recovered under a general averment. In cases of this character, as in seduction, the mental anguish, disgrace, and injury to feelings are a natural and necessary consequence of the alienation and separation. They may be inferred from the malicious injury inflicted by the defendant, and a recovery had therefor under the general allegation of damage sustained. A special averment of damages arising from

such injuries is not required. *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; 19 A. & E. Encycl. Pl. & Prac. 411.

The court also instructed the jury as to exemplary damages. No complaint is made of the rule laid down if such damages may be given in cases of this kind, but it is contended that such damages are not recoverable, because malice, which furnishes the foundation for such damages, is a necessary ingredient of the principal cause of action, without which no recovery for compensatory damages can be had, and that to allow both compensatory and punitive damages based on malice would in effect be double damages for a single cause. There is no duplication of damages, nor any double allowance for the same cause. The fact that the wrong for which the action was brought is essentially malicious does not change the rule of damages. A party is entitled to full compensation for actual losses resulting from a willful and malicious wrong, but exemplary damages are allowed upon a wholly different principle. Such damages rest upon the right to punish a wrongdoer, and not on the right of an individual to compensation for wrongs done to him. "They are not given upon any theory that the plaintiff has any just right to recover them, but are given only upon the theory that the defendant deserves punishment for his wrongful acts, and that it is proper for the public to impose them upon the defendant as punishment for such wrongful acts in the proper action brought by the plaintiff for the recovery of the real and actual damages suffered by him." *Schippel v. Norton*, 38 Kan. 567, 16 Pac. 804. In this case, taking the testimony which was accepted by the jury there was more than malice involved in the action of the defendant. His conduct was wanton, high-handed, and oppressive, and it is well established by a long line of decisions in this state that, wherever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows exemplary damages. *Cady v. Case*, 45 Kan. 733, 26 Pac. 448, and cases cited.

To sustain the verdict, it is unnecessary to attempt a detailed statement of the acts of the defendant. It is sufficiently shown that he had and exercised a dominating influence over his son, and that he had determined to effect a separation of the young people, with or without justification. The son hesitated in believing the imputations made by his father against the conduct and character of his wife, sometimes protesting and sometimes crying, but he appeared to lack the manliness and courage to resent them or to protect her. He weakly yielded to the aggressive conduct of his father, who compelled him to put his young wife in a wagon and take her to her parents, and to be sure that there was no change of purpose or turning back he accompanied them, ordered her out of the wagon at her mother's home, and in a cruel and

abusive manner charged that she had been guilty of gross wrongs and offenses. It is but fair to the defendant to say that he denied many of the things attributed to him, but the testimony of the plaintiff below was accepted by the jury, and is sufficient to support the verdict. From the testimony Ella appeared to be very much attached to her husband, and there was no attempt to prove her guilty of any of the things with which her father-in-law had charged her. Nothing in the affidavits presented for the purpose of obtaining a new trial warrant the setting aside of the verdict, nor do we find any error which would justify a reversal.

The judgment of the district court will therefore be affirmed. All the Justices concurring.

(68 Kan. 539)

**LA RUE v. KANSAS MUT. LIFE INS. CO.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**LIFE INSURANCE—MILITARY SERVICE—EXTRA PREMIUM—JUDICIAL NOTICE.**

1. A policy of life insurance provided that the insured might serve in the military service of the United States in time of war by giving the insurance company notice and paying an extra premium for the war hazard; otherwise, in case of death the company should be liable for the reserve on the policy only. The insured enlisted in the service of the United States, and was killed on the island of Mindanao, one of the Philippines, in May, 1900. No extra premium was paid. *Held*, that the company was not liable for more than the reserve on the policy.

2. Courts of this country take judicial notice that under the treaty of Paris between the United States and the kingdom of Spain, signed December 10, 1898, the Philippine Islands became a part of our territory, and that after that time the inhabitants of those islands were in a state of insurrection against the government. Judicial notice is taken also of the fact that in 1902 the insurrection had not ended in the island of Mindanao.

(Syllabus by the Court.)

Error from District Court, Coffey County; Dennis Madden, Judge.

Action by Vashti La Rue against the Kansas Mutual Life Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Joe Rolston and C. B. Graves, for plaintiff in error. Theo. K. Long, Henry W. Price, and Herrick & Allen, for defendant in error.

SMITH, J. Edward La Rue, son of the plaintiff in error, was insured in the sum of \$1,000 by the Kansas Mutual Life Insurance Company under a policy which contained the following condition: "Military or Naval Service.—The insured under this policy is permitted to serve in the militia or in the military or naval force of the United States in time of peace without prejudice to his policy; and he may so serve in time of war by giving the Company notice in writing, and paying an extra premium therefor, not to exceed three per cent. per annum upon the amount insured. But should such notice not be given



and the extra premium for war hazard not be paid at the time the risk is incurred, the Company will be liable for the reserve only on this policy, computed according to the actuary's table of mortality and four per cent interest." In September, 1899, the policy being in force, he enlisted in the volunteer service of the United States, and went with his regiment to the Philippine Islands. No extra premium was paid on the policy. In May, 1900, he was killed at the village of Loculan in the island of Mindanao by a blow from a weapon known as a "bolo" in the hands of an insurrecto. Such facts appeared in the proofs of death given to the company. This was an action by the mother of the deceased, and beneficiary under the policy, to recover the full amount of the insurance. She was defeated in the trial court.

Plaintiff below offered to prove that Loculan, the place where the assured was killed, was in a region where there was no armed resistance against the forces of the United States; that the insured, with his company, was sent there from the island of Luzon after a period of active service for the purpose of having an opportunity to rest; that the soldiers stood guard with empty guns; that prior to the death of the insured there was no disturbance of any kind on that island or at that place. The offer of this proof was rejected on the ground that the court took judicial notice that the inhabitants of the island of Mindanao were at the time in a state of insurrection against the sovereignty of the United States government.

The argument of counsel for plaintiff in error is that the condition requiring notice to the company and payment of an extra premium by a policy holder serving in the military forces in time of war was to enable the company to protect itself against the extra hazard to life resultant on increased danger to which the insured might be subject when engaged in actual warfare. This contention is illustrated by counsel in supposing that the deceased had lost his life at Ft. Riley, in this state, after enlistment, and while his regiment was awaiting orders to move to the Philippine Islands. In such case, it is urged, the fact that the United States might have been engaged in war when the insured died would not be deemed material. Whatever the rights of the plaintiff in error might have been in the hypothetical case assumed by counsel, it is unnecessary to discuss.

We judicially know that under the treaty of Paris between the United States and the kingdom of Spain, signed December 10, 1898, the Philippine Islands became a part of the territory of the United States, and that after that time the inhabitants of those islands were in a state of insurrection against our government. The existence of war is a political question, and not judicial. Courts take notice without proof of the acts of the different political departments of the government.

See *Philips v. Hatch*, 1 Dill. 571, Fed. Cas. No. 11,094.

In passing on a claim of Lieut. Stickle for property lost en route from West Point to Manila, the war department, in December, 1901, through Secretary Root, announced: "The insurrection in the Philippines against the sovereignty of the United States and the authority of the government of the Philippine islands is of such character and extent as requires the United States to prosecute its rights by military force, and therefore creates the condition of war in said archipelago." This expression, however, was made at a date subsequent to the death of La Rue.

On July 4, 1902, the President issued a proclamation of amnesty as follows: "Whereas, the insurrection against the authority and sovereignty of the United States is now in hand, and peace has been established in all parts of the archipelago, except in the country inhabited by the Moro tribes, to which this proclamation does not apply; and, whereas, during the course of the insurrection against the kingdom of Spain and against the government of the United States those engaged therein, or those in sympathy with or abetting them, committed many acts in violation of the laws of civilized warfare, but it is believed that such acts were generally committed in ignorance of those laws and under orders issued by the civil or military insurrectionary leaders: Now, therefore, be it known, that I, Theodore Roosevelt, President of the United States by virtue of the authority and power vested in me by the Constitution, do hereby proclaim and declare, without reservation or condition except as hereinafter provided, a full and complete pardon and amnesty to all persons in the Philippine Archipelago who have participated in the insurrection aforesaid." The Moro tribes mentioned in the preamble of the proclamation inhabit the island of Mindanao where the insured was killed. The existence of an insurrection there was in this form expressly recognized by the government.

It being established that an insurrection existed in 1901 and 1902, the question still remains whether courts will take knowledge of such insurrection at a prior date in the absence of a formal declaration of war. In *Prize Cases*, 2 Black, 635, 666-668, 17 L. Ed. 459, the Supreme Court of the United States has said: "Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their

former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence in order to become a sovereign state, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason. \* \* \* As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know. The test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: 'When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land.'

The hostile opposition which continued in the Philippine Islands after the treaty of Paris was in the nature of a civil war, which, as stated in the above opinion, begins by insurrection, and courts take judicial notice of it as a fact in history. In *City of Topeka v. Gillett*, 32 Kan. 431, 437, 4 Pac. 800, Mr. Justice Valentine, speaking for the court on the subject of judicial notice, says:

"Courts may take judicial notice of the census returns, of the general history of the country, of what the members of the Legislature ought to know when passing the statute which the courts are called upon to construe, and, indeed, of what all well-informed persons ought to know." Every well-informed person knows the history of the late war with Spain and its results. The accession of foreign territory is a part of the world's history. The existence of an insurrection in the newly acquired islands, which continued against the authority of the United States after that territory had been obtained from Spain, is an event in our national career which every schoolboy knows. Courts would stultify themselves by requiring proof of such public matters, concerning which judges are informed in common with all other persons who read.

Knowing judicially that there was a state of war against the authority of this nation in the Philippine Islands immediately after they were acquired from Spain in 1898, we also know by recitals in the President's proclamation that the insurrection had not ended in 1902, so far as the island of Mindanao was concerned. While stationed on this island, the command to which La Rue was attached was in a country whose inhabitants were in a state of hostility to the national authority which he was enlisted to defend. The warlike spirit of these inhabitants increased the peril of a soldier, active or at rest, within that territory, in the service of a country to which such insurgents disclaimed allegiance.

The judgment of the court below will be affirmed. All the Justices concurring.

(68 Kan. 512)  
**BUTLER et al. v. SCOTT.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**ERROR—SERVING CASE—JUDGE—EXPIRATION OF TERM.**

1. When the term of office of the trial judge expires before the time set for serving a case and suggesting amendments, no time being otherwise fixed within which it is to be settled, jurisdiction to settle the case is preserved, but only until the expiration of the time for suggesting amendments.

(Syllabus by the Court.)

Error from District Court, Rawlins County; John R. Hamilton, Judge.

Action by Charley E. Scott against Calvin A. Butler and others. Judgment for plaintiff. Defendants bring error. Dismissed.

J. P. Noble, for plaintiffs in error. Dempster Scott (John E. Hessin, of counsel), for defendant in error.

MASON, J. In this case the only question necessary to be determined arises upon a motion of defendant in error to dismiss the proceedings on the ground that the case made is a nullity because settled by the trial judge after he had lost jurisdiction. The judgment complained of was rendered November 29, 1902, when defendants (the losing parties) were given until February 1, 1903, to make and serve a case, plaintiff being allowed 10 days thereafter to suggest amendments. It was also ordered that the case was to be settled on five-days' notice, but further than this no time was fixed within which the case was to be signed and settled. The term of the trial judge expired January 12, 1903. The case was served January 22d, and settled and signed by the ex-judge February 16th, after a five days' notice had been given. Under substantially similar circumstances dismissals have been ordered in *Insurance Co. v. Nichols*, 6 Kan. App. 923, 50 Pac. 940, affirmed 60 Kan. 856, 55 Pac. 1101, and in *Mowery v. Wilson State Bank*, 67 Kan. —, 72 Pac. 539, and perhaps in other cases not reported, upon the assumption that they were within the rule declared in *Railway Co. v. Wright*, 53 Kan. 272, 38 Pac. 331. There is this difference, however, between that case and this: In each the term of office of the trial judge expired while no time was fixed for settling the case, but there it expired after the time fixed for serving the case and suggesting amendments, while here it expired before the time fixed for serving the case. The statute reads (Civ. Code, § 549): "In all cases heretofore or hereafter tried, when the term of office of the trial judge shall have expired, or may hereafter expire before the time fixed for making or settling and signing a case, it shall be his duty to certify, sign, or settle the case in all respects as if his term had not expired."

In *Railway Co. v. Wright*, it was said:

"The only contingency which warrants an ex-judge in settling and signing a case is that

at the expiration of his term the time was actually fixed for making or settling and signing the case." The making of a case is an act entirely distinct from the settlement and signing. "The making and serving of a case are the acts of the plaintiff in error." *Railway Co. v. Ft. Scott*, 15 Kan. 435, 477. "While in one sense the making and serving of a case may be more than a single act, yet in practice the preparation and delivery of a case to the opposite party is frequently spoken of by both lawyers and judges as the making of a case. In section 549 of the Code (Gen. St. 1897, c. 95, § 590; Gen. St. 1899, § 4843), after providing for the making and service of the case and the suggestion of amendments, it is provided that the case, 'when so made,' shall be settled, certified, and signed by the judge, making no mention of the service of the case. The words 'so made' evidently include all the preliminary steps to the presentation of the case to the judge for settlement." *Railway Co. v. Guild*, 61 Kan. 213, 59 Pac. 283.

Having in view this distinction between the making and the settling of the case, the Supreme Court of Oklahoma has held in *Barnes v. Lynch*, 9 Okl. 11, 59 Pac. 995, that when the term of office of the trial judge expires before the time fixed for making a case, no time having been designated for its settlement, he may sign and settle it after the time limited for service and suggestion of amendments. In the opinion it is said: "As we construe the provisions of section 567 of the Code (section 549, Civ. Code Kan.) that section means that, if the term of the trial judge shall expire before the expiration of the time fixed for making a case, he may settle and sign such case; or, if his term of office shall expire during the time fixed for settling and signing the case, he may settle and sign the same thereafter. In other words, there are two contingencies under which he may have authority to complete the work of perfecting the case for appeal, viz., if his term of office expires during the time fixed for making and serving the case, or if his term shall expire thereafter during the time fixed for its settling and signing; but if his term of office does not expire during the time fixed for making and serving the case, and no time has been fixed for settling and signing before his term expires, then he cannot settle and sign the case."

So far as the language quoted is concerned, we think the interpretation of the statute is correct. The jurisdiction of the trial judge to settle the case is preserved in either of two contingencies, namely: First, when his term of office expires before the time fixed for making a case; second, when his term of office expires before the time fixed for settling and signing a case. But the Oklahoma court further holds that in the first of these contingencies the case may be settled

at any time within a year after the date of the judgment or order sought to be reviewed. This construction may seem to follow naturally from a literal reading of the words authorizing the trial judge to settle the case under such circumstances "in all respects as if his term had not expired," but does not accord with the spirit and purpose of the statute. The object of the provision in question is to preserve the jurisdiction of the trial judge after his term has expired, not for an indefinite time, but only during a fixed and certain period. If, when his term expires, a time has been fixed within which the case is to be settled, that is the limit of his jurisdiction; he may settle the case within that time, but not later (unless in virtue of an extension, as to which no question is here involved). So if, when his term expires, a time has been fixed within which the case is to be made, that time (including that given for suggesting amendments) is the limit of his jurisdiction; he may settle the case within that time, but not later. "If no time is fixed by the order of the court for settling and signing the case, the time fixed for making the case must control." *Railway Co. v. Corser*, 31 Kan. 705, 3 Pac. 569. "Where there is no order fixing the time for presenting the case for settlement, and only the simple order giving an extension of time for making and serving a case, the case is duly settled and signed, if settled and signed within three days after the time fixed for making and serving a case." *Railway Co. v. Ft. Scott*, 15 Kan. 435, 478. See *Thurber v. Ryan*, 12 Kan. 455. If this case had been settled within the time limited for the suggestion of amendments, it would have been valid, but, having been settled later than that, it is void. This conclusion is in harmony with the rulings heretofore made. It has perhaps been said that jurisdiction was lost whenever the term of office of the trial judge expired while no time had been fixed for settling the case, whereas a complete statement of the rule should cover the contingency of the term expiring before the time fixed for making the case. But these expressions are not misleading if considered in connection with the facts to which they are applied. In cases tried before a judge pro tem. it is obvious that the contingency referred to cannot arise. The term of office of the trial judge is co-extensive with the time allowed for suggesting amendments, and therefore cannot expire before the time fixed for making the case; so that the rule as stated applies in such cases without qualification. See *Railway Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050.

It may be added that an examination of the record discloses no error, and if the matter were properly before us the judgment would be affirmed.

The proceedings in case are dismissed. All the Justices concurring.

(68 Kan. 452)

**PROVIDENT LOAN TRUST CO. v. MCINTOSH et al.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**FRAUD—RELIEF—LACHES—FALSE REPRESENTATIONS—VENDOR AND PURCHASER—CONTRACT—RESCISSION—NEW TRIAL.**

1. Relief on the ground of fraud will not be granted to one who does not seek it promptly after discovery of the fraud, and who, with knowledge of the fraud, retains the fruits of the transaction it induced.

2. Relief will not be granted on account of false representations not shown to have been relied upon as an inducement to conduct resulting in injury.

3. A man having an interest in land, and having such control of its title that he may require a conveyance of it, may rightfully make a contract in his own name to convey it by a warranty deed, without disclosing the actual state of the title to the purchaser.

4. Money paid upon a contract induced by fraud cannot be recovered unless the contract may be rescinded; and a rescission will not be decreed to one who was himself in default at the time of the dereliction of which he complains.

5. A party accepting all the issues tendered by the petition, and defending the case at the trial against all the theories presented, will not be granted a new trial because such theories are inconsistent with each other.

(Syllabus by the Court.)

Error from District Court, Geary County; O. L. Moore, Judge.

Action by Gordon McIntosh and others against the Provident Loan Trust Company. Judgment for plaintiffs. Defendant brings error. Reversed.

Humphrey & Humphrey, for plaintiff in error. Taylor & Brown and Roark & Roark, for defendants in error.

**BURCH, J.** The plaintiffs brought an action to recover from the defendant, the Provident Loan Trust Company, money they had paid, to it under a contract for the purchase of real estate. They founded their action upon fraud in the formation of the contract and subsequent acts of the defendant whereby it voluntarily deprived itself of the power to convey to them the land. The defense was that the contract was free from fraud in its inception, and that the defendant was ready, able, and willing to perform, but that the plaintiffs were in default. And the answer alleged that, if plaintiffs ever had any cause of action, it was barred by the statute of limitations. The plaintiffs prayed for damages, while the defendant prayed for the balance due upon the contract, and for a decree of forfeiture if it be not performed within a time to be fixed by the court. Upon the trial the court, upon request, made findings of fact and conclusions of law, and rendered judgment for the plaintiffs. The defendant prosecutes error in this court.

Such of the findings of the court as are necessary to a decision of the case, briefly summarized, disclose the following facts:

Prior to 1893 Henrietta M. Shaw, of Coopers-town, N. Y., held a mortgage on the land in controversy, which was foreclosed, and the property bid in by the defendant. In November, 1893, the defendant conveyed the land to Henrietta M. Shaw by warranty deed, but took from her a contract whereby the company took charge of the land for a year, to rent, if possible, and to sell as soon as might be, and apply the proceeds to the payment of taxes and insurance and the principal and interest of Henrietta M. Shaw's mortgage debt; any surplus to be retained by the defendant in payment of what was termed its "equity" and "services." This contract was not recorded, and plaintiffs had no knowledge of it until it was pleaded. On August 16, 1894, the plaintiffs purchased the land, paying part of the purchase money in cash, and agreeing to pay the balance in installments, and executed the contract in suit as evidence of the terms and conditions of sale. The only reference to the ownership of the land or the source or character of title to be conveyed which the contract contained was in the words: "The said party of the first part hereby agrees to sell and by warranty deed to convey to the said parties of the second part, the following described property, to wit." By the language of the contract time was made of the essence of its terms, and forfeiture was made the penalty for a default. After the execution of the contract plaintiffs placed the land in the hands of the defendant to rent, and the land was rented for three years, beginning September, 1894, at an average rental of \$150 per annum, which rents were credited on plaintiffs' account for the purchase of the land and used for the payment of taxes. During these three years plaintiffs made additional payments on the contract from their own funds, amounting altogether to \$341. In a letter of January 21, 1897, the defendant rendered a statement, and made a report of the rents for the year 1896. On February 7, 1898, an agent of the plaintiffs wrote the president of the defendant company a letter, containing the following language: "Your favor of the 26th ult. duly received. You speak of rent of McIntosh farm for 1897, \$110.00. Mr. McIntosh understood the farm was rented at same price as for the year 1896, viz. \$150.00. In the year, \$100.00 was paid cash and \$50.00 allowed for a well. \* \* \* In your letter of January 27th, 1897 (to Daniel Evans), you say, 'We certainly do not want Mr. McIntosh to lose on this investment,' etc., and you say this in connection with the \$400.00 proposition. Now as but a year has elapsed during which time you have had the \$110 rent to apply on the interest and taxes, and you double the amount now exacted to \$800, I think you have made a mistake or else you are ready to see Mr. McIntosh lose on the investment. Will you please advise me and oblige." On February 2, 1897, an agent of plaintiffs wrote

¶ 2. See *Fraud*, vol. 23, Cent. Dig. §§ 17, 24.

the president of the defendant company, acknowledging that there was then due defendant on the contract and growing out of it \$329.29, and suggesting a compromise plan for carrying out the contract as to a part of the land. Portions of the letter of February 7, 1898, confessed inability to carry out the contract, and offered a plan whereby the plaintiffs might obtain title to 80 acres of the land. In March, 1898, the defendant made a settlement with Henrietta M. Shaw, releasing any claim it had upon the land in controversy. On March 12, 1898, Henrietta M. Shaw conveyed the land by warranty deed to George C. Eaton, which deed was recorded March 5, 1899. Before the commencement of suit one 80 acres of the land had been conveyed by Eaton to Henry Lichtenhan, and the other 80 acres of it to Alice M. Nickells, who had mortgaged her portion for \$500. Suit was commenced June 25, 1900. Plaintiffs purchased the land after a representation by an officer of the defendant company that the rental value of the land was \$500 per year. This representation was false, and was known to be so by the party making it. Plaintiffs were ignorant of its falsity, relied upon its truthfulness, and were induced by it to make the purchase.

Concerning the allegations respecting the state of the title to the land the court found as follows: "At the time he made the contract, McIntosh believed that the land he was buying was the property of the Provident Loan Trust Company, and at all times prior to February 25, 1898, he still believed the property was the property of the Provident Loan Trust Company. From the terms and averments and covenants of the contract the plaintiff had reason to and did believe that at the time of the execution of the contract the Provident Loan Trust Company was the owner of the legal and equitable title to the land in controversy." Following the last statement is another, which, however, is a conclusion of law, and not a finding of fact. It reads: "And the failure of the officers and agents of said company to reveal the name of the party who was to hold the legal title to the land in trust for plaintiffs until plaintiffs should pay the balance of the purchase price was a fraud upon the plaintiffs, which would avoid the contract, when discovered by the plaintiffs." In conclusion the court said: "The plaintiffs learned of the fraudulent representations as to the rental value of the land more than two years before the commencing of the action, and their action to rescind the contract upon that ground is barred by the statute of limitations. I have therefore reached the conclusion in this case that the plaintiffs are entitled to recover the purchase money which they paid upon this contract from the Provident Loan Trust Company, because of the fraudulent representations and concealments in relation to the title to the land, and because at the time of the commencement of this action the de-

fendant, the Provident Loan Trust Company, had voluntarily placed it beyond its power to perform the conditions of the contract by making a conveyance of the same to the plaintiffs." Since the defendant was a non-resident corporation, it could not make the defense of the statute of limitations. *Williams v. Met. St. Ry. Co.* (Kan. Sup. December, 1903) 74 Pac. 600. Therefore the refusal of the court to grant relief to the plaintiffs on that ground was erroneous. But the error cannot redound to the advantage of the plaintiffs, since the findings of fact affirmatively show the plaintiffs were altogether without the pale of equity when assailing the contract on account of misrepresentations concerning the rental value of the land. Since the average rental of the land for 1894, 1895, and 1896 was but \$150 per annum, the total amount received for the three years could not equal the represented income for one year. Therefore, whenever plaintiffs received their first year's rent, they knew that the representations had failed. If they were aggrieved by the fraud, they should have made a prompt disavowal of any obligation incurred on account of it. Instead of this, they chose to keep the land, and to appropriate the rents from it, year after year, to the reduction of their debt. Meanwhile they were making payments out of their own resources upon the same debt in order to hold the possession of the very land which was rendering such insignificant returns. On February 7, 1898—3½ years after making the contract—information that the rent for 1897 was only \$110 did nothing more than bring out a mild protest that the plaintiffs understood the rent to be \$150, as it had been for the year 1896. No intimation of a repudiation even then escaped, and suit was not commenced until almost 2½ more slothful years had worn away. The plaintiffs, therefore, by their own conduct, erected a double barrier between themselves and any relief in a court of conscience—an attempt to make a profit from the transaction by clinging to its fruits after full knowledge of the fraud and an insufferable delay. "The law does not permit a party to rescind a contract on the ground of fraud under all circumstances, but imposes certain well-defined limitations on the right of rescission. In the first place a contract cannot be rescinded for fraud after it has once been affirmed, expressly or impliedly, with a full knowledge of the fraud. The party has a right to rescind, but he is not bound to do so; and when he has once made his election he is bound by it. A contract may be affirmed either expressly or impliedly. It is impliedly affirmed, so as to bar a subsequent rescission, if it is acted upon by the party defrauded, after discovery of the fraud, by accepting money, property, or other benefits under it, or otherwise unequivocally recognizing it as binding. \* \* \* It is also a well-settled principle that, to entitle one to rescind a contract for fraud, he must

exercise his option within a reasonable time after the discovery of the fraud. If he delays rescission for an unreasonable time, he will be held to have affirmed the contract, and cannot afterwards rescind. 14 A. & E. Encycl. of L. (2d Ed.) 159, 161, and authorities cited. The evidence of the plaintiff himself shows that he discovered shortly after the contract was made that the defendant had misled him in the description of the tract fronting upon the boulevard. After such knowledge he paid several installments upon the contract, and also effected the sale of the other tract embraced therein to Marks. When he found out that the defendant had deceived him in the description of a part of the land, he should have at once rescinded or offered to rescind the contract, and reconveyed or offered to reconvey his interest in all the property he had acquired thereunder. He cannot be permitted to select his own time and consult his own convenience before exercising the right of rescission. That would give him the power to retain the property, and, after waiting, if markets should prove favorable, he could thus secure possible benefits, and, on the other hand, have time to reconvey if it should decrease in value, and thus escape all disadvantages. The law does not allow any one to play fast and loose in such a manner. *Estes v. Reynolds*, 75 Mo. 563; *Melton v. Smith*, 65 Mo. 315." *Bell v. Keepers*, 39 Kan. 105, 108, 17 Pac. 785.

Included within one of the assignments of error is the charge that the decision rendered is contrary to law, and that part of the decision granting relief because of fraudulent representations and concealments in relation to the title to the land is assailed on the ground that it does not appear that the representations charged in any way operated to the injury of plaintiffs, or violated any confidence reposed on the faith of them. "A rescission of the contract for the purchase of land and the cancellation of the conveyances on the ground that the representations of the vendor were false and fraudulent is an extraordinary power of equity, and should not be exercised unless it is clearly established that the representations were false or fraudulent, and that they were relied on by the purchaser; and the right to disaffirm the contract must be exercised promptly after the discovery of the fraud." *Wood v. Staudenmayer*, 56 Kan. 399, 43 Pac. 760. Likewise, in *White, Adm'x, v. Smith*, 39 Kan. 752, 18 Pac. 931, it is said: "To sustain a judgment for damages for fraud and deceit in the sale of a newspaper upon the ground that its subscription list was not as large as represented it must be alleged, and also shown, that the purchaser relied on the representation of the number of paying subscribers as an inducement to the purchase." In 14 A. & E. Encycl. of L. (2d Ed.) 106, many cases are collated in support of the following text: "General rule that representations must be relied upon. To entitle a person to relief or redress because

of a false representation, it is well settled that it is not enough to show merely that it was material, that it was known to be false, and that it was made with intent to deceive, but it must also be shown that it actually did mislead and deceive; or, in other words, that it was relied upon by the party complaining. This is true whether the false representation be made the ground for an action of deceit or ground for rescission of a contract; and it is true in equity as well as at law." "Where plaintiff seeks to recover because of the fraud of the defendants based upon misrepresentations, it is incumbent upon him to allege and prove what misrepresentations were made, that they were false, that he believed them to be true, and that he relied and acted upon them." *Grentner v. Fehrenschild*, 64 Kan. 764, 68 Pac. 619. Applying this law to the findings of fact, it is evident the judgment rendered cannot be sustained upon the ground under consideration. The findings of fact are barren of any suggestion that the plaintiffs relied upon the representations of the defendant that title was in it, and not in some one else, as an inducement to buy. True, it is found that they believed the title to be in the defendant, but that is not sufficient. If it was in fact immaterial to plaintiffs who held the title at the time, and if they would have bought the land as readily if they had been apprised of the facts, they were not defrauded; and without a finding excluding such an attitude on the part of plaintiffs toward the trade the presumption of good faith attending every transaction until it is proved to be vicious is not overcome.

The fact that the court made an express finding relating to this element of fraud with respect to the rental value of the land renders its omission here especially striking. Conceding, however, that within the statement that failure to reveal the name of the party holding title to the land was a fraud the court intended to include all the essential elements of fraud when committed by false representations, the judgment cannot be sustained. A man having an interest in land, and having control of the title, so that he may require a conveyance of it at will, may make a contract in his own name to convey it by a warranty deed without disclosing the actual state of the title, and not be guilty of any fraud upon the purchaser. The defendant occupied such a position with reference to the land in controversy when it made the contract in question. The contract no more contained an implied covenant that the defendant then held the title to the land than it contained an implied covenant that the plaintiffs then held title to all the money they were to pay for it. There is no finding of any effort or intention to deceive or to conceal, or any bad faith of any kind, beyond the fact the defendant propounded the contract in silence. This does not amount to fraud. "It is not necessary, however, that

the vendor should be the absolute owner of the property at the time he enters into the agreement of sale. An equitable estate in land, or a right to become the owner of the land, is as much the subject of sale as is the land itself; and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof. As was said by Mr. Justice Paterson in *Burks v. Davies*, 85 Cal. 114 [24 Pac. 613], 20 Am. St. Rep. 213: 'If, though he be not the absolute owner, it is in his power, by the ordinary course of law or equity, to make himself such owner, he will be permitted within a reasonable time to do so.' If the agreement is made by him in good faith, and he has at the time such an interest in the land, or is so situated with reference thereto, that he can carry into effect the agreement on his part at the time when he has agreed so to do, it will be upheld. 1 Chitty on Contracts (11th Am. Ed.) 431; *Dresel v. Jordan*, 104 Mass. 407; *Townsend v. Goodfellow*, 40 Minn. 312 [41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. Rep. 736]; *Smith v. Cansler*, 83 Ky. 371; *Gaither v. O'Doherty* (Ky.) 12 S. W. 306; *Tapp v. Nock*, 12 S. W. 713; *Ley v. Huber*, 3 Watts, 367; *Tierman v. Roland*, 15 Pa. 429. We cannot lose sight of the proposition that in this country, where values of land fluctuate rapidly, and where transfers are so frequent, it is very common for the purchaser of land to make a transfer before he has acquired the title. It would work great injustice to hold that no one could make a valid contract for the sale of land until he has himself become clothed with the absolute title. \* \* \* It has been held that, when the vendor has no interest whatever in the lands which he agrees to convey, and his contract of sale is the mere speculation of a volunteer, courts will refuse to enforce the contract at his instance, and will rescind the agreement at the instance of the vendee, upon the ground that the contract was not made in good faith. The correctness of this rule in its application to a case wherein there is no charge of bad faith has, however, been seriously questioned, and was distinctly repudiated in *Dresel v. Jordan*, 104 Mass. 407." *Easton v. Montgomery*, 90 Cal. 307, 315, 27 Pac. 280, 25 Am. St. Rep. 123.

The only remaining support of the judgment of the district court is that the defendant voluntarily deprived itself of the power to convey the land to plaintiffs.

The defendant contends that the theory sustaining a right to relief upon this ground is necessarily inconsistent with those already considered. This is true. Under one hypothesis the contract was fraudulent, and therefore without engaging quality from the beginning. Under the other hypothesis the contract was a valid one, and should be car-

ried out, except that the defendant has rendered further performance on the part of the plaintiffs futile. But the defendant is in no position to complain. The two issues were tendered in the petition. Instead of challenging the confusion of theories at the outset, the defendant chose to meet its adversary at all points, and combat both positions. Having exposed itself to assaults both in its front and in its rear, it must now endure with fortitude.

The conclusion of law last referred to is evidently drawn from the finding that in March, 1898, the defendant settled with Henrietta M. Shaw, and released all claims to the land in controversy. At that time, however, the plaintiffs were more than a year in default, and since then they have never been in a position to demand a conveyance. Without this they have no standing to impeach the defendant's conduct. "One who pays money on a contract cannot recover the same unless he is entitled to a rescission of the contract. The rescission of a contract is a remedy to be applied in the sound discretion of the court, and only he is entitled to it who can show that he is without fault, and that the other party is derelict." *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161. "It is obvious that the right to rescind a contract belongs only to the party who is himself without default. Even if he has sufficient grounds for rescission, if he has done some act which hinders performance by the other party, or has failed in any way to perform his own part of the contract, his right to rescind is forfeited." 24 A. & E. Encycl. of L. (2d Ed.) 647.

The president of the Provident Loan Trust Company was made a defendant to the action in his individual capacity, and jointly charged with the fraud alleged. The court found that he made no representations except that he wrote the contract and executed it as president of the company, and rendered judgment in his favor. The plaintiffs, by cross-petition, assign error upon this ruling. In view of the foregoing considerations, this part of the judgment was correct.

The judgment of the district court in favor of the defendant Pierce is affirmed. The judgment in favor of the plaintiffs is reversed, and the district court is directed to enter judgment in favor of the Provident Loan Trust Company upon the findings of fact. All the Justices concurring.

(63 Kan. 413)

#### HOLMES v. NEWMAN.

(Supreme Court of Kansas. Feb. 6, 1904.)

#### BOND FOR DEED—CONSTRUCTION—RECORD—NOTICE.

1. A bond for a deed in the ordinary form is not an instrument of defeasance within the meaning of section 4217, Gen. St. 1901. The recording of such bond for a deed does not impart notice to a purchaser of the land that the obligee in the bond stands in the relation of

mortgagor to the person giving the bond, although that was the intention of the parties.

(Syllabus by the Court.)

Error from District Court, Lyon County; Dennis Madden, Judge.

Action by James H. Holmes against F. C. Newman. Judgment for defendant, and plaintiff brings error. Affirmed.

Graves & Hamer and Buck & Spencer, for plaintiff in error. Kellogg & Madden, for defendant in error.

SMITH, J. In October, 1857, James H. Holmes was the owner of a quarter section of land in Lyon county, and Annie Archibald owned an adjoining quarter section. Asa P. Rand, who resided in Massachusetts, had advanced them money with which to defray the expenses of entering the land, and for the purpose of securing its payment Holmes and Annie Archibald executed and delivered to Rand separate warranty deeds dated October 6, 1857, receiving back from him bonds for deeds of even date with the conveyances. These bonds obligated Rand to convey the land to Holmes in the one case on the payment by the latter of \$493 on or before October 30, 1858, and to Annie Archibald in the other on payment by her of \$238 at the same time. The bonds for deeds are in the usual form, binding the grantee in the deeds to convey by good and sufficient warranty deeds in fee simple, free from incumbrances, the land in controversy on the payment of the sums stated. The deeds were recorded on April 12, 1859, and the bonds on January 5, 1860. They were duly acknowledged. In October, 1857, James H. Holmes and Annie Archibald were married, and lived in a cabin on the husband's land until the April following, when they both went to the Pike's Peak country, and did not thereafter exercise any rights of possession to the property. In May, 1860, Asa P. Rand conveyed both quarter sections to Marilla Root, J. S. Greenough, and John Alden for a consideration of \$1,500. From said grantees the title came down to the defendant in error, Newman, who purchased the land from Mary G. Mosely and husband in 1900. Rand and the other owners down to Newman were nonresidents of the state, and possessed the land through tenants. Annie Holmes, née Archibald, died in 1887, leaving two children surviving her, and plaintiff in error claims to own three-fourths of the 160 acres of land standing in her name as heir at law of his wife and two deceased children.

This was a suit by Holmes against Newman to redeem. He was denied any relief below. The court found that the warranty deeds by Holmes and Annie Archibald, and the bonds for deeds given back to them by Rand, were, in legal effect, mortgages on the land. This action was begun in 1901. The

good faith of the defendant in error in his purchase of the land is not disputed. It is asserted by counsel for plaintiff in error that the transactions between the parties as found by the court having created the relation of mortgagor and mortgagee between Holmes and Annie Archibald on the one part and Rand on the other, an examination of the public records by Newman would have disclosed that fact. There was nothing in the form of the bonds for deeds to indicate that they were intended as defeasances. The court below was convinced of that fact only by the aid of testimony explaining the nature of the transaction outside of and beyond what appeared from a reading of the deeds and bonds. Section 4217, Gen. St. 1901, reads: "When a deed of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such deed shall not be defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the register of deeds of the county where the lands lie." To sustain the position of plaintiff in error we must hold that bonds for deeds drawn in the ordinary form are instruments of defeasance within the meaning of the statute. There is no reference in either bond to a prior conveyance. There is no recital of indebtedness from Holmes or Annie Archibald to Rand. From the language of the bonds the right of purchase on the payment of certain sums in a stated time was given to the obligees; nothing more. See *Yost v. First Nat. Bank of Hays City*, 67 Kan. —, 72 Pac. 209; *Weide v. Gehl*, 21 Minn. 449. The court below, in disposing of the case, took the position that the rights of the parties were determined by the application of the rule that, where one of two parties must suffer a loss, it should fall on him whose negligence or omission occasioned it, and that Holmes was in equity that negligent party, because he took the wrong form of instrument to evidence the fact that he was a mortgagor—an instrument which did not disclose the true nature of the transaction.

There are other considerations in the matter, which, in view of what has been already said, it is unnecessary to discuss, arising out of the neglect for over 40 years on the part of plaintiff in error to assert his rights. The application of the statutory requirements respecting the recording of instruments of defeasance giving notice to the world of the true character of the transaction for the protection of innocent purchasers for value leaves plaintiff in error no ground on which to stand.

The judgment of the court below will be affirmed. All the Justices concurring.



(98 Kan. 815)

**KANSAS CITY, FT. S. & M. R. CO. v. MATSON.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**RAILROADS—NEGLIGENCE—PLACES ATTRACTING CHILDREN—CONCURRENT NEGLIGENCE.**

1. Testimony that a pile of wood was allowed to stand in a place attractive to children, within two feet of a railroad track, in a thickly populated district; that the ground was susceptible to jar from the passage of trains; that children had been allowed to play on the wood pile, with the knowledge of the railroad, for a year or more; and circumstantial evidence warranting an inference that plaintiff, a boy of five years, was shaken from the wood pile by the passing of a train—was sufficient to authorize its submission to the jury in an action against the railroad for plaintiff's injuries.

2. Where a railroad knows the dangerous situation of a wood pile attracting children near its tracks, it is liable for injuries to a child proximately caused by its negligence in leaving it there, irrespective of the ownership of the ground on which the wood was placed, or the concurring negligence of some other party.

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by Johnnie Matson, a minor, etc., against the Kansas City, Ft. Scott & Memphis Railroad Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

Pratt, Dana & Black and L. F. Parker, for plaintiff in error. Getty, Hutchings & Dean, for defendant in error.

**PER CURIAM.** Judgment was recovered against the railroad company for cutting off the foot of Johnnie Matson, a minor, about five years old. The negligence was in allowing a pile of logs, boards, timbers, and wood to be placed and to remain in proximity to the railroad tracks, which were laid in a thickly populated district, called the "Patch"; that this pile attracted the children in the neighborhood, and on which they played with the knowledge of the railroad company; that the ground of the Patch was close to the river, was of a loose, spongy character, and when heavy trains ran over it the ground was shaken so that the children on the pile were liable to be shaken off. On a certain day Johnnie and other children were playing on this pile, when a locomotive and a number of cars ran along the track, close to the pile, shaking it and causing the boy to fall under the train.

The principal question was raised on a demurrer to the evidence, and the court held that it was sufficient. There is testimony tending to show the dangerous location of the pile of wood; that the ground was susceptible to movement or jar from the passage of trains near it; that children had been allowed to play upon this pile of wood, with the knowledge of the railroad company, for a year or more; and testimony, somewhat circumstantial, it is true, but from which the jury might fairly infer that the boy was shaken from this pile of wood by

the passing of the train, and that he was not hurt, as the railroad contended, while attempting to climb upon the train. There is little to contend over as to whether the place was attractive to children, since it was shown that it had existed in this place, within two feet of the railroad track, for a long time, and that the children had played thereon with the knowledge of the railroad company. The wood pile, away from the tracks, would not be dangerous in itself, yet, when placed so close to the track, on shaky ground, it became a dangerous place when trains passed near it. From the testimony, it must be inferred that the company knew the character of the ground, and the jarring effect of trains in passing over it. It is immaterial who owned the ground on which the pile of wood was placed, as the railroad company was aware of the situation and the danger. Even if the injury was the result of the concurrent negligence of two parties, the railroad company would be responsible, where its negligence was a proximate cause of the injury.

The questions of law were fairly submitted by the charge of the court to the jury, and we find nothing in the rulings on the instructions which approaches error, or furnishes any reason for extended comment. The judgment of the district court will be affirmed.

(68 Kan. 534)

**MOOREHEAD v. ROBINSON et al.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**PARTITION—WHO MAY BRING—POSSESSION OF LAND—PLEADING—NEW TRIAL.**

1. A joint tenant or tenant in common out of possession cannot maintain a suit for partition against his co-tenants who hold adversely to him without joining with the demand for partition a cause of action for possession of the land. *Denton v. Fyfe*, 68 Pac. 1074, 65 Kan. 1, 93 Am. St. Rep. 272, cited and reaffirmed.

2. In an action for partition of premises, where the petition avers the parties are tenants in common, and it is not expressly averred that plaintiffs are in possession, and there is not joined with the demand for partition an action for the possession of premises, and where the defendant answered claiming title and possession, asking that title be quieted as against the claims of plaintiffs, and the sufficiency of plaintiffs' petition was not challenged in any manner by defendant in the trial court, *held*, that defendant thereby waived all objections to the sufficiency of said petition. *Held*, also, that defendant was not entitled to a new trial as a matter of right, under section 5086, Gen. St. 1901, for the recovery of real property.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by Abner Robinson and Amanda Hines against Paulina Moorehead and Jane Moore. Judgment for plaintiffs, and Paulina Moorehead brings error. Affirmed.

J. W. Jenkins and McGrew, Watson & Watson, for plaintiff in error. L. F. Bradley, for defendants in error.

ATKINSON, J. This is an action brought by Abner Robinson and Amanda Hines against Paulina Moorehead and Jane Moore in the court of common pleas of Wyandotte county for the partition of lots 26, 27, 28, and 29, of block 169, in the city of Wyandotte, now a part of Kansas City, Kan. Plaintiffs in their petition allege that they are seized in fee simple of an undivided one-fourth of said premises, and pray partition of said premises. Defendant Jane Moore was in default of pleading. Defendant Paulina Moorehead answered by a general denial, by a claim of possession and ownership, and by interposing the statute of limitations against the claim of plaintiffs and against defendant Moore. Plaintiffs denied the allegations of defendant's answer inconsistent with the averments of their petition. Upon the issues thus framed the case was tried before the court. Certain facts were agreed upon by counsel in open court. Upon the trial, testimony was offered by both plaintiffs and defendant. The court, upon the agreed facts and the testimony offered, found that plaintiffs and defendants inherited the premises in controversy from a common ancestor, and were the owners each of an undivided one-fourth thereof, seized in fee simple of the same, but as tenants in common, and entered judgment of partition. To the findings and judgment of the court, defendant Paulina Moorehead excepted, and brings the case to this court for review.

The petition not having alleged in express terms that plaintiffs were in possession of the premises in controversy, and plaintiffs not having in said petition joined with their demand for partition an action for the possession of premises, defendant assigns error that plaintiffs were by the court permitted to maintain this action. In support of her claim of error, defendant cites the cases of *Denton v. Fyfe*, 65 Kan. 1, 68 Pac. 1074, 93 Am. St. Rep. 272, and *Chandler v. Richardson*, 65 Kan. 152, 69 Pac. 168. In the case of *Denton v. Fyfe*, supra, it was said: "A joint tenant or tenant in common out of possession cannot maintain a suit for partition against his co-tenants who hold adversely to him without joining with the demand for partition a cause of action for possession of the land." In the case of *Chandler v. Richardson*, supra, this doctrine was reaffirmed. The doctrine promulgated by these cases has become the settled rule of practice in this state. The reason therefor is manifestly clear. The parties to an action of this kind, to obviate a multiplicity of suits, ought to have their possessory rights determined in the same proceeding. Two actions are wholly unnecessary; complete relief can be obtained in one.

The record in this court discloses that the sufficiency of plaintiffs' petition was not assailed by motion, by demurrer, or by an objection to the introduction of testimony under it; nor was it sufficiently challenged by defendant in any manner in the court below.

Defendant thereby waived all objections to the sufficiency of said petition, and cannot now raise the question of its sufficiency in this court.

The next assignment of error is that the court in its findings and judgment disregarded certain facts admitted by counsel in open court. It is claimed by defendant that it was agreed by counsel for plaintiffs, in open court, that there had been executed and delivered to defendant, by her father, a deed to the premises in controversy, and that the same had not been recorded and was lost. An examination of the record does not disclose this fact to have been agreed to by counsel for plaintiffs, as claimed by defendant. The statement of counsel as shown by the record is that defendant Moorehead claimed such to be the fact. It would appear that all parties upon the trial so understood. The question of whether such deed had in fact been made and delivered was the principal issue contested upon the trial. In fact, this claim of defendant, together with her claim that she had been in open and notorious possession of the premises in controversy, occupying the same as a homestead, for more than 20 years, were the only issues seriously contested. As to these the evidence was conflicting, both parties offering the testimony of numerous witnesses. The findings and decision of the trial court upon conflicting testimony are conclusive against defendant in this court.

The only other assignment of error insisted upon by defendant is that the trial court committed error in overruling the motion of defendant for a new trial. The claim of defendant that she was entitled to a new trial as a matter of right cannot be maintained. The action on the issues, as framed, was not one entitling defendant to a new trial as a matter of right, under section 5086, Gen. St. 1901, for the recovery of real property. Affidavits were filed and read on the hearing of motion for new trial by plaintiffs and defendant. Defendant endeavored to show, by affidavits, newly discovered evidence as to the execution and delivery to her of said deed by her father; also statements made by the father tending to show that he had executed and delivered, or contemplated executing and delivering, to her such deed. Plaintiffs filed and read counter affidavits. These affidavits are before us in the record. The evidence offered by these affidavits is mostly cumulative. There is little, if anything, in the affidavits of defendant, that can properly be termed newly discovered evidence. Very little diligence is shown on the part of defendant to procure and have had for use at the trial the testimony of witnesses claimed to be newly discovered material evidence. We believe the trial court committed no error in overruling defendant's motion for a new trial.

The judgment of the court below is affirmed. All the Justices concurring.

(68 Kan. 566)

## STATE v. NELSON.

(Supreme Court of Kansas. Feb. 6, 1904.)

CRIMINAL LAW—EVIDENCE AT FORMER TRIAL  
—CONSTITUTIONAL LAW—HOMICIDE—THREATS.

1. The fact that a witness against the defendant in a criminal case is outside of the state at the time of the trial, and therefore beyond the reach of process, authorizes the introduction in evidence of the testimony given by the witness at a former trial of the same case, notwithstanding an opportunity to subpoena the witness may have been neglected by the prosecution. The requirement of the Bill of Rights that the accused shall be allowed to meet the witness face to face is complied with, in that he has already at the former trial been confronted by the absent witness, and at the later trial meets the witness who gives evidence of what such former testimony was.

2. In a homicide case, where self-defense was relied on by defendant, there was testimony of threats made against him by the deceased, some of which were communicated to him. The court instructed correctly as to the consideration to be given to threats as showing the state of mind of the deceased, but omitted any reference to the communication of the threats. No instruction as to communicated threats was asked. *Held* not error.

(Syllabus by the Court.)

Appeal from District Court, Montgomery County; Thos. J. Flannelly, Judge.

John Nelson was convicted of manslaughter, and appeals. *Affirmed*.

J. H. Keith and W. E. Ziegler, for appellant. C. C. Coleman, Atty. Gen., Mayo Thomas, H. A. Scott, J. H. Dana, and H. C. Dooley, for the State.

MASON, J. John Nelson, charged with the murder of Albert Morris, was convicted of manslaughter in the second degree, and appeals. The principal claim of error is based upon the fact that the prosecution was permitted to introduce in evidence the testimony given by a witness at a former trial of the same case, such witness having left the state, and being therefore beyond the reach of process. It is argued by appellant that this was a denial of the constitutional right of the accused in a criminal prosecution to meet the witnesses face to face. *State v. Foulk*, 57 Kan. 255, 45 Pac. 603, is cited as supporting this contention, but does not reach the question at issue. There it was held to be error to admit in evidence, over the objection of defendant, the testimony given by a witness in a former trial, but the record discloses that one objection made to it was that the whereabouts of the witness was known to the state, and no reason had been shown why he was not produced. It was agreed that he was confined in the penitentiary, but this did not necessarily prevent his being brought into court. His imprisonment made him an incompetent witness, but this is an objection the defendant might have waived, and apparently was disposed to waive. A reading of the opinion shows that the question wheth-

er such testimony might be received when for any reason the attendance of the witness could not be procured was neither determined nor discussed by this court. The question is one upon which the decisions are in conflict. They are well collected and arranged in 14 Cent. Dig. c. 1933, § 1233, and Id. c. 2272, § 1542. But the authorities are so nearly unanimous that they may be said to be in substantial agreement that the former testimony of a witness who has since died may be used in further proceedings in the same criminal case over the objection of defendant. 14 Cent. Dig. c. 1931, § 1232. In *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257, the rule was applied where the action in which the testimony was used was not technically the same as that in which it was taken, both, however, being prosecutions for the same criminal act. Some cases base this doctrine upon a construction given to the Constitution as a matter of compelling necessity, to avoid a failure of justice (*Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95), or upon the ground that the constitutional provision in this regard is but declaratory of the common law, under which this practice was allowed (*State v. McO'Brien*, 24 Mo. 402, 69 Am. Dec. 435). Others hold that the provision in question is met by the defendant being confronted by the witness who undertakes to state the testimony formerly given by the person since deceased, leaving to be determined only the competency of that kind of evidence. The great majority of courts that have permitted such evidence at all have done so either upon this ground or upon the theory that, when the defendant has once met a witness face to face and had an opportunity to cross-examine him, the constitutional requirement has been satisfied, and that no necessity exists, so far as the Constitution is concerned, for again producing that witness in court. The following quotations illustrate these views:

"The requirement that the accused shall be confronted, on his trial, by the witnesses against him, has sole reference to the personal presence of the witnesses, and it in no wise affects the question of the competency of the testimony to which they may depose. When the accused has been allowed to confront, or meet face to face, all the witnesses called to testify against him on the trial, the constitutional requirement has been complied with. This was done on the trial of the case before us, in the district court. Mary Clinch was not a witness on that trial. Being dead, it was an impossibility that she could be a witness on that trial. Logan, however, who was a witness, and did testify, did meet the accused face to face on the trial. The provision in the Bill of Rights was complied with. And the true question is, not whether the constitutional right of the accused was violated, but whether the testimony given by Logan on the trial was competent or not." *Summons v. State*, 5 Ohio St. 325, 341.

"The substance of the constitutional pro-

¶ 1. See Criminal Law, vol. 14, Cent. Dig. §§ 1233, 1542.

tection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Mattox v. U. S.*, 156 U. S. 237, 244, 15 Sup. Ct. 340, 39 L. Ed. 409.

It is obvious that, if either of these two propositions is sound, it applies with as much force when a witness is beyond the reach of process as when he is dead. In the elaborately considered case of *Cline v. State*, 36 Tex. Cr. R. 320, 37 S. W. 722, 61 Am. St. Rep. 850, in which the authorities are reviewed at length, the court recognizes this fact, and repudiates the entire doctrine, overruling many earlier Texas cases, and taking a position in opposition to the current of judicial decision. Logically, there seems no middle ground. Unless the requirement of the Constitution is complied with, the death of a witness should not permit the use of his testimony. If it is complied with, the evidence should be admitted, unless open to some objection other than the constitutional one. Accordingly, as already stated, a considerable number of cases hold that the absence of the witness from the jurisdiction of the court, and the consequent impossibility of compelling his attendance, justifies the use of his former testimony. While there are also many decisions to the contrary, the recent tendency seems to favor the rule stated. This is illustrated by a comparison of a part of section 1195 of 1 Bishop's Criminal Procedure (3d Ed.) with the corresponding matter in the same section in 1 Bishop's New Criminal Procedure, which respectively read as follows:

"If there has been a prior proceeding involving the same issue between the same parties, conducted regularly in pursuance of law, and therein the defendant had the opportunity to cross-examine the witnesses against him, not otherwise, then, if a witness has died, or, says Archbold, if he is 'insane (though the insanity were of a temporary nature), or if it appeared satisfactorily to the court that he was kept out of the way by means of the procurement of the defendant, or if he were bedridden or so ill as to be unable to travel' (but not if simply he cannot be found, or by most opinions if only he is absent from the state or otherwise beyond the reach of process), what he testified to at the former hearing may be shown in evidence against the defendant in the present one."

"If a witness has died, or has become insane, though but temporarily, or by the opposite party is kept out of the way, or is too ill or infirm to come to the court (for it cannot adjourn to his house), or if from any cause for which the party is not responsible, such as residence beyond the process of the court, or the like, the witness' personal presence cannot be had (a rule as to which the decisions are somewhat indistinct and inharmonious), added to which, if there has been a prior proceeding involving the same issue between the same parties, conducted regular-

ly in pursuance of law, and therein the defendant had the opportunity to cross-examine the witnesses against him, not otherwise, what was on such former hearing testified to by a witness whose presence cannot now be had may be shown against the defendant."

In *People v. Fish*, 125 N. Y. 136, 26 N. E. 319, the inquiry was as to the validity of a statute authorizing the use in a criminal case of the deposition of a witness who "is dead, or insane, or cannot with due diligence be found in the state." The court said: "The evidence of the witness was taken in his [defendant's] presence, where he had the opportunity to cross-examine him, and where he did in fact cross-examine him, and thus he had all the protection that the Bill of Rights and the Constitution were intended to secure him. This constitutional provision was not intended to secure to the accused person the right to be confronted with the witnesses against him upon his final trial, but to protect him against ex parte affidavits and depositions taken in his absence, as was frequently the practice in England at an early day. It was never regarded as an invasion of the fundamental rights of an accused person to read depositions upon his trial, if at some stage of his case he could be confronted with and cross-examine the witnesses to be used against him."

In *Commonwealth v. Cleary* (Pa.) 23 Atl. 1112, it is said: "Where a witness has been examined in the presence of the accused, and the latter has had a full opportunity to cross-examine him, we think the additional requirement that the defendant should meet his accuser face to face is fully complied with. Where, upon a subsequent trial, the witness is dead, or beyond the jurisdiction of the court, there seems no good reason why his testimony, taken upon the former trial, and clearly proved, should not be admitted."

And in *State v. King*, 24 Utah, 482, 68 Pac. 419, 91 Am. St. Rep. 808: "By taking the testimony of the witness Johnson in the presence of the accused upon the examination at a time when he had the privilege of cross-examination, this constitutional privilege is satisfied, provided the witness cannot, with due diligence, be found within the state." And again, quoting from 1 Greenleaf on Evidence (10th Ed.) § 163g, p. 284: "The death of the witness has always, and as of course, been considered as sufficient to allow the use of his former testimony. The absence of the witness from the jurisdiction, out of reach of the court's process, ought also to be sufficient, and is so treated by the great majority of the courts. Mere absence, however, may not be sufficient, and it is usually said that a residence or an absence for a prolonged or uncertain time is necessary. A few courts do not recognize at all this cause for nonproduction; a few others deny it for criminal cases. Neither position is sound. Inability to find the witness is an equally sufficient reason for nonproduction, by the better opinion,

though there are contrary precedents. The sufficiency of the search is usually and properly left to the trial court's discretion."

And in *Territory of Idaho v. Evans*, 2 Idaho (Hasb.) 651, 23 Pac. 232, 7 L. R. A. 648: "While the decisions have not been uniform in their conclusions, the weight of authority is that depositions taken in the presence of the defendant, with the right of cross-examination, is being 'confronted by the witnesses,' and meets the demands of the Constitution. Such depositions have been admitted when it appeared the witness was dead. If constitutional in such case, the same justification can be urged for their use in case of absence of the witness."

We think the only reasoning that justly sustains the use of the former testimony of a witness who has since died applies with equal force where the witness is out of the jurisdiction of the court, and so cannot be produced, and conclude that there was no error in the ruling of the trial court in this regard. That apart from the constitutional question the evidence was competent, see *Railroad Co. v. Osborn*, 64 Kan. 187, 67 Pac. 547, 91 Am. St. Rep. 189.

Another phase of the same objection is presented in virtue of the fact that there is no showing in the record that the state had taken the precaution, before the witness left the state, to serve him with a subpoena or require him to give a recognizance to appear. To have done so would have placed him under an obligation to attend the subsequent trial, but could not have compelled such attendance. In *Motes v. U. S.*, 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150, it was held that, the absence of the witness being due to the negligence of the prosecution, his former testimony could not be used against the defendant. But there the witness in question was a co-defendant held without bail, and it was within the absolute power of the government to secure his presence. He was taken from the jail in violation of law by the official agent of the United States and practically set at liberty. Moreover, his disappearance did not occur long enough prior to his being called as a witness to justify the conclusion that he had gone out of the state. In any case where it appears that the absence of a witness is by the procurement of the prosecution, the trial court should of course protect the defendant, and refuse to permit the use of the former testimony, not because of the constitutional requirement referred to, but because the ordinary rules of evidence require the presence of the witness if it can be had, and a party procuring the absence of a witness could not derive an advantage from it. But the mere fact that the absent witness was not under subpoena does not raise a presumption of bad faith, nor amount to such lack of diligence as of itself to forbid the use of his testimony given at a former trial.

A further claim of error is based upon the admission of the former testimony of another witness, said to have died before the last trial. It is urged that there was no sufficient proof of his death. Whether this is true or not, there was a sufficient showing that he had left the state to bring the case within the operation of the rule already discussed.

Error is assigned in the giving of an instruction that evidence of previous threats made by Morris against defendant might be considered for the purpose of throwing light on which was the aggressor, and tending to show the animus of the deceased. This is conceded to be the rule of law in relation to uncommunicated threats, but it is insisted that the court, having entered upon the discussion of the effect of threats against defendant at all, should have instructed as to the consideration that should be given to threats that were communicated to defendant, since there was evidence that some of them were communicated. The argument is made that the jury would naturally infer that even the communicated threats should not be considered for any other purposes than those specifically named in the instruction. This is not sound. There is a great and obvious difference in the effect to be given to uncommunicated threats against the defendant and threats that are communicated. The essential thing in the one case is the fact that the victim of the homicide made the threat, and in the other that the defendant knew or believed that he had made it. In the latter case it is really the communication, and not the threat, that is important. The threat is relevant because it tends to show the feeling of the deceased toward defendant; the communication of the threat is relevant because it tends to show that the defendant knew of such feeling, and was justified in acting with reference to it. The two subjects are not so closely related that the court may not instruct as to the force of threats without also specifically referring to the communication of threats. The defendant did not ask for an instruction as to communicated threats, and therefore the omission to give one was not error.

Other assignments of error relate to the evidence, and do not require special discussion. It is claimed that the evidence did not justify the conviction because it showed that the defendant acted only in self-defense. The homicide was the result of a street fight. Morris was unarmed, except that he had a small penknife in his hand. Nelson had a revolver, which he fired at him four or five times, one shot being almost immediately fatal. Other facts appear in the statement in *State v. Nelson*, 65 Kan. 689, 70 Pac. 632. It is obvious that the guilt or innocence of the defendant was a fair matter for the determination of a jury.

The judgment is affirmed. All the Justices concurring.

(68 Kan. 819)

**THOMPSON v. COLBURN.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**TAXATION—DEEDS—VALIDITY—LIMITATIONS.**

1. That tax deeds recite payment by the certificate holder of subsequent taxes for three successive years, showing the aggregate amount paid, but not the amount paid for each year; that the recited consideration preceding the words "taxes, cost and interest due on said land for the years," etc., is the sum of the face of the amounts paid to the county treasurer, without the addition of interest; and that the words "an adjourned sale of" contained in the statutory deed, with the purpose that they should not be used except when appropriate, were retained—are not such defects as to prevent the five-year limitation statute running in favor of the deeds.

Error from District Court, Woodson County; L. Stillwell, Judge.

Action between John B. Thompson and Effie Colburn. There was judgment for the latter, and the former brings error. Affirmed.

L. W. Galbraith and S. C. Holmes, for plaintiff in error. A. J. Jones and Chauncey M. Millar, for defendant in error.

**PER CURIAM.** This proceeding involves the validity of the title to real estate asserted under tax deeds which have been of record more than five years and which have been upheld by a prior judgment.

It is contended by plaintiff in error that the deeds are so defective upon their face that they are not sufficient to set the statute of limitations in operation, and that the former judgment is void. Among the matters relied upon as making the deeds void on their face are: The deeds recite the payment by the holder of the certificates on which they are based of the subsequent taxes for three successive years, and show the aggregate amount paid, but not the amount paid for each year; the amount recited in the deeds as the consideration, preceding the words "taxes, cost and interest due on said land for the years," etc., is the sum of the face of the amounts paid to the county treasurer, without the addition of interest; the words "an adjourned sale of" included in the statutory form of tax deed, with the obvious purpose that they should not be used except when appropriate, were retained. None of these defects is sufficient to prevent the statute running in favor of the deed. *Morrill v. Douglass*, 14 Kan. 293, 301; *Harris v. Curran*, 32 Kan. 580, 4 Pac. 1044; *Martin v. Garrett*, 49 Kan. 131, 140, 30 Pac. 168.

A further claim is based upon the supposition that the word "not" was omitted from the recital of the deeds relative to redemption not having been made. The word, however, appears in the record. It is true that it is interlined in pencil, but so are other obvious clerical errors. No attack has been made upon the truth of the record as so corrected. The deeds being good upon their face, and having been of record five years without an attack being made upon them, it is unneces-

sary to consider the questions presented regarding the former judgment upholding them.

The judgment is affirmed.

(68 Kan. 817)

**SWARTWOOD et al. v. SAGE.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**GUARDIANS—SUIT AGAINST PLEADINGS—STATUTORY PROVISIONS.**

1. While Code Civ. Proc. § 101, requires a guardian ad litem to file a general denial, and it is error to try a case against a minor without it, his omission to file such a pleading is not a jurisdictional defect.

Error from District Court, Rawlins County; John R. Hamilton, Judge.

Action by Jerome E. Sage against Franziska Swartwood and others. There was judgment for plaintiff, and defendant Swartwood brings error. Affirmed.

J. P. Noble, for plaintiff in error. Albert Hemming and J. T. McClure (Fred Robertson, of counsel), for defendant in error.

**PER CURIAM.** Jerome E. Sage sued in the district court and recovered judgment upon a note and mortgage executed by Helmut Weber and wife. Weber had died before the action was brought, and his heirs, some of whom were minors, were made defendants. The guardian of the minors was also made a defendant in that capacity. No guardian ad litem was appointed. The only argument presented for reversing the judgment is based upon the claim that under such circumstances it was necessary for the plaintiff to prove the execution of the note and mortgage, although their execution was not denied under oath. In support of this contention, plaintiff in error cites *Nell v. J. I. Case & Co.*, 25 Kan. 510, 37 Am. Rep. 259, and *Bryant v. Stainbrook*, 40 Kan. 356, 19 Pac. 917. These cases have no bearing on the matter; they merely hold that in actions brought to the district court on appeal from the probate court, no new pleadings being filed, the Code provision that allegations of the execution of written instruments are taken as true unless denied under oath does not apply, because the practice followed is that of the probate court. It is true that an answer of a guardian defending for a minor is not required to be verified (Code Civ. Proc. § 109), but this point is not raised by plaintiffs in error, and neither the minors nor their guardian (in that capacity) are made parties in this court. Moreover, the answer filed by the defendants did not deny the execution of the note and mortgage under oath or otherwise, but rather admitted it. The statute requires a guardian ad litem to file a general denial (Code Civ. Proc. § 101), and it is error to try a case against a minor without such a pleading. *Brenner v. Bigelow*, 8 Kan. 496. But, as already stated, no such

question is here presented, and the omission is not a jurisdictional defect. Walkenhorst v. Lewis, 24 Kan. 420.

The judgment is affirmed.

(68 Kan. 545)

**ATCHISON, T. & S. F. RY. CO. v. PALMORE.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**BEST AND SECONDARY EVIDENCE—PERSONAL INJURIES—MEDICAL EXAMINATION.**

1. A card five or six inches square, tacked to the end of a wooden railway tie in a pile of ties loaded in a box car, discovered by a laborer engaged in unloading the ties for final use, bearing the printed words "Arkansas and Texas Tie Company," and the written words, "Creosote Treated Ties," is technically the best evidence of whatever information its inscription imparted; but, since it is obvious a card of that character is not intended to be preserved, and is not likely to be preserved, very slight evidence of its loss is sufficient to authorize parol proof of its contents, and a verdict will not be set aside because no other foundation for secondary proof than the foregoing facts is established.

2. Before inscriptions upon a card of the character described can be offered in evidence as an admission of the truthfulness of their recitals, or as an admonition concerning the character of the ties, it must be made to appear that the party to be charged made the admission or had notice of the warning.

3. In an action for damages for a negligent injury to the eyes, claimed to be permanent, a timely request for an expert physical examination of the injured organs in the usual and ordinary manner should be granted, although involving the use of drugs for dilating the pupils of the eyes, subject, however, to the limitation that the examination do not produce serious discomfort or any deleterious consequence.

(Syllabus by the Court.)

In Banc. Error from District Court, Sumner County; James Lawrence, Judge.

Action by Herschell Palmore against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. A. Hurd and O. J. Wood, for plaintiff in error. W. W. Schwinn, for defendant in error.

BURCH, J. The plaintiff recovered a judgment for damages against the defendant resulting from personal injuries claimed to have been received by him while in the railroad company's employ. He charged that the defendant sent him into a box car to unload wooden ties which had been prepared for use by immersion in creosote, a virulent poison, the natural effect of which is to destroy the tissues of the human body with which it may come in contact; and that in handling the ties a fine light dust which had accumulated upon them, and which had become impregnated with the creosote, was disseminated in the air, and into his eyes, by means of which they were badly burned, and his vision was permanently impaired. On the trial the only evidence offered to prove that the ties had

been treated with creosote, or that the defendant had any knowledge of the fact that they had been so treated, was the following: "I got in to unload the ties, and the only place for me to work was to get behind that pile of ties and shove them out. The other places were filled up. I was told to get into this separate car. The rest of my gang went to another car, all except one man; and I went to shove these ties out. There was dry stuff on top of the ties blew into my eyes and burned my eyes for fifteen minutes, so that I had to stop work for about that long, and I went to the door; and as I went to the door, after I got so that I could see again, I saw on the end of the ties a card about five or six inches square. \* \* \* Q. Now you may tell what you saw, Herschell. A. I saw a card. At the heading of the card was printed, says, 'Arkansas and Texas Tie Company'; in indelible blue pencil was marked, 'Creosote Treated Ties.' Q. You say the card was printed on it 'Arkansas and Texas Tie Company'? A. Printed at the top, the heading of the card; and in blue pencil was marked 'Creosote Treated Ties.' Q. Where was the card? A. It was tacked on the end of a tie about the middle of the pile on that end. \* \* \* Q. And that was on one tie? A. One tie, about the middle of the car." The railroad company insists that the card itself should have been produced or accounted for. In strictness the card would have furnished the best evidence of whatever information its inscriptions imparted. Its affixture was so slight and temporary that it was removable without effort. It was easily portable and preservable, and its description falls within that of a private document best provable by production. But, inasmuch as the card was casually discovered by a laborer when unloading the ties for final use, and inasmuch as it is apparent that the card was not intended to be, and was not likely to be, preserved, only very slight evidence was required to show its loss; and that is sufficiently furnished by the very statement of the circumstances, so that a verdict should not be overturned because a foundation for secondary proof was not sufficiently established.

A more serious objection to the proof of the language of the card is that the defendant was not shown to be cognizant of it or privy to it in any way. The card could be important only as an admission of the truthfulness of its recitals, or as an admonition concerning the character of the ties. Without some proof that the company made the one or had due information of the other, it could not be bound. The fact that the plaintiff found the card tacked to the ties was wholly inadequate for either purpose. Any stranger to the company might have placed it there; and, if it were affixed without the authority of the officers or agents of the company, it was nothing more than the declaration of the person doing so, and of no binding

¶ 2. See Evidence, vol. 29, Cent. Dig. § 1003.

effect without proof of facts showing it was intended as a means of conveying information concerning the character of the ties, and that the officers or agents of the company were, or should have been, apprised of it in time to notify the plaintiff. Unsupplemented as the evidence stood, it was not only insufficient to establish a liability on the part of the company, but should have been stricken out.

Before the trial began, the defendant made a request for an expert physical examination of the plaintiff's eyes in the usual and ordinary manner. No objection was made to the time or form or propriety of the request. On behalf of the plaintiff it was stated that he consented that experts might examine his eyes by inspecting them, but that he protested against the court permitting experts or anybody else to put drugs into his eyes for the purpose of dilating them. No reason whatever for this protest was vouchsafed. On the part of the defendant it was suggested that in no instance could a proper examination of the eye be made without dilating certain of its parts, and the request was made that this feature of the examination be left to the experts themselves. Thereupon the court made the following order: "The plaintiff, by his consent, may subject himself to have his eyes examined, but the court will not permit any drugs to be used in the examination without the consent of the plaintiff." On the trial the plaintiff himself testified to a great destruction of his eyesight. Two physicians produced by him detailed the results of superficial observations of the eyes, and pronounced his vision to be permanently impaired. One of them was 25 years of age, had been practicing medicine but 18 months, and had been without eye practice, except in a clinical way connected with his college work. The other was a physician of experience, but he was not interrogated concerning any special qualifications he might possess for the diagnosis of cases of this character. Two physicians called by the defendant stated they had inspected the plaintiff's eyes, and were able to describe the condition of the outer tissues, but they united in asserting that no superficial examination could discover the facts or test the truthfulness of the plaintiff's statements; that the true condition of his eyes could only be ascertained by an ophthalmoscopic examination of their deeper structures; that a dilation of the pupils by appropriate drugs for that purpose was essential, and that such was the usual and ordinary method of examining eyes by all specialists. Upon the submission of the cause the jury returned the following remarkable special findings: "Q. If you find for plaintiff, what do you allow him for loss of time in the past? A. Nothing. Q. If you find for plaintiff, what do you allow him for loss of time in the future? A. Nothing. Q. If you find for plaintiff, what do you allow him for pain and suf-

fering in the past? A. Nothing. Q. If you find for plaintiff, what do you allow him for prospective pain and suffering? A. Nothing. Q. If you find for plaintiff, what do you allow him for mental pain and anxiety? A. Nothing. Q. If you find for plaintiff, what do you allow him for loss of ability to earn a livelihood? A. Nothing. Q. If you find for plaintiff, what do you allow him for permanent injuries? A. \$5,000.00." If, therefore, the ruling of the court upon the application for an examination of the plaintiff's eyes was erroneous, it was not cured by any subsequent circumstance of the trial.

It is a matter of common knowledge that, through the restriction of the energies of trained students and investigators to that single field, ophthalmology has been brought to a state of comparative perfection. Here, as in all other quests for truth conducted under the guidance of the scientific method, the first requirement is a full and accurate observation of the facts. The sages of old, from the data at hand, proved that the flood of the Nile is caused by the tears of Isis shed for Osiris, until the eye of the explorer rested upon the melting snows of the mountain peaks of central Africa. The ancient method of establishing facts yet dominates some minds, but the modern scientific expert will be content with nothing short of a view of the facts when they can be seen. Therefore he has invented the ophthalmoscope for the exploration of the interior of the eye, the rhinoscope for the exploration of the nasal cavities, and other appropriate instruments for the exploration of other hollow organs of the body, and he will not attempt to bridge the chasm between ignorance and knowledge in any case where they may be of assistance until he has availed himself of their use. The question therefore arises whether or not the law, as a means of justice, will tolerate any other than the surest method of ascertaining truth; whether or not, with all the marvels of scientific achievement placed at its command, the rule of thumb shall be sufficient for its purposes; and whether or not in this case the timely application of the defendant for the production of the best evidence shall be granted before a transfer from the treasury of the defendant to the plaintiff of the sum of \$5,000 is ordered.

In the case of *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659, an order of a district court denying an application requiring a plaintiff in a personal injury case to submit to an expert examination of his eyes was declared to be erroneous. Mr. Justice Valentine, speaking for the court, said: "The tendency of modern adjudications and of modern thought is to open the door as wide as possible for the introduction of all evidence that may throw light upon the particular subject then undergoing investigation. All attainable evidence and instruments of evidence, within certain limitations, may be



presented to the jury for their inspection and consideration, and all proper modes of investigation or inspection may be resorted to for the purpose of enabling the jury to arrive at just and correct conclusions. Many instruments of evidence, however, can be examined only by the aid of experts, and in all such cases the aid of experts is not only allowable, but may be demanded as a matter of right by the party needing such aid. It was shown in the present case by the testimony of Dr. Williams that the nature, the extent, and the permanency of the injury to the plaintiff's eyes could not be determined with any reasonable degree of accuracy except by a careful examination, made by some oculist or person who had made diseases and affections of the eyes a special study; and we would naturally suppose that such would be the case, independent of the testimony of Dr. Williams. Hence it would seem that in a case like the present the evidence of some such expert who had made such an examination would be an almost indispensable necessity; but such evidence in many cases could not be obtained unless the plaintiff were first compelled by an order of the court to submit himself to a personal examination by some such expert. Now, is such evidence to be lost, and justice possibly defeated, or may the court order that such an examination may be had? We favor the proposition contained in the latter portion of this alternative." It does not affirmatively appear from the statement of facts, however, if the examination of Thul contemplated the use of drugs, and in support of its opinion the court quotes from a decision of the Supreme Court of Iowa as follows: "To our minds, the proposition is plain that a proper examination by learned and skilled physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it. The use of anæsthetics, opiates, or drugs of any kind should have been forbidden, if, indeed, it had been proposed; and it should have prescribed that he should be subjected to no tests painful in their character." This authority, however, is by no means conclusive. Drugs are of infinite shades of potency from the rankest poisonousness to absolute innocuousness. They may produce death, or an effect so fleeting and temporary that only the most skilled observer can be conscious of it; and reactions from them range from the utterly intolerable to the positively pleasurable. The question, therefore, is not if drugs shall be used, but if an examination shall be made without serious inconvenience and without deleterious effect. Any enforced examination is vexatious and embarrassing,

and very frequently must involve some slight degree of that discomfort which is denominated pain; but an examination may nevertheless be made with due consideration of both the sensibilities of the plaintiff and the demands of justice. Other adjudicated cases cast little light upon the question. In the case of *Strudgeon v. Village of Sand Beach*, 107 Mich. 496, 65 N. W. 616, the court held: "An order requiring the plaintiff in an action for personal injuries to submit to an examination by physicians, necessarily involving the use of anæsthetics, is properly refused." It is to be inferred, however, from the report of the case, that the physicians were there demanding the total subjugation of consciousness—a measure so extreme that the court might well refuse to consider it. In *Hess v. Lake Shore & Michigan Southern R. R. Co.*, 7 Pa. Co. Ct. R. 565, the court, in a speculative way, remarked: "The examination should, however, be conducted in such a manner as to avoid the infliction of pain, the subjection to indignity, or the endangering of health or life. No anæsthetics, opiates, or drugs should be administered." But it then proceeded to order an examination "by electric tests by means of a battery of such moderate power as is approved by medical authority in like cases, and as will not inflict pain or endanger the health or life of plaintiff, either or all." Just why degrees of potency should be recognized in the application of a powerful natural agent like electricity and rejected when considering vegetable or mineral substances is not obvious. In the case of *Belt Electric Line Co. v. Allen* (Ky.) 44 S. W. 89, 80 Am. St. Rep. 374, it is said: "The examination should be ordered and had under the direction and control of the court, whenever it fairly appears that the ends of justice require the disclosure of more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to the plaintiff's life or health, and without the infliction of serious pain." And in the case of *City of South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200, after reviewing the authorities to the date of the decision, the Supreme Court of Indiana drew the following conclusion: "The cases above cited as affirming the existence of the power establish the following propositions: \* \* \* (4) That the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed or fully elucidated by such an examination, and such an examination may be made without danger to the plaintiff's life or health or the infliction of serious pain." In these two cases, however, the narrow question under consideration was not inde-

pendently discussed. So far as the intrinsic character of the agency employed is concerned, the law should not distinguish between dilations accomplished by mechanical and by medicinal means. In the case of *O'Brien v. The City of La Crosse*, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831, the refusal of the plaintiff's physician to permit the use of a catheter in the course of an examination by physicians employed by the defendant was upheld, because it appeared that a dangerous inflammation was likely to result. In the case of *Louisville Ry. Co. v. Hartlege*, 74 S. W. 742, the Supreme Court of Kentucky adhered to the rule announced in *Belt Electric Line Co. v. Allen*, supra, but affirmed an order denying an examination of the person of a woman which involved a mutilation and severe pain. But in the carefully considered cases of *Ala. Great Southern R. R. Co. v. Hill*, 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764, and *Brown v. Chicago, M. & St. P. Ry. Co.* (N. D.) 95 N. W. 153, the examinations authorized necessarily contemplated either an internal digital exploration or the use of the speculum. The conclusion to be drawn from these decisions therefore is that due precautions for the comfort and safety of the subject are the matters for primary consideration. With these provided for, the method and means employed should be left to the discretion of the expert making the examination.

From all this the conclusion must follow that the district court should have required an expert examination of the plaintiff's eyes to be made, subject to the limitation that it should not produce serious discomfort or any deleterious consequence; and, in order to insure the execution of its order according to the strict letter of its terms, the court should have approved, if it did not actually select, the experts appointed to make the examination.

The judgment of the district court is reversed, with direction to proceed further in accordance with this opinion. All the Justices concurring.

(68 Kan. 485)

#### MOESER et al. v. LEWIS.

(Supreme Court of Kansas. Feb. 6, 1904.)

#### SPECIAL FINDINGS—MOTION FOR JUDGMENT.

1. A motion for judgment upon special findings covering a portion of the matters established by the evidence is properly denied when such findings may be harmonized with the evidence sustaining the general verdict.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by John F. Lewis against William Moeser and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Moore & Berger, for plaintiffs in error. Ferry & Doran and D. M. Relihan, for defendant in error.

BURCH, J. A workman in an ice and cold storage plant was injured by the falling of a hoisting crane, which it was his duty to operate, from a beam supporting it some distance above his head. In an action for damages against his employers, the proprietors of the plant, for the injuries received, the workman alleged and proved a number of causes for the accident, any one of which would be sufficient to account for it. The issues in the case were partially covered by special findings of fact returned by the jury, as follows: "Q. 1. Had not this particular crane been used for about fourteen years immediately prior to the accident? A. Yes; with some changes. Q. 2. Did not the defendants use that care which a reasonably prudent person would have exercised to have the crane with which the plaintiff was working at the time of the accident on October 2, 1901, in a reasonably safe condition? A. No. Q. 3. Was not the crane which fell on Lewis replaced on the same tracks soon after the accident to Lewis, and on the same night, and used in that same condition for several months after October 2, 1901, by other employees of defendants? A. Yes; with some repairs. Q. 4. Prior to October 2, 1901, had the crane ever fallen off of the beams on which it was moved? A. No. Q. 5. If the last question is answered in the affirmative, state when it was? A. —. Q. 5. Was the crane on the night of October 2, 1901, in an unsafe condition, if handled or moved with ordinary care? A. Yes. Q. 7. If you answer the last question in the affirmative, did the defendants know the crane was in an unsafe condition at or immediately prior to the accident to Lewis? A. Yes. Q. 8. Was it not the duty of Lewis to manage and control the moving of the crane, without the aid or assistance of any other person? A. Yes. Q. 9. Was not Lewis equally as competent as defendants to judge of the risks or probability of the crane falling? A. No. Q. 10. Had not Lewis worked with the crane several weeks immediately prior to October 2, 1901? A. Yes. Q. 11. Prior to October 2, 1901, did the crane work properly while Lewis was operating it? A. Yes. Q. 12. Did not the plaintiff, Lewis, when working with the crane, have an opportunity of observing or noticing its condition? A. Yes. Q. 13. What caused the crane to fall on Lewis? A. No direct evidence to show what caused it. Q. 14. Did not the plaintiff, Lewis, on the night of October 2, 1901, have as good an opportunity as the defendants to judge of the probability of the crane falling on him? A. Yes. Q. 15. Was the injury to plaintiff the result of an accident occurring without the negligence of plaintiff or defendants? A. Without the negligence of the plaintiff." The jury also returned a general verdict for the plaintiff, upon which judgment was entered. A motion for a new trial was filed by the defendants, and then withdrawn. They then filed a motion for judgment in their fa-

vor upon the special findings, which was overruled, and upon that ruling alone error is predicated.

It is contended that because the findings show a long-continued use of the crane, and that it had worked properly for several weeks before the accident, the defendants had no reason to anticipate a casualty would occur, and hence that actionable negligence does not appear. Much evidence in the case, however, established the fact that the crane was in a defective and dangerous condition, as shown by finding No. 6, and that though prior to October 2, 1901, the crane had never fallen off the beams supporting it, as stated in finding No. 4, it frequently came off the tracks upon which it ran, and only by slender means was prevented from falling entirely down. Though the crane had been used a long time, it was with changes; and, though replaced after the accident, it was with repairs. Findings numbered 1, 3, and 10 are entirely consistent with findings numbered 2, 6, and 7, and do not by any means exclude liability on the part of the plaintiff's employers.

It is further argued that because it was the plaintiff's duty to manage and control the movements of the crane without the assistance of any other person, and because he had worked with it for a considerable length of time, had an opportunity of observing and noticing its condition, and had as good an opportunity to judge of the probability of the crane falling on him as did his employers, he assumed the risk of an accident. This argument, however, is fairly answered by finding No. 9, that the plaintiff was not as competent as his employers to judge of the probability of the crane falling, or the risk of such an occurrence, and by the case of *A., T. & S. F. R. Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253, which decides that mere knowledge or opportunity of observation is not enough to raise the implication of assumed risk.

Finally, it is insisted that finding No. 13 required the court to enter judgment for the defendants, since negligence must be proved, and cannot be presumed or conjectured or surmised. The only witness to the accident was the plaintiff himself, who testified that he did not know how the crane happened to get off the track. There was, therefore, as the jury found, no direct evidence of what caused the injury. This, however, falls far short of saying there was no evidence whatever to sustain the general verdict. The record contains an abundance of evidence describing defects in the mechanism of the crane and its mounting, owing their existence to the negligence of the defendants, and amply sufficient to produce the casualty which did occur. By the general verdict the jury drew the conclusion that one or more of these defects caused the crane to fall. The evidence warranted such conclusion, and the jury was authorized to draw it. Rail-

way Co. v. Wood, 66 Kan. 613, 72 Pac. 215; Railroad Co. v. Perry, 65 Kan. 792, 70 Pac. 876; K. C., Ft. S. & M. R. Co. v. Blaker & Co. (Kan., Jan. 1904) 75 Pac. 71. The finding, therefore, is not inconsistent with the general finding of the verdict.

Under these circumstances, the motion for judgment on the special findings was properly overruled, and the judgment of the district court is affirmed. All the Justices concurring.

(30 Mont. 30)

### SMITH v. SHOOK.

(Supreme Court of Montana. Feb. 26, 1904.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE—IGNORANCE OF EXISTENCE—TIME FOR FILING ADDITIONAL AFFIDAVITS—WITNESSES—CROSS-EXAMINATION—PROPRIETY.

1. In an action to recover an alleged loan it appeared that plaintiff had been employed by defendant's firm, and had been paid a certain compensation, and that he had borrowed a sum of money from the firm, which he had afterwards repaid. Defendant sought to show by cross-examination of plaintiff's wife that plaintiff's statement of the amount received by him for the labor was not true, and that plaintiff had secured \$50 from defendant to send witness to Chicago, and at that time had no money. *Held* improper cross-examination.

2. Code Civ. Proc. § 1171, authorizes the granting of a new trial for newly discovered evidence, which the moving party could not with reasonable diligence have discovered and produced at the trial. In an action to recover a loan plaintiff testified in justice's court that no one was present when the loan was made, but in the district court testified that his wife was present. Defendant asked no continuance to secure impeaching witnesses, and made no effort to that end, but himself testified to the contradiction. *Held*, that a new trial was properly refused.

3. The party moving for a new trial on the ground of newly discovered evidence must show by his own affidavit that the new evidence was not known to him at the time of the trial, and the affidavits of other persons on that question are not sufficient.

4. Where it appears that nine affidavits relative to an alleged contradiction between the opposing party's testimony at a former and at the present trial were read in support of a motion for a new trial, it was not error to refuse to extend the time to enable the moving party to secure additional affidavits.

Commissioners' Opinion. Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by Charles G. Smith against George L. Shook. From a judgment for plaintiff, defendant appeals. Affirmed.

A. L. Duncan, for appellant. Jno. M. Evans, for respondent.

POORMAN, C. This action was commenced in the justice court to recover the sum of \$50 alleged to have been theretofore loaned by plaintiff to defendant. The defendant made general denial. Verdict and judgment for plaintiff. Defendant appealed to the district court, where a trial again resulted in a

¶ 3. See New Trial, vol. 37, Cent. Dig. § 310.

verdict and judgment for the plaintiff. The defendant appeals from the judgment and from the order denying his motion for a new trial.

It appears from the record that the plaintiff and his wife had been employed by the firm of Shook & Hinchman, and had been paid a certain compensation; that plaintiff had borrowed a sum of money from the firm, which he had afterwards repaid. Plaintiff claims also that he had some money, derived from other sources, at the time he made the alleged loan to defendant.

1. At the trial the defendant sought to show by cross-examination of plaintiff's wife, Mrs. C. G. Smith, that plaintiff's statement of the amount of money received by him for the labor was not true; that plaintiff had secured \$50 from defendant for the purpose of sending witness to Chicago; that plaintiff at that time had no money. This evidence was objected to as improper cross-examination, and the objection was sustained. The defendant does not claim that he ever loaned the plaintiff any money. It is admitted by defendant that the money borrowed from the firm by plaintiff had been repaid prior to the commencement of this action. There was no dispute between plaintiff and defendant as to the amount received by plaintiff for labor performed for Shook & Hinchman, and the witness had not testified on direct examination as to any other money plaintiff had at any time. The court did not err in sustaining this objection.

2. It is also claimed that a new trial should have been granted on the ground of surprise and newly discovered evidence under section 1171 of the Code of Civil Procedure, and that an extension of time should have been given appellant in which to file additional affidavits on his motion for a new trial. The showing of surprise and newly discovered evidence consists in the alleged fact made to appear that plaintiff had testified in the justice court that no one was present when this loan was made, while in the district court he testified that his wife was present; and that Mrs. C. G. Smith, after the trial, made statements to the effect that she was not present at the time the loan was made, while in her testimony she had stated that she was present at that time. This newly discovered evidence in either case is no more than impeaching evidence, and that relating to plaintiff does not go to his testimony regarding the loan itself, but to the incidental fact as to who was present at that time. At the trial in the district court the defendant knew of the statements made by the plaintiff at the former trial, and knew in whose presence they were made, but no continuance was asked for, and apparently no effort then made to secure the evidence. The trial proceeded without any objection, and defendant testified on this very point. This impeaching evidence as to plaintiff then became cumulative. The defendant should

have made some effort, when it first became known to him that this impeaching evidence was necessary, to have secured a continuance or permission to have these witnesses called. Objection after verdict, in such cases, comes too late. *Heath v. Scott* (Cal.) 4 Pac. 557; *Knuffke v. Knuffke* (Kan. App.) 56 Pac. 326; *Pincus v. Puget S. B. Co.* (Wash.) 50 Pac. 930; *Walker v. Gray* (Ariz.) 57 Pac. 614; *Huster v. Wynn* (Okla.) 58 Pac. 736; *Lee-Clark A. H. Co. v. Yankee* (Colo. App.) 48 Pac. 1050; *Rand v. Kipp*, 27 Mont. 138, 69 Pac. 714; *Romero v. Desmarais* (N. M.) 20 Pac. 787.

3. The defendant filed an affidavit in support of his motion for a new trial, but made no reference whatsoever to this newly discovered impeaching evidence as to the witness Mrs. C. G. Smith, nor did defendant offer any affidavits of the witnesses by whom he expected to make the proof, nor give any reasons why he did not make reference thereto or submit the affidavits, though it is stated in the affidavit of defendant's attorney that he knew the names of some of those witnesses. *Elliott et al. v. Martin et al.*, 27 Mont. 519, 71 Pac. 756. It is fundamental that the moving party must show by his own affidavit that the new evidence was not known to him at the time of the trial. Upon that question the affidavits of other persons are not, as a general rule, sufficient. 1 *Spelling*, New Trial & App. Prac. par. 207, and cases cited; *Hayne*, New Trial & App. par. 92; *Arnold v. Skaggs*, 35 Cal. 684. It is a general rule that, before a new trial will be granted on the ground of newly discovered evidence, cumulative or impeaching, it must be made to appear affirmatively that the new evidence would probably be sufficient to change the verdict and produce a different result. *Hayne*, New Trial, par. 90; *Huster v. Wynn*, supra; *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; *Springer v. Schultz*, 105 Ill. App. 544; *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. 637. See, also, *Baxter v. Hamilton*, 20 Mont. 327, 51 Pac. 265; *State v. Brooks*, 23 Mont. 147, 57 Pac. 1038. Statutes similar to section 1171 of our Code of Civil Procedure have been so construed. *Oberlander v. Fixen & Co.*, 129 Cal. 690, 62 Pac. 254. "The additional evidence to afford opportunity for the introduction of which a new trial is sought, must be newly discovered, by which expression is meant that it must have been discovered since the trial. If discovered before or at the trial, and no continuance of the trial was applied for, an answer to the motion that no diligence is shown will be sufficient to defeat it, no matter what else may be shown." 1 *Spelling*, New Trial, supra; *Curran v. Stange Storage Co.* (Wis.) 74 N. W. 377. It appears from the record that nine affidavits relative to the alleged statements made by plaintiff at the former trial were read and used in support of the motion for a new trial, and the court did not err in refusing to extend

the time in order to enable the defendant to secure additional affidavits on that point, even if the application for such extension had been made within the time required by section 1173, Code Civ. Proc., as that section is construed in *Wright v. Mathews*, 28 Mont. 442, 72 Pac. 820, and *State ex rel. S. M. Co. v. Second Judicial District Court*, 28 Mont. 123, 72 Pac. 412.

We find no material error in this case, and recommend that the judgment and order appealed from be affirmed.

CLAYBERG, C. C., and CALLAWAY, C., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

(30 Mont. 13)

MOORE v. MURRAY et al.

(Supreme Court of Montana. Feb. 24, 1904.)

PLEADINGS—DENIALS—SUFFICIENCY—JUDGMENT ON PLEADINGS—DETERMINATION OF MOTION—ENTRY OF FINAL JUDGMENT.

1. Judgment on the pleadings cannot be entered where there is an issue framed thereby.

2. Denials which are as specific as the allegations they are intended to meet, and which controvert the spirit and substance of the adverse pleading, are sufficient to raise issues.

3. Although Code Civ. Proc. § 741, provides that an appeal cannot be taken from a denial of judgment on the pleadings, and that subsequent proceedings of either party are not prejudiced thereby, it was proper for the court to enter judgment for defendant after overruling plaintiff's motion for judgment on the pleadings, where plaintiff, instead of proceeding to trial upon the merits, announced that he would stand on the motion as made.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by Donald Moore against James A. Murray and others. From a judgment in favor of defendant James A. Murray, plaintiff appeals. Affirmed.

The plaintiff commenced this action by filing a complaint containing, among others, the following paragraphs:

"(1) That at all the times hereinafter mentioned the defendant James A. Murray was the owner and reputed owner of the property hereinafter described, and that the defendants James Cummings and T. J. McKenzie were the owners of an interest in said realty together with said Murray, as the plaintiff is informed and believes, and were the owners of certain improvements thereon, made by them and said Murray; and that all funds for the said improvements on said realty were made by said defendants jointly, and with moneys advanced by said Murray to said partnership in said mines for the purpose of developing the same for the benefit and use of all of the said defendants.

"(2) That between the 25th day of July, 1899, and the 17th day of February, 1900, the plaintiff rendered and performed services as miner upon the said premises, the same being under a continuous contract, amounting to 196 days' labor at the rate of \$3.50 per day, amounting in all to the sum of \$686, said work and labor being performed at the instance and request of the said James Cummings, and for the use and benefit and improvement and development of the said property, and for the use and benefit of the said defendants.

"(3) That said Cummings agreed to pay the plaintiff the sum of \$686, and said agreement was made upon the part of said defendants in their capacity of co-owners of said property. Plaintiff further avers that the said sum of \$686 was due and owing and entirely unpaid to plaintiff, and is now so due and owing at the date of commencement of this action, and when the lien hereinafter mentioned was filed."

To the complaint is attached a copy of the mechanic's lien referred to in the complaint, which is designated "Exhibit A."

Thereupon the defendant Murray filed an answer containing the following paragraphs:

"Now comes the defendant James A. Murray, and for himself alone, and for his separate answer to the complaint on file herein, denies that the defendants James Cummings and T. J. McKenzie were the owners, or that either of them was the owner, of an interest in the realty and mining premises mentioned and described in said complaint, or that they were the owners, or that either of them was the owner, of certain or any improvements thereon, or that all or any funds for any improvements of said realty and mining premises were made by defendants to this action jointly, or with money advanced by this defendant Murray, for the purpose of developing said realty and mining premises for the benefit or use of all of said defendants.

"Denies that plaintiff rendered or performed services as a miner or otherwise upon said premises for the use or benefit of this defendant, or at the request of this defendant.

"Denies that defendant Cummings agreed to pay said plaintiff the sum of \$686, or any other sum or amount whatever, upon or by virtue of any agreement made or entered into by or upon the part of this defendant, or in his capacity as co-owner of said property, or that this defendant ever promised or agreed to pay said plaintiff said sum of \$686, or any other sum or amount whatever, or in any capacity whatever."

Upon the filing of this answer the plaintiff interposed the following motion: "Comes the plaintiff, and moves the court for a judgment upon the pleadings herein, as against the said defendant Murray, in accordance with the prayer of the plaintiff's complaint, for the reasons that it appears from the record herein that the defendants James Cum-

¶ 2. See Pleading, vol. 39, Cent. Dig. § 244.

mings and T. J. McKenzie have made default herein, and thereby have admitted the allegations of the plaintiff's complaint; that the facts and matters stated in the answer of defendant Murray do not constitute a defense or counterclaim to the plaintiff's complaint."

This recitation is found in the bill of exceptions: "Whereupon the said motion for judgment upon the pleadings is by the court heard and considered, and is by the court overruled, to which ruling of the court the plaintiff, by counsel, duly excepted. Thereupon the plaintiff, by his counsel, announced in open court, and immediately upon the overruling of the said motion, that the defendant Murray might have judgment, and that the plaintiff would stand upon the motion as made."

Immediately a judgment was entered against the defendants James Cummings and T. J. McKenzie personally for the sum of \$686, with interest thereon, and costs of suit; and it was also provided that the plaintiff take nothing against the defendant Murray, and also that the defendant Murray recover from the plaintiff his costs. No reference to the lien is found in the judgment. From this judgment the plaintiff has appealed.

J. B. Healy, for appellant. J. L. Wines, for respondent.

CALLAWAY, C. (after stating the facts). If there is an issue framed by the pleadings, the court was right in refusing to grant plaintiff's motion for judgment thereon. *Horsky v. Moran*, 13 Mont. 250, 34 Pac. 360; *Bach, Cory & Co. v. Montana L. & P. Co.*, 15 Mont. 345, 39 Pac. 291; *Floyd v. Johnson*, 17 Mont. 469, 43 Pac. 631; *Sklower v. Abbott*, 19 Mont. 228, 47 Pac. 901; *Bryant v. Davis*, 22 Mont. 534, 57 Pac. 143. No question has been raised by counsel as to the sufficiency of the complaint. We think material portions of it are, in effect, denied by the answer, though the latter pleading is subject to criticism. The first paragraph of the answer is merely a literal denial of a portion of the first paragraph of the complaint, and is insufficient. In the second paragraph of the complaint it is alleged that the plaintiff performed the work at the instance and request of Cummings, "and for the use and benefit and improvement and development of the said property, and for the use and benefit of the said defendants." The answer "denies that plaintiff rendered or performed services as a miner or otherwise upon said premises for the use or benefit of this defendant, or at the request of this defendant." The third paragraph of the complaint contains this language: "That said Cummings agreed to pay the plaintiff the sum of \$686, and said agreement was made upon the part of said defendants, in their capacity of co-owners of said property." This is met by the answer thus: "Denies that defendant Cummings agreed to

pay said plaintiff the sum of \$686, or any other sum or amount whatever, upon or by virtue of any agreement made or entered into by or upon part of this defendant, or in his capacity as co-owner of said property." Denials which are as specific as the allegations they are intended to meet, and which convert the spirit and substance of the adverse pleading, are sufficient. *Miles v. Edsall*, 7 Mont. 185, 14 Pac. 701. We think the court was justified in overruling the motion.

Section 741 of the Code of Civil Procedure declares: "If a demurrer, answer, or reply is frivolous, the party prejudiced thereby, upon a previous notice to the adverse party, of not less than five days, may apply to the court or to a judge of the court for judgment thereupon, and judgment may be given accordingly. If the application is denied, an appeal cannot be taken from the determination, and the denial of the application does not prejudice any of the subsequent proceedings of either party. Costs may be awarded in the discretion of the court." After the court overruled the motion, the plaintiff was at liberty to proceed with his proof. He was in no manner injured by the action of the court. Instead of proceeding to trial upon the merits, he saw fit to say to the court that the defendant Murray might have judgment, and it was entered accordingly. This the court could not have done rightfully in the absence of plaintiff's action in the premises, because, some of the material allegations of the complaint being denied by the answer, an issue remained to be tried. Under the circumstances the court's action was proper.

We are of the opinion that the judgment should be affirmed.

CLAYBERG, C. O., and POORMAN, C., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(30 Mont. 5)

STATE ex rel. DAVIS v. DISTRICT COURT OF SECOND JUDICIAL DIST. OF SILVER BOW COUNTY et al.

(Supreme Court of Montana. Feb. 24, 1904.)

INCOMPETENTS — GUARDIAN — APPOINTMENT — ATTORNEYS — SUBSTITUTION — PAYMENT OF FEES — CONDITIONS — MANDAMUS — CLAIMS — INCOMPETENT'S ESTATE — ALLOWANCE.

1. That a party becomes insane while indebted to an attorney who was representing him at the time with respect to his property interests does not give such attorney the right per se to appear as attorney for the party's guardian, who by reason of such appointment, as provided by Civ. Code, § 3151, becomes responsible for the estate and the proper conduct of the incompetent's affairs.

2. Where at the time of the insanity of a client he was indebted to his attorney who had charge of his interests, the appointment of a guardian for the client did not divest the attorney of any lien or security which he had at the time to secure payment of his fees.

3. Under Code Civ. Proc. § 2810 et seq., providing for the allowance and payment of claims against the estate of an incompetent by his guardian, a guardian appointed for an incompetent who was indebted to his attorney for fees at the time of such appointment could not pay such attorney the fees claimed to be due out of the funds of the incompetent's estate until such claim had been allowed by the court.

4. Where, from the facts stated on an application for the substitution of attorneys, it was the plain legal duty of the court to grant the application, and was without his proper discretion to refuse the same, the applicant was entitled to mandamus to compel the court to grant such application.

5. Under Code Civ. Proc. § 399, providing that an attorney in an action may be changed on the order of the court on an application of either client or attorney, after notice from one to the other, an incompetent's guardian was absolutely entitled to have a different attorney substituted to represent him, for the firm which had represented the incompetent prior to the guardian's appointment, notwithstanding the fees due such substituted attorneys have not been paid.

Application by the state, on relation of Calvin P. Davis, an incompetent, by his guardian, George W. Davis, for mandamus to compel the district court of the Second Judicial District and E. W. Harney, judge thereof, to enter an order of substitution of attorneys. Granted.

W. A. Clark, Jr., and Jesse B. Roote, for relator. C. P. Drennan and Geo. F. Shelton, for respondents.

POORMAN, C. This is an application for a writ of mandate to compel the district court to enter an order substituting attorneys. It appears that one Calvin P. Davis, by virtue of contracts of settlement and decrees of court entered in accordance therewith, became and is entitled to a certain distributive share of the estate of Andrew J. Davis, deceased; that he had been represented during all the time of this settlement by the law firm of Logan, De Mond & Harby, of New York, and C. P. Drennan, of Butte, Mont., and that they still appear as attorneys of record in said cause. It was agreed by Calvin P. Davis that all money coming to him should be distributed to said attorneys, and by them paid to Davis. On December 2, 1901, said Calvin P. Davis was adjudged incompetent, and George W. Davis was appointed guardian of his estate. He qualified as such guardian January 3, 1902, and letters of guardianship were issued to him. Thereafter the attorneys, Logan, De Mond & Harby and C. P. Drennan, assumed to act as such attorneys for the estate of such incompetent, and are by the district court adjudged the right as attorneys to control the distribution of said estate. On January 24, 1902, said Calvin P. Davis, by his said guardian, after notice to Logan, De Mond & Harby and C. P. Drennan, applied to the district court for an order changing the attorneys by substituting W. A. Clark, Jr., and Jesse B. Roote in lieu of said C. P. Drennan and the firm of Logan, De Mond &

Harby. The last-named attorneys contested this application. No order had been made by the court with reference to this application up to November 14, 1903, and on that day relator, by his guardian, applied to this court for a writ of mandate commanding the district court to make the order of substitution demanded. The district court, by its answer filed January 19, 1904, alleges, among other things, that, on December 5, 1903, the court denied the application for such substitution, and that the said attorneys, Logan, De Mond & Harby and C. P. Drennan, "have never at any time had their names entered nor are they attorneys of record for George W. Davis as guardian of Calvin P. Davis, an incompetent person, nor said attorneys have not been, nor do they assume to be, the attorneys of said guardian in any manner whatsoever."

Neither Calvin P. Davis, an incompetent person, nor his estate, can make any appearance whatsoever, except by and through the legally appointed guardian; and if these attorneys are not the attorneys for the guardian it is not apparent by what authority they can make any appearance whatsoever in any action or matter affecting the interests of this estate. They, however, by their affidavits filed, protest against any order being made removing them as attorneys and substituting any one else, so that there may be no question that they will receive the balance of their fees.

The statute leaves parties to the exercise of their own judgment in making contracts with attorneys at law, as in the employment of other agents, and the mere fact that a party becomes insane or dies while he is indebted to the attorney who was at the time representing him with respect to his property interests does not give that attorney the right per se to appear as such for the guardian or administrator appointed, and who, by reason of such appointment, becomes responsible for the estate and the proper conduct of its affairs. Section 3151, Civ. Code. Neither does such appointment divest the attorney of any lien or security which he at the time had to secure him in the amount due. In this case the guardian could not pay the attorney fee claimed to be due to this firm of attorneys out of the funds of the estate until the same had been allowed by the court, and when allowed by the court it becomes a valid charge against the estate, which the guardian cannot refuse to pay. Section 2810 et seq., Code Civ. Proc.

Section 399, Code Civ. Proc., so far as applicable to this proceeding, provides that the attorney in an action may be changed "upon the order of the court upon the application of either client or attorney, after notice from one to the other." The general rule under similar statutes appears to be that a party has an absolute right to change his attorneys at will, and without assigning any cause therefor, unless it appears that some

good reasons exist which justify the court in refusing to make the order. *Weeks, Attorneys at Law*, par. 250; *Lee v. Superior Court*, 112 Cal. 354, 44 Pac. 666; 20 Enc. Plead. & Prac. 1013.

It is claimed by the respondents that the action of the court in refusing to make this order of substitution was a judicial act, and that such acts cannot be controlled by mandamus. It is elementary that mandamus will not lie to interfere with the exercise of a court's discretionary power. *State ex rel. Harris v. District Court*, 27 Mont. 280, 70 Pac. 981. A different rule, however, prevails in matters where the court cannot exercise any discretion. In *Rundberg v. Belcher* (Cal.) 50 Pac. 670, the court says: "While mandate will lie to compel judicial action, and in some instances even specific action (*Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249), and is an appropriate remedy in a proper case to obtain the relief here sought (*People v. Norton*, 16 Cal. 436), it may not be invoked to require a judicial officer to act in a particular way except it appears by necessary legal deduction from the facts stated that the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant, and without his proper discretion to refuse (*Keller v. Hewitt*, 109 Cal. 146, 41 Pac. 871)." The court in that case, which was a proceeding for substitution of attorneys under a similar statute, denied the writ, because it did not appear from the record why the court had refused to grant the order. In *Lee v. Superior Court*, supra, which was also an application for a writ of mandate to compel the substitution of attorneys, the record contained the reasons why the court had refused the order. The appellate court reviewed these reasons, and held that they were not sufficient, and ordered the writ to issue.

So, in this case, it appears from the record that the only reason why this application was denied was based upon the fact that the contract of employment with the contesting attorneys was coupled with an interest, and this interest was that (1) they had a right to have the money of the estate pass through their hands; (2) that they had not yet been paid their fees.

The first of these propositions is not involved in this proceeding. The second is untenable for the reasons above stated. *Muth v. Goddard*, 28 Mont. 237, 72 Pac. 621; *Matter of Prospect Avenue*, 85 Hun, 257, 1 N. Y. Ann. Cas. 347, 32 N. Y. Supp. 1013; *Matter of Mitchell et al.*, 9 N. Y. Ann. Cas. 224, 67 N. Y. Supp. 961; *Hunt v. Rousmanier's Adm'r*, 8 Wheat. 174, 5 L. Ed. 589.

We therefore recommend that the peremptory writ of mandate be issued as prayed for.

**CALLAWAY, C.**, concurs. **CLAYBERG, C. C.**, being disqualified, takes no part in this decision.

**PER CURIAM.** For the reasons stated in the foregoing opinion, it is ordered that the peremptory writ of mandate issue as prayed.

(30 Mont. 1)

**BICKFORD v. KIRWIN et al.**

(Supreme Court of Montana. Feb. 24, 1904.)

**JUDGMENT ROLL—AGREED CASE—WAIVER OF ERROR—LEASE—CONSTRUCTION—LIABILITY FOR RENT.**

1. Though there is no formal judgment roll consisting of the papers enumerated in Code Civ. Proc. § 1196, because there was no formal answer, yet the only papers which could be incorporated in the roll—the complaint, stipulation with exhibit attached (which the court and parties treated as amending the complaint and presenting an issue), the judgment, and bill of exceptions—being in the record, properly certified as constituting the judgment roll, will be considered as such.

2. Where a complaint is filed giving jurisdiction, and a stipulation is then filed, treated by the court and parties as amending the complaint and raising an issue, the case is not an agreed case, which has to be submitted with the formalities required by Code Civ. Proc. § 2050 et seq., to give jurisdiction.

3. Even if it is error for the court, in an action for rent, to undertake, at the instance of the parties, to determine defendants' liability, under the terms of the lease, for an installment of rent not in fact due at the commencement of the action, defendants, in whose favor was the decision, and who have not appealed, may not complain of such action of the court.

4. Under the first paragraph of the habendum clause, the property was leased to defendant for the full term of two years, unless the lease was sooner forfeited. It then provided that the lessee should pay the lessor, as rent for the premises, \$150 per month "during occupancy" thereof, and that, should the lessee fail to make such payments, the lessor might re-enter without this working a forfeiture of the rents to be paid, and that the lessee should not sublet, and should surrender the property "at the expiration of the time herein recited." Held, that "during occupancy" meant "while possession continues," that is, during the whole term; so that the lessee could not, before expiration of the term, surrender possession and relieve himself from liability for further rent.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

Action by F. L. Bickford against Thomas Kirwin and others. From the judgment, plaintiff appeals. Reversed.

This action was brought to recover judgment against the defendants for the sum of \$450, alleged to be due as rent for the three months beginning on August 15, and ending on November 15, 1901, under a lease by the plaintiff to the defendant Kirwin of certain premises in Kalispell, Flathead county. The lease was for a term of two years from and after March 15, 1901, rent payable monthly, at the rate of \$150 per month. As construed by the parties, payment was to be made on the 15th of each month in advance. To secure the payment of the rent according to the terms of the lease, the other defendants became sureties to the plaintiff for Kirwin upon a bond, of even date with the lease, in the sum of \$1,000.



Kirwin went into possession of the property and occupied it up to and including October 15, 1901, when he tendered the plaintiff the keys of the building and offered to surrender possession. He was then in default for the rent due on August 15th, and thereafter up to and including October 15th. The offer being declined, Kirwin went out of possession and refused to pay rent after that time, claiming that under the terms of the lease he had the right to surrender the property at any time and be released from all further liability. The action was thereupon commenced. The defendants filed no answer, because they did not care to resist payment of the installments of rent already accrued; but on November 9th stipulated with the plaintiff that the complaint might be amended so as to include a demand for the installment to fall due on November 15th, and that the court might render judgment for this installment, also, if the defendants were liable for it under the contract. The stipulation stated that the plaintiff would, if the evidence was admissible, testify that the defendant Kirwin had prepared the written contract and submitted it to him for signature, and that his understanding of it was that it embodied a "straight lease" for a term of two years, to be forfeited at plaintiff's option for breach of any of its conditions by Kirwin; that the defendant would testify that he understood that he had the option to relinquish occupancy at any time and be released from liability; that the installments of rent alleged to be due up to October 15th were actually due and payable; that the installment to fall due on November 15th would be treated as due and payable at the commencement of the action; and that the sole question to be determined by the court was whether the defendants were liable for rent after Kirwin ceased to occupy the premises, which in fact he did on October 15th. To the stipulation was attached a certified copy of the lease. The court adjudged that installments of rent had become due and payable on the 15th of August, September, and October, but that the plaintiff was not entitled to recover any other installment, thus sustaining the contention of the defendants that Kirwin was to be released from liability upon ceasing to occupy the property at any time. Judgment was accordingly entered for the plaintiff for \$450 and costs. From this judgment the plaintiff appealed, and has submitted to this court the question whether the district court correctly construed the contract.

The first paragraph of the lease is in the ordinary form, the habendum clause being as follows: "To have and to hold the above rented premises to the said party of the second part, his heirs, executors, administrators and assigns for and during the full term of two years from and after the (15) day of March, 1901, unless sooner forfeited."

It then proceeds: "And the said party of the second part, for his heirs, executors, administrators and assigns, agrees to and with the said party of the first part, to pay his heirs, executors, administrators or assigns, as rent for the above mentioned premises, the sum of one hundred and fifty and no/100 dollars per month during occupancy of said building. And it is further agreed by and between the parties as follows: That should the said party of the second part, his heirs, executors, administrators or assigns, fail to make the above mentioned payments as herein specified, or fail to fulfill any of the covenants herein contained, then and in that case it shall be lawful for the said party of the first part, his heirs, executors, administrators or assigns, to reenter and take full and absolute possession of the above rented premises—30 days' notice, and hold and enjoy the same fully and absolutely, without such reentering working a forfeiture of the rents to be paid and the covenants to be performed by the said party of the second part, his heirs, executors, administrators or assigns." Then follow provisions prohibiting a subletting of the premises during the term of the lease, and requiring the lessee to quietly yield and surrender the property to the lessor "at the expiration of the time herein recited."

Noffsinger & Poorman, for appellant.  
Downing & Stephenson, for respondents.

BRANTLY, C. J. (after stating the facts).

1. At the hearing the respondents submitted a motion to dismiss the appeal on the ground that the record does not contain a copy of the judgment roll. There is no merit in the motion. It is true there is no formal roll consisting of the papers enumerated in section 1196 of the Code of Civil Procedure, for the obvious reason that no formal answer was ever filed in the cause. The only papers which could be incorporated in the roll were the complaint, stipulation—with the exhibit attached—the judgment, and bill of exceptions. There were no formal findings. All the papers mentioned are found in the record, properly certified as constituting the judgment roll, and, taken together, must be so considered. The stipulation was treated by the court and the parties as amending the complaint and presenting an issue as to the installment due on November 15th. In so far as it presented an issue on the part of the defendants as to this item, it performed the office of a formal pleading.

2. The point is also made by the respondents that the district court had no jurisdiction to render judgment at all, for the reason that, it being in fact an agreed case, the controversy was not submitted with the formalities required in such cases by section 2050 et seq. of the Code of Civil Procedure. The case does not fall within the purview of these sections. They authorize

judgment without action where the parties observe the necessary requirements, and the jurisdiction of the court depends upon observance of these requirements. In the present case the court acquired jurisdiction by the filing of the complaint. Any error intervening thereafter was error within jurisdiction, and subject to review only on appeal. But if it be conceded that the court was in error in undertaking, at the instance of the parties, to determine the question of the liability of the defendants, under the terms of the lease, for the installment which was not in fact due at the time the action was commenced, yet the defendants may not question its action in the premises, because the decision was in their favor, and they have not appealed. In urging this point they assume a position inconsistent with that assumed in the remainder of their argument, whereby they seek to sustain the judgment as correct.

3. Counsel for the appellant argues that the judgment, in so far as it sustains the contention of the defendants as to Kirwin's option under the lease, is erroneous. This contention submits to this court the question what meaning should be given to the expression "during occupancy of said building" in the second paragraph of that instrument. This paragraph is crude and inaccurate in its statement, in that the covenant therein expressed is on behalf of the heirs, executors, administrators, or assigns of the respective parties. But from the other provisions of the instrument it is clear that the parties, in contracting with each other, intended, but failed, to follow the usual form of expression. The contention is that the anomalous expression "during occupancy of the building" is equivalent to the expression "for and during the term," the form of words ordinarily used, and granted no option whatever to the respondent Kirwin. Counsel for respondents argue that the parties in drafting the contract, used a printed form, and erased the words "for and during the term," substituting therefor the other form of expression, thus clearly indicating their purpose that Kirwin should have the option claimed. They cite section 2216 of the Civil Code as the rule of interpretation to be applied. It does not appear, however, that a printed form was used, or that any erasure or substitution of words was made. So far as the record shows, the instrument was written by the parties at the time of its execution. Nothing appears showing the circumstances under which it was drafted and executed. The stipulation reveals nothing further than that at the time the controversy arose, on October 15th, each party insisted on its own construction of the contract. This court is therefore left to ascertain the intention of the parties from the terms employed by them. In this connection the rule must be borne in mind that the whole of a contract is to be taken together, so as to give effect to every

part—if reasonably practicable—each clause helping to interpret the other (Civ. Code, § 2206), as well, also, as another familiar rule, that the words of an instrument, as between conflicting constructions, are to be construed most strongly against him whose words they are (Civ. Code, § 2219). Examining the instrument, we find that under the first paragraph the premises are let to the defendant Kirwin for and during the full term of two years, unless the contract is sooner forfeited. This provision is clear and explicit, and without condition, except that upon default of the lessee the landlord, at his option, may, as provided in the third paragraph, upon notice re-enter. There is no express covenant on the part of the lessee to occupy, yet that he shall do so is implied. How long should the occupancy continue? Certainly during the term, unless, by express provision or clear implication, the intention was otherwise. The forfeiture clause was clearly for the benefit of the lessor. He might or might not enforce it at his own option, although the enforcement of it would determine the lease. *Taylor's Landlord and Tenant*, § 492. The lessee could not elect that the lease should be void upon a forfeiture of any of its covenants, nor could he vacate the premises and avoid liability for rent, except by consent of the lessor. *Id.* § 492; *Creveling v. West End Iron Co.*, 51 N. J. Law, 34, 16 Atl. 184; *Wood's Landlord and Tenant*, § 513; *Letherman v. Oliver* (Pa.) 25 Atl. 309. Are the words "during occupancy of said building" in the second clause to be construed as modifying these provisions, so as to leave it optional with the lessee to enter upon the occupancy of the premises and to become liable for the rent at all? Surely not. Yet this would be the result if respondents' claim should be sustained. It is as strongly implied that he should continue his occupancy for the term as it is that he should enter upon it in the first instance, for not only is the term absolute for two years, subject only to the proviso for re-entry, but there is also a covenant in the last paragraph that the lessee should surrender the property "at the expiration of the time herein recited." This clearly manifests the intention of one to let, and of the other to occupy, the premises for the full term of two years at the stipulated rent, subject only to the option reserved to the lessor. The second paragraph, therefore, though the expression "during occupancy" be construed most strongly against the lessor, can have no other meaning than that the rent should be due and payable at the stipulated times, so long as the landlord did not re-enter upon default and put an end to the occupancy. The expression means "while possession continues," that is, while the term continues; and the whole instrument, taking all its provisions together, must bear the construction we have given it, or else it must be held to be inoperative from the beginning. The judgment of the district

court should have included the installment due on November 15th.

The cause is therefore remanded, with directions to amend the judgment accordingly.

MILBURN and HOLLOWAY, JJ., concur.

(30 Mont. 18)

CITY OF BUTTE v. PALTROVICH.

(Supreme Court of Montana. Feb. 23, 1904.)

ORDINANCES—REGULATING HOURS OF BUSINESS—LICENSES—EQUAL PROTECTION OF LAW—REASONABLENESS OF ORDINANCE.

1. An ordinance making it unlawful to keep open a pawnshop after 6 o'clock p. m. is not a prohibition of the business, but a regulation of it, authorized by Pol. Code, § 4800, subd. 16.

2. One taking a license to carry on the pawnshop business, which states nothing as to the hours within which the business may be conducted, takes with notice that the city may impose reasonable regulations therefor.

3. An ordinance does not deny the equal protection of the law because regulating the hours of operating pawnshops, loan offices, and secondhand stores, only.

4. An ordinance making it unlawful to keep open a pawnshop, loan office, or secondhand store after 6 o'clock p. m., except on days preceding a holiday, when they may be kept open till 10 o'clock p. m., will, in the absence of clear proof to the contrary, be held reasonable.

Appeal from District Court, Silver Bow County; Jno. B. McClernan, Judge.

Victor Paltrovich was convicted of violating an ordinance, and appeals. Affirmed.

J. L. Wines, for appellant. E. M. Lamb and J. L. Templeman, for respondent.

HOLLOWAY, J. The appellant, Victor Paltrovich, was convicted in the police magistrate's court of the city of Butte of violating Ordinance No. 586 of that city. He appealed to the district court, where the cause was tried on an agreed statement of facts. The facts agreed upon are that Ordinance No. 586 was duly passed by the city council, approved by the mayor, and published and recorded as required by law; that defendant, Paltrovich, was a pawnbroker engaged in that business in the city of Butte; that he kept his place of business open and transacted such business after 6 o'clock p. m. on January 7, 1902 (January 7, 1902, not being a day next preceding a holiday); that the defendant had a license to conduct such business from the city of Butte, and a like license from the authorities of Silver Bow county; that the city of Butte has not required any trades or avocations mentioned in subdivision 16 of section 4800 of the Political Code, as amended by act of the Fifth Legislative Assembly approved March 8, 1897 (Sess. Laws 1897, p. 203), to close between 6 o'clock p. m. and 7 a. m. of the next day, except pawnbrokers, loan offices, and secondhand stores, but that all other places of business, trades, and professions in said city do close at 6 p. m. by consent, without being required to do so by ordinance. Upon this

statement of facts, the district court found the defendant guilty, and adjudged that he pay a fine of \$50 and costs. From this judgment, and an order denying him a new trial, defendant appeals.

Section 1 of Ordinance No. 586 reads as follows: "That hereafter it shall be unlawful for any person, persons or corporation to keep open or transact business with the public between the hours of six o'clock p. m. and seven o'clock a. m. of the following day and on legal holidays, in the operation of a pawnshop, loan-office or second-hand store: provided however, that on the next day preceding a legal holiday, the hour of closing said place of business shall not be later than ten o'clock p. m." Section 2 provides a penalty for a violation of the ordinance, and section 3 contains a repealing clause.

Both parties have proceeded upon the theory that section 4800, above, as amended, is controlling in this instance, and we shall do likewise, as it is immaterial to the consideration of this case whether in fact it is, or whether the act of the Third Legislative Assembly approved March 7, 1893 (Sess. Laws 1893, p. 113), is in force. Subdivision 16 of section 4800, above, as amended, reads as follows: "The city or town council has power: (16) To license, tax and regulate auctioneers, peddlers, pawn-brokers, second-hand and junk shops, drivers, porters, saloons, billiard tables, ten-pin alleys, shooting galleries, shows, circuses, street parades, theatrical performances and places of amusements, within the city or town. \* \* \* Under the authority conferred by this section, the city enacted Ordinance No. 586.

Appellant contends that the ordinance is invalid for the reason that the city exceeded the authority delegated to it by subdivision 16 of section 4800 as amended, in the following particulars: (1) The ordinance prohibits the prosecution of his business; (2) it is an unlawful interference with or restraint of trade; and (3) under this ordinance he is denied the equal protection of the law.

1. Appellant contends that this ordinance prohibits him from conducting his business during a portion of every day, and that, under the power granted to the city to license, tax, and regulate such business, it has no power to prohibit it altogether. A regulation presupposes the existence of a right. "To regulate" means to adjust; to govern by rule; to direct or manage according to certain standards or laws; to subject to rules, restrictions, or governing principles. Standard Dictionary. But does the ordinance in fact operate as a "prohibition," as that term is used in the adjudicated cases? An examination of the authorities discloses that, where the term "prohibit" is used, it is in the sense of interdict; that is, to stop altogether. Most, if not all, police regulations do in fact operate as an interference with the free exercise of the classes of business made subject to them, but this interference

alone cannot be made the test of their validity. If they afford reasonable facilities for the conduct of the business, they do not amount to a prohibition, but to a regulation, thereof. *Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558; 1 *Dillon on Mun. Corporations* (4th Ed.) § 400; *Ex parte Byrd*, 84 Ala. 17, 4 South. 397, 5 Am. St. Rep. 328.

2. Appellant also contends that as he had a city and state license to conduct his business, and neither license imposed any limitation on the time within which he might conduct such business, the ordinance in question operates as an unlawful restraint of trade. But appellant's licenses were mere permits to conduct his business, and he took them charged with the knowledge that the city might impose any reasonable regulation for the conduct of that business which might be necessary to the peace and good order of the city. *Smith v. Knoxville*, 3 Head (Tenn.) 245; *Horr & Bemis on Mun. Police Ordinances*, § 132.

3. Appellant makes particular complaint that only pawnbrokers, secondhand stores, and loan offices, of all the classes of business enumerated in subdivision 16, *supra*, are made subject to this ordinance, and that he is thus denied the equal protection of the law; but he does not say that any other pawnbroker is exempt from the operations of this ordinance. It is only where persons engaged in the same business are subjected to different restrictions, or are granted different privileges under like conditions, that the discrimination is open to objection, or can be said to impair the equal right which all may claim under the law. *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. The power conferred upon the city of Butte by subdivision 16, above, is primarily to enact such police regulations with reference to the occupations therein enumerated as shall be necessary to the good order and general welfare of its citizens.

The only remaining question is, is the regulation provided by this ordinance a reasonable one? The mere fact that appellant's business is legitimate, and specifically recognized as such by legislative enactment, does not render ineffectual the power conferred by subdivision 16 above. The police power is not confined to the regulation of those classes of business which are essentially illegal, for, if illegal, in the sense that they are prohibited by law, it is not easily understood how they could be regulated at all. It is of the very essence of the exercise of police powers that citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right. *Hopper v. Stack* (N. J. Sup.) 56 Atl. 1. It is not a material inquiry to attempt to ascertain the reason which impelled the Legislature to designate the business of pawnbrokers as sub-

ject to police regulations. It is sufficient for us to know that it has done so, and deal with the law as we find it.

The fact that appellant cannot prosecute his business whenever he may desire to do so is hardly a sufficient reason for saying that the restrictions imposed are unreasonable. However comprehensive the terms "individual liberty," so frequently made use of, are, and however broad the claim which may be advanced that every one may employ his time in a lawful undertaking as may best serve his own interests, still the liberty referred to is a relative term, and, at most, means liberty regulated by just and impartial laws, while all sorts of reasonable restrictions are imposed upon the actions of men for the common welfare and good of society. *State v. Freeman*, 38 N. H. 426. However, the question of the reasonableness of the regulation is one of fact, of which the city council is the best judge. *Staates v. Washington*, 44 N. J. Law, 605, 43 Am. Rep. 402; *City of Grand Rapids v. Brandy* (Mich.) 64 N. W. 20, 32 L. R. A. 119, 55 Am. St. Rep. 472. And in the absence of a clear showing to the contrary, its reasonableness will be presumed. *Ivins v. Inhabitants of Trenton* (N. J. Sup.) 53 Atl. 202. The express power to enact an ordinance of this character is conferred by subdivision 16, above, and the Legislature thereby indicated that it is safe to trust to the judgment and discretion of the common councils of our cities to determine to what extent the power conferred should be exercised; and there is every presumption to be indulged in this instance that the city council of Butte was actuated by pure motives, and that it was thoroughly familiar with the peculiar surrounding circumstances, with the defects of prior regulations, and with the particular evils to be remedied. In addition to this presumption, it is made to appear from the record that all other places of business close at 6 o'clock p. m., so that, after all, appellant is in no position to say that he is discriminated against in any sense. The ordinance permits him to conduct his business until 10 p. m. on every day next preceding a holiday, and, as more than 60 holidays are provided for by our Code (Pol. Code, § 10), it is not apparent that the regulation is in any wise unreasonable.

In numerous instances like ordinances have been called in question, where the business affected was the proper subject of police regulation, and sustained as reasonable. *State v. Welch*, 36 Conn. 215; *Bowling Green v. Carson*, 10 Bush (Ky.) 64; *State v. Freeman*, *supra*; *Staates v. Washington*, 44 N. J. Law, 605, 43 Am. Rep. 402; *Soon Hing v. Crowley*, *supra*; *Barbier v. Connolly*, *supra*; *Smith v. Knoxville*, 3 Head (Tenn.) 245; *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 600; *Maxwell v. Jonesboro*, 11 Helsk. (Tenn.) 257.

We are of the opinion that the authority to enact Ordinance No. 586 is specifically given by subdivision 16 of section 4800 above, as

amended; that it is a police regulation, and, in the absence of clear proof to the contrary, it will be deemed reasonable.

The defendant was properly convicted, and the judgment and order denying his motion for a new trial are affirmed. Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

(30 Mont. 25)

HYNES v. BARNES, Constable.

(Supreme Court of Montana. Feb. 26, 1904.)

REPLEVIN—VERDICT—JUDGMENT—ALTERNATIVE—CORRECTION—APPEAL.

1. Under Code Civ. Proc. § 1103, providing that in replevin, if the property has not been delivered to the plaintiff, or if defendant claimed a return, the jury, if their verdict be for plaintiff, or if, being in favor of defendant, they find he is entitled to a return, shall find the value of the property and assess the damages, the verdict need not be in the alternative.

2. Code Civ. Proc. § 1193, provides that in an action to recover personal property, judgment for plaintiff may be for possession, or the value in case a delivery cannot be had, and damages for the detention, and that judgment for defendant may be for a return of the property, if it has been reclaimed by plaintiff, or for the value in case a return cannot be had. Section 1190 requires the clerk to enter judgment in conformity to the verdict. *Held*, that the judgment in an action of replevin must be in the alternative.

3. Code Civ. Proc. § 1730, providing that an appeal stays all further proceedings in the court below on the judgment or order appealed from, or on the matters embraced therein, the trial court had no authority, after an appeal from a judgment in replevin for the value of the property, to correct it by entering a judgment in the alternative.

4. A party in whose favor a judgment is rendered cannot, by failing to see that a proper judgment is entered, deprive his adversary of the right of appeal.

Commissioners' Opinion. Appeal from District Court, Granite County.

Replevin by Annie M. Hynes against Frank E. Barnes, constable. From a judgment for plaintiff, defendant appeals. Remanded, with directions.

D. M. Durfee and J. Shull, for appellant. G. A. Maywood, for respondent.

POORMAN, C. 1. This is an appeal by the defendant from a judgment in favor of the plaintiff entered on a verdict in a claim and delivery action. The judgment appealed from is a money judgment for the value of the property. Prior to the service and filing of the notice of appeal, plaintiff had filed a motion to amend the judgment. This motion, however, was not passed upon until subsequent to the perfection of the appeal, when an amended judgment was ordered entered. It is claimed by the appellant that the verdict is erroneous in not providing for the return of the property, that it is indefinite, and that it "is not in the alternative." The respondent contends that both

the verdict and the original judgment are correct in form, and that, if the judgment was erroneous, it was the duty of the appellant to apply to the trial court for its correction. The assignment of error relative to the alleged defects in the verdict is not referred to in the brief, except in the somewhat extended objection under the heading "Specifications of Error." No authorities are cited, nor have counsel given the court the benefit of their opinion as to why they think the verdict defective, further than the mere assignment of error. We have, however, examined this assignment, and find that the verdict is not open to the objections made. Section 1103, Code Civ. Proc.; *Wheeler v. Jones*, 16 Mont. 87, 40 Pac. 77; *Etchepare v. Aguirre* (Cal.) 27 Pac. 668, 25 Am. St. Rep. 180.

2. The judgment appealed from, however, does not conform to the requirements of the statute. It is not in the alternative, as required by section 1193, Code Civ. Proc. The defendant is not given the option of returning the property. The entry of a judgment on a verdict is made the duty of the clerk by section 1190, Code Civ. Proc., which reads, in part, "When trial by jury has been had judgment must be entered by the clerk in conformity to the verdict;" and the judgment so entered must also conform to said section 1193. The entry of the judgment is the act of the clerk, but, when entered, becomes the judgment of the court. In *Boley v. Griswold* (1874) 20 Wall. 486, 22 L. Ed. 375, appealed from the Montana territorial court (1872; 1 Mont. 545), the Supreme Court of the United States held that a judgment for the value of the property in a claim and delivery action was sufficient, without providing for the return thereof, when it appeared to the court that the property could not be returned; but this question was not presented to, nor passed upon by, the territorial court. The gist of a claim and delivery action is the wrongful detention of the property. The demand is for the return of the property, or the payment of its value if a return cannot be had. Damages for the wrongful detention are incidental. The return of the property is the primary thing sought. The very nature of the action would seem to indicate an alternative judgment, and that is undoubtedly the meaning of the statute. The verdict must support the judgment, and both verdict and judgment must conform to the law. *Etchepare v. Aguirre*, 91 Cal. 288, 27 Pac. 668, 25 Am. St. Rep. 180; *Cooke v. Aguirre*, 86 Cal. 479, 25 Pac. 5; *Dwight v. Enos*, 9 N. Y. 470; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Berson v. Nunan*, 63 Cal. 550; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605; *Washburn v. Huntington* (Cal.) 21 Pac. 305.

3. Section 1724, Code Civ. Proc., provides that an appeal is taken by filing a notice of appeal, and serving the same on the adverse party. This corrected judgment was not

¶ 2. See *Replevin*, vol. 42, Cent. Dig. § 424.

rendered nor entered until long after this appeal had been perfected. Section 1730, Code Civ. Proc., provides that, where an appeal is perfected, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein. The action of the trial court in attempting to correct this judgment was certainly a "proceeding in the court below upon the judgment," and a "matter embraced therein." Under a similar statute the Supreme Court of California has repeatedly held that the trial court has no authority to take any proceedings whatsoever with respect to matters embraced in the appeal after the appeal is perfected. "The trial court has no jurisdiction pending an appeal to allow an amendment to any pleading." *Kirby v. Superior Court*, 68 Cal. 604, 10 Pac. 119. "An order of the court below amending a judgment after an appeal is taken is erroneous." *Bryan v. Berry*, 8 Cal. 130; *Shay v. Chicago Clock Co.*, 111 Cal. 549, 44 Pac. 237. "The trial court has no power to so change the judgment appealed from as in effect to prevent the review of alleged errors brought up by bill of exceptions." *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480. "The superior court cannot deprive the Supreme Court of jurisdiction of an appeal from a judgment by amending it while the appeal is pending." *San Francisco Sav. Union v. Myers*, 72 Cal. 161, 13 Pac. 403. "Pending an appeal from an order denying a motion for a new trial the lower court has no authority to vacate or set aside the same." *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605. "Pending an appeal the court below so far loses jurisdiction of the cause that it cannot on its own motion set aside the judgment." *Peycke v. Keefe*, 114 Cal. 212, 46 Pac. 78; *Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517; *Finlen v. Heinze*, 28 Mont. 548, 569, 73 Pac. 123; *Bordeaux v. Bordeaux* (Mont., decided Feb. 1, 1904) 75 Pac. 359; *Glavin v. Lane* (Mont.) 74 Pac. 406. The corrected judgment entered in this case on January 3, 1903, cannot, therefore, have any effect upon this appeal, nor be considered any further than as a mere fact appearing in the amended record.

4. The district court, prior to appeal, has the power to correct its judgments in certain particulars. *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22; *Etchepare v. Aguirre*, supra; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605. But it is the primary duty of the party in whose favor a judgment is ordered to see that the proper judgment is entered; and if, by his inattention, an erroneous judgment is entered, he cannot complain if the aggrieved party exercises his statutory right of appeal. It has been said: "If the judgment is objectionable in form, the remedy is by motion to correct in the court below, and an appeal may be taken from a denial of the motion, but an appeal without making such motion is not proper." *Black on Judgments*

(2d Ed.) par. 163; *Kindel v. Beck & P. L. Co.* (Colo.) 35 Pac. 538, 24 L. R. A. 311. This is, in effect, saying that there is no appeal from a judgment for an error which the trial court had authority to correct. In counties where the district court is in session but once in three months, and where the judge does not reside, great injustice might be done pending defendant's motion to have the plaintiff's erroneous judgment corrected; nor can the plaintiff, by keeping a motion on file to correct his judgment, deprive the defendant of his statutory right of appeal from the judgment, nor prevent him, on such appeal, from presenting to the appellate court any error appearing from the judgment roll. The right of appeal commenced with the entry of the judgment, and continued for one year. This right cannot be held in abeyance, nor the time shortened, except by some act or acquiescence of appellant.

We therefore recommend that this cause be remanded to the district court, with direction to modify the judgment so as to make the same conform to the provisions of section 1193 of the Code of Civil Procedure, and that the judgment, when so modified, be affirmed.

CALLAWAY, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion, this cause is remanded to the district court, with directions to modify the judgment so as to make the same conform to the requirements of section 1193 of the Code of Civil Procedure, and that when so modified it be affirmed.

(30 Mont. 36)

#### BORDEAUX v. BORDEAUX.

(Supreme Court of Montana. Feb. 26, 1904.)

DIVORCE—DESERTION—ADULTERY—CONDONATION—SUIT MONEY—ALLOWANCE—ABUSE OF DISCRETION—RECRIMINATION—FINDINGS.

1. Where, in an action for divorce, plaintiff alleged that his wife had been guilty of desertion and adultery, which she denied, and, on her application for suit money and attorney's fees, it appeared that plaintiff had property of the value of \$69,000, and it was uncontradicted that a much larger sum than \$200 was necessary to enable defendant to properly prepare her defense, together with her cause of action for a divorce on the ground of desertion and extreme cruelty, alleged in a cross-bill, an order denying defendant's application for attorney's fees, and allowing only \$200 for suit money, was an abuse of discretion.

2. Civ. Code, § 160, provides that a divorce must be denied on a showing of recrimination; section 170 defines "recrimination" as a showing by defendant of any cause of divorce against plaintiff; and section 132 declares that extreme cruelty and desertion are grounds for divorce. *Held*, that where, in a suit for divorce on the ground of adultery, plaintiff's wife, by way of recrimination, alleged cruelty, and desertion as grounds for divorce against plaintiff, which he denied by replication, and the jury specially found against defendant on both grounds, but the court set aside such findings, and denied de-

defendant's application to make findings on the issues in the case other than those presented by the complaint, and granted plaintiff a divorce, without making any findings on the issues made by defendant's cross-bill, plaintiff's judgment could not be sustained.

3. Where, in a suit for divorce, defendant, by cross-bill, alleged extreme cruelty and desertion in recrimination, which plaintiff denied, and the court set aside findings by the jury against defendant on such issues, and granted plaintiff a divorce, findings against defendant on the issues raised by the cross-bill could not be implied.

4. Civ. Code, § 160, provides that a divorce must be denied on a showing of condonation; section 163 defines "condonation" as the unconditional forgiveness of a matrimonial offense; and section 164 declares that knowledge on the part of the injured party of facts constituting a cause of divorce, and reconciliation, and remission of the offense by the injured party, and restoration of the offending party to all marital rights, are necessary to condonation. *Held*, in an action for divorce on the ground of a wife's adultery, that where plaintiff's witnesses informed him of such adultery within two or three days after its occurrence, on December 23, 1897, and, notwithstanding such knowledge, he continued to live with defendant as his wife until January 26, 1898, occupying the same room with her, in which there was but one bed, etc., he thereby condoned her offense, and was not entitled to a divorce by reason thereof.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by John R. Bordeaux against Ella F. Bordeaux. From a judgment in favor of plaintiff, defendant appeals. Reversed.

See 75 Pac. 359.

John J. McHatton, W. A. Clark, Jr., and Jesse B. Roote, for appellant. Stapleton & Stapleton and B. S. Thresher, for respondent.

CLAYBERG, C. C. Appeal from judgment and order overruling motion for new trial. The action was commenced by John R. Bordeaux, as plaintiff, against Ella F. Bordeaux, as defendant, for a divorce on the ground of desertion, by filing a complaint on January 26, 1899. Defendant answered, denying all the material allegations, and, by way of "recrimination, defense, counterclaim, and cross-complaint," set forth a claim for a divorce on the ground of desertion and extreme cruelty. To this answer plaintiff filed a replication denying all the material affirmative allegations. On February 25, 1899, plaintiff filed an amended complaint, in which was set forth desertion as one cause of action, and, as another, several specific, and many general, acts of adultery on the part of the defendant. Further reference to this first amended complaint is immaterial, because it was again amended as hereinafter set forth. Defendant filed a demurrer to this amended complaint, which was sustained by "consent," and 10 days allowed to file a further amended complaint. On March 3, 1899, a second amended com-

plaint was filed, which consisted of two causes of action: First, desertion; and, second, adultery. The specific adulterous acts set forth were that the defendant committed adultery with an unknown person on the 1st day of September, 1891, in the "Old Owsley Building"; also with Lyman A. Sisley on the 23d day of September, 1897, "at a house on the west side of Missoula Gulch, which was then in an unfinished condition, and which is now numbered eight hundred and twenty-five West Broadway street, in Butte City"; also with Lyman A. Sisley on the 2d day of October, 1897, "on the west side of Missoula Gulch, in a new building, which was then in an unfinished condition, and is now numbered 825 West Park street, Butte City"; also with Lyman A. Sisley during the month of August, 1897, "in a lodging house on the east side of Main street, in Butte City, \* \* \* known as and called the 'Red Boot Lodging House'"; also on the 30th day of November, 1896, with Lyman A. Sisley, "in room number 27 in what was then, and is now, known as the 'Weyerhorst Block'"; also with Lyman A. Sisley on or about the 25th day of November, 1897, at plaintiff's residence. This complaint contains some five or six other allegations, charging adultery generally, at different times and places, and with Lyman A. Sisley, or persons unknown. Defendant demurred to this second amended complaint. This demurrer was overruled. Defendant then filed her answer, denying each and every material allegation of the complaint, and alleging, "by way of recrimination, defense, counterclaim, and cross-bill," as a ground for divorce, first, the desertion of the defendant; second, his extreme cruelty. To the affirmative matter set forth in this answer, plaintiff filed a replication denying all the material allegations thereof. Upon these pleadings the cause came on for trial on the 16th day of August, 1901, before the court and a jury.

1. Suit Money and Attorney's Fees. The first error urged is based upon the action of the court in entering the order of August 17th on the hearing of defendant's application for attorney's fees and suit money. This application was filed on August 5th. The court made an order, returnable August 10th, requiring plaintiff to show cause why the application should not be granted. On this return day the court refused to hear the application, for the reason that the proper notice had not been entered in the motion book. On August 17th, the time the order was granted, the trial was proceeding. The court refused to consider the application as to attorney's fees, and refused to grant plaintiff any greater sum than \$200 for suit money. By the uncontradicted showing made upon this application, a much larger sum than \$200 appeared to be necessary to enable the defendant to properly prepare and present to the court her defense, and her own cause of action against the plaintiff,

¶ 4. See Divorce, vol. 17, Cent. Dig. §§ 172, 174, 181, 451.

as alleged in her answer. The \$200 was allowed by the court "to pay witness fees for witnesses who might attend upon the trial in behalf of the defendant," and nothing was allowed to pay the other necessary expenses of properly preparing her case for trial, and presenting the same. The court refused to consider the application as to attorney's fees "until after the case had been tried and determined." We are of the opinion that the court abused the discretion vested in it, in refusing to make a larger allowance for "suit money," and in refusing to consider the application as to attorney's fees. As said by the Supreme Court of California in the case of *Sharon v. Sharon*, 75 Cal. 1, 48. 16 Pac. 345, 366: "The discretion of the court is a legal discretion, to be reasonably exercised. 'Abuse of discretion' in making such order does not necessarily imply a willful abuse or intentional wrong. In legal sense, discretion is abused whenever, in its exercise, a court exceeds the point of reason, all circumstances being considered." The defendant stood accused of various acts of adultery—one of the most heinous offenses that could be charged against any woman of respectability. The dates of the offenses charged were, for the most part, some years prior to the trial of the suit. It was important, therefore, that the defendant investigate the facts in connection with these charges, ascertain the witnesses in her behalf, and generally to so prepare her case as to meet the charges made in the complaint, and prepare her case against the plaintiff for trial. From her showing, which, as said before, was uncontradicted, it appeared that she was without funds of any kind; and the court had already found, upon a former application for alimony, expenses, etc., that the plaintiff was possessed of property exceeding in value the sum of \$69,000. This order of the court was introduced as a part of plaintiff's showing on this application. We are therefore satisfied that the allowance made was so grossly inadequate, under all the circumstances, that it was, in effect, a denial to her of the funds necessary to be expended in the proper preparation and presentation of her case to the court.

2. Recrimination. The complaint, as above stated, charged the defendant with two statutory grounds of divorce, viz., desertion and adultery. The answer denied the allegations of the complaint, and set up, "by way of recrimination," that the plaintiff was guilty of extreme cruelty and desertion—two other statutory grounds of divorce. The plaintiff filed a replication to this answer, thus raising issues upon its allegations. Plaintiff's cause of action on the ground of desertion was abandoned at the trial, but all the other issues were tried. The jury, in reply to requests for special findings submitted by the defendant, answered that the defendant did commit adultery, that the plaintiff was not guilty of extreme cruelty, and that he did

not desert the defendant. In reply to special findings submitted by plaintiff, the jury found that defendant did commit some of the offenses of adultery charged. After the jury had rendered their verdict, written application was made to the court by plaintiff to adopt the findings of the jury, and by the defendant to disregard the findings returned against her, and to make other and further findings. The court adopted findings 1, 2, 3, 4, 5, and 7 returned in favor of plaintiff, all of which related to the adultery of defendant, and, at his request, made a further finding to the effect that plaintiff had been a resident of the state of Montana for five years last past. The court then, of its own motion, set aside and refused to adopt all the further findings of the jury. Section 160 of the Civil Code provides that divorce must be denied upon a showing of recrimination. Section 170 of the Civil Code defines "recrimination" as "a showing by defendant of any cause of divorce against the plaintiff." By section 132 of the Civil Code, extreme cruelty and desertion are grounds of divorce. As above stated, the answer set forth, "by way of recrimination," these two grounds of divorce as against the plaintiff. The jury found specially against defendant on both grounds. The court set aside these findings, and denied defendant's application to make findings on the other issues in the case. The conclusion resulting from this action of the court is apparent, viz., that no findings were made upon the recriminatory allegations in the answer. In such case the judgment cannot be maintained. These issues were material, and the findings must cover all matters at issue made by the pleadings. *Cassidy v. Cassidy*, 63 Cal. 352. The above cited case is peculiarly in point. The action was by the husband for divorce. The wife denied the allegations of the complaint, and set up the defense of extreme cruelty. The court found that all the material allegations of plaintiff's complaint were true, and rendered judgment for the husband. No finding was made by the court upon the issues tendered by the wife as to cruelty. The court say: "It is well settled in this state that the findings must respond to all the material issues made by the pleadings;" citing *Swift v. Canavan*, 52 Cal. 417; *Billings v. Everett*, 52 Cal. 661; *Phipps v. Harlan*, 53 Cal. 87. That court held that the defendant may allege and prove facts constituting cause of divorce against plaintiff in bar of the plaintiff's cause of action, and the averment of the facts constituting such recriminatory defense, and the denial thereof by plaintiff, create a material issue, upon which the court must find. If these issues had been found in favor of defendant, plaintiff would not have been entitled to a divorce. *Nagel v. Nagel*, 12 Mo. 53; *Church v. Church* (R. I.) 19 Atl. 244, 7 L. R. A. 385; *Ribet v. Ribet*, 39 Ala. 348; *Pease v. Pease*, 72 Wis. 130, 39 N. W. 133; *Reading v. Reading* (N.



J. Ch.) 5 Atl. 721; Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; Estill v. Irvine, 10 Mont. 509, 26 Pac. 1005. We are aware that the doctrine of implied findings prevails in this state, but such doctrine cannot apply to this case. The jury made special findings upon the issues raised by defendant's answer, and the court below set them aside on its own motion. If any findings upon these issues are to be implied from the above stated facts, such findings would be contrary to those of the jury and in favor of the defendant, thus defeating the judgment for plaintiff. Therefore, we must conclude that the judgment must be reversed on this ground.

3. Condonation. Section 160 of the Civil Code provides that a divorce must be denied upon a showing of condonation. Section 163 of the same Code defines condonation as being "the conditional forgiveness of a matrimonial offense constituting a cause of divorce." Section 164 provides: "The following requirements are necessary to condonation: (1) A knowledge on the part of the injured party of the facts constituting the cause of divorce. (2) Reconciliation and remission of the offense by the injured party. (3) Restoration of the offending party to all marital rights." The verdict of the jury in this case finds the defendant guilty of adultery on the 23d day of December, 1897, and at other dates prior thereto. The witnesses who testified to the adulterous act of December 23, 1897, testify that within two or three days after the occurrence of this act they informed plaintiff, who admits that he received such information. That he must have believed it is sufficiently evidenced by the fact that he called the same persons, as his witnesses upon the trial, to make proof of the allegations of the complaint. Yet he continued to live with the defendant until the 26th day of January, 1898, and occupied the same room with her, in which there was only one bed. He denies that he cohabited with his wife after the receipt of this information; but she, on the other hand, testifies that they did live together, and occupied the same room and bed. Another witness testified that he spent two nights at plaintiff's house, and during those two nights the plaintiff and defendant occupied the same room and bed. All the offenses found by the jury against the defendant occurred long prior to the time of the actual separation, and the record discloses that the plaintiff had full knowledge of the existence of the facts to which the witnesses would testify, and, with that knowledge, cohabited with the defendant until the 26th day of January, 1898. Under these circumstances, and under the authorities, it is very clear that the plaintiff condoned the offenses of adultery which he had charged in his complaint, and therefore was not entitled to a decree of divorce. Marsh v. Marsh, 13 N. J. Eq. 281; Delliber v. Delliber, 9 Conn. 233; Turnbull v. Turnbull, 23 Ark. 615; Horne v. Horne, 72 N. C. 530; Farmer v.

Farmer, 86 Ala. 322, 5 South. 434; Phillips v. Phillips, 91 Ga. 557, 17 S. E. 633; Todd v. Todd (N. J. Ch.) 37 Atl. 766; Tilton v. Tilton (Ky.) 29 S. W. 290.

In Marsh v. Marsh, supra, it is said: "Condonation may be implied if the husband, after reasonable knowledge of the infidelity of his wife, continues to admit her as the partner of his bed. Poynter on Mar. & Div. 232. \* \* \* Reasonable knowledge may be said to have been had when information of a fact is given by credible persons, speaking of their own knowledge, particularly if the same facts be afterwards proved, and they become instrumental in the proof. Poynter on Mar. & Div. 232; Dobbyn v. Dobbyn, Ibid. 233, note 'z.'"

The adultery charged in the complaint in the foregoing action was alleged to have been committed from March to July, 1857, and the act more especially relied upon was charged to have occurred the 23d day of June, 1857. The plaintiff was told all about this prior to July 4, 1857, by a witness whom he afterward put on the stand to prove it, and suit was commenced January 18, 1858, and, during all the time between receiving knowledge of the act and commencing the suit, plaintiff continued to cohabit with his wife as if nothing had occurred. They lived in the same room in a boarding house. The court, in regard to these facts, uses the following language: "It appears, then, as early as July 4, 1857, the petitioner had not only probable knowledge, but, if his witness is truthful, certain information, of his wife's guilt. He had the very information from the lips of the same witness upon which he asks this court to pronounce his wife guilty. He, at least, must be presumed to have deemed the witness credible (for he has placed her on the stand), to sustain his case."

In Turnbull v. Turnbull, supra, the court say: "He had the right to forgive her or not, as he saw fit, but, having once forgiven, it is not his privilege to retract his pardon, to subserve the purposes of his passion, his caprice, or his interest. He has passed an act of oblivion which heals all, and, in the eyes of the law, for all time to come."

In Horne v. Horne, supra, the Supreme Court of North Carolina uses the following vigorous language: "A husband who admits his wife to conjugal embraces after he knows that she has committed adultery is looked on as a disgraced man, 'a cuckold, a beast with horns.'"

In Todd v. Todd, supra, the court uses the following language: "If a man—a stranger—and a woman had occupied the same room and the same bed for a whole night, would any court accept his statement that he did not take off his clothes as a refutation of the natural inference which would be drawn that the transactions between those people were such as would justify a belief in a conjugal, or at least a copulative, relation? But when this husband got into bed with that wife he got into bed with a woman whose

person he had enjoyed. He felt entirely free to make any approaches to her that he might like, and obviously he was not repelled by the knowledge of her wrongdoing, else he would not have been there at all; so that he must be presumed to be a person who came to that degree of intimate relation with that woman on that occasion, not deterred by his knowledge of her previous unfaithfulness, else it is impossible to believe that he would have been in such a place with her. \* \* \* A manly character would in all probability never have been found in the same house with the woman who had committed such an offense, save to denounce her; but this man was able to occupy not only the same house, but the same room and the same bed, with his unfaithful wife."

In *Tilton v. Tilton*, supra, Chief Justice Pryor says: "The judgment in this case against her, establishing a want of chastity, has taken from her a hitherto pure and spotless character, that took her, as a welcome guest, to her neighbors, that she might ply her needle from day to day, and enjoy the associations of the best and purest women of the village. The facts of this record show this proceeding by the husband to be a merciless assault upon women and virtue, and brand the appellant with infamy and disgrace, when it is apparent, even if the wife was guilty, that the husband sustained his relations with her with a full knowledge of what he claims to be the facts evidencing her guilt, and therefore the chancellor should have dismissed his petition."

We cannot refrain from saying that the record discloses in many instances a most reckless disregard for the truth on the part of some of plaintiff's witnesses, and also a character to some of plaintiff's witnesses which is not enviable, to say the least.

We have directly considered only three important errors upon which the case must be reversed. There are over 100 errors assigned in the brief of appellant, and, after an examination of all these errors and the record, we are of the opinion that a great majority of them are such that if considered would be sufficient to reverse the judgment and order appealed from, but inasmuch as they all pertain, either to the introduction or rejection of testimony, or matters of mere practice which may be avoided on another trial, and as the judgment and order must be reversed and a new trial granted, we do not deem it necessary to further refer to these various errors.

We advise that the judgment and order appealed from be reversed, and the case remanded for a new trial.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded.

(12 Okl. 413)

HUMPHREY v. TIMKEN CARRIAGE CO.  
et al.

(Supreme Court of Oklahoma. Jan. 13, 1904.)

SALE—ACTION FOR PRICE—JOINDER OF ISSUES  
—PAROL EVIDENCE.

1. Where, in an action upon an order for goods, which sets out the order in full, and alleges such order was duly accepted, and goods shipped to defendant, and the defendant answers by a general denial, upon the issue so joined it is competent to prove by oral testimony that the order was not accepted upon the terms proposed, and that there was no delivery of the goods ordered.

The issue so presented should be submitted to a jury upon conflict of testimony with reference thereto.

2. Oral testimony is not competent to change or vary the terms of a written instrument, but may be introduced to show that, by an agreement of the parties at the time of its execution, such instrument was executed by one and accepted by the other of the parties thereto for a purpose wholly different from that alleged in the petition.

Burwell, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Burford.

Action by the Timken Carriage Company against Avery A. Humphrey and another. Judgment for plaintiff, and defendant Humphrey brings error. Reversed.

This action was commenced on the 6th day of June, 1899, by the defendant in error Timken Carriage Company, a corporation doing business in St. Louis, Mo., by filing in the district court of Logan county a petition alleging their corporate capacity under the laws of the state of Missouri, and that they were engaged in the business of manufacturing buggies, carriages, and other vehicles; that on the — day of April, 1898, the plaintiff and defendant A. A. Humphrey made and entered into a certain agreement, whereby the said defendant bought of the plaintiff, and plaintiff sold to said defendant, certain merchandise and vehicles for the agreed price of \$1,807.94; that the said defendant bought the same by written order, dated March 22, 1898, showing the description of articles and price thereof, and requested the plaintiff to ship said articles by freight as soon as practicable, and proposing to make payment in four months from May 15, 1898 (copy of said order was attached, and marked "Exhibit A"); that thereafter, on the 24th of March, 1898, the defendant B. F. Berkey entered into an agreement with the plaintiff, in writing, whereby he also became indebted in said sum to the plaintiff for the articles of merchandise ordered by the defendant Humphrey, which instrument in writing was attached to the petition, and marked "Exhibit B"; that the plaintiff duly accepted said order of Humphrey and agreement of Berkey, and thereafter said contract of sale of said articles became complete, and that, in compliance therewith, the plaintiff delivered to Humphrey the goods mentioned

In said order, according to the terms thereof, by reason whereof said defendants, Humphrey and Berkey, became indebted to the plaintiff in the sum of \$1,807.94; that \$1,029.65 had been paid; and that there was still due \$778.29, with interest after September 1, 1898, for the recovery of which judgment was prayed.

Exhibit A to said petition is as follows:

"Timken Carriage Co., 2nd and Branch Streets, St. Louis, Mo. Ship via Frisco, Santa Fe to — at once or as soon thereafter as practicable, the following goods as described in your catalogue, on following terms: Cash, less five per cent. in thirty days, or note or acceptance, payable four months from May 15th, in funds par at St. Louis or New York, without any expense to factory for carrying, exchange or collection. No cancellations, agreements, conditions or stipulations, verbal or otherwise, save those mentioned in this contract, will be recognized.

"The title to goods delivered under this contract to remain in the name of the sellers until they shall have received the money for same, and upon failure to make such payment, the sellers shall repossess themselves, and take away such goods. Should time be taken under terms of settlement of this or other contracts with us by the buyer, and he should become insolvent, or default payment, sellers shall have the right to declare the whole amount of this or other sales, including all papers given, to be due and collectible.

"Payment or settlement to be made direct, and not through salesmen.

"[Here follows list of goods and prices.] Goods F. O. B. St. Louis, Mo. Shipped at consignee's risk. A. A. Humphrey.

"Accepted subject to approval of Timken Carriage Co.

"F. A. Slusser, Salesman."

Exhibit B to said petition is as follows:

"Timken Carriage Co., Wholesale Carriage Manufacturers.

"Henry Timken, Prest. H. H. Timken, Sec. & Treas.

"Our Specialty, Timken New Side Spring Vehicles.

"2nd & Branch Sts.,

"St. Louis, Mo., Mar. 24/98.

"Timken Carriage Co., St. Louis, Mo.—Dear Sirs: I herewith hold myself responsible for order given you by A. A. Humphrey, Guthrie, O. T., Mar. 22nd.

"Yours truly, Ben F. Berkey.

"Ship goods to A. A. Humphrey."

On the 20th of June, 1899, the defendant Humphrey filed his separate answer to plaintiff's petition, in two paragraphs: The first was a general denial. The second alleged: That his codefendant, Berkey, for five years or more, had been engaged in the business of selling buggies and agricultural imple-

ments at Guthrie, Okl., receiving on different occasions merchandise from the plaintiff, which he sold at retail. That he (Humphrey) was engaged wholly in the real estate and insurance business in said city. That on the 22d day of March, 1898, F. A. Slusser, agent and salesman of plaintiff, called on him at Guthrie, and represented to him that the plaintiff desired to ship goods to Mr. Berkey, who was considerably in debt; that the plaintiff did not propose to sell any goods to Mr. Berkey, or part with the title to goods that should be shipped to him (Berkey); that plaintiff was willing to trust Berkey to handle and dispose of goods, but did not like to ship goods direct to Berkey, for fear of getting involved in litigation with some of Berkey's creditors in regard to the title of the goods. Said agent then proposed to Humphrey that, if he would sign an order for such goods, the plaintiff would ship goods to Guthrie in the name of Humphrey, and upon arrival he should turn them over to Berkey as goods of the plaintiff, and plaintiff would arrange with Berkey for the sale and payment of the same; that, if Humphrey would sign such order, he would not be considered or held liable to the plaintiff thereon—and called plaintiff's attention to the fact that the order retained title in the goods until the same were paid for. That upon such representation said Humphrey was induced to sign said order. That after he (Humphrey) had signed said order, plaintiff, without his knowledge, made arrangements with Berkey for the sale of the goods, and prepared and sent to Berkey a statement to be signed, acknowledging Berkey's personal responsibility and liability for said goods, which statement was signed by Berkey and forwarded to plaintiff. That defendant Humphrey, after signing said order, had no further dealings with plaintiff, and never saw said goods, and never received the same from plaintiff. That plaintiff shipped the goods to Guthrie in the name of Humphrey, but sent the bill of lading to Berkey, who, without the knowledge of Humphrey, received and disposed of the same, and made payments therefor to plaintiff. That he (Humphrey) never received any benefit, advantage, or consideration for signing said order, and had no knowledge of the shipment of said goods to Guthrie until long after they had been shipped and turned over to Berkey as aforesaid.

The second count of said answer was demurred to by plaintiff, and demurrer was sustained. Afterward, on the 12th of November, 1892, with leave of court, defendant Humphrey filed his additional answer, setting forth in general the same facts stated in the first, and averred that he signed the written order for the specific purpose of enabling the plaintiff to sell and deliver the goods to Berkey; that the order was executed, not as a contract, but for the purpose aforesaid; that Berkey at the time was en-

gaged in the implement business, and had become financially involved; that plaintiff, through its agent and traveling salesman, represented to him (Humphrey) that, while it was willing to trust Berkey to the disposition of the goods on commission, it feared that it might become involved with creditors of Berkey in regard to the title of its goods, and it was thereupon understood and agreed between said plaintiff, acting through its authorized agent and salesman, and defendant Humphrey, that said order should be signed by him (Humphrey) for the specific purpose of enabling plaintiff to deliver and sell said goods to said Berkey, and it was expressly agreed between said parties that said written order was not to have and had no effect as a contract between the parties, but merely as a writing for the specific purpose aforesaid. Said defendant Humphrey, further answering, alleged that said written order was executed without consideration therefor; that none of the goods described were ever delivered to him by plaintiff or any other person; that he never received benefit, advantage, or consideration for said order; and that the consideration purporting to be expressed had totally and wholly failed. Afterwards, on the 15th day of November, 1900, the plaintiff filed its general denial to defendant Humphrey's answer.

Said cause was then tried to a jury, and one A. J. Corkins was first called as a witness on behalf of plaintiff, who testified that he was agent of the Atchison, Topeka & Santa Fé Railroad at Guthrie; that such goods were received there, and on April 25th delivered and receipted for upon payment of freight, the receipt signed, "A. A. Humphrey;" that he thought the handwriting thereto was that of Mr. Humphrey; that he knew Mr. Berkey's signature; that the cashier at the depot handled this transaction; that he did not see the receipt signed, and knew nothing about it personally; that the only knowledge he had was what he gained from the papers; that he thought the receipt was signed by A. A. Humphrey, judging from the handwriting.

Mr. Timken, of the carriage company, testified by deposition as follows: "About the 24th of March, 1898, we received through our Mr. Slusser an order for a car load of vehicles. Said order was dated March 22, 1898, and was signed by A. A. Humphrey. Upon receiving the order, I noticed that Berkey had not signed it, and, inasmuch as our previous transactions had been with those parties jointly, we desired them to be jointly liable in this order also. Therefore, on March 24th, I wrote the defendant Berkey a letter, a copy of which letter is hereto attached, and marked 'Exhibit E.' In reply to that letter, on April 1st we received from defendant his obligation to be jointly liable with Mr. Humphrey, which paper is hereto attached, and marked 'Exhibit F.' [This is the same as Exhibit B. to petition.] The order in question was duly filed by us April 18,

1898." The evidence of Mr. Timken then showed the amount of payments which were made by Mr. Berkey, and the balance due. His testimony closes with the following: "Q. Please state who ostensibly conducted the business at Guthrie? A. Mr. Berkey. Q. How, then, did Mr. Humphrey come to be interested in the transaction, so far as you are concerned? A. We did not regard Mr. Berkey as a responsible person to whom to extend credit, because we had investigated his financial condition, through the mercantile agencies, and had found that they did not give him any responsible rating. For these reasons, we wanted some responsible person to become responsible for the bill. We investigated, and found that Mr. Humphrey was responsible, and that we would be safe in giving him credit. This investigation was made at the beginning of our dealings with these defendants. Q. On whose credit did you make the shipment? A. On the credit of Mr. A. A. Humphrey. We would not have shipped to Mr. Berkey on his sole credit."

It was then shown on behalf of the plaintiff, by testimony of Mr. B. F. Berkey, that all of the goods had been disposed of to the general public before suit brought.

After presentation of a demurrer to the evidence by the defendant Humphrey, which was overruled by the court, Mr. B. F. Berkey was called as a witness for the defense, who, after the introductory testimony, in which he stated he knew Mr. Timken in March, 1898, was asked: "Q. State whether or not at that time or any time in the month of March, 1898, you purchased a bill of goods from the plaintiff through their agent Slusser? (Objected to as incompetent, irrelevant, and immaterial, and not the best evidence.) By the Court: Is that in reference to the goods in controversy? By Mr. Huston: Yes, sir. (Which objection was by the court sustained, to which the defendant excepts.)" Mr. Berkey then testified that he knew Mr. Slusser; that he knew when the order for goods was made out; that he saw it made out; that it was at his house; that Slusser and he were present; that he dictated the order, and he (Slusser) wrote it. "Q. Did you have any conversation with Mr. Slusser at that time about the matter of giving the order for goods? (Objected to. Objection sustained.) Q. Please state what, if anything, you stated to Mr. Slusser at that time concerning the matter of giving him an order? (Objected to. Objection sustained.) Q. State whether you saw the instrument signed by Mr. Humphrey? A. Yes, sir. Q. Please state what, if anything, was said by plaintiff's agent to induce Mr. Humphrey to sign it? (Objected to. Objection sustained.) Q. State what was said, if anything, between Slusser and Mr. Humphrey, as to any conditions upon which the order was signed, or for what purpose, if any, the order was to be used, at or before Mr. Humphrey signed the same? (Objected to. Objection sustained.)" Mr.

Berkey then testified that he received the goods described in the order; that he received the bill of lading for these goods; that he received it by letter from the Timken Company, in St. Louis, direct to him; that he took the bill of lading, and, when the goods came, went to the depot for them, showed the agent the bill of lading as his authority for receiving them, and receipted for them, signing Mr. Humphrey's name to the receipt, and received them after paying freight on the same, and had the drayman take them to his place of business. "Q. State whether or not Mr. Humphrey ever received those goods, or any portion of them, if you know? (Objected to. Objection sustained.)" Mr. Berkey then testified that he sold the goods to his customers, that he never gave any of them to Mr. Humphrey; that he collected proceeds of sale, and never gave any of proceeds to Mr. Humphrey; that he paid plaintiff what was paid for them. Mr. Berkey then testified further that, after he and Slusser had made out the order for the goods, he (Slusser) went out to get Mr. Packer, and returned to Berkey's house with Mr. Humphrey. Mr. Berkey was then again asked for the conversation between Humphrey and Slusser, and whether anything was said between them as to whether or not the order was to be a contract for the purchase of the goods by him, and also for what use the order, when signed, was to be put to, all of which was by the court rejected. On cross-examination Mr. Berkey repeated that he got the goods, and stated that he did not know how soon Mr. Humphrey found out that he got them, but that he probably knew within 30 or 60 days. On redirect examination Mr. Berkey testified that the written obligations (Exhibit B to petition) by which he agreed to become responsible for the shipment was made out in St. Louis by the Timken Company, and sent to him; that he signed it and sent it back, adding, in his own handwriting, the postscript which reads, "Ship goods to A. A. Humphrey."

The defendants then offered W. D. Packer as a witness to prove the object of securing a signature other than that of Berkey to the order, and made the following tender of testimony by said Packer: "Counsel for the defendants, on behalf of the defendant Humphrey, now offers to prove by this witness that shortly after the order sued on in this case was made out, and before the same was signed by the defendant Humphrey, that the plaintiff's agent and salesman went to this witness at the business house and office of the defendant Berkey, in the city of Guthrie, and stated to him that he had completed taking an order for goods from Mr. Berkey, but that Mr. Berkey had said that he couldn't give the order himself, for fear that his other creditors (the Keystone people) might jump onto their goods and attach them, and, if the order was made out in his name, that he (Slusser) had proposed to Berkey to have

Billy (meaning Mr. William Packer, this witness) sign the order; and we offer further to prove that Slusser, the agent and traveling salesman of the plaintiff, then requested this witness to sign this order, and at the same time stating to him that he wasn't to be held liable for it; that it would be no contract at all as between the plaintiff in this case and the witness, but that it would be used only for the specific purpose of enabling them to sell these goods to Mr. Berkey." Offer objected to, and by the court excluded. Mr. Packer testified that he was clerk for Mr. Berkey; that the bill of lading for the goods in question came, through the regular course of mails, from the Timken Carriage Company, of St. Louis, to Mr. Berkey.

The plaintiff in error was then offered as a witness in his own behalf, and admitted signing the order for purchase of the goods, and tendered his testimony as to the terms and conditions upon which he signed it, which tender was as follows: "Here counsel for the defendants, in behalf of the defendant Humphrey, offered to prove by the witness Humphrey that on the day that this order was given, and before it was given, the plaintiff, by their agent, Slusser, came to his real estate and insurance office, in the city of Guthrie, and informed him that he had sold a car load of goods to the defendant B. F. Berkey, and that an order had been made out, but that Mr. Berkey had told him that he wasn't in shape to give the order in his own name, for the reason that he was somewhat involved with the Keystone people, other creditors of Berkey's, and feared that the Keystone people might jump onto the goods of this plaintiff if they were sent to him in his own name, and that Mr. Slusser had suggested to Mr. Berkey that the matter might be remedied by having Billy Packer sign the order, and have the goods sent here to Guthrie in Billy Packer's name; that he had seen Billy Packer, and Billy did not want to do it, as he stayed right there with Berkey, and didn't want to mix in it in that way, and that he (Slusser) then went to Humphrey, and proceeded to explain the matter to Mr. Humphrey (this witness), and stated that, if he would sign that order, that he wouldn't be held liable for it at all, and that it should not be a contract at all, so far as he was concerned, and that the only purpose of it was to enable the plaintiff in this case, the Timken Carriage Company, to sell this order of goods to Mr. B. F. Berkey; that upon such explanation this witness and defendant accompanied Mr. Slusser up to Berkey's residence, where Berkey was then ill, and the matter was further talked over there with the same effect, and that upon that agreement that, if he (Humphrey) would sign the order, that he should not be held liable—that it would be used only for the specific purpose of enabling the Timken Carriage Company to sell and ship these goods to Berkey, in order to protect them and Berkey

from having those goods attached by other creditors of Berkey—thereupon the defendant Humphrey, relying upon those statements, signed said contract, if the same was to be used for the specific purpose of enabling the Timken Carriage Company to sell the goods to B. F. Berkey, and for no other purpose." Upon objection offered, this tender of testimony was rejected by the court, and exceptions taken. Mr. Humphrey then testified that he never received the goods, and was never notified of their shipment; that he did not know for two weeks after Berkey got the goods that he (Berkey) had received them; that he did not authorize Berkey to get them from the depot; that the freight receipt was not his, and that signature thereto was not his signature; that he did not write his name to it, or authorize any other person to write it; that he did not receive the goods, or authorize anybody to receive them on his behalf. The court sustained objections to the following questions: "Q. State whether you received proceeds from the sale of any of these goods at any time?" "Q. State whether or not you ever received any benefit, advantage, or consideration of any kind or character for or upon that order?" On cross-examination Mr. Humphrey testified that there was no understanding at the time the order was signed that Berkey was to receive the goods, further than the understanding he had with Slusser that he was to sign the order for the goods for the purpose of helping Slusser, as agent of the Timken Carriage Company, to sell a car load of buggies to Berkey, and on that occasion there was no understanding that Berkey was to go and get the goods when they arrived; that there was nothing said between him and Slusser in regard to receiving the goods; that he knew he was not to receive them, because Mr. Slusser told him they would ship the goods direct to Berkey in his (Humphrey's) name. The cross-examination developed the fact that Humphrey expected Berkey to receive the goods because he (Humphrey) had not purchased them, but had taken steps intended to facilitate a purchase by Berkey. Upon redirect examination there was another attempt to show that whatever expectation Mr. Humphrey had of Berkey's receiving the goods was based upon the fact that he (Humphrey) had not agreed to the purchase of them, but that Berkey and the company had agreed upon terms between themselves. This was held by the court incompetent, as it sought to contradict the writing.

The jury was then instructed by the court as follows: "By the Court: 'Gentlemen of the Jury: You have heard the evidence in this case, and, in the judgment of the court, there is no controverted issue of fact to be determined by the jury. It is the view of the court that, on the uncontroverted facts, and under the issues in this case, and under the law, that the plaintiff is entitled to recover the amount due for the shipment of

buggies under the contract or order that has been introduced in evidence; and the court directs the jury to return a verdict for the plaintiff for that sum, which I will indicate to you as soon as it is figured up.' To which instruction of the court the defendant Humphrey excepts." This was the only instruction given by the court.

The jury returned a verdict for plaintiff in the sum of \$893, upon which judgment was rendered in favor of plaintiff and against defendant Humphrey in said sum. On the next day, motion for a new trial was filed on the grounds that verdict and judgment were contrary to law and not sustained by sufficient evidence, and other grounds specifying error in admitting and rejecting testimony, and in peremptorily instructing the jury to return a verdict for plaintiff and against Mr. Humphrey for \$893, or for any sum. Motion for new trial was overruled, and exception taken, and the case was then brought to this court.

Exhibit E, referred to in the testimony of Mr. Timken, is as follows:

"St. Louis, Mo., Mar. 24/98.

"B. F. Berkey, Esq., Guthrie, Okla.—Dear Sir: We are in receipt of your order given Mr. Slusser, and signed by Mr. Humphrey. Mr. Slusser writes that you prefer it this way, and it is agreeable to us, providing you simply write us a letter that you are responsible for the account with Mr. Humphrey. We will make shipment to Mr. H. and also bill it to him.

"Mr. Slusser advises that if we can get in more work to put in Klondykes, crating all leather quarter tops low. On account of the arched axle work, will not be able to ship this car as promptly as otherwise. We, like all other carriage houses, have all and more than we can do, and we are liable to disappoint you a little on time on this order. Business has never been as good as at present, that is, as far as the volume is concerned, and for that reason each buyer wants his goods promptly, which means that a factory must have a little more time in the rush of the season on the individual orders.

"We will promise to do our best for you, and feel sure that you will find this car of work an improvement over the two previous cars.

"Thanking you for the same, and trusting to hear from you promptly, beg to remain,  
"Yours truly, Timken Carriage Co."

September 26th, Timken Carriage Company wrote A. A. Humphrey as follows:

"St. Louis, Mo., Sept. 26/98.

"A. A. Humphrey, Esq., Guthrie, Okla.—Dear Sir: We have drawn on you at one day's sight for \$1,807.94 to pay for car of buggies shipped Apr. 18th, and which was sold on terms of 4 months net from May 1st; therefore as the account was due Sept. 15th, we trust you will honor draft on presentation. At one day's sight, it will give you three of grace, and in this trust it will not incor-

venience you to pay it at the end of the fourth day.

"Yours truly, Timken Carriage Co."

The above letter was answered as follows:

"Guthrie, Okla., Sept. 28th, 1898.

"Timken Carriage Co., St. Louis, Mo.—

Dear Sir: I am in receipt of yours of Spt. 26th, notifying me that you have drawn on me for buggies shipped April 15th. Of course, you are aware how this matter is, and it will be a great convenience to me if you will call that draft back and wait thirty or sixty days for this money. The larger part of those buggies were sold on time and the notes are becoming due from the 1st of October up.

"Hoping that you may see fit to extend this matter for thirty or sixty days, then the matter will be attended to promptly. I remain,

"Yours truly, A. A. Humphrey."

Which letter was replied to by Timken Carriage Company, as follows:

"St. Louis, Mo. Sept. 30/98.

"A. A. Humphrey, Esq., Guthrie, Okla.—

Dear Sir: We are in receipt of yours of the 28th; also received letter from Mr. Berkey, and kindly refer you to our letter to him. In that letter we propose that he pay one-half now and the balance Dec. 1st. We have explained our reasons why we cannot see our way clear to grant an extension on the whole of the account.

"Yours truly, Timken Carriage Co."

Lawrence & Huston, for plaintiff in error.  
Cotteral & Hornor, for defendants in error.

GILLETTE, J. (after stating the facts). This case was tried and determined upon the theory that the transaction resulting in the shipment of the goods was a transaction resting upon a written agreement, and could not, therefore, be varied by parol evidence. The determination of this question determines all necessary questions presented by the record.

The order for the goods was not a contract binding upon the parties until accepted by the Timken Carriage Company. It was a proposal, only, which required acceptance, according to its terms and tenor, before it assumed the dignity of a written obligation. There is no contract, in fact, until the minds of the contracting parties have met, and consented to the terms proposed. The agreement must be mutual, and communicated each to the other, and consent is not mutual unless the parties all agree upon the same thing in the same sense. The Timken Carriage Company say in their petition that the order for the goods was duly accepted, "and that thereafter said contract of sale of said articles became complete, and that, in compliance therewith, the plaintiff delivered to Humphrey the goods mentioned in said order, according to the terms thereof." How this acceptance was communicated to Mr. Humphrey was not shown—whether by letter or verbal notice is left to conjecture—but the peti-

tion does say the goods were delivered to Humphrey according to the terms of the order. The defendant answered first by a general denial, and such answer put in issue the question of acceptance, as pleaded, and the question of the delivery of the goods. The evidence upon the trial did not show either written or verbal acceptance of the order by the Timken Carriage Company, which was communicated to Mr. Humphrey, but does show that the Timken Carriage Company did not accept it until one B. F. Berkey had been written to, and requested to become responsible for the order; and, when notified by Mr. Berkey that he would become so responsible, the goods were shipped by bill of lading addressed to Mr. Humphrey, but mailed to Mr. Berkey, who took the same, and procured the goods from the Atchison, Topeka & Santa Fé Railroad at Guthrie, placed them in his own place of business, and sold them to his customers. Mr. Timken, of the Timken Carriage Company, testified that the goods were billed to Mr. Humphrey April 18, 1898; but this declaration probably refers to the language of the bill of lading, for the evidence is conclusive that it was mailed to B. F. Berkey. The pleadings and the evidence show a disputed question of fact, which raises the question as to whether or not a consummated contract was ever entered into, by and upon which defendant A. A. Humphrey became liable to the Timken Carriage Company. Mr. Humphrey did not receive benefit from the transaction. His liability, if any is found, rests upon the contract sued on, the validity of which is in contest.

The jury was instructed that there was no controverted question of fact in the case, and that the plaintiff was entitled to recover. This, we think, was material error; which necessitates a reversal of the judgment. In the trial of the case, the defendant offered evidence to show that the order for the goods which is made the basis of plaintiff's action was given at the solicitation of the plaintiff's agent Slusser, who represented that he had sold a car load of goods to B. F. Berkey, but that Berkey was involved financially, and it was feared that a shipment to Berkey would involve the Timken Carriage Company with other creditors; that, if he (Humphrey) would sign the order for the goods, he would not be held liable for them; that it would be used only for the specific purpose of enabling the Timken Carriage Company to sell and ship goods to Berkey without danger of having them attached by other creditors; and that the order was signed for this, and for no other, purpose. This tender of testimony and all evidence of like purport was by the court rejected because in conflict with the contract.

Admitting that the order so signed was a contract in writing, was it not competent to prove that it was not intended as such, and was in fact executed and delivered for an entirely different and specific purpose? Un-

der the law, as generally accepted and enforced in this country, parol evidence is not competent to change or vary a written agreement; but when does a writing become an agreement? Certainly not until it is assented to in the sense that its tenor purports. As between the parties, a written instrument which is understood to have a particular import and meaning cannot, by one of the parties thereto, without the knowledge or consent of the other, be so diverted from the purpose of its execution as to fix other and new liabilities, not contemplated when made. Such a construction of the law wholly destroys the definition which time-honored customs and rules have given to contracts, to wit, that two minds must meet and consent. The courts, in the enforcement of contracts, have looked to the intent of the parties in the execution and delivery of them, and, in many instances, where the plain letter of the contract fixes a liability contended for by one of the parties, have admitted parol proof to show that, in the execution and acceptance of it, something else was intended. *Hurlburt v. Dusenbery et al.* (Colo. Sup.) 57 Pac. 860; *Brick v. Brick*, 98 U. S. 517, 25 L. Ed. 256; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; *Bradley v. Washington, Alexandria & Georgetown Steam Packet Co.*, 13 Pet. 89, 10 L. Ed. 72; *U. S. Fidelity & Guaranty Co. v. Siegmann* (Sup. Ct. Minn., Aug. 1, 1902) 91 N. W. 473. In *Hurlburt v. Dusenbery et al.* (Colo. Sup.) 57 Pac. 860, the court, quoting from the opinion of Mr. Justice Miller in *Grierson v. Mason*, 60 N. Y. 394, said: "The object of the testimony was to show that the instrument was executed for a specific purpose, and, that purpose being accomplished, was of no effect in changing the contract previously made with the defendant. I think that it was competent evidence for this purpose. The defendant made out a contract. The plaintiff proved an instrument which altered the contract, and the defendant had a right to prove that the instrument introduced was not intended as an alteration of the contract, but with a view of accomplishing a particular purpose. Such evidence was not given to change the written contract by parol, but to establish that such contract had no force, efficacy, or effect; that it was not intended to be a contract, but merely a writing to be used in inducing Woods to make advancements upon the goods. This is in avoidance of the instrument, and not to change it; and I do not see why the testimony was not as competent in this case as it would be to show that a written instrument was obtained fraudulently, by duress, or in any improper manner. Such evidence does not come within the ordinary rule of introducing parol evidence to contradict written testimony, but tends to explain the circumstances under which such instrument was executed and delivered." The court also quotes approvingly

from the language of Earl, J., in *Pym v. Campbell*, 6 El. & Bl. 370, as follows: "The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and if, in fact, he did sign the paper, *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence. \* \* \* But, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing it." From those authorities, it would seem clear that Humphrey had a right to show that the order was not given as a purchase, or proposal for a purchase, but for the purpose stated. It is true that it was given to an agent, and contained a provision that it was subject to the approval of Timken Carriage Company. But such agent, in an agreement as to what the order was for, spoke for the Timken Carriage Company, and what he did agree to was binding upon his principal. To admit otherwise would be to sanction a fraud in the interest of the principal because the principal perpetrated it through an agent.

But we think the conclusions here reached need not rest alone upon the declaration of Mr. Humphrey as to what was understood and agreed to as between Mr. Humphrey and Slusser, agent for the Timken Carriage Company, for we think that the evidence introduced by the plaintiff was sufficient to justify a submission of it to the jury, for the purpose of determining the question as to whether or not the Timken Carriage Company at the time accepted the order as Humphrey's contract or proposal to purchase. The order was given March 22d, and received by them in St. Louis March 24th, and on that day they wrote Mr. B. F. Berkey concerning the order as follows:

"St. Louis, Mo., Mar. 24/98.

"B. F. Berkey, Esq., Guthrie, Okla.—Dear Sir: We are in receipt of your order given Mr. Slusser and signed by Mr. Humphrey. Mr. Slusser writes that you prefer it this way and it is agreeable to us, providing that you simply write us a letter that you are responsible for the account with Mr. Humphrey. We will make shipment to Mr. H. and also bill it to him.

"Mr. Slusser advises that if we can get in more work to put in Klondykes, crating all leather quarter tops low. On account of the arched axle work, will not be able to ship this car as promptly as otherwise. We, like all other carriage houses, have all and more than we can do, and we are liable to disappoint you a little on time on this order. Business was never as good as at present, that is as far as volume is concerned, and for that reason each buyer wants his goods promptly, which means that a factory must have a little more time in the rush of the season on the individual orders.



"We will promise to do our best for you and feel sure that you will find this car of work an improvement over the two previous cars.

"Thanking you for same, and trusting to hear from you promptly, beg to remain,  
"Yours truly, Timken Carriage Co."

In the light of this case, this language admits of the construction contended for by the defendant, that the order given Slusser was the order of Berkey, and so understood by Timken Carriage Company; that it was not received as the order of Humphrey at the time, but was received under the terms and conditions set up in defendant's answer, proof in support of which was tendered and rejected by the court.

For the reasons herein stated, the judgment of the district court is reversed, and the cause is hereby remanded to the district court of Logan county, with instructions to vacate the judgment rendered therein, and grant a new trial upon the motion therefor. All of the Justices concurring, except BURFORD, C. J., who tried the case below, not sitting, and BURWELL, J., who dissents.

(12 Okl. 401)

#### HACKNEY v. McKEE.

(Supreme Court of Oklahoma. Jan. 13, 1903.)

#### FORCIBLE ENTRY AND DETAINER—WHEN LIES.

1. Forcible entry and detainer is a proper remedy for a homestead entryman, whose rights have been finally determined, as against one whose claim to the land has been canceled by the Land Department. The right so determined carries with it the exclusive and undisturbed possession of the whole of the premises.

2. The action of forcible entry and detainer cannot be converted into an action to try the question of title to the premises by an answer to the complaint putting in issue such title.

Following *McQuiston v. Walton* (Okl.) 69 Pac. 1048, and *Brown v. Hartshorn* (Okl.) 69 Pac. 1049.

(Syllabus by the Court.)

Error from District Court, Kay County; before Justice Bayard T. Hainer.

Action by Frank A. McKee against Nathan O. Hackney. Judgment for plaintiff. Defendant brings error. Affirmed.

S. H. Harris, for plaintiff in error. Ransom & Bailey, for defendant in error.

GILLETTE, J. This action is the final culmination of proceedings in the land department for the N. E.  $\frac{1}{4}$  section 8, township 28, range 2 E. I. M.

Several parties, including the present plaintiff and defendant, made entries upon said premises, and offered their filing thereon to local land office at —, and therefore in due time the conflicting claims were consolidated, and a hearing of all the parties in interest was had in the local land office, and upon its conclusion that office rejected

all the conflicting claims, and awarded the land to the defendant in error herein, Frank A. McKee. From this decision of the local land office the present plaintiff in error appealed to the Commissioner of the General Land Office, where the same finding and decision was made as in the local land office. Thereupon plaintiff in error further presented his appeal to the Secretary of the Interior, where the decision of the Commissioner was modified to the extent of directing a further hearing between defendant in error, McKee, and one Thomas M. Hartshorn, as to their relative rights to the E.  $\frac{1}{2}$  of said N. E.  $\frac{1}{4}$  of section 8, but affirming the decision of the Commissioner denying to plaintiff in error any rights to any part of the said N. E.  $\frac{1}{4}$  as against defendant in error, McKee.

It will be seen from the foregoing statement that in his contest in the land office the plaintiff has been denied any right in the premises as against either this defendant in error, McKee, or Hartshorn, but as between McKee and Hartshorn it is yet undecided which has the better right to the east half of the said quarter section of land. This is an action of forcible entry and detainer brought in the probate court of Kay county to compel plaintiff in error, Hackney, to vacate and surrender to defendant in error, McKee, that part of said premises by him occupied and cultivated. It must be remembered that both the parties are and have been in possession of said premises since the 13th day of September, 1893, the difference in their initial settlement being only about 20 minutes, and in this action have set up and are relying on their respective rights acquired by virtue of their respective settlements and residence upon these premises as a part of the public domain. No question of tenancy exists in the case, and the right which either party has to the possession of the premises, or any part thereof, is determined by the right which he has secured by a compliance with the land laws of the United States. These rights have been fully submitted to the special tribunal created by the government for the express purpose of determining such conflicting claims, and that tribunal has settled for all time the relative rights of the plaintiff and defendant herein, unless it shall be made to hereafter appear that the land officials misapplied the law to the facts before them, and, as between the parties to this action, have erroneously awarded the right of homestead entry to defendant in error, McKee. This right carries with it the right to the exclusive and undisturbed possession of the whole of said premises, as against one whose rights have been passed upon and decided against by the Secretary of the Interior. Defendant in error, McKee, may fail to perfect his homestead entry, and may yet forfeit his opportunity to obtain title to the land; but until he makes such failure, or forfeits his rights to acquire the title, he has a right to the

¶ 2. See *Forcible Entry and Detainer*, vol. 23, Cent. Dig. §§ 31, 61.

free and undisturbed possession of the whole of said premises.

It is objected that the probate court has no jurisdiction in this class of actions. So far as this court is concerned, that question has been passed upon in the case of *McClung v. Penny*, 69 Pac. 499, and jurisdiction of the probate court upheld. The answer in this case sets up the proceedings and decision in the Land Office, and especially the decision of the Secretary of the Interior, and the only attempted defense set out in the answer is that the Secretary of the Interior committed error in applying the law to the facts before him, which error this court is asked to correct. Stated differently, it is that the title to the premises is in issue, and this court is asked to determine which of the parties has the better title, and is therefore entitled to possession. It is useless to discuss such a defense as this in this form of action. It has been so often and so universally held by the courts that the title to real estate could not be tried or determined in an action of forcible entry and detainer that it seems amazing that it should continue to be pressed upon the attention of the court.

The case is so nearly a repetition of *McClung v. Penny* (decided by this court at the June Term, 1902) 69 Pac. 499, that it would be impossible to make a distinction between them (if we were inclined to do so) without overruling that case. That case is stated as follows: "This is an action commenced by defendant in error in the probate court of Kay county, Okl. T., and is an action of forcible entry and detainer to recover the possession of the S. W.  $\frac{1}{4}$  of section 30, township 26 N., of range 1 E. I. M. The facts are that defendant in error and one Charles R. McClung, the husband of plaintiff in error, both claimed this tract of land as homestead settlers, and contested for their rights as such, through the several departments of the Interior, to a final determination, which was in favor of the defendant in error, who, having completed his entry, brought this action to obtain possession of the land. The defendant files a general denial, and also sets up, by way of answer, that the Land Department and the Secretary of the Interior misapplied the law in the case, and that the defendant in error was not a qualified entryman, and alleges that she [the plaintiff in error] intends to bring an action to declare the title of defendant in error a trust for the benefit of plaintiff in error. Judgment in the probate court was rendered in favor of defendant in error. An appeal was taken to the district court, and a similar judgment rendered there, and exception saved, and the cause is brought here for review."

The foregoing would be a complete summary and statement of the facts in this case, and the law as therein declared establishes the following propositions: (1) The probate

courts in this territory have jurisdiction in actions of forcible entry and detainer. (2) A party who has prosecuted his homestead entry through the Land Office, and obtained the decision of the Secretary of the Interior awarding to him the right to make his homestead filing and proof, has such an equitable interest in and title to the premises that he is entitled to the exclusive possession of all the premises contested for, and may maintain the action of forcible entry and detainer to recover the possession of all or any part of the premises held and occupied by an unsuccessful contestant. (3) A plea of title in the defendant, or a plea alleging that title to the premises will be in issue in such case, cannot be interposed in such action, or, indeed, in any action of forcible entry and detainer, because the title to real estate cannot be tried or determined by any court in that form of action, and, if such plea is offered, it should be rejected or struck out on motion of plaintiff. (4) That the claim of a resulting trust sets up title in the defendant, and asks the trial court to reverse the decision of the Department of the Interior and declare the title in the defendant, and this claim the court cannot adjudicate in this form of action. *Olds v. Conger*, 1 Okl. 232, 32 Pac. 337; *Oklahoma City v. Hill*, 4 Okl. 522, 46 Pac. 568; *Chisholm v. Weise*, 5 Okl. 220, 221, 47 Pac. 1086; *McDonald v. Stiles*, 7 Okl. 327, 54 Pac. 487; *Dysart v. Enslow*, 7 Okl. 386, 54 Pac. 550; *McClung v. Penny* (Okl.) 69 Pac. 499; *Kirtley v. Dykes*, 10 Okl. 18, 62 Pac. 808; *Packing Co. v. Howe* (Kan.) 64 Pac. 43; *Wideman v. Taylor* (Kan.) 65 Pac. 664.

In *Olds v. Conger*, 1 Okl. 232, 32 Pac. 337, it is held: "\* \* \* In an action of forcible detainer the title to the property is not, and cannot be, tried and determined. The right of possession is the only right involved."

In *Chisholm v. Weise*, 5 Okl. 221, 47 Pac. 1086, it is said: "\* \* \* If the question of ownership, or in which party the title may be, is not properly an issue in forcible entry and detainer proceedings, then the mere claim of title, or the offering in evidence of a deed of conveyance by one of the parties, will not raise a question of title so as to divest a justice of the peace of jurisdiction. Title is only involved where the title may be a proper question for decision."

In *McDonald v. Stiles*, 7 Okl. 329, 54 Pac. 488, this court says: "We are satisfied that it was never the intention of the Legislature that any question other than that of the right to possession should be tried in this class of cases. \* \* \* By putting title in issue, and certifying the case to the district court, all the purposes and ends to be attained by this form of remedy, and the evils to be corrected, are defeated, and the action becomes one to try legal and equitable titles, and delays the determination of possessory rights. Upon neither sound reason nor principle can the practice be sustained

of converting a possessory action into one of ejectment, or one in equity to declare a resulting trust and decree conveyances of legal titles. \* \* \*

In *Dysart v. Enslow*, 7 Okl. 386, 54 Pac. 550, it is held: " \* \* An action of forcible detainer is purely a proceeding at law, and does not and cannot involve the exercise of equitable jurisdiction. \* \* "

In *Packing Co. v. Howe*, 62 Kan. 587, 64 Pac. 43, it was held: " \* \* Section 5042 of the General Statutes of 1899 (Gen. St. 1897, c. 103, § 26), providing that, when it appears to the satisfaction of a justice of the peace that the title or boundary of land is in dispute in any action, he shall certify the case to the district court for trial, has no application to actions of forcible entry and detainer." In that case a plea of title had been interposed by the defendant in the justice's court, who thereupon certified the case to the district court for trial, where a trial was had and the cause taken on error to the Supreme Court. That court dismissed the proceedings in error for want of jurisdiction in either the district court or the Supreme Court over the subject-matter of the action, holding in effect that forcible entry and detainer proceedings must be tried before the justice, and thence appealed to the district court, in order for the latter court to obtain any jurisdiction to hear or determine proceedings in forcible entry and detainer.

We have quoted thus at length from former decisions of this and other courts, in the almost vain hope of some time discouraging these continual attempts to litigate the title and to determine equitable interests in actions of forcible entry and detainer.

The judgment of the court below must be affirmed. All the Justices concurring, except HAINER, J., who tried the cause below, not sitting.

(13 Okl. 356)

# NEELEY v. SOUTHWESTERN COTTON SEED OIL CO.

(Supreme Court of Oklahoma. Sept. 10, 1903.)

TRIAL—DIRECTING VERDICT—INJURY TO EMPLOYE—PRESUMPTIONS—SAFE APPLIANCES—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. The court may withdraw a case from the jury, and direct a verdict for the defendant, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

2. In case of an accident to an employé the fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the accident was the result of the negligence of the employer.

3. It is the duty of the employer to furnish the employé a reasonably safe place to work, and reasonably safe appliances with which to work, reasonably safe material to work with, and reasonably competent fellow servants. He is required to furnish appliances free from de-

fects discoverable by the exercise of ordinary care, and the employé has the right to rely upon this duty having been performed; and while, in entering the employment, he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employé with respect to appliances furnished. The exception to this rule is that where the employé receives for use a defective appliance, and with knowledge of the defect and its dangerous character continues to use it without notice to his employer, he cannot recover for an injury resulting from such defective appliance thus voluntarily used.

4. A servant entering into an employment which is hazardous assumes the usual risks incident to such service and those which are apparent to ordinary observation, and when he accepts or continues in the service with knowledge of the character of appliances from which injury may be apprehended, he also assumes the hazards incident to such situation.

5. The risks assumed by an employé are such perils as exist after the employer has used due care and precaution to guard the former against danger by providing him a reasonably safe place to work in, reasonably safe appliances to work with, reasonably safe materials to work upon, and reasonably competent fellow servants to work with; but when the employé undertakes to use defective or unsafe appliances with knowledge of such unsafe condition he assumes the increased risk of danger, and the employer is relieved from responsibility to the employé by reason of the employé's knowledge.

6. It is the duty of the employer to provide the employé with reasonably safe machinery, tools, and appliances with which to do his work, and he cannot relieve himself from liability by delegating this duty to another, and in case of injury resulting from defective or unsafe appliances the relations of fellow servants cannot arise.

7. If an employé discovers that appliances furnished him by the employer with which to do his work are defective or dangerous, and informs the employer of such defect, and requests that the employer remedy such defect so as to avoid increased risk, and the employer gives him assurances that the defect will be remedied, and, relying upon such assurance, the employé continues in the service, but before the repairs are made an injury results to the employé by reason of such defective appliances, the employé will ordinarily be entitled to recover. But if, after giving such assurances, and prior to the accident, the employer directly or indirectly revokes his former promise to repair or remedy, the employé will not, in such event, be warranted in further continuing his service based upon such promise to repair, and under such circumstances the question of contributory negligence should ordinarily be left to the jury.

8. When, on the trial of a cause, a question is presented as to the existence of negligence or contributory negligence, and the facts which the evidence reasonably tends to establish are such that all reasonable men must draw the same conclusions from them, the case is one of law for the court; but, if fair-minded men may honestly draw different conclusions, the cause should not be withdrawn from the jury.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; before Justice B. F. Burwell.

Action by Nathan Neeley against the Southwestern Cotton Seed Oil Company. Judgment for defendant, and plaintiff brings error. Reversed

¶ 6. See *Master and Servant*, vol. 34, Cent. Dig. §§ 175, 392.

The plaintiff, Neeley, brought this action in the district court of Oklahoma county to recover damages from the Southwestern Cotton Seed Oil Company for personal injuries received while in the employ of the defendant. The plaintiff was a common day laborer, and had been in the employ of the defendant as such for only a few weeks when the accident occurred. The defendant is a corporation engaged in the manufacture of cotton seed oil and cotton seed products at their plant at Oklahoma City. As part of their buildings, was a large room about 30 by 50 feet, containing portions of their mill machinery. Through this room, about 18 feet from the floor, extended a steel revolving shaft, on which were pulleys, and from which connecting belts drove these various machines. The floor was smooth and slick from the oil. One of the pulleys on this shaft carried an eight-inch leather belt to the pulley on the "linters." Occasionally this belt slipped off the upper pulley while the machinery was in motion, and it was necessary to go up to the upper shaft to replace it. It is usual and customary in oil mills of this character to have a footboard placed a few feet below the shaft, upon which persons could walk and stand when oiling or repairing the machinery or adjusting the belts. This mill had only been completed one season, and no footboard had been placed in position. The company had procured to be made for its use a ladder about 18 feet long, constructed of two 2x4 pine scantlings, dressed down to about 2x3½ for side pieces, upon which steps or cross-pieces were nailed, made from 1x3 boards. This ladder was weak on one side, and had a tendency to turn sidewise with the weight of a person, and to avoid this defect a 1x4 board about 2 to 3 feet long had been nailed on the inner side of the right-hand scantling. This ladder was furnished by the company to be used for placing the belt upon the upper shaft or pulley. In order to perform this difficult feat, the lower end of the ladder was placed upon the floor, and the upper end rested against the revolving shaft. One employé then ascended the ladder and lifted the belt in place, while another employé went upon some part of the machinery and held the other end in place, and the two operating together thus readjusted the belt to its proper place. It required from the man upon the ladder a force or resistance of from 100 to 200 pounds to force the belt onto the pulley. All the employés who had used this ladder considered it weak and limber, and two or three had called the attention of the superintendent to this fact, and requested that the company put up a footboard to avoid the anticipated danger. The superintendent informed the employés who gave him this warning that he understood his business, and that, if they did not want to use the ladder, he would get some one who would. On the 31st day of January,

1899, the plaintiff, who had been in the employ of the company about two weeks as a laborer, was engaged in operating the machinery in the room in question, when the belt came off, and he and a fellow servant attempted to replace it. The plaintiff placed the ladder in position, and ascended it, and took the belt in his hands, and was in the act of placing it on the pulley when the ladder gave down and fell to the floor with the plaintiff. The plaintiff received injuries resulting in a severe shock, a wound on the head, and the fracture of the bones in both wrists. After the fall one side of the ladder was found broken apart, and the piece that had been nailed on to strengthen it was both broken and split. About one week before the accident the night foreman had told the plaintiff that he intended to put up a footboard along the shafting in question, and about three days before the accident the plaintiff told the foreman that the ladder seemed unsafe, and asked him to put up a footboard. To this request his reply was: "That ladder is all right, and you boys go ahead, and if it don't suit you, and you can't do this work, I'll get men that can do it." The plaintiff, previous to the accident, was strong and able-bodied, 33 years old, and a common laborer, and has been disabled from work ever since. The plaintiff, on the trial of the cause to a jury, introduced evidence tending to establish the foregoing state of facts. The defendant demurred to the evidence, and the court sustained the demurrer, and rendered judgment for the defendant. From this judgment the plaintiff has appealed, and we are called upon to review the proceedings below.

Hays & McMechan and M. Fulton, for plaintiff in error. Howard & Ames, for defendant in error.

BURFORD, C. J. (after stating the facts). In the briefs presented for our consideration a great many cases are cited from the various state courts and quite a number from the Supreme Court of the United States. The questions embraced in this case have been extensively discussed by the jurists and authors, and no court or text-writer has ever been able to harmonize the numerous decisions. Every question presented could be decided either way, and have ample authority for its support. The Supreme Court of the United States has in the last quarter of a century had before it every legal proposition that is likely to arise in a personal injury case, and enunciated rules which ought to be safe for a court to follow which has no state Constitution, statute, or judicial precedents to control or embarrass it. It has been the policy of this court, on questions where there is a seeming conflict between the state courts and the Supreme Court of the United States, to follow that court which has direct appellate supervision over the de-

cisions of this court, and we are content to continue that policy. There are a few general principles established by repeated decisions of that court, which, when applied to the facts in the case under consideration, control every question presented by the record. We will not attempt to follow the arguments presented in the briefs upon either side, but will endeavor to determine each question which, in our judgment, may be fairly raised by the record in this case, and agreed in the briefs.

When may a court take a case from the jury and direct a verdict? "If the evidence, giving the plaintiff the benefit of every inference to be fairly drawn from it, so conclusively established contributory negligence on his part as would have compelled the trial court in the exercise of a sound judicial discretion to set aside any verdict returned in his favor, then the direction to find for defendant was proper." *Kane v. Northern Central R. R. Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18, 27 L. Ed. 65; *Randall v. B. & O. R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Goodlett v. Louisville R. R. Co.*, 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230; *Jones v. East Tenn., V. & G. R. R.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478; *Dunlap v. N. E. R. R. Co.*, 130 U. S. 649, 9 Sup. Ct. 647, 32 L. Ed. 1058; *T. P. R. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Gardner v. Mich. Central R. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107. Mr. Justice Brewer, in discussing this question in *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, very appropriately said: "It is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that a court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it. It is undoubtedly true that cases are not to be lightly taken from the jury, that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who, in our jurisprudence, stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record; and when, in

his deliberate opinion, there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

It requires a more extended examination of the facts and reasonable inferences therefrom in plaintiff's favor in order to determine whether or not the court acted within the foregoing rule in taking the case from the jury. The rules of law governing this case are those relating to employer and employé. These rules are different from those which govern in cases of accidents to passengers or to strangers. In the case of an employé, "the fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence." "And it is not sufficient for the employé to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was." *Patton v. Texas & Pacific R. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. The duty that an employer owes to his employé has been extensively discussed, and the Supreme Court of the United States has enunciated the rule a number of times. In *Northern Pacific Railroad Co. v. Peterson*, 162 U. S. 353, 16 Sup. Ct. 845, 40 L. Ed. 994, it is said: "The general rule is that those entering into the service of a common master become thereby engaged in a common service, and are fellow servants; and prima facie the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes as such to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties. And it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employés, and, if the employé suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things

which it is the duty of the master to perform as such." This doctrine was cited, quoted, and approved in the later case of *New England Railroad Company v. Conroy*, 175 U. S. 323, 338, 20 Sup. Ct. 85, 44 L. Ed. 181. It was also said in *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1049, 34 L. Ed. 235: "Neither individuals nor corporations are bound as employers to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master falls in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was or ought to have been known to him, and was unknown to the employé or servant." And the foregoing was quoted with approval in *Patton v. Tex. & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. In the case of *Texas Pacific Railway v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, Mr. Justice White stated the law concisely and intelligibly as follows: "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employé has a right to rely upon this duty being performed; and that whilst, in entering the employment, he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employé with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employé receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. But no reason can be found for, and no authority exists supporting, the contention that an employé, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished which contain defects that might have been discovered by reasonable inspection. The employer, on the one hand, may rely on the fact that his employé assumes the risks usually incident to the employment. The employer, on the other hand, has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances con-

taining such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known the methods, and inferred therefrom that danger of unsafe appliances might arise. The employé is not compelled to pass judgment on the employer's methods of business, or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe, and to deal with those furnished relying on this fact, subject, of course, to the exception which we have already stated, by which, where an appliance is furnished an employé in which there exists a defect known to him, or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues to use it. In assuming the risks of the particular service in which he engages the employé may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and whilst this does not justify an employé in using an appliance which he knows to be defective or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances. In *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573, the court said: 'It is as a general rule, true that a servant entering into employment which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation; and when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended he also assumes the hazards incident to the situation. Those not obvious, assumed by the employé, are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of structures or appliances, which, by the exercise of reasonable care of the master may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation.' " The foregoing excerpt embraces practically all the law in the case under consideration, and is well supported by the decisions of numerous state courts, and we might safely rest the decision of this case on the law as stated by Justice White. In the case of *B. & O. R. R. v. Baugh*, 149 U. S. 387, 13 Sup. Ct. 921, 37 L. Ed. 772, the opinion of the court was delivered by Mr. Justice Brewer, and he there quoted and approved the language of Mr. Justice Valentine in *A., T. & S. F. R. R.*

v. Moore, 29 Kan. 632, as follows: "A master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and when the master has properly discharged these duties, then at common law the servant assumes all the risks and hazard incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and co-employees. And at common law whenever the master delegates to any officer, servant, agent, or employé, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employé stands in the place of the master, and becomes a substitute for the master—a vice principal; and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any one of the servants for the acts or negligence of any mere fellow servants or co-employé of such servant, when the fellow servant or co-employé does not sustain this representative relation to the master."

These cases are sufficient to establish the law defining the relations of employer and employé, the duties which the employer owes to the employé, and the test of liability when the employer has been negligent and the employé is without fault. We must now determine the rule as to what constitutes contributory negligence on the part of the employé. Here again we find the adjudications numerous and conflicting, and, without attempting to harmonize or explain them, we shall follow the rule which has met the approval of the Supreme Court of the United States in numerous well-considered cases. In *Kane v. Northern Central Ry. Co.*, 128 U. S. 91, 95, 9 Sup. Ct. 17, 32 L. Ed. 339, that court said: "It is undoubtedly the law that an employé is guilty of contributory negligence which will defeat his right to recover for injuries sustained in the course of his employment where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man under similar circumstances would have avoided them if in his power to do so. He will be deemed in such case to have assumed the risks involved in such heedless exposure of himself to danger. \* \* \* But in determining whether an employé has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the

exigencies of his position; indeed, to all the circumstances of the particular occasion." It was also held in the case of *District of Columbia v. McLaughlin*, 117 U. S. 621, 633, 6 Sup. Ct. 889, 29 L. Ed. 940: "That it was the duty of an employé having knowledge of the dangerous character of the place in which he was working to exercise due diligence and care in protecting himself from harm; and if he failed to exercise such care, and exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the employer to provide precautionary measures, be guilty of such contributory negligence as would defeat his claim for injuries so received; and also that the employer is not liable in any event if the danger apprehended is so imminent or manifest as to prevent a reasonably prudent man from risking it, and the employé, possessed of such knowledge, continues his service. But in all such cases the real question to be determined is whether at the time of the accident the plaintiff was exercising such reasonable care and caution as an ordinary person would exercise under similar circumstances." In *Washington & G. Railroad v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1049, 34 L. Ed. 235, the court said: "But if the employé knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery." In *Texas & Pacific R. R. v. Archibald*, 170 U. S. 665, 673, 18 Sup. Ct. 777, 42 L. Ed. 1188, the court said: "Where an employé takes reckless risks with full knowledge of the danger, and injuries result, he cannot recover, for the reason that he has not exercised due care." *Bunt v. Sierra Butte Gold Mining Co.*, 138 U. S. 483, 11 Sup. Ct. 464, 34 L. Ed. 1031. These cases seem to fairly state the law upon the question of contributory negligence on the part of an employé where negligence is alleged on the part of the employer in failing to perform a duty to such employé. The plaintiff undertook to prove negligence on the part of the company in failing to provide him a safe means of performing his work, and it is claimed that the evidence introduced by him established contributory negligence on his part. If this be true, then clearly he cannot recover. But this leads us to the inquiry as to what the state of the evidence must be to warrant the court in taking the case from the jury and holding as a matter of law that contributory negligence has been shown. It was observed in the case of *St. L. & S. F. Ry. Co. v. Schumacher*, 152 U. S. 77, 14 Sup. Ct. 479, 39 L. Ed. 361, that where it plainly appears from the evidence that the plaintiff was guilty of contributory negligence, and there

is no evidence of a willful or intended negligence on the part of the defendant, the court may take the case from the jury. It has been held that, "as a general rule, contributory negligence is a question for the jury, under proper instructions by the court, especially where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences." *Washington & R. R. Co. v. McDade*, 135 U. S. 573, 10 Sup. Ct. 1049, 34 L. Ed. 235. In the last-cited case the court approves the rule stated in *Daley v. American Printing Co.*, 150 Mass. 77, 22 N. E. 439, in a case very similar to the one at bar. That court said: "But the ground upon which the case was withdrawn from the jury is not stated. We cannot say as a matter of law that no sufficient evidence was introduced or offered of negligence on the part of the defendant, or of freedom from negligence on the part of the plaintiff. \* \* \*

If the machinery was found to be unsuitable, and if the plaintiff was within the line of his duty in attempting to adjust the belt, we cannot say that he was not entitled to go to the jury on the question of whether he was in the exercise of due care." In *Kane v. Northern Central Railway Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339, a brakeman brought an action to recover for injuries received while climbing from a freight car which had a broken step. He knew of the dangerous condition of the step prior to the accident, and had called the conductor's attention to it. The trial court held that he was guilty of contributory negligence, and took the case from the jury, and rendered judgment for the defendant railroad company. The Supreme Court reversed this judgment, and directed the question of contributory negligence submitted to a jury, and said: "It is undoubtedly the law that an employé is guilty of contributory negligence which will defeat his right to recover for injuries sustained in the course of his employment where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man under similar circumstances would have avoided them if in his power to do so. He will be deemed in such case to have assumed the risks involved in such heedless exposure of himself to danger. \* \* \*

But in determining whether an employé has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position; indeed, to all the circumstances of the particular occasion." In the case of *Railroad Company v. Stout*, 17 Wall. 657, 21 L. Ed. 743, the court announced the law to be "that on the trial of a cause, whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case must be submitted to the jury"; and we think this is the safe and sound rule. As

was well said in that case: "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw unanimous conclusions. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." It was held in the case of *Richmond & Danville Railroad Co. v. Powers*, 140 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642, Mr. Justice Brewer speaking for the court, that: "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them." It was held in *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003, that it is for the judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably inferred, and it is for the jury to say whether, from those facts, when submitted to them, negligence ought to be inferred. When the facts are such that all reasonable men must draw the same conclusions from them, the case is one of law for the court, and may be taken from the jury. *Gardner v. Mich. Cent. R. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107. It has also been frequently stated thus: "A case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which could properly be taken of the facts the evidence tends to establish." *Tex. & Pac. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Dunlap v. Northeastern R. R.*, 130 U. S. 649, 9 Sup. Ct. 647, 32 L. Ed. 1058; *Kane v. Northern Central Ry.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *Jones v. E. Tenn., V. & G. R. R.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478.

There is but one other legal proposition, we think, presented by this case. It is suggested that the relation of fellow servant existed between plaintiff in error and the night boss, who had charge of the oil mill at the time the accident occurred to the plaintiff. The question of the relation of fellow servant has no place in this case. The plaintiff seeks to recover for injuries resulting from the alleged failure of the oil company to provide reasonably safe appliances with which to do his work. The law makes it the duty of the employer to provide the



employé with reasonably safe and suitable appliances with which to do his work, and the employer cannot delegate this duty to a subordinate, or relieve himself from liability by imposing the duty upon another. And in any case of injury resulting from defective or unsafe appliances the relations of fellow servant do not and cannot arise. *Northern Pac. R. R. Co. v. Peterson*, 162 U. S. 846, 16 Sup. Ct. 843, 40 L. Ed. 994; *New England R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Washington & G. R. R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Patton v. Tex. & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Wabash Ry. Co. v. McDaniel*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 603; *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *U. P. Ry. Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 750, 38 L. Ed. 597. By a correct application of the rules of law enunciated in the authorities herein cited to the facts, and reasonable inferences in plaintiff's favor, as shown by his evidence, a correct conclusion should be reached. It seems clear that when the oil company employed the plaintiff it undertook to provide him a reasonably safe place in which to work, reasonably safe appliances, machinery, and tools with which to do his work, and reasonably competent fellow servants to assist in his work. On the other hand, the plaintiff assumed all the dangers and risks incident to his employment, as well as the risks of any enhanced dangers arising from defective appliances of which he had full knowledge, or which were so obvious as to be readily apparent. The duty of the company to provide safe appliances was measured by the hazards reasonably incident to the operation of oil mill machinery, constructed as its mill was; and the risks assumed by the plaintiff were such as could be reasonably expected to result from the operation of such machinery and its appliances when properly constructed and properly operated. The company was required to exercise reasonable care and caution in the supplying and maintenance of its appliances furnished employes with which to perform their work, and the employé was required to exercise reasonable care and caution for his own safety, and to avoid injuries to himself. The company was not required to furnish the best or latest patterns or most modern designs of machinery or appliances, but it was bound to provide such as were reasonably safe and free from dangerous defects, and was required to exercise reasonable care and caution in the selection and in the maintenance of that character of appliances that it did provide and use. If the company, instead of erecting a footboard for use of its employes in oiling and repairing the overhead shafting

and pulleys and in adjusting the belts to the pulleys, elected to provide a ladder for such purpose, it was then its duty to exercise due care and caution in the selection of such a ladder as would be reasonably safe, and without dangerous defects which might, in the exercise of reasonable diligence, have been discovered; and the duty remained with the company continuously, so long as the ladder was so used, to see that it was reasonably suitable and satisfactory for such purpose. If the ladder was defective, if it was too weak, if it was not suitable for the purpose for which it was used at the time of the accident, then the company was chargeable with notice of such dangers or defects as shown by the evidence, as a number of the employes at divers times had informed the manager of the company of the conditions as they existed. There was evidence reasonably tending to show that the ladder was weak on one side; that when in use the weight of a person upon it had a tendency to cause it to turn to one side; that in replacing the belt the operator had to stand near the top of the ladder, and lift one end of a large belt, and in putting on the belt a considerable pressure was required, amounting, it was estimated, to from 100 to 200 pounds. To support the weight of the man and the added weight of the belt, and resist the required pressure to adjust the belt, required a sustaining capacity very largely in excess of that ordinarily required on a ladder. This ladder had been used about the mill for several months, had been used by carpenters and laborers, and had been frequently used for the purpose of putting on the belt the same as when the accident occurred. An attempt had been made to strengthen the weak side of the ladder, and a piece of a board had been nailed on, which had caused the side piece to split. It was clearly shown that the proper and suitable mode of constructing such mills was to construct a foot or running board along the shafting, with railings, so that employes required to go up to the shafting could walk upon such footboard and reach the shaft, pulleys, and belts; and that it was more hazardous to use the ladder for such purposes. But the plaintiff knew of this mode of performing this work when he took this particular employment. He had previously worked in other parts of the mill, and knew of the risk and danger of ascending this ladder for the purpose of replacing the belt in question. With full knowledge of these conditions, he took the employment, and accepted the risks incident to such work. He assumed such extra hazards as were to be reasonably expected from the use of the ladder in putting on the belt, but he also had a right to assume that the employer had provided a ladder which was strong enough to support his weight, and the additional force necessary to put the belt on the pulley, unless the defect or danger

of the ladder breaking was so obvious and imminent as to be apparent or observable. The employé is not required to inspect machinery furnished him to work with; he is not bound to look for latent defects; nor is he chargeable with notice of defects that he might have discovered by the exercise of reasonable diligence. He is only chargeable with such defects as are apparent to ordinary observation. This was expressly decided in the case of *Texas & Pacific Railway v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, and our own court has said in *City of Guthrie v. Swan*, 5 Okl. 779, 51 Pac. 562: "There must be knowledge of the danger, or sufficient reason to apprehend it, to put a reasonable man on his guard, or there can be no contributory negligence. But, even though the person injured had reason to apprehend it, yet it does not necessarily follow that he has been guilty of contributory negligence. Thus one may voluntarily and unnecessarily expose himself or his property to a known danger without being guilty of contributory negligence as a matter of law; and while, in so doing, he is held to assume all risks of injury which a careful and prudent person would apprehend as likely to flow from his conduct, yet, if injured by the negligence of another without any negligence upon his part proximately contributing to the injury, he may recover, and it is usually held a question for the jury whether he was in the exercise of due care to avoid danger."

The company which procured the ladder to be made, and supplied it for the use in the room where the accident occurred, and caused it to be used in the manner that the plaintiff was using it when he was injured, was bound to know that it was suitable for this purpose. It had no right to guess or experiment with it. The duty it owed to its employé required it to exercise reasonable care, skill, caution, and judgment. It was required to know or take reasonable precautionary steps to ascertain the kind, character, and quality of the timber used in the construction of the ladder so far as it could be ascertained from examination and inspection. It was required to know that the scantlings used for the side pieces were of sufficient capacity to support the weight of the plaintiff and resist the force necessary to be used in replacing the belt. And after the ladder was "spliced," or "patched," as it was termed by the witnesses, it was the duty of the company to see that it was not weakened by the nails or cracks caused by the nails. To fail to use such reasonable care and caution at all times as was necessary to obtain such information was negligence. On the other hand, if there were defects rendering the ladder unsafe, which were of such a character as to be apparent to ordinary observation, and the plaintiff had reason to apprehend danger from such defects, then he assumed the hazard incident to such condi-

tion, and his own negligence contributed to his injury, and thereby prevents a recovery. But he was not required to know the sustaining power of the timbers, the amount of resistance required to meet and overcome the force of putting up and adjusting the belt, or how much weight the ladder was capable of supporting. He had a right to assume that the employer, in performance of its duty, had done all things reasonably necessary to provide him with a reasonably safe ladder, and to rely upon such assumption, unless the condition of the ladder itself, and what he had observed in the use of it previously, were such as would lead a reasonably careful person to believe that it was unsafe and dangerous for use in replacing the belt on the overhead pulley. If he did have such knowledge as would cause a reasonably cautious person to refrain from taking the risk under all the circumstances of the case at the time, and not regarding such knowledge he continued using the ladder, then he will not be entitled to recover for any injury resulting from the insufficiency of the ladder for the purpose used. It is not every suspicion or apprehension of danger that will warrant an employé in abandoning his post and in refusing to perform his labors. Taking the risk of apprehended danger is not necessarily negligence. There must be knowledge of danger, or knowledge of a condition which reasonably leads to a belief of danger, and this rule is different from that which controls in case of passengers, travelers, or strangers. In this case the mill was running day and night. The plaintiff and one other person were employed on the room where the "linters" and "hullers" were operated. These machines were propelled by the belt which was in turn driven by the pulley on the overhead shaft, against which it was necessary to support the upper end of the ladder in adjusting the belt. When this belt slipped off the pulley, a portion of the machines in this room were stopped, and, the seed being forced into them, they became choked. It was necessary to raise the lids or doors on these machines to prevent more serious consequences. The engineer was in another room. When the belt came off the power continued, and other parts of the machinery were kept in motion. Breaking this link destroyed the effectiveness of any of the process. The plaintiff was employed to look after the operation of the machinery in this room. He had one assistant, who had not worked long at the business. He complained to the company of the hazard of adjusting the belt while standing on a ladder, and said the ladder did not seem safe. The night manager assured him the ladder was all right, and instructed him to go ahead, and further said, if it did not suit him, he would get men who would use it. With this assurance he did go on and use the ladder. Does this state of facts, under all the surrounding circumstances, show contrib-

utory negligence? Can fair-minded men arrive at only one conclusion, and that that the plaintiff recklessly and heedlessly, and without regard to his own safety, used the ladder in question? Or will some fair-minded men honestly come to the conclusion that the plaintiff acted in this case as any ordinarily careful and cautious person would be expected to act under all the circumstances? We think there is room for a diversity of honest judgment, and that the plaintiff was entitled to have the question, both of negligence of the defendant and that of contributory negligence, go to the jury. We think the case is one that comes within the rule where it is error to withdraw the case from the jury and decide the case as a question of law.

There are some suggestions in the briefs that ought to be referred to, inasmuch as a new trial must be had. It had been suggested that the law as stated in the case of the City of Guthrie v. Swan, 5 Okl. 779, 51 Pac. 562, is controlling in this case. We do not think so. This case is governed entirely by the law as between employer and employee in such cases, and their reciprocal relations to each other. The Swan case is controlled by the laws governing the duties of municipal corporations to pedestrians. While some of the principles stated in the Swan Case are applicable here, the controlling principle is not the same.

The plaintiff has sought in his brief to make the rule apply as stated in Hough v. Railroad Co., 100 U. S. 213, 25 L. Ed. 612. There it was held: "There can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as would be reasonable to allow for its performance, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." But we do not think him entitled to the benefit of this rule. It is true that he testified that about a week previous to the accident he complained of the dangerous mode of performing the duty of putting on the belt, and that the officer in charge assured him that he would have a footboard put up. But this assurance was clearly revoked and repudiated by the last conversation, had only two or three days before the accident, at which time he again stated to the officer in charge that the ladder seemed unsafe, and was informed that it was sufficient, and, if he did not like it, he would get some one who would use it. In view of this last conversation, we do not think the plaintiff was still permitted to rely upon the previous promise, or to govern his conduct thereby. In order to entitle an employee to the benefit of the rule claimed, the promise to repair or remedy must have been made under such circumstances that the employee relied upon

it, and continued his service upon the assurance that it would be done.

Counsel for defendant in error very confidently rely upon the case of Southern Pac. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391, where Mr. Justice Shiras, speaking for the court, said: "He knew as much about it and the risk attending its use as the master. The defendant could not be required to provide himself with other machinery, or with new appliances, nor to elect between the expense of doing so and the imposition of damages for injuries resulting to servants from the mere use of an older or different pattern. In the absence of defective construction, or of negligence or want of care in the reparation of machinery furnished by him, the master incurs no liability from its use. The general rule is that the servant accepts the service subject to the risks incidental to it, and when the machinery and implements of the employer's business are, at the time, of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards." In the Seley Case the plaintiff was employed upon a railroad as conductor. He placed his foot in a frog, and was run over by the train and killed. He was familiar with frogs, the various kinds and their dangers, and took his employment assuming all the risks incident to their use. It was shown that there was a later improved pattern of frog that was not subject to these perils. The contention of plaintiff's counsel was that it was negligence on the part of the railroad company to use these open frogs. The court cites a number of cases, all to the effect that, where the company has adopted an appliance which is suitable and in common use, it will not be charged with negligence for not adopting a later pattern. But there is nothing in the Seley Case which absolves an employer from exercising reasonable care and caution to supply reasonably safe appliances and to keep them in a reasonably safe condition. As said before in this opinion, the oil mill company had elected to make use of a ladder to put up these belts, and the plaintiff took his employment with knowledge of such mode of doing the work; yet the oil mill company was not absolved from providing a reasonably suitable and safe ladder, and, in the absence of direct knowledge to the contrary, the plaintiff had a right to assume that the company had done its duty, and that the ladder was reasonably suitable and safe for the work which he was required to do. The rule we have herein stated is, we think, in harmony with the law as expressed in the Seley Case. Nor is there anything herein in conflict with the law as enunciated in Chaddick et al. v. Lindsay, 5 Okl. 816, 49 Pac. 940.

In conclusion, we are of the opinion that on account of the error of the trial court in

withdrawing the case from the jury the judgment should be reversed, and cause remanded to the district court, with directions to re-submit the issues to a jury, and, unless the evidence should be substantially different, that the question of whether the defendant oil mill company exercised proper care and caution in the selection of the ladder and keeping it in repair, and whether it was defective or reasonably sufficient to support a person while adjusting the belt in question, and whether the company exercised ordinary caution in determining such questions, and also whether, under the circumstances at the time, the plaintiff acted as an ordinarily prudent person would be expected to act, be submitted to the jury under proper instructions of the court.

The judgment is reversed, at costs of defendant in error. All the Justices concur, except BURWELL, J., who tried the case below, not sitting, and GILLETTE, J., absent.

(68 Kan. 576)

#### STATE v. STEVENS.

(Supreme Court of Kansas. Feb. 6, 1904.)

COMMON NUISANCE—CRIMINAL LIABILITY—INFORMATION—MOTION TO QUASH—PLEA IN ABATEMENT—LIQUOR NUISANCE—COMPETENCY OF JURORS.

1. Section 4, c. 165, p. 241, Laws 1887 (Gen. St. 1901, § 2463), prescribing punishment for the owner or keeper of a common nuisance, was repealed by section 1, c. 232, p. 416, Laws 1901 (Gen. St. 1901, § 2493), prescribing punishment for the person engaged in maintaining or assisting in maintaining a common nuisance.

2. On February 12, 1901, an information was filed against defendant, intended to charge him with being the owner or keeper of a common nuisance, under section 4, c. 165, p. 241, Laws 1887 (Gen. St. 1901, § 2463). Said information was by the court, on motion of defendant, on the 22d day of April, 1903, quashed, as being indefinite in the crime charged, and in location of the place. The state was permitted to file an amended information under said section 4 of chapter 165. Defendant filed his motion to quash said amended information, and filed also plea in abatement, averring, in substance, that said amended information was indefinite and charged no public offense; that it was a departure from the original information; that said section 4 of chapter 165 was repealed by said section 1 of chapter 232; that, at the time said amended information was filed, no legal proceeding had been commenced or was pending against him. *Held*, there was no error in the court overruling the motion to quash said amended information, nor in sustaining the demurrer of the state to said plea in abatement; that the averments of the original information were sufficient; that a proceeding was commenced and pending, within the meaning of section 7342, Gen. St. 1901; and that, under said section 7342, the right survived to the state, under the order of the trial court, to amend the original information, and prosecute defendant, under the information as amended, for a violation of section 4, c. 165, p. 241, Laws 1887 (Gen. St. 1901, § 2463).

3. In a prosecution for the violation of the prohibitory liquor law, charging defendant with being the owner and keeper of a common nuisance, under section 4, c. 165, p. 241, Laws 1887 (Gen. St. 1901, § 2463), *held*, it was error for the court to overrule defendant's challenges to jurors for cause, over his exception, and permit

such jurors to serve upon the trial, defendant having exhausted all his peremptory challenges in the impaneling of said jury; it having been shown by the answers of the said jurors that each, from having heard of a "joint smashing," entertained an opinion that "joints," or places where intoxicating liquors were kept, sold, and drank as a beverage in violation of said act, were at the time destroyed; it having also been shown by the answers of said jurors that if, upon the trial, it should appear that defendant was the owner or keeper of a place at the time so destroyed, said jurors entertained an opinion that it would establish defendant the owner or keeper thereof.

Cunningham, Greene, and Mason, JJ., dissenting from third paragraph of syllabus, and corresponding portion of opinion.

(Syllabus by the Court.)

Appeal from District Court, Harper County; P. B. Gillett, Judge.

George B. Stevens was convicted of keeping a common nuisance, and appeals. Reversed.

Geo. E. McMahon, S. S. Sisson, and T. A. Noftzger, for appellant. C. C. Coleman, Atty. Gen., R. H. Beebe, and E. C. Wilcox, for the State.

ATKINSON, J. On February 12, 1901, an information was filed against George B. Stevens in the district court of Harper county. The intention of the prosecutor was to charge appellant, in said information, with being the owner and keeper of a common nuisance in the city of Anthony, Harper county, Kan., under section 4, c. 165, p. 241, Laws 1887 (Gen. St. 1901, § 2463). Defendant filed his motion to quash the information on the grounds, first, that said information was vague, indefinite, and uncertain as to the offenses charged therein; and, second, that several offenses were improperly joined and set forth in one count of said information. This motion was heard, and by the court sustained, on the 22d day of April, 1903. The county attorney, over the objection of defendant, was by the court given leave to amend said information; and an amended information charging the defendant, in two counts, with keeping and maintaining a common nuisance at each of the two places described in the original information, was filed on April 23, 1903. Defendant filed his motion to quash said amended information on the grounds, first, that it did not state facts sufficient to constitute a public offense; and, second, that it was a departure from the original information. This motion to quash was overruled by the court, defendant excepting thereto. Defendant then filed his plea in abatement; therein alleging, in substance, that the amended information filed against him on April 23, 1903, was not an amendment of the original information filed against him on the 12th day of February, 1901, but a total departure from it; that the only crime attempted to be charged in the supposed information was the crime of being the keeper of a common nuisance, as defined by section 4, c. 165, p. 241, Laws 1887 (Gen. St. 1901, § 2463); that said

law defining the crime with which he was sought to be charged in the original information was repealed by section 1, c. 232, p. 416, Laws 1901 (Gen. St. 1901, § 2493). Defendant in said plea in abatement further averred that at the time of the repealing of said section 4, c. 165, p. 241, Laws 1887 (Gen. St. 1901, § 2463), there was no sufficient information or proceeding pending against him, charging him with the offense attempted to be charged in said amended information; that the original information filed against him failed to charge him with the offense or crime of being the owner or keeper of a common nuisance, as defined by the said law in force at the time of filing said original information. To this plea in abatement a demurrer was filed, and sustained by the court; defendant excepting thereto. Trial was had upon the amended information, and defendant on the 19th day of September, 1903, was convicted on both counts of the amended information, and sentenced to imprisonment in the county jail for a period of 30 days, and to pay a fine of \$100 on each count. Defendant appealed to this court, and assigns error in the rulings of the trial court in overruling his motion to quash said amended information, and in sustaining the demurrer of the state to said plea in abatement. A motion to dismiss the appeal is filed in this court, but we do not deem the same well taken.

Chapter 232, p. 416, Laws 1901, took effect March 1, 1901. Section 9 of said act repeals all acts and parts of acts inconsistent therewith, and contains no saving clause as to pending prosecutions or otherwise. Section 4, c. 165, p. 241, Laws 1887 (Gen. St. 1901, § 2463), under which defendant was prosecuted and convicted, contains both a criminal and civil remedy for the suppression and abatement of common nuisances. Section 1, c. 232, p. 416, Laws 1901 (Gen. St. 1901, § 2493), contains a criminal remedy only for the suppression and abatement of common nuisances. In section 4 of the act of 1887, it is the owner or keeper of such nuisance who is defined as being the offender. In section 1 of the act of 1901, it is the person who maintains or assists in maintaining such common nuisances who is defined as being the offender. The fine in each of said sections, upon conviction, is the same; but by the former upon conviction the maximum jail sentence is 90 days, while by the latter upon conviction, the maximum jail sentence is 6 months. Because of changes in the nature of the offense, and because of the change in the penalty prescribed, section 4, c. 165, p. 241, Laws 1887 (Gen. St. 1901, § 2463), was repealed by section 1, c. 232, p. 416, Laws 1901 (Gen. St. 1901, § 2493). State v. Estep, 66 Kan. 416, 71 Pac. 857.

If, as contended by defendant, the original information was so defective as not to have charged him with an offense under section 4, c. 165, p. 241, Laws 1887 (Gen. St. 1901, § 2463), the trial court committed error in not

sustaining defendant's motion to quash, and in sustaining the demurrer of the state to said plea in abatement. We have carefully examined the original information. It is inartistically drawn, and does not use the language of said section 4 in charging defendant as being the owner or keeper of such common nuisance, and is somewhat open to the charge of being indefinite in the language used. We are of the opinion, however, that the averments of this information are such that a proceeding was commenced, within the meaning of section 7342, Gen. St. 1901; that under said section the right survived to the state, under the order of the trial court, to amend the original information, and prosecute defendant under the information as amended; that the amended information was not such a departure from the original information as would be fatal to it; that the court committed no error in refusing to sustain defendant's motion to quash the amended information, nor in sustaining the demurrer of the state to said plea in abatement.

A more serious question arises, however, upon defendant's assignment of error to the ruling of the trial court in overruling his challenges for cause to jurors who sat and served as such upon the trial. The record contains a statement that "on the trial of said cause the evidence disclosed and proved that on the morning of the 30th day of January, in the year 1901, there occurred in the city of Anthony, in said county, what was known as a 'joint smashing,' and that a number of persons, carrying hatchets, hammers, etc., did break into the building described in the first count of the amended information filed in this cause, and did break and destroy a large amount of property, and that a large percentage of the property so destroyed consisted of intoxicating liquors; that the property so destroyed in said building, including said intoxicating liquors, belonged to, and was owned by, the defendant." The following are questions propounded by defendant to the juror R. C. Haskins upon his voir dire—a juror who sat and served upon the trial of said cause—and the answers of said juror thereto: "Q. You heard along some time in the latter end of January or first of February, 1901, of what was known as the smashing of intoxicating liquors here in the city of Anthony? A. Yes, sir; I believe I did. Q. Did you read about it at the time? A. Yes, sir. Q. Read that Mr. Stevens had some property destroyed by a mob at that time? A. Yes, sir. Q. Well, did that leave you to form the opinion that Mr. Stevens, who had his property destroyed, was probably engaged in the violation of the prohibitory law at that time? A. Yes, sir; I think it did. Q. And you have that opinion at this time, don't you? A. Yes, sir. Q. That Mr. Stevens, who had his property destroyed at that time, was engaged in the violation of the prohibitory liquor law? A. Yes, sir. Q. And probably the keeper or maintainer

of what is known as a 'joint'? A. Yes, sir. Q. Are you acquainted with Mr. Stevens? A. No, sir. Q. If it should transpire that the defendant is the same Mr. Stevens you heard of—the same man that had the property destroyed—you would have an opinion, as far as that fact appears, that he was at that time engaged in the violation of the prohibitory liquor law? A. Yes, sir." Defendant challenged said juror for cause, and the court overruled said challenge, and permitted said juror to sit and serve upon the trial. Like questions to the jurors F. E. Roy, C. F. Debord, and R. Behrens met with similar response, and each of these jurors were by defendant challenged for cause, each such challenge was by the court overruled, and each juror sat and served upon the trial of said cause, over the objection of defendant. The record further shows that defendant, in impaneling said jury, exhausted all his peremptory challenges on others offered as jurors. Did the trial court commit error in overruling the challenges to these jurors for cause? Defendant was entitled to jurors upon said trial who had not formed an opinion with reference to whether these places, on account of their having been raided by "joint smashers," were places where intoxicating liquors were being unlawfully kept, sold, or drank as a beverage in violation of the act of 1887. So far as the jurors named were concerned, it was only necessary to prove these were the places that had been broken into by the parties at the time engaged in joint smashing. That being done, so far as these jurors were concerned, the state had made its case against defendant. He was entitled to be tried by a jury to whom it would have been necessary for the state to prove by legal and competent evidence that the places described in the amended information were places where intoxicating liquors were unlawfully kept, sold, or drank as a beverage in violation of said act, and that defendant was the owner or keeper thereof. The record clearly discloses that the jurors named, from their answers on their voir dire, were disqualified to sit and serve as such upon the trial in the court below. *State v. Miller*, 29 Kan. 43; *State v. Beatty*, 45 Kan. 492, 25 Pac. 899; *State v. Snodgrass*, 52 Kan. 174, 34 Pac. 750; *State v. Beuerman*, 59 Kan. 586, 53 Pac. 874; *State v. Start*, 60 Kan. 256, 56 Pac. 15; *State v. Otto*, 61 Kan. 58, 53 Pac. 995.

For error of the court in overruling the challenge of appellant to said jurors for cause, the judgment of the court below will be reversed, and the case remanded for a new trial.

JOHNSTON, C. J., and SMITH and BURCH, JJ., concurring.

CUNNINGHAM, J. (dissenting). I dissent from the conclusion arrived at, as indicated in the third division of the syllabus and the corresponding portion of the opinion.

In addition to the questions and answers quoted from the examination of Juror Haskins, the record shows the following: "Q. Have you any impression now as to whether or not this defendant, Stevens, was guilty of violating the prohibitory liquor law? A. I think I have. Q. That opinion is formed upon the supposition that he is the Stevens that was named in the article you have read [i. e., newspaper article about the smashing of liquors]? A. Yes, sir. Q. That is the only ground upon which you base your opinion? A. Yes, sir."

Now, at the time the juror was accepted, there was nothing whatever connecting his "impression" derived from newspaper reading with the defendant. It had not been shown that the defendant was the man whose property had been destroyed. Admitting that, had the juror at this time had this knowledge, he would have been disqualified, he did not then have it, and hence was a good juror when accepted. The court could not presume that this apparently irrelevant matter would come into the case, so as to disqualify the juror. The court could not presume that the juror would become possessed of matters outside the case, which, added to impressions he then had, would go to make up a disqualifying opinion. It does appear, however, from the record, that upon the trial there crept into the evidence proof that the defendant had intoxicating liquors destroyed, of the smashing of which the juror had read. It was then for the first time, if ever, the juror was rendered or shown to be incompetent. The defendant then, however, was satisfied with the juror. He made no application to discharge the jury, but permitted the trial to proceed. He did not suggest a mistrial. A defendant ought not thus to be permitted to take the chance of an acquittal, and, when thrown, be given another hearing.

Beyond this, I do not think, even had it been shown at the time of the impaneling of the jury that the defendant was one who had been smashed, that the impression or opinion arising from that was sufficient to disqualify. Such opinion came from the reading of newspaper accounts. It is well characterized by the juror as an impression—such an impression as readers of newspapers get by reading news items, and such only. We have passed the day when only those who cannot or do not read newspapers are eligible to service on juries.

MASON, J. (dissenting). I agree with the views expressed in the last paragraph of the dissenting opinion of Mr. Justice CUNNINGHAM, and for that reason join in the dissent.

GREENE, J. (dissenting). I concur in the views expressed by Justice CUNNINGHAM, as expressed in the last paragraph of his dissenting opinion.

(63 Kan. 560)

**KANSAS CITY v. OVERTON.**

(Supreme Court of Kansas. Feb. 6, 1904.)

**CITY ORDINANCE—VALIDITY—PUBLICATION—NEWSPAPER—HUCKSTER'S LICENSE—REASONABLENESS.**

1. A city ordinance imposing a license tax cannot be regarded as embracing two subjects because it operates to regulate a business as well as to provide public revenue.

2. Section 855, Gen. St. 1901, which provides that ordinances shall be published in a newspaper within the city, is the controlling statute as to the publication of ordinances in cities of the first class, and section 3893, Gen. St. 1901, regulating the printing of legal notices, does not apply.

3. A weekly publication, printed and circulated in a city, containing the current news and matters of general interest, as well as the local happenings, is a newspaper within the meaning of the statute requiring the publication of city ordinances although its circulation may be very limited.

4. An ordinance requiring hucksters or hawkers to pay a license of \$35 for each six months, and requiring a helper or assistant of such huckster or hawker to pay a license of \$15 for the same time, is not so unjust or unreasonable in its operation as to be invalid.

5. The expense of inspection and regulation, the amount of the city indebtedness, and the necessary cost of carrying on the municipal government enter into the question as to whether a license tax is reasonable and just, and these are considerations for the municipal authorities rather than for the courts.

6. A city ordinance imposing a license tax on hucksters or hawkers is not invalid because it exempts from its operation those who are personally selling the products of their own or leased lands.

(Syllabus by the Court.)

Appeal from District Court, Wyandotte County; E. L. Fischer, Judge.

George Overton was convicted of violating a city ordinance, and appeals. Affirmed.

J. A. Smith, for appellant. M. J. Reitz, J. W. Dana, and T. A. Pollock, for appellee.

**JOHNSTON, C. J.** George Overton was convicted of carrying on the business of a huckster without a license, in violation of a city ordinance of Kansas City. It ordained that a huckster or hawker's license for each six months should be \$35, and that each person engaged in helping or assisting a huckster or hawker in the sale of his wares should pay a license, for each six months, of \$15. It also contained a clause providing that nothing in the ordinance should apply to a person who is personally selling the product of his own or leased land. In his appeal he attacks the validity of the ordinance upon a number of grounds.

The first objection is made under the provision that no ordinance shall contain more than one subject, which shall be clearly expressed in its title. The ordinance treats of a single subject, namely, the imposition of a license tax on hucksters and hawkers, and the title explicitly points out the subject of the enactment. The fact that the enforcement of the ordinance may operate to

regulate as well as provide revenue does not indicate two subjects, nor make it obnoxious to the fundamental rule.

The next objection, that the legislation granting to cities power to levy a license tax is invalid because it does not contain restrictions to prevent the abuse of the power, is not tenable. There are restrictions imposed, and the objection made is fully answered in *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486.

It is next contended that the ordinance is ineffectual for lack of publication. It provided that it should be in force from and after its publication in the *Kansas City, Kan., News*. While that print appears to be a general newspaper which had been issued for over two years, its circulation was quite limited. There were issued about 500 papers of the weekly edition, and only 102 of the daily edition, in which the ordinance in question was published. Because of the limited circulation, it is contended that the publication was insufficient, and the ordinance, therefore, inoperative. The claim of the appellant is that the sufficiency of the publication is to be measured by section 1, c. 239, p. 430, Laws 1901, a general provision regulating the printing of legal notices in a newspaper of the county having a general circulation therein, while the city contends that the governing statute is section 855, Gen. St. 1901, which specifically provides that the ordinances of a city of the first class shall be published in a newspaper printed within the city. The former provision requires publication in a newspaper of general circulation in a county, and one which has been published for at least a year, while the latter only requires publication in a newspaper, without prescribing the extent of the circulation or the length of time the newspaper shall have been published. The former makes a publication in any newspaper published in the county sufficient, while the latter requires publication to be in a newspaper printed within the city which enacts the ordinance. The former is general, applying to what are designated as legal notices and advertisements, while the latter is specific, applying only and particularly to city ordinances. The act of 1901, which is an amendment of chapter 156, p. 292, of the Laws of 1891, is a later enactment than the one providing for the publication of city ordinances, and it is contended that it operates to abrogate or repeal the earlier provision. Ordinarily, an act treating a matter solely and specially is not affected by a later act covering a wider field in general terms, and only touching the matter in the special act in a general and incidental way. It will not do so unless the provisions of the general act clearly indicate that it is a substitute for the special and particular legislation. From an examination of the two acts it is plain that the Legislature did not intend that the provision as to the publication of legal notices should cover or affect city or-

¶ 6. See *Licenses*, vol. 22, Cent. Dig. § 48.

finances. This, in fact, has already been determined by *The City of Pittsburg v. Reynolds*, 48 Kan. 360, 29 Pac. 757, where it was held that chapter 156, page 292, of the Laws of 1891, had no application to the publication of city ordinances. While the act interpreted in that decision has been amended by the act of 1901, the provisions which we are considering have not been materially modified, and therefore the case cited is controlling here. It is only necessary, therefore, that the publication should be regarded as a newspaper, to meet the requirements of the law. It was issued at regular stated intervals, contained the current news and matters of general interest, including the local happenings of the city, and a great many proposals and notices concerning the grading and paving of streets and other works of internal improvement. Although the News was very limited in circulation, we think it must be held to be a newspaper within the meaning of the statute, and therefore the objection to the publication of the ordinance cannot be sustained.

An attack is made on the ordinance imposing the license tax on the grounds that it is unjust and unreasonable in its terms, and denies to hucksters and hawkers equal protection and privileges. There is legislative authority to impose license taxes on hucksters, as well as almost all other occupations and lines of business. While the tax imposed appears to be large, we cannot say that it is so unreasonable and oppressive as to be invalid. As was said in *Fretwell v. City of Troy*, 18 Kan. 271, the mere amount of a tax does not prove its invalidity. Many things enter into the determination of what constitutes a just and reasonable license tax, and the amount is necessarily left largely to the judgment and discretion of the municipality. It has been held that a license tax may be imposed on occupations as a matter of regulation, and also for the purpose of obtaining revenue to meet the general expenses of the city. *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486; *In re Chipchase*, 56 Kan. 357, 43 Pac. 264; *In re Martin*, 62 Kan. 640, 64 Pac. 43. The expense of inspection and regulation, the amount of the city indebtedness, and the necessary cost of carrying on the municipal government enter into the question of whether the tax is reasonable and just, and these are considerations for the mayor and council rather than the courts. It does not appear that the tax imposed is in excess of the necessities of the city, nor that it is prohibitive or destructive of the licensed business. In such a case the reasonableness of the tax must be left to the municipal authorities. The *City of Cherokee v. Fox*, 34 Kan. 16, 7 Pac. 625, was an attack on a hawker's license, which required the payments of \$2.50 per day as a license tax. It was contended that the ordinance imposing it was unjust, partial, and oppressive in its operation, but its validity was sustained.

See, also, *Fretwell v. City of Troy*, *supra*; *City of Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949.

The final contention is that the ordinance is invalid because it makes unjust discriminations. The only exception contained therein is one making it inapplicable to persons personally selling the product of their own or leased lands. It is competent for the Legislature to make classifications and distinctions which rest on a reasonable basis. The ordinance in question applies to itinerant traders who have no fixed places of business, but who travel from house to house peddling goods purchased from others. A farmer or gardener who sells the growth or products of his own farm or garden does not come within this class. The vending of the products of the farm or garden in such cases is regarded to be incidental to the principal business of farming and gardening, and it is well settled that they do not come within the meaning of an ordinance requiring the payment of a license for huckstering and peddling in a city. The classification is not arbitrary, as there is a reasonable distinction between the producer who sells his own products and the middleman or itinerant trader who sells what others have produced. *People v. Sawyer*, 106 Mich. 428, 64 N. W. 333; *Davis v. Mayor & Council of Macon*, 64 Ga. 128, 37 Am. Rep. 60; *Burr & Co. v. The City of Atlanta*, 64 Ga. 225; *Commonwealth v. Gardner*, 133 Pa. 284, 19 Atl. 550, 7 L. R. A. 666, 19 Am. St. Rep. 645; *Homewood v. City of Wilmington*, 5 Houst. 123; *Landsford v. Wertman*, 18 Pa. Co. Ct. 469; *Roy v. Schuff*, 51 La. Ann. 86, 24 South. 788; 15 A. & E. Ency. of L. (2d Ed.) 294.

The ordinance makes no exception in favor of soldiers of the Civil War, and hence the question discussed by counsel does not arise in this case.

We find no error, and therefore the judgment of the district court will be affirmed. All the Justices concurring.

(68 Kan. 377)

#### MANLEY v. MAYER.

(Supreme Court of Kansas. April 22, 1904.)

NONRESIDENT EXECUTOR — ATTACHMENT — CONSTITUTIONAL LAW — CORPORATIONS — DISOLUTION — ACTION AGAINST STOCKHOLDERS — STATUTES — AMENDMENT — CONFESSION OF JUDGMENT — DORMANT JUDGMENT.

1. Section 203 of the executors' and administrators' act (section 3009, Gen. St. 1901) authorizes the enforcement of the contract obligation of a nonresident who died owning real estate in Kansas, by attachment and sale of such real estate in an action brought against the nonresident executor. This statute, as so construed, is not in conflict with the provisions of the state or federal Constitutions forbidding discrimination against, or abridgment of the privileges and immunities of, citizens of other states.

2. The amendment to section 40 of the corporation act in 1883 (section 1200, Gen. St. 1889), providing that, for the purpose of enabling cred-



itors to prosecute actions against stockholders, a corporation should be deemed dissolved whenever it had suspended business for more than one year, was not obnoxious to the provision of the state Constitution requiring the subject of an act to be expressed in its title, or to that forbidding the amendment to a section unless the new section should contain the entire section as amended.

3. A confession of judgment against a corporation, based upon its personal appearance by its vice president and presiding member, and upon an affidavit made by him setting out his capacity and the facts regarding the indebtedness, will not be held void upon its face, when interposed by its owner as a defense in an action brought to enforce his liability as a stockholder in the corporation.

4. A judgment against a corporation by confession, in favor of the executor of an estate, is not rendered void for all purposes by the fact that it is based upon an appearance and affidavit made by an officer who, as an individual, is interested in the estate as a legatee.

5. A judgment in this state becomes dormant by the death of a party. Its revivor in the name of the representative of such party restores the judgment to full force, and gives it effect for the ensuing period of five years, without execution, to the same extent as a revivor in the case of a judgment that has become dormant for want of an execution.

(Syllabus by the Court.)

Error from District Court, Atchison County; W. T. Bland, Judge.

Action by William G. Mayer against Reuben M. Manley. Judgment for plaintiff, and defendant brings error. Affirmed.

L. F. Bird, for plaintiff in error. Jackson & Jackson, for defendant in error.

MASON, J. William G. Mayer sued Reuben M. Manley, as executor of George Manley, under the provisions of sections 1200 and 1204 of the General Statutes of 1889 (now repealed), authorizing creditors of dissolved corporations to bring action against stockholders upon their individual liability, and recovered a judgment, which the defendant seeks to reverse. George Manley, a resident of New Jersey, died owning real estate in Kansas; and jurisdiction was obtained by attaching this property as that of the executor, also a nonresident. This was done under the authority of section 3009, Gen. St. 1901, which reads: "An executor or administrator duly appointed in any other state or country may sue or be sued in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued."

It is claimed that this statute was only intended to authorize a nonresident executor to be sued as a resident executor might be; that a creditor of the estate of a decedent, however his claim may be established, can only collect it by sharing in due proportion with other creditors in the proceeds of an orderly administration under the direction of the probate court, and not by seizing and selling specific property; that the title to the real estate was in the devisees under the will, not in the executor; and that it could

not be levied upon under process against the latter. These arguments would appeal to the court with much force if the questions presented were new. But they are not. They have been determined adversely to the contentions of plaintiff in error in a series of decisions by this court, commencing with *Cady v. Bard*, 21 Kan. 667, decided in 1878. See *Manley v. Park*, 62 Kan. 553, 64 Pac. 28, and cases there cited. So far as relates to the interpretation of the statute, this consideration should be conclusive. A judicial construction placed upon its language by a united court over a quarter of a century ago, and repeatedly affirmed without dissent, must be deemed to have received the sanction of legislative approval. Granting that the court in the first instance mistook the purpose and intent of the act, there has been so abundant opportunity for the lawmaking power to give further expression to its will that its failure to act amounts to a ratification. With respect to the validity of the law as so construed and accepted, the weight to be given the earlier decisions is less controlling, and depends upon the force of the reasoning by which they are supported. It is urged that, under the construction given it, the statute conflicts with section 17 of the Kansas Bill of Rights, with section 2 of article 4 of the federal Constitution, and with the fourteenth amendment to it, in that it makes a distinction between citizens of Kansas and those of other states; denying to the latter privileges and immunities of the former, and depriving them of property without due process of law. The statute is an unusual one. It originated in this state at the time of the revision of 1868, when the chapter regarding executors and administrators was adopted from Ohio. The corresponding section there (1 Rev. St. Ohio 1860, c. 43, § 236) provided only for suits by, not against, foreign executors and administrators. It was transplanted with only so much change of language as authorized them to be sued, as well as to sue, "in like manner and under like restrictions as a non-resident." If any similar provision exists elsewhere, its validity seems not to have been drawn in question. The territory of Washington formerly had a statute expressly authorizing the attachment of the property of nonresident executors, but it was repealed before being passed upon, although it was referred to in *Barlow v. Coggan*, 1 Wash. T. 257. In *Craig v. Railroad Co.*, 2 Ohio N. P. 64, the constitutionality of a statute authorizing nonresident executors to be sued was affirmed; the opinion citing *Cady v. Bard*, supra. The same case is cited with approval in 1 *Woerner's American Law of Administration*, p. 360, and in *Reno on Nonresidents*, § 59, where it is said: "There seems to be no doubt that a state is not restrained by the national Constitution from authorizing suits to be brought in its courts against foreign executors and administrators, and that service of process by

attachment of property within its jurisdiction, and notice by publication to the nonresident foreign executor or administrator, in accordance with the local statute, will confer jurisdiction over such property, and will justify its sale upon execution. \* \* \* Such statutes seem to be eminently just and proper. They afford an easy means of preventing the withdrawal of local assets before the claims of local creditors have been satisfied. Local creditors can protect themselves by the simple process of attachment and publication. Their constitutionality seems clear. Such state process is not contrary to 'due process of law,' as against the defendant's title to the property attached, even if he does not appear in the proceedings, for the preliminary attachment and publication subject the property to the control and jurisdiction of the court, which is therefore authorized, upon due proof of the plaintiff's claim, to order its sale, and thereby to divest the title of the nonresident defendant." In *Manley v. Park*, 62 Kan. 553, 64 Pac. 28, the question of the constitutionality of the statute was discussed to some extent, but not definitely passed upon, for the reason that it was treated as not having been raised before judgment. It was sought to have this case reviewed by the United States Supreme Court, but the judgment was there affirmed on the same ground. *Manley v. Park*, 187 U. S. 547, 23 Sup. Ct. 208, 47 L. Ed. 296.

The claim is made that the statute discriminates against the nonresident executor in three ways, namely: (1) In permitting suit to be brought against him in the district court, whereas resident executors can only be sued in the probate court; (2) in permitting specific assets under his control to be segregated for the benefit of a particular creditor, whereas resident executors are allowed to apportion the proceeds of the property equitably among all the creditors; (3) in permitting him to be sued in attachment upon no other ground than that he is a nonresident. The first contention is unsound in fact. The resident executor, like the nonresident, may be sued in the district court. Section 2891, Gen. St. 1901. The second contention seems based upon solicitude for the rights of other creditors, rather than for those of the executor. Nonresident creditors are afforded the same privilege of attachment as resident. Whether, in a controversy between two attaching creditors, the ordinary rules of priority would be affected by the consideration that the property was a part of the estate of a decedent, is not a matter to be inquired into at the instigation of the executor. The only issue, as to him, relates to cutting off his title and subjecting the property to the payment of the debts sued on, if found to be valid. In Tennessee an attachment may be had "where any person liable for any debt or demand, residing out of the state, dies, leaving property in the state." Section 5211, Shannon's Code 1896. It was held in *Bac-*

*chus v. Peters*, 85 Tenn. 678, 4 S. W. 833, that "the statute was intended to afford the creditor a simple and speedy remedy for the collection of his debt where administration was not granted—too expensive or unnecessary—but was not intended to provide a method by which one creditor might by diligence obtain priority. In cases where there are no other creditors, or where none intervened, and no insolvency exists or is suggested, and proper defense interposed before the final appropriation of property attached, the statute would operate for effectual relief of the attaching creditor alone." The reason of the rule that an executor cannot (without statutory authority) sue in a foreign jurisdiction is said to be "the protection of local creditors, who might be injured by permitting the withdrawal of the assets, and compelling them to resort to a foreign jurisdiction to obtain satisfaction of their claims." 13 A. & E. Encycl. of L. 948. "That this is the ground on which the rule is enforced is shown by the cases on ancillary administration, which uniformly hold that the duty of the ancillary administrator here is to account to domestic creditors, and, after they are satisfied, to pay the balance to the primary or domiciliary administrator." *Laughlin v. Solomon* (Pa.) 36 Atl. 704, 57 Am. St. Rep. 633. "Every sovereign has his own code of administration, varying to infinity, as to the order of paying debts, and, almost without an exception, asserting the right to be himself first paid out of the assets." *Smith v. Union Bank*, 5 Pet. 518, 526, 8 L. Ed. 212. "By the administration law, foreign executors and administrators may sue and be sued in this state, like those of our own appointment; thereby, in most cases, making it unnecessary that any ancillary administration should be instituted." *Swearingen v. Morris*, 14 Ohio St. 424, 431. The Ohio statute referred to, relating to ancillary administration, provided: "The proceeds of such assets shall be applied to the payment of the debts which shall be proved against such estate before such administrator, \* \* \* and the surplus, if any, shall be paid into the court granting such administration for the benefit of the estate of such decedent, in the state where the decedent resided at the time of his death." 1 S. & C. St. 1860, c. 43, § 260. "A judgment against an administrator is, in legal effect, an adjudication subjecting the assets within the jurisdiction of the court to the satisfaction of the claim in suit." *Burton v. Williams* (Neb.) 88 N. W. 765. "It is a settled rule of law of this state that a domestic creditor of a nonresident decedent will not be compelled to go to a foreign jurisdiction if there be property here which can be applied to the satisfaction of his claim. We therefore assume the right to administer the property here for the benefit of domestic creditors, and to impress upon it a lien or trust for their benefit." *Montgomery v. Boyd* (Sup.) 79 N. Y.

Supp. 879, 885. These citations and quotations sufficiently show the general acceptance of the doctrine that it is competent for the Legislature by appropriate action to subject such property of a decedent as is located within the state to the payment of creditors who see fit to resort to the courts of that state. This, so far as relates to the complaints here made, is all that the statute under discussion attempts. The particular legal machinery by which this result is accomplished is not a matter of concern to the foreign administrator. "It is not a right, privilege, or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action, instead of by another." *Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389, 16 Sup. Ct. 344, 40 L. Ed. 467. With regard to the third contention—that it is an unlawful discrimination to allow an attachment to issue against a nonresident, and not against a resident executor—no reason is perceived, other than those already considered, for distinguishing this question from that arising upon the usual statute authorizing the attachment of the property of a nonresident for the very reason that he is a nonresident. In either case the proceeding is in fact a mere device for obtaining jurisdiction of the property for the purpose of applying it to the payment of debts, there being no way by which personal jurisdiction of the nonresident may be obtained. *Dillon v. Heller*, 39 Kan. 599, 18 Pac. 693. "No one ever dreamed that the attachment laws of the several states authorizing attachments against nonresident defendants were violative of the Constitution of the United States." *Pyrolusite Manganese Co. v. Ward*, 73 Ga. 491. "The constitutional provisions are not violated by a statute which allows process by attachment against a debtor not a resident of the state, notwithstanding such process is not admissible against a resident." *Cooley on Constitutional Limitations*, 397. In *Central Loan & Trust Co. v. Campbell*, 173 U. S. 84, 97, 19 Sup. Ct. 346, 351, 43 L. Ed. 623, it is said: "The only remaining contention to be considered is the claim that the territorial statute authorizing the issue of an attachment against the property of a nonresident defendant in the case of an alleged fraudulent disposition of property is repugnant to the fourteenth amendment to the Constitution of the United States, and in conflict with the civil rights act. The law of the territory, it is said, in case of an attachment, for the cause stated, against a resident of the territory, requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, whilst it has been construed to make no such requirement in the case of an attachment against a nonresident. This, it is argued, is a discrimination against a nonresident, does not afford due process of law, and denies the equal protection of the laws. The elementary doctrine is not denied,

that, for the purposes of the remedy by attachment, the legislative authority of a state or territory may classify residents in one class, and nonresidents in another; but it is insisted that where nonresidents 'are not capable of separate identification from residents by any facts or circumstances other than that they are nonresidents—that is, when the fact of nonresidence is their only distinguishing feature—the laws of a state or territory cannot treat them to their prejudice upon that fact as a basis of classification.' When the exception thus stated is put in juxtaposition with the concession that there is such a difference between the residents of a state or territory and nonresidents as to justify their being placed into distinct classes for the purpose of the process of attachment, it becomes at once clear that the exception to the rule which the argument attempts to make is but a denial, by indirection, of the legislative power to classify which it is avowed the exception does not question. The argument, in substance, is that, where a bond is required as a prerequisite to the issue of an attachment against a resident, an unlawful discrimination is produced by permitting process of attachment against a nonresident without giving a like bond. But the difference between exacting a bond in the one case, and not in the other, is nothing like as great as that which arises from allowing processes of attachment against a nonresident and not permitting such process against a resident in any case. That the distinction between a resident and a nonresident is so broad as to authorize a classification in accordance with the suggestion just made is conceded, and, if it were not, is obvious. The reasoning, then, is that, although the difference between the two classes is adequate to support the allowance of the remedy in one case, and its absolute denial in the other, yet that the distinction between the two is not wide enough to justify allowing the remedy in both cases, but accompanying it in one instance by a more onerous prerequisite than is exacted in the other. The power, however, to grant in the one and deny in the other, of necessity embraces the right, if it be allowed in both, to impose upon the one a condition not required in the other, for the lesser is necessarily contained in the greater power. The misconception consists in conceding, on the one hand, the power to classify residents and nonresidents for the purpose of the writ of attachment, and then, from this concession, to argue that the power does not exist unless there be something in the cause of action for which the attachment is allowed to be issued which justifies the classification. As, however, the classification depends upon residence and nonresidence, and not upon the cause of action, the attempted distinction is without merit." Prior to 1883 it was provided by section 44 of the corporation act (Gen. St. 1868, c. 23) that creditors might sue the stockholders of

a dissolved corporation upon their individual liability, and by section 40 it was provided how a corporation might be dissolved. In 1883 (Laws 1883, p. 88, c. 46) this section 40 was amended by adding a provision that a corporation should be "deemed to be dissolved," for the purpose of enabling creditors to sue stockholders, whenever it had ceased to do business for more than one year. It is claimed by plaintiff in error that this amendment is void because enacted in violation of section 16 of article 2 of the Kansas Constitution, relating to the title of acts, and requiring amendments to sections to contain the entire section amended. It is argued that, under color of amending section 40, the Legislature really attempted to amend section 44; that the new matter added to the statute had no reference to the subject of when or how a corporation is dissolved, but merely gave a new remedy to creditors against stockholders. The substance of the argument is that the situation is the same as though the Legislature had attempted to accomplish the purpose intended by directly enacting that section 44 should be amended by adding certain words thereto, without incorporating into the new act the provisions of the section already existing. This course would obviously have been within the letter and reason of the constitutional prohibition. But the answer to the argument is that while the Legislature might properly have reached the desired end by amending section 44 in set terms, incorporating the old section with the amendment into a new one, or might have improperly attempted this by the course suggested, it in fact chose another method, and in due form amended section 44. It is not true that the new matter had no relation to the subject of the dissolution of the corporation. If the new conditions prescribed as authorizing a suit against the stockholders had in fact no relation to the matter of the dissolution of the corporation, and the Legislature had sought to arbitrarily classify corporations as dissolved under circumstances manifestly not justifying such a term, a very different question would be presented. But there is no impropriety in calling a corporation dissolved when it has ceased for a year to do the business for which it was created. Nor is there anything inconsistent in providing that a corporation may be at the same time dissolved for certain purposes, and not dissolved for others.

It is further objected that the action will not support an attachment, because not founded on contract. It has repeatedly been held, however, that the liability sued upon is contractual. It is also claimed that the bonds of the corporation that formed the basis of the suit were void because not authorized by its charter. They purported to be issued for existing obligations of the company, and were certainly not void upon their face. Complaint is also made that the trial court permitted plaintiff to introduce in evi-

dence a pleading filed by defendant in another action, in which certain facts were admitted for the purpose of such action only. If this was error, it was not material, since the trial was had without a jury, and there was competent evidence upon the only issue affected sufficient to support the finding of the court.

The objections so far considered relate to the right of plaintiff to maintain the action at all, and upon all such objections our holding is against the plaintiff in error. But other questions are presented, relating to the amount of recovery, and to matters which defendant claimed should limit the total amount of his liability to corporate creditors. The most important of these concerns a judgment held by him against the corporation, which was first allowed, but afterwards disallowed, by the trial court, as a limitation upon his liability. The judgment was rendered upon confession, and the objections made to it are three—that the statute relating to judgments by confession was not complied with, and the judgment was therefore a nullity; that it was rendered in favor of an executor upon a confession made by an officer assuming to act for the corporation, who, as an individual, was a beneficiary of the act, in that he was one of the distributees of the estate represented by the executor; and that the judgment had become dormant, and so was unavailable for any purpose. The first objection turns upon the fact that the judgment was founded upon the personal appearance of the corporation in court by R. M. Manley, its "vice president and presiding member," and upon an affidavit made by him. The statutory provisions relating to judgment by confession are as follows (sections 402-405, Civ. Code):

"Sec. 402. Any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and with the assent of the creditor or person having such cause of action, confess judgment therefor; whereupon judgment shall be entered accordingly.

"Sec. 403. Judgments may be entered upon confession by an attorney authorized for that purpose by a warrant of attorney, acknowledged or proved as conveyances of land, without any previous process or proceeding; and judgments so entered shall be a lien from the date of entry.

"Sec. 404. The debt or cause of action shall be briefly stated in the judgment, or in writing, to be filed as pleadings in other actions.

"Sec. 405. Before any judgment shall be entered by confession, an affidavit of the defendant must be filed, stating concisely the facts on which the indebtedness arose, and that the amount of such indebtedness is justly due and owing by the defendant to the plaintiff."

The proceeding in question was had under the first section quoted, without the use of a warrant of attorney. It is objected that

a corporation cannot personally appear, within the meaning of this section, and that, if it can, the vice president or presiding member has no authority in virtue of his office to make such appearance in its behalf. In *Chamberlin v. Mammoth Mining Co.*, 20 Mo. 96, it was said that the president, "being the person appointed by law to defend the corporation, was competent to confess the action. He might have suffered a judgment by default, and the matter is not made worse by an appearance and confession." This reasoning seems sound and applicable to any officer upon whom service might be had. See *Bank v. Prescott*, 60 Kan. 490, 57 Pac. 121. The statute allows service of summons against a corporation to be made upon its "president, mayor, chairman of the board of directors, or trustees, or other chief officer." Cases are cited in *Debenture Co. v. Lombard*, 66 Kan. 251, 71 Pac. 584, holding that service may be made upon a vice president. The offices of vice president and presiding member are recognized by the statute (section 1308, Gen. St. 1901) authorizing either to execute a deed. Manley might in either capacity (with the addition of the common seal) have made a sufficient power of attorney to enable some one else to confess judgment for the corporation. It is to be borne in mind throughout this discussion that the attack upon the judgment is not only collateral. It is made by one occupying no more advantageous ground than the defendant itself. As between the parties, a judgment by confession may be good, notwithstanding a failure to comply fully with the statute. See *Smith v. State*, 64 Kan. 730, 68 Pac. 641, and cases cited; also *Union Pac. Ry. Co. v. McCarty*, 8 Kan. 125. If this judgment was a valid claim against the corporation, no reason is apparent, in the absence of any charge of fraud, why its owner might not interpose it in reduction of his liability as a stockholder, when sued for a corporate debt. The affidavit in verification of the pleading of a corporation is merely required to be made by some officer. Section 110, Civ. Code. If a manifestly bad service were made upon a defendant corporation, and an answer were filed in its behalf, verified and signed only by some officer other than the president, could the corporation be heard, after judgment, to say that the court had no jurisdiction? Here the corporation's officer made and filed an affidavit required by the statute, setting out his official capacity. This was tantamount to a pleading in an ordinary action. It was verified according to the provisions of the Code. It was legal evidence of its contents, which included a statement of the facts occasioning the indebtedness and authorizing a judgment. No question of fact is raised either as to the validity of the debt, or as to the actual authority of the officer to represent the company. We cannot say that, under these circumstances, and as against the attack here

made upon it, the judgment was, upon its face, utterly void.

It is claimed that the second objection to the judgment, based upon the fact that Manley was a beneficiary of the plaintiff's trust, is substantially the same as that held to be good in *Manley v. Larkin*, 59 Kan. 528, 53 Pac. 859. There an insolvent debtor confessed judgment against himself in favor of an estate in which he was interested as a devisee. This was attacked by another creditor, and it was held void as to him because it resulted in a secret trust in favor of the debtor, by giving him a lien on the real estate to the prejudice of other creditors. Here the situation is very different. The attack is not made by another creditor, nor by any one similarly situated or having equivalent equities. The feature of that case upon which the decision turned was that the confession of the judgment, by creating a lien, became substantially a mortgage. Here the matter of the creation of a lien was not involved, and, indeed, the judgment was no more effective for the purpose for which it is here invoked than the debt upon which it was based would have been, if valid, while there the validity of the claim was immaterial. Again, in that case the debtor confessed a judgment against himself in favor of himself, and thereby, in effect, conveyed property to himself as security. Here he acted merely as an agent for a corporation. His acts under such circumstances are subject to the keenest scrutiny, but it cannot be said that they are under all circumstances absolutely void. "Whenever an agent, in acting for his principal, also deals with himself, \* \* \* such dealings will be held to be valid unless the principal chooses to hold them invalid. Such dealings are not void, but only voidable at the option of the principal." *Barr v. Randall*, 35 Kan. 126, 130, 10 Pac. 515. See, also, *Bank v. Milling Co.*, 59 Kan. 654, 54 Pac. 681. We hold that the judgment is good against this objection.

The third objection made to the judgment is that it had become dormant by plaintiff's permitting five years to elapse without suing out an execution, and that this condition had existed for more than a year, so that the judgment was absolutely barred for all purposes. In reply to this, it is said that, before the expiration of five years from the date of the judgment, the representative powers of William H. Risk, the judgment plaintiff, having ceased, the judgment had been duly revived in the name of his successor, Reuben M. Manley, and that, at the time the pleadings were settled, five years had not elapsed since then. This presents the question whether, when a judgment is revived by reason of the death of a party or the cessation of his powers, such revivor affords a new starting point, and makes the judgment good for five years more without further revivor or execution. Upon the one hand, it is argued that the judgment had

once become dormant and had been revived, and that it could not become dormant again except for causes accruing wholly after such revivor; on the other, that a judgment does not become dormant by the death of a party or the cessation of his powers, and that the substitution of a new party in lieu of one who has died or whose powers have ceased is not a revivor. The latter view has heretofore been urged upon the court in several cases, an especially elaborate discussion of it having been presented in the brief of plaintiff in error in *Johnson v. Wynne*, 64 Kan. 138, which was reversed upon considerations foreign to this matter. The subject of the dormancy and revivor of judgments has given rise to much discussion and disagreement. The decisions in this state have departed radically from the law as construed elsewhere, even under similar statutes. Our Code provides (section 425) that, on the death of a party to an action, it may be revived in the name of his representative, but only if the order therefor is made within a year (section 433); that, if a judgment becomes dormant, it may be revived in the same manner (section 440); that, if either party to a judgment dies, his representative may be made a party to it in the same manner as is prescribed for reviving actions (section 439). This last proceeding is not in so many words described as a revivor, but it is uniformly so designated in the decisions both in this state and elsewhere. A more significant fact is that the statute does not undertake to define "dormancy," and does not apply the term to the condition arising upon the death of a party to a judgment. But in Kansas, as perhaps in no other jurisdiction, such condition is constantly spoken of as "dormancy," and a long line of decisions have assimilated this condition to that of a judgment dormant for want of the timely issuance of execution, until they must be regarded as practically identical. It is held that a judgment dormant for want of execution must be revived, if at all, within the year (*Angell v. Martin*, 24 Kan. 334), and that this is true of a judgment a party to which has died (*Scroggs v. Tutt*, 23 Kan. 181); that, after the year has passed without revivor, neither judgment will support an action (*Mawhinney v. Doane*, 40 Kan. 676, 17 Pac. 44; *Smalley v. Bowling*, 64 Kan. 818, 68 Pac. 630). In the last-cited case it was recognized that all of these decisions, and many others of like nature, are at variance with the current of authority elsewhere, but the majority of the court held that it was too late to attempt to conform to the practice in other jurisdictions. The analogy between the situation arising upon the death of a party to a judgment, and the condition ordinarily known as "dormancy" must be determined in the light of the construction already given these statutes by this court. It is not clear whether the word "dormant," as applied to judgments, had or-

iginally or has ordinarily a well-defined technical meaning; but here it has, by repeated use, been given a definition broad enough to cover judgments that have not wholly lost their vitality, but which cannot support an execution for want of necessary parties. In *Kothman v. Skaggs*, 29 Kan. 5, 17, it was said of a judgment after the death of the defendant: "The judgment then ceased to be a lien against any living person, but it did not become a nullity. It was still a judgment in a limited sense. It was a judgment in abeyance—a dormant judgment." In *Ashmore v. McDonnell* (Kan.) 16 Pac. 687, the term was applied to a judgment against one afterwards sentenced to the penitentiary for life, and therefore civilly dead. It was said: "This conviction deprived the plaintiff of all civil rights, and, before an execution could be issued thereon, this judgment would have to be revived. This not having been done, the execution was issued on a dormant judgment, and was of no validity." This language was omitted from the final opinion as officially published (39 Kan. 669), but only in view of new facts developed, not because the statement of law was doubted. It was quoted with approval in *Seeley v. Johnson*, 61 Kan. 337, 59 Pac. 631, 78 Am. St. Rep. 314, where it was also said (page 339, 61 Kan., and page 632, 59 Pac., 78 Am. St. Rep. 314): "Upon the death of the plaintiff in the judgment, it became dormant." In *Mawhinney v. Doane*, 40 Kan. 676, 680, 17 Pac. 44, 48, it was said: "The judgment sued on is dormant, and the time has expired within which it can be revived. This dormancy was created by the death of Sarah F. Mawhinney." These cases sufficiently illustrate the proposition stated, that, whatever may be the rule elsewhere in Kansas, the death of a party renders a judgment dormant, within the meaning of the statute. When a judgment dormant because of the lapse of five years without an execution is revived, it cannot be doubted that such revivor restores life to it, and makes it good for five years, without the issuance of an execution. It is not a new judgment, but it has been re-animated, restored to activity, and made as effective as ever. So, if a party to such a dormant judgment should die, and a revivor be had in the name of his representative within a year from the occurrence of the first dormancy, this would obviously cure the dormancy occasioned by the want of execution, as well as that resulting from the death. The proceedings in the two cases are alike, and the orders substantially the same. And when the judgment is dormant only because of the death of a party, the order of revivor should be equally effective. We think this view harmonizes with all the actual decisions that have heretofore been made by this court, and with the language used in support of them, except, in part, in the case of *Halsey v. Van Vliet*, 27 Kan. 474. There the only question before the court was whether,

under the facts of that case, the judgment involved was a lien on certain real estate, and it was decided that it was not. The judgment was rendered February 18, 1873. On April 18, 1873, the defendant conveyed the land in question to a third party. On April 28, 1873, the defendant died, and on May 19, 1873, an administrator was appointed. On October 11, 1875, by the consent of the administrator, the judgment was revived. Since the judgment could at that time be revived only by consent, it is obvious, under the authority of *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765, that it could not be made a lien on the land without the consent of the owner. The consent of the representative of the defendant, who had parted with the title, was not sufficient. Mr. Justice Brewer, in discussing the effect of executions issued after the death of a party, and before revivor, expressed his own views as follows: "The writer believes that, so far as affects the question of keeping alive the judgment, those executions cannot be considered nullities. While doubtful whether a sale under them could be upheld, even when collaterally attacked, and conceding that such a sale would be voidable, and would be set aside upon a motion or other direct proceeding, he holds that this result follows alone from the fact that there is no party defendant in being whose property can be seized. He believes that the principle upon which the issue of an execution keeps alive a judgment is that thereby the plaintiff affirms its validity, and that this principle is enforced whenever the plaintiff comes into court and causes an execution to be issued and placed in the hands of an officer, and that it is immaterial whether the defendant then has any property upon which the process may be levied, or whether by the death of the defendant there be any party in being against whom the process may lawfully run. It is in either case equally an assertion by the plaintiff that the judgment is unpaid, and that he is intending at some time and in some way to enforce its collection." The court held this reasoning to be inapplicable, for the reason that the executions were absolute nullities, and that, "when an execution is void, the causing it to issue cannot be regarded a proceeding in good faith to collect the judgment." A valid order of revivor, on the contrary, is the highest form of an affirmation that the judgment is unpaid, since it amounts to a judicial determination to that effect at the instance of plaintiff, and on notice to defendant. We hold that the judgment was not dormant at the time the answer was filed. It is further argued that the revivor was void because made upon only five days' notice. The statute requires only a reasonable notice (*Coal Co. v. Carey*, 65 Kan. 639, 70 Pac. 589), and it cannot be said, as a matter of law, in a collateral attack, that this notice was not sufficient.

Two other demands of the defendant

against the corporation were disallowed by the trial court. It is said by plaintiff in error that this was because they had outlawed between the time of the filing of the petition and the filing of the answer, and the question is argued at length, whether, for the purposes here involved, the commencement of this action should be deemed to stop the running of the statute of limitations against these claims. It is at least doubtful whether plaintiff was in a situation to avail himself of this consideration. However, neither of these questions need be determined. It appears that the claims were based upon guaranties made by the corporation, its obligation being secondary, and there is no such showing of diligence exercised against the principal obligor as to charge it absolutely. On the contrary, the negligence shown seems such as to discharge the corporation altogether. The ruling of the trial court in disregarding these claims is approved, not because action upon them against the corporation was barred, but because it is not shown that a cause of action upon them ever accrued against it.

The conclusions here reached will not affect the final judgment in this particular case, which is one of a series of the same character; but the additional deduction to be allowed defendant will diminish his total liability, and require the reversal of one of the judgments and the modification of another.

This judgment is accordingly affirmed. All the Justices concurring.

(68 Kan. 400)

### MANLEY v. PARK.

(Supreme Court of Kansas. April 22, 1904.)

#### ASSIGNMENT OF NOTE—ACTION BY ASSIGNEE—CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.

1. One who holds the full legal title to a promissory note by assignment may maintain an action thereon against the maker, notwithstanding that he has no beneficial interest in the proceeds; the assignment having been made to enable him to realize on the claim in the interest of the original payee. Overruling *Stewart v. Price*, 67 Pac. 553, 64 Kan. 191.

2. The right of a creditor having various claims against a corporation to exact payment from a stockholder is not such a single and indivisible demand that, by placing one such claim in judgment against the stockholder, he is precluded from proceeding against him upon the others.

(Syllabus by the Court.)

Error from District Court, Atchison County; W. T. Bland, Judge.

Action by Anna O. Park against Reuben M. Manley, executor. Judgment for plaintiff, and defendant brings error. Modified.

L. F. Bird, for plaintiff in error. Jackson & Jackson, for defendant in error.

MASON, J. Richard A. Park, who is succeeded by Anna O. Park, held a debenture

bond issued by a corporation in which George Manley owned stock. The corporation having suspended business for more than a year, and Manley having died, Park sued the executor, Reuben M. Manley, as a stockholder, on the bond, and recovered judgment, to review which this proceeding is brought. All the questions just decided in *Manley v. Mayer*, 75 Pac. 550, arise in this case. As to them nothing further need be said. But two additional questions are also now presented. The first relates to the matter of parties. There was evidence that, while the bond referred to had been assigned to Park, he had no beneficial interest therein; the assignment having been made to enable him to realize on the claim in the interest of the original payee. We are asked to hold, upon the authority of *Stewart v. Price*, 64 Kan. 191, 67 Pac. 553, that under these circumstances he was not the real party in interest, and could not maintain the action. That case was decided by a divided court, three justices dissenting. The two conflicting views involved were there fully discussed, the authorities in support of each being reviewed. There was no difference of opinion on the proposition that the conclusion reached was at variance with the weight of authority, and in conflict with earlier Kansas decisions. For reasons therein stated, we now believe that the law should then have been declared in accordance with the minority opinion, and that it is better to make such declaration at this time, than to confirm that case as an authoritative precedent. When the owner of a note, for reasons satisfactory to himself, assigns it to another, thereby vesting in him the full legal title, the assignee becomes, so far as the debtor is concerned, the real party in interest. The original owner is still the person to be finally benefited by the litigation, but his legal demand is no longer against the maker of the note, but against the person to whom he has assigned it. When the obligor is sued by such assignee (no claim as innocent purchaser being involved), he can make any defense he could have made against the assignor; he is fully protected against another action; and in no way is it a matter of the slightest concern to him what arrangement between the plaintiff and the original creditor occasioned the assignment. This being true, it would be a sacrifice of substance to form to permit the defendant to defeat the action by showing a failure of consideration for the transfer, or that the plaintiff was bound to account to his assignor for a part or all of the proceeds. We hold that the objection urged to the judgment on the ground that plaintiff was not the real party in interest is untenable.

The second question turns upon the fact that the plaintiff had formerly sued defendant and obtained a judgment against him upon a similar cause of action. It is argued that the creditor of a corporation has

but one demand against a stockholder for the payment of all his claims against the corporation, that he may not split this demand and harass the stockholder with several suits, and that when he has once obtained a judgment for any amount, based on the stockholder's individual liability, he has exhausted his remedy against him. The principle is well settled that a single demand, entire in its nature, may not be made the basis of different suits, and, if judgment is obtained upon one part of it, that is a final adjudication of the whole matter. But this principle cannot apply to the facts of the present case. It is true that there is a sense in which the action is brought, not upon the note, but on the statutory liability. This is illustrated by the application of the three-year statute of limitations. On the other hand, it is recognized that the stockholder's obligation is contractual. In view of the statute, whenever one subscribes to stock in a corporation he thereby assumes a liability as to each and every obligation of that body. The corporation might be sued in a separate action upon each of the bonds issued by it. Different issues might arise in each suit. Upon several judgments being obtained by one person upon different bonds, he might, upon failure to collect by the ordinary means, charge a stockholder, by separate motion in each case, with the payment of each and all of the judgments. Each bond of the corporation forms a good cause of action against it. Each bond, with the fact of the stockholder's ownership of stock, forms a good cause of action against him whenever the business of the corporation has been suspended for more than a year. The liability of the stockholder in this regard is as broad as that of the corporation. The judgment complained of will be held good against this objection.

For the reasons stated in *Manley v. Mayer*, the judgment in this case is excessive and will be reduced to \$1,033.97. All the Justices concurring.

(68 Kan. 496)

#### CROSS et al. v. BENSON.

(Supreme Court of Kansas. Feb. 6, 1904.)

HOMESTEAD—EXEMPTIONS—DEATH OF OWNER—FAMILY—DESCENT AND DISTRIBUTION—WILL—ELECTION BY WIDOW—TRUST DEED—CONSTRUCTION.

1. The constitutional exemption of a homestead from forced sale under process of law may survive to the family of its owner after his death.

2. If a husband and wife occupy a tract of land belonging to him as a homestead, she is the family of the owner, within the meaning of the Constitution; and his death does not deprive her of the right to continue to be so designated, in order to maintain the homestead, to which she takes title, and which she continues to occupy, free from forced sale under process of law for the payment of his debts.

3. The purpose of the statute of descents and distributions is to provide for the transmission of title at death in case of intestacy, and to



regulate the division of estates among heirs; it is not primarily an exemption or homestead law; and, though it may enlarge the right to an exemption of real estate from appropriation to the payment of debts, it cannot restrict the constitutional guaranty.

4. Upon the death of her husband, a wife may elect to take title under his will to their homestead, which she continues to occupy, without subjecting it to the payment of his debts.

5. The use of merely formal phrases will not make a devise of a homestead subject to the payment of the testator's debts. To do so, the language employed must be unequivocal and imperative.

6. A trust deed examined, and held not to be testamentary in character.

7. A minor child, who resides with her grandparents under such circumstances that she becomes in fact dependent upon them, and they become morally responsible for her nurture, becomes a member of their family, within the meaning of the homestead provision of the Constitution, without formal adoption; and this is true even though her father, who is divorced from her mother, still lives, and has a decree of court awarding her custody to him.

(Syllabus by the Court.)

In Banc. Error from District Court, Lyon County; Dennis Madden, Judge.

Action by A. W. Benson, receiver, against Mary Cross and others. Judgment for plaintiff, and defendants bring error. Reversed.

Kellogg & Madden and Lambert & Hugins, for plaintiffs in error. Rossington, Smith & Histed and Graves & Hamer, for defendant in error.

BURCH, J. On the 4th day of September, 1894, H. C. Cross, of the city of Emporia, died testate, leaving as his heirs at law his widow, Sue S. Cross, and an adult son, Charles S. Cross. At the time of his death he was the owner of certain contiguous lots of ground within the limits of the city, which in their entirety were less than one acre in extent, and which were occupied as a residence by himself and wife. Their infant granddaughter, Mary, the child of Charles S. Cross, lived with them. Charles S. Cross had been divorced from Mary's mother. The decree dissolving their marriage awarded the legal custody of the child to her father, but, by an understanding of the parties, it was arranged that Mary should make her home with her grandparents. Thenceforth they assumed the care and the responsibility of her nurture, and she was treated as their child. The will of H. C. Cross expressed the desire that his debts and funeral expenses be first paid, and devised the homestead to his wife. Upon its probate the widow elected to take under the will. After the death of her husband, Mrs. Cross and Mary continued to reside upon the homestead property. Mrs. Cross continued to sustain the same cherishing relation toward Mary as before, and ultimately adopted her by formal proceedings in the probate court. Charles S. Cross survived his father little more than a year. Upon February 5, 1902, Sue S. Cross died, leaving a will, which was afterward properly probated, in which the homestead was devised

to F. C. Newman, as executor, to be sold, however, and the proceeds to be invested in interest-bearing securities, which, with the income to accrue from them, were to be the property of Mary. On the day following that of the execution of the will, Mrs. Cross executed a deed purporting to convey in fee the homestead, with full covenants of warranty, to F. C. Newman, as trustee, for the benefit of Mary; reserving to herself, however, a life estate, and providing that after her death the property should be sold, and the proceeds devoted to the same uses as the will prescribed. A subsequent codicil to the will annulled a specific bequest, and changed the beneficiaries of the residual portion of the estate, but did not disturb the devise of the homestead, upon which Mary continued to abide alone.

Creditors of the estate of H. C. Cross have secured a judgment subjecting this property to the payment of their claims, and the question for determination is whether that judgment is authorized by our Constitution and laws. In support of the judgment, the following claims are made:

"(1) The constitutional exemption does not survive the death of the owner of the homestead. Any extension of the homestead estate beyond the death of the owner must be found, if at all, in the statute of descents and distributions.

"(2) Under the statute of descents and distributions, a homestead estate does not survive for the benefit of a widow and child or children who have reached the age of majority, there being no minor heirs.

"(3) After the death of the homestead owner, who dies testate, leaving children who have attained the age of majority, and without minor heirs, his widow may elect to take under the statute of descents and distributions, or under the will. If she elects to take under the will, she thereby abrogates her right to claim any homestead exemption against the debts of her husband.

"Applying the foregoing propositions of law to the case at bar, our position may be summarized:

"(a) At the time of the death of H. C. Cross, he leaving a widow and one son, who had attained the years of majority, the homestead character of the property ceased and determined, and his widow and son, if he had died intestate, would have been entitled each to a moiety of the property under the statute of descents and distributions. Inasmuch as the only living adult son could not claim the integrity and protection of the homestead, neither could the widow.

"(b) But H. C. Cross died testate, and, in his will, devised the whole of the property in question to his widow; and, she electing to take thereunder, it follows that she thereby took the same subject to the antemortem debts of her husband, the payment of which was expressly directed by his will.

"(4) Assuming, however, but merely for

the purpose of argument, that Sue S. Cross did acquire a homestead under the will, exempt from the debts of her husband, such homestead, affected by such exemption, could continue only during her life; and while she might sell or convey the property in her lifetime, free from the obligations of her husband, she could not devise it, nor could her heirs inherit it, exempt from the payment of her husband's debts.

"(5) The trust deed to F. C. Newman, of March 2, 1901, was not a conveyance, but amounted merely to a testamentary disposition of her property in accordance with the terms of the will already made, and this is made conclusively apparent by her subsequent change in the disposition of her property by the codicil of November 21st."

The principal question here proposed for determination is one of constitutional interpretation.

Out of the womb of history there has come to us an institution, known as the "family." Its establishment has been believed to be by the ordinance of Divinity itself. "God setteth the solitary in families." The pagan Plato understood its fundamental importance. "Whatever is most excellent in the state must always begin at the fireside." And when the modern critical method of inquiry made it the subject of investigation, and the sciences of biology and anthropology and sociology, and the rest, had summed up and compared the results of their exhaustive researches, they concurred in proclaiming that, aside from its efficiency as an economic arrangement for the promotion of race and individual progress, the moral virtues which constitute the bright, consummate flower of our humanity all had their origin, received their nurture, and attained their perfection within and through the family. Therefore the present age, with its keener insight and its ampler understanding, regards the family with an enthusiasm and a respect more tender, more intense, and more profound than ever before; and the courts will abate none of their jealousy to see that laws intended for its conservation and protection are administered in a spirit as beneficial and as kind as the language of the instrument will bear.

A consideration of the origin and purpose of the homestead right, and of its establishment in the Constitution of this state, will show that the provisions made in that document were intended to be complete, and that all legislative action in attaining the desired end was intended to be dispensed with. With a higher appreciation of the function and importance of the family came more liberal sentiments toward its submerged element, the wife, and her elevation, through an amelioration of the law. The word "family" has its root in the Oscan word "famul," which signifies a slave. Much of this primary meaning was applicable to the status of married women at the common law with

reference to property. Marriage amounted to a spoliation of the woman, and an investiture of the man with property in her personalty, and the possession and enjoyment of her realty, and her individuality of management and control of whatever was hers at marriage was completely merged in that of her husband. Under the same common law the creditor could seize and appropriate to the satisfaction of his debt the goods and the estates of his debtor, without distinction as to whether they were held by virtue of his marital right, or by other methods of acquisition and ownership. As a result, wives found themselves stripped of their possessions by the folly or misconduct of spendthrift husbands, reduced to penury without any fault of their own, and rendered powerless to retrieve their fortunes by the incapacity which the law imposed. To eradicate these evils, hoary with the sanction of centuries, two remedial measures were proposed—the married woman's separate estate, and the homestead right; the one seeking to restore to women their just share in the management and control of their own property, and the other seeking to guard against the sufferings of women and children, who, through ill conduct or misadventure, were deprived of support, by segregating a modicum of property for undisturbed occupation as a home, entirely exempt from the ordinary incidents of ownership—the right of free alienation by the owner, and the liability to seizure and sale for his debts. Article 15 of the Constitution contains provisions upon both these subjects. But the saving of a home to the family, free from alienation without joint consent, and beyond the reach of process of the law, was of overshadowing importance. Therefore, while section 6 directs the Legislature to provide for the protection of the rights of women in acquiring and possessing property, real, personal, and mixed, separate and apart from their husbands, section 9 itself creates, limits, and defines the homestead right. The difference in treatment of the two subjects is strikingly shown by bringing the sections of the Constitution relating to them in juxtaposition:

"Sec. 6. The Legislature shall provide for the protection of the rights of women, in acquiring and possessing property, real, personal and mixed, separate and apart from the husband; and shall also provide for their equal rights in the possession of their children."

"Sec. 9. A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the pay-

ment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife."

Sections 6, 9, art. 15, State Const.

Upon the matter of homestead not only is legislative aid dispensed with, but legislative interference is foreclosed. Without any statute upon the subject, no forced sale of any homestead occupied in the manner prescribed could be lawful, and no conditions may be imposed by statute upon the enjoyment of the right. Since this is true, it is not apparent why the framers of the Constitution, with all their admirable solicitude for the poverty and pain of the innocent victims of weakness and folly and unpropitious fate, should forget the desolation and disaster which follow in the wake of death; why a wife and children should be so zealously screened so long as a husband and father lives to beat up the stream of the world's unkindness with them, but that a widow and orphans should be left to the whim and caprice of inconstant legislation. Indeed, it would seem to be something of an imputation to assert that the constitutional convention stopped short in its labors, and left the most delicate and the most urgent portion of its work unguarded to the Legislature. The language of the Constitution itself forbids such an interpretation. By its terms the area and appurtenances of the homestead are expressly limited; the beneficiary of the right is expressly limited; the manner of its enjoyment is expressly limited; the method of transferring the estate in the land it covers is expressly limited; the charges which may be made against it are expressly limited, and the character of process upon which it may be sold is expressly limited; but the time during which occupation by the family of the owner shall be a barrier to its appropriation for the payment of debts is not limited. There is no time appointed beyond which it shall not endure.

To satisfy the creditors who press this suit, it is necessary to ingraft upon the words of the Constitution, "shall be exempted from forced sale under any process of law," the alien phrase, "during the lifetime of the owner whose family occupies it." The Constitution itself forbears to express any such limitation. Such an interpretation can scarcely be made in a document which enumerates its own exceptions and prescribes its own limitations, and much less should it be undertaken when the result would be to abridge the scope and curtail the benignant power of a remedial charter.

Whenever, therefore, a homestead is once established, it will endure as long as the enumerated elements essential to its existence continue to co-ordinate. The homestead may be voluntarily abandoned by those entitled to

its privileges, it may be conveyed away, and the family itself may be dissolved, until there is no one left to invoke the constitutional protection, as in *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529; but, so long as family occupation as a residence persists, no creditor may obtrude upon the sanctity of the homestead demesne.

Applying these propositions to the case at bar, and, for the purpose of the application, excluding Mary Cross from the family of her grandfather, it may be observed that, before the death of H. C. Cross, his wife, Sue S. Cross, constituted his family. That he had an adult son living apart from him in no way disparaged that fact. She was "the family of the owner" of the lots. Because she was his family, and occupied the lots as a residence, it was exempt from the payment of his debts. When her husband died, the conditions in respect of which the Constitution gave her a home were not improved. The gaunt gray wolf of debt, that had been skulking in the shadows of her habitation and crouching at its door, could ravage still. She continued, as before, to be the constituent element of the family of H. C. Cross; she continued in the rightful occupation of the homestead as her residence; and it would turn into mockery the constitutional provision prepared against the days of her adversity to say that her husband's creditors might enter as soon as his hearse had left the door.

It is said, however, that, in the light of the statute of descents and distributions, the homestead must be regarded as ceasing at the death of H. C. Cross. The statute of descents and distributions can shed no light upon the subject. The Constitution creates the homestead. This court is the final interpreter of that instrument, and no legislative misconception of its scope, if any such should become manifest, can be permitted to diminish the field of its operation. However, the purpose of the statute of descents and distributions must be taken to be what its name imports—a statute providing for the transmission of title at death in cases of intestacy, and regulating the division of estates among heirs. It is not an exemption or homestead law. Upon the death of the owner, the title to his land must vest anew, or escheat to the state. If there be no will, the law alone accomplishes the transfer, and names the persons who take. With this devolution of title the Constitution has nothing to do. Property descending to heirs must be distributed, to be properly enjoyed. With this distribution the Constitution has nothing to do. These are matters left by the Constitution to the Legislature. But homestead interests are disturbed by them no more than the division of the title and the division of the land necessarily require, and the rights of creditors are enlarged no further than these circumstances necessarily compel. Neither descent nor distribution can make subject to execution for

payment of debts any portion of the homestead inherited and occupied by a person who is not by death or by subsequent circumstances taken from the category of the family of the owner. If in this case there had been no will, upon the death of H. C. Cross the title to the homestead would have descended to Sue S. Cross, the widow, and the adult son, Charles S. Cross. It may be granted, for the purpose of the illustration, that, because the latter was of mature age, partition could have been compelled. But, because Sue S. Cross was the beneficiary of a homestead right in the property, her share upon a division would have retained its homestead character so long as she chose to observe the requirements making it such. The primary function of the statute of descents and distributions, therefore, is the transfer of title and the partition of the estate among its inheritors; and, while it may enlarge the privilege of freedom from appropriation to the payment of debts, it cannot restrict the constitutional guaranty. If it be said that this construction of the Constitution is not in harmony with those provisions of the statute of descents and distributions which seem to permit no homestead privilege to a widow when adult children also survive the owner's death, it can only be replied that the Constitution is the paramount law, and its mandates must be obeyed.

It is further claimed that the taking of title under the will of a homestead owner necessarily abrogates the homestead right, because a person must devise his lands "subject nevertheless to the rights of creditors." Section 7937, Gen. St. 1901. This proposition ignores the persistence of the exemption from forced sale, independent of changes in the title, already illustrated in the case of descent. In this case Sue S. Cross occupied the lots in question as a residence, and as the family of the owner, H. C. Cross. By the will of the owner the title was devised to her, and she elected to take under the will. But there was no hiatus in her occupation of the premises as a residence and as the family of H. C. Cross. The homestead privilege was no more disturbed than it would have been, had H. C. Cross deeded the lots to his wife in his lifetime, and while she was occupying them as a homestead. She continued in the enjoyment of precisely the same right to immunity from the loss of her hearthstone at the suit of her husband's creditors as before his death. And since the lots in question were continually impressed with the homestead interest of Sue S. Cross in the lifetime of her husband, at the date of his death, and during the following years, until her own demise, creditors enjoyed no rights to which such lots were subject, or to which the making of a will of them was subject.

It is asserted that since Sue S. Cross elected to take the property in question under the terms of a will, in which a request that the

testator's debts and funeral expenses be first paid was expressed, she held it subject to the payment of such charges. In England the validity of the rule that a general direction for the payment of debts creates a charge upon real estate is now doubted. "Such, then, is the long line of cases in which it has been held that a general direction by a testator that his debts shall be paid charges them upon his real estate. Though certainly in some of the wills there were expressions which might be fairly considered to sustain the construction independently of any such doctrine, it seems to be generally admitted that the courts have allowed their anxiety to prevent moral injustice by the exclusion of creditors, 'and that men should not sin in their graves,' to carry them beyond the limits prescribed by established general principles of construction." Jarman on Wills, § 1397. In Bigelow on Wills, 317, it is said: "Indeed, as a new question, there would be ground for question whether a direction to pay debts and legacies should be deemed a charge upon land devised." In the matter of City of Rochester, 110 N. Y. 159, 17 N. E. 740, it is said: "Payment of debts will not be charged upon a devise of real estate without clear evidence of such an intent in the will. The intention may not be presumed merely from the use of formal words, or the presence of commonly employed phrases." Other American cases are to the same effect. *Starke v. Wilson*, 65 Ala. 576; *Cooch's Ex'r v. Cooch's Adm'r*, 5 Houst. 540; *Matter of Bingham*, 127 N. Y. 296, 27 N. E. 1055; *Matter of Powers*, 124 N. Y. 361, 26 N. E. 940. Much more imperative and unequivocal must be the language of a will which would subject to the payment of debts that property toward which the eye of the creditor need never be turned.

Finally it is said that even though Sue S. Cross might have the right to enjoy the property in question free from her husband's debts during her lifetime, and might have the right to convey it disincumbered of such obligations, yet the Newman trust deed was insufficient for such purpose, because it was testamentary in character. A policy to be followed in the construction of doubtful instruments of the character under consideration was adopted in *Love v. Blauw*, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334, and applied in *Durand v. Higgins* (Kan.) 72 Pac. 567. It will not now be departed from. The codicil to the will, executed after the relations of the parties to the deed had become fixed, could not alter their rights.

The constitutional question discussed above is a new one. Because of the diversity of their provisions, and the contrariety of view of the courts construing them, little assistance has been derived from the Constitutions and laws of other states. No previous decision of this court has been made with the interpretation of the Constitution here adopt-

ed in mind. Many expressions of opinion to be found in earlier cases point the way. Some affirmations by way of argument and illustration appear to be opposed to the view here taken. But upon a careful discrimination of the precise points determined, it will appear that no former decision need now be overturned. The case of *Batley v. Barker*, 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33, is most in conflict. The doctrine there applied is the strict one upon which *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529, is based. In the latter case it was held that a sole adult remnant could not himself constitute his own family, so as to preserve land exempt from the payment of his own debts. Thus, it might be argued that, after the death of H. C. Cross, Sue S. Cross could not herself be her own family, as against the claims of her creditors. If, however, this be admitted, a single individual, Sue S. Cross, was sufficient to constitute the family of H. C. Cross, and, because of her sole existence, the precincts of her home were inviolable by his creditors. H. C. Cross and Sue S. Cross alone exhibited the clear distinction of the Constitution between an owner, whose property is liable for his debts, and his family, who would be unhoused if the liability were enforced; and his death could not deprive her of the right to continue to be designated the family of H. C. Cross, as against the claims of those same creditors.

In order that the ground of this decision might not be misunderstood, the relation of Mary Cross to this homestead has been excluded from consideration. If, however, a plurality of persons were required to form the family of H. C. Cross, the condition was fulfilled. Even though her father was alive, and held a court decree for her custody, by the conduct of the parties Mary Cross became a member of the family of H. C. Cross, within the meaning of the homestead provision of the Constitution. Formal adoption was not necessary. The fact of her actual dependence upon her grandparents, and their consequent moral responsibility for her nurture, was sufficient. "It is also well settled that it is not necessary that the relation of husband and wife, nor that of parent and child, should exist, in order to constitute a family. *Bradley v. Rodelsperger*, 3 S. C. 226; *Garaty v. Du Bose*, 5 S. C. 493; *Moore v. Parker*, 13 S. C. 486; *Rollings v. Evans*, 23 S. C. 316. \* \* \* Nor do we think that it is necessary that there should be any legal obligation on the part of one claiming to be the head of a family to support the members thereof, but a moral duty, arising from ties of blood, or possibly other similar relations, will be sufficient. As is said in 7 Am. & Eng. Encycl. L. 804, note 2, 'the test of a legal duty has been rarely applied, and unquestionably a moral duty to support the members of a family is sufficient to constitute one its head.' Citing *Thomp. on Homest.*

§ 45. Accordingly we find that it has been

held in *Arnold v. Waltz*, 53 Iowa, 706 [6 N. W. 40], 36 Am. Rep. 248, that an unmarried woman, keeping house, and there bringing up two children of her deceased sister, is the head of a family, though she has taken no steps to adopt said children under the statute of that state; in *Wade v. Jones*, 20 Mo. 75 [61 Am. Dec. 594], that a brother living with his widowed sister and her four small children and providing for them is the head of a family; in *Bailey v. Cumings*, 16 Nat. Bank. Reg. 382, that a bachelor who supports a widowed sister, who keeps house for him, may be the head of a family. We are inclined to agree with what is said by *Anderson, J.*, in *Calhoun v. Williams*, 32 Grat. 18, 34 Am. Rep. 759: "The whole theory and policy of the homestead [law] is founded upon the principle that there is a natural and moral obligation on the head of a family to provide for the support of his wife and children, and other persons dependent on him, towards whom he stands almost in loco parentis, which is, if not paramount, equal, to his obligation to pay his debts. \* \* \* The family may consist of a wife and children, or of other persons who may stand in a state of dependence in the family relation, or it may consist of persons standing in either of these relations, whether the father or mother, or a brother or a sister, or other relation, is the head; but they must be persons who are dependent in some measure on the head for support, and who have an interest in his holding his property, and would be prejudiced by its seizure and sale under execution or other process, and who would be benefited by its exemption." *Moyer v. Drummond*, 32 S. C. 165, 168 [10 S. E. 952, 7 L. R. A. 747, 17 Am. St. Rep. 850]. While there was no legal obligation on the part of this widow to support the minor children of her husband, yet we think that, inasmuch as she undertook to keep them together, and to care for and support them, as the evidence shows she did, they all remained members of the testator's family, and, under the laws of this state, were entitled to a homestead, as the head of a family. See *Capek v. Kropik*, 129 Ill. 509, 21 N. E. 836, where it was held that, on the death of his wife, a widower, together with his minor stepchildren, was entitled to a homestead in an entire lot of land which he had held in common with his wife. Moreover, when Mrs. Holloway took the minor children under her care and custody, she stood in the relation of a parent to them, and took upon herself that obligation. She then was under a moral obligation to support and maintain these children, and the authorities hold that such a moral obligation is sufficient to entitle her to have a homestead set apart for the benefit of herself and the minor children." *Holloway v. Holloway*, 86 Ga. 576, 578, 12 S. E. 943, 11 L. R. A. 518, 22 Am. St. Rep. 484.

From all this it follows that the judg-

ment of the district court must be reversed, with direction to that tribunal to enter judgment upon the agreed facts in favor of the defendants, and it is so ordered. All the Justices concurring.

(141 Cal. 692)

**CUTTING FRUIT PACKING CO. v. CANTY.** (S. F. 2,852.)

(Supreme Court of California. Jan. 19, 1904.)

**SALE — BREACH OF CONTRACT — DAMAGES — PLEADING—COUNTERCLAIM—APPEAL — DATE OF JUDGMENT.**

1. A complaint alleging the execution of a contract for the sale of a certain amount of goods at an agreed price, the breach thereof by the vendor by failure to deliver part of the goods, and damages sustained by the purchaser because compelled to purchase the goods at a higher price, was a sufficient statement of a cause of action.

2. Objections as to the manner of stating the facts in the complaint, and not to the omission of any material fact, are waived when not taken by special demurrer.

3. Any variance between the terms of a contract sued on as alleged in the complaint and as contained in a copy attached thereto is only an ambiguity, which is removed by the finding that the contract the parties entered into is as set forth in the copy.

4. That a court failed to make a finding of fact as to a counterclaim which it partially allowed, presents no ground for reversal on appeal by the defendant.

5. Under Civ. Code, § 3287, in an action for breach of contract, the court properly allowed interest from the filing of the complaint on the amount of damages found.

**On Petition for Rehearing.**

6. Where a clerk neglected to enter judgment for nearly two years after its rendition, he should then have entered the judgment as of the time of its rendition for the amount due at the commencement of the action, with interest to the date of the entry.

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Cutting Fruit Packing Company against D. J. Canty. From a judgment in favor of plaintiff, defendant appeals. Amended and affirmed.

Stanton L. Carter, for appellant. Olney & Olney, for respondent.

**PER CURIAM.** The plaintiff and the defendant entered into a contract in writing May 26, 1897, by which the defendant sold to the plaintiff 400 tons of peaches at \$30 per ton, to be delivered at railroad station in San Francisco during the season of 1897, for which payment was to be made by the plaintiff weekly and on acceptance of the peaches. After the contract had been entered into, the market value of peaches rose from \$30 per ton to \$42 per ton, and the defendant, after delivering 129½ tons of the peaches, refused and failed to deliver any more. The plaintiff thereupon, after demand upon the defendant for their delivery, pur-

chased the remaining 270½ tons, for which it was obliged to pay \$42 per ton. It seeks by this action to recover from the defendant, as damages for the breach of his contract, the difference between the contract price of the peaches and the amount it was compelled to pay for those which the defendant refused to deliver, viz., \$3,246. The cause was tried without a jury, and upon findings of fact in accordance with the claim of the plaintiff judgment was rendered in its favor. The defendant has appealed directly from the judgment upon the judgment roll without any bill of exceptions.

1. The complaint alleges the execution of the contract between the plaintiff and the defendant, setting forth a copy of the same; the breach of the contract by the defendant in its refusal to deliver a portion of the peaches; the damage sustained therefrom by the plaintiff, together with the manner in which such damage was caused, viz., by being compelled to pay more than the price at which the defendant had agreed to furnish the peaches. This was a sufficient statement of a cause of action, and if the facts thus alleged were admitted by the defendant or sustained at the trial, the plaintiff was entitled to judgment. The objections to the complaint urged by the appellant relate to the manner in which the facts are stated, and not to an entire absence of any material fact. These objections should have been presented to the superior court by a special demurrer, but, as such demurrer was not interposed, they must be deemed to have been waived. Any variance between the terms of the contract as alleged in the complaint and as contained in the copy attached thereto was only an ambiguity or uncertainty, which is removed by the finding of the court that the copy as set forth in the complaint is the contract into which the parties entered. Defective allegations in the complaint are cured by a verdict, and all intendments will be made in support of the judgment thereon. *San Francisco v. Pennie*, 93 Cal. 465, 29 Pac. 66; *Kimball v. Richardson*, 111 Cal. 386, 43 Pac. 1111; *Hughes v. Alsip*, 112 Cal. 587, 44 Pac. 1027. The facts found by the court are sufficient to sustain the judgment, and are within the issues presented by the complaint. If the defendant had any objection to the evidence offered in support of the allegations of the complaint, either on the ground of variance or that the facts sought to be established were not pleaded with sufficient definiteness, it was incumbent upon him to make such objection at the trial. In the absence of any bill of exceptions it must be assumed that the evidence presented in support of these findings was competent to establish the facts alleged, and was received without any objection, and was sufficient to sustain each of the facts found.

2. In his answer the defendant admits the delivery by him of 129½ tons of peaches, and alleges that there is still unpaid therefor, and

¶ 2. See Pleading, vol. 39, Cent. Dig. § 1362.

due to him from the plaintiff, \$20.96. He also sets up a counterclaim against the plaintiff for \$392.80 for peaches sold and delivered by him to the plaintiff. The court finds that the plaintiff paid the defendant for the 129½ tons of peaches delivered by him, and it also finds that "the defendant is entitled by way of offset to the claim of plaintiff to the sum of \$371.84 for other peaches sold and delivered by the defendant to the plaintiff, and being the peaches referred to in the counterclaim set up by the defendant." Judgment is thereupon directed in favor of the plaintiff for the difference between \$371.84, the amount of defendant's counterclaim, and \$3,246, the amount of damage sustained by the plaintiff. It is contended by the appellant that by reason of the failure of the court to make a finding of fact upon the issue presented by the counterclaim, the judgment must be reversed. It is a sufficient answer to this contention to say that the record does not show that the defendant offered any evidence in support of his counterclaim, and that, as a failure of the court to make a finding thereon would not justify a reversal (*Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. 504; *Rogers v. Duff*, 97 Cal. 66, 31 Pac. 836; *F. A. Hihn Co. v. Fleckner*, 106 Cal. 95, 39 Pac. 214), its finding in his favor for a less amount than claimed must be held to be all that the evidence offered in support of his claim would justify. Moreover, this finding is a decision upon the issue in favor of the appellant, and it is a general rule that courts will not listen to a party who seeks the reversal of a judgment in his own favor, unless he can make it appear that the judgment should have been for a greater amount or a wider scope. Error is not to be presumed, and, if the appellant would contend that the court should have found for his counterclaim a greater amount, it was incumbent upon him to cause the record to show that such finding was required by the evidence.

3. The court filed its findings of fact and conclusions of law January 27, 1899, in which judgment was ordered in favor of the plaintiff for \$2,874.16, with interest thereon from the date of filing the complaint, viz., February 24, 1898. The clerk did not enter the judgment, however, until January 12, 1901, at which time he entered a judgment in favor of the plaintiff for \$3,454.26, that sum being the amount of the damages found by the court, together with interest thereon at 7 per cent. per annum from the date of the decision until the date at which the judgment was entered of record. The court properly allowed the plaintiff interest upon the amount of damage sustained by defendant from the date of filing the complaint (*Civ. Code*, § 3287; *Pacific Mut. Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758; *Lane v. Turner*, 114 Cal. 396, 46 Pac. 290); and the action of the clerk in adding the interest from the date of the decision to the entry of the judgment was correct (*Code Civ. Proc.* § 1033; *Golden*

*Gate Mill Co. v. Machine Works*, 82 Cal. 184, 23 Pac. 45; *Barnhart v. Edwards*, 128 Cal. 575, 61 Pac. 176).

4. In the judgment as recorded the clerk has written at its head, "January 27th, A. D. 1899," the date at which the decision was filed, and which, upon the face of the judgment, appears to be its date; and it is urged by the appellant that, inasmuch as the judgment directs that plaintiff shall recover from the defendant the sum of \$3,454.26, with interest thereon at the rate of 7 per cent. per annum "from the date hereof till paid," the plaintiff will recover a greater amount of interest than he is entitled to receive. It clearly appears from an examination of the judgment roll that the clerk computed the interest up to the date of the entry of the judgment, and that by the insertion of the words "from the date hereof till paid" he intended to refer to the date of such entry. The prefatory date, "January 27th, A. D. 1899," is no part of the judgment, but was evidently intended only as a connecting link between the decision and the entry of the judgment. The date of the judgment is the date of its entry. These words, however, create an ambiguity on the face of the judgment which the appellant is entitled to have removed. The superior court is therefore directed to cause the aforesaid prefatory date, "January 27th, A. D. 1899," to be expunged from the face of the judgment. In all other respects the judgment is affirmed. As the correction herein directed would have been made by the superior court upon a mere suggestion therefor, the costs of the appeal must be borne by the appellant.

On Rehearing.

(February 18, 1904.)

PER CURIAM. A rehearing of this cause is denied, but it is necessary to modify the order of the department remanding the cause with directions in relation to the amendment of the judgment as entered by the clerk. The facts stated in the department opinion show that the clerk neglected to enter the judgment for nearly two years after its rendition, and then included interest from the filing of the complaint till the date of entry (less about \$15, which, we suppose, was owing to a mistake in the calculation). The result of this action on the part of the clerk is to charge the defendant with compound interest on the amount due, when he was liable for simple interest only. This may be shown by the following example: A judgment is rendered to-day for \$1,000. It is the duty of the clerk to enter it immediately. If he does so, it will, at the end of five years from the date of rendition, amount, with interest at 7 per cent. to \$1,350. But if the clerk neglects for two years to enter the judgment, and then includes the interest computed from the date of rendition (\$140), there will be a judgment for \$1,140, which, at the end of three years from that date (five years

from date of rendition), will amount, with interest at 7 per cent., to \$1,379.40, or \$29.40 more than the true amount for which the defendant is liable. The neglect of the clerk to enter the judgment when he ought to enter it cannot be permitted to have this injurious consequence, which can only be corrected by causing the judgment entry to bear the date it ought to have borne; i. e., the day of, or the day after, its rendition, so that it will draw interest from that date. In this case the proper amount of the judgment is to be ascertained by adding to the sum found due at the date of the commencement of the action (\$2,874.16) interest up to the date it should have been entered (January 27, 1899), which amount will bear interest from that date.

We reaffirm what was said in the department opinion as to the costs of the appeal. The superior court committed no error calling for a reversal or modification of the judgment. The only error found in the proceedings was an error of the clerk. There is no necessity to prosecute an appeal to this court on account of the clerk's mistakes, unless the superior court refuses on proper motion to correct them, in which case the court's action, not the clerk's, will be brought up for review.

The cause is remanded, with directions to the superior court to cause the judgment to be entered nunc pro tunc as of January 27, 1899, for the amount found due at the commencement of the action, with interest to that date. As so amended, the judgment is affirmed; costs of appeal to be paid by appellant. This order to take the place of the department order.

(142 Cal. 15)

EAKLE et al. v. INGRAM. (S. F. 3,598.)  
(Supreme Court of California. Jan. 26, 1904.)  
TRUSTS — DISSOLUTION — TRUSTEE — COMPENSATION — FAILURE TO SET UP CLAIM — APPEAL AND ERROR.

1. Where there are several beneficiaries of a trust, all of one mind and none under disability, a decree dissolving the trust on their application is proper.

2. A trustee without interest in the trust, except a claim for services on continuance of the trust, has no standing in court to dispute the application of all the beneficiaries for a dissolution of the trust.

3. The fact that a trustee without interest in the trust, except a claim for services, was not made an allowance by the court on decreeing a dissolution of the trust, is not cause for reversal, where he filed no answer or otherwise set up any right to compensation.

Commissioners' Decision. Department 1. Appeal from Superior Court, Lake County; R. W. Crump, Judge.

Action by Martha A. Eakle and others against C. L. Ingram. From a judgment for plaintiffs, defendant appeals. Affirmed.

Crawford & Crawford, for appellant. Thos. B. Bond and Chas. W. Haycock, for respondents.

SMITH, C. The plaintiffs are the children and sole heirs of Mrs. E. A. Hammack, who died December 26, 1902, intestate. The plaintiff Eakle is the grantee and party of the second part, and the plaintiff Henry Hammack the party of the third part, in a deed of conveyance executed by Mrs. Hammack, as party of the first part, June 26, 1899, conveying to the grantee, "and to her successors, in trust," the land described in the complaint, "to have and to hold," the same, etc., "and to pay the rents, issues, and profits thereof to the said party of the first part during her natural life, and after the decease of the said party of the first part to pay the rents, issues, and profits thereof to the said party of the third part during his natural life." The deed also contains a clause authorizing the parties of the second and third parts to sell the premises upon certain contingencies specified, but this is omitted from our statement as immaterial. The defendant is a trustee appointed by the court, January 27, 1903, upon the resignation of Mrs. Eakle. The suit was brought for the dissolution of the trust and the discharge of the trustee. A general demurrer to the complaint was interposed and overruled, and judgment entered for the plaintiff. The defendant appeals from the judgment.

The judgment, we think, is right. The plaintiffs are the only persons beneficially interested in the property (Civ. Code, § 866; *Morfev v. R. R. Co.*, 107 Cal. 595, 40 Pac. 810; 1 *Perry on Trusts*, § 320; *Young v. Bradley*, 101 U. S. 787, 25 L. Ed. 1044); and in such cases the rule is as stated by Mr. Underhill: "If there is only one beneficiary, or if there are several and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished." Underhill on Trusts & Trustees, pp. 370-375, 13, and cases cited. See, also, 2 *Perry on Trusts*, § 920; 1 *Perry on Trusts*, § 104; Civ. Code, §§ 2252, 2253; *Lewin on Trusts*, 684, 685; *Hill on Trustees*, 278; *Tiffany & Bullard Law of Trusts & Trustees*, 815, 816. The court below was therefore empowered to decree a dissolution of the trust, and a release of the trust property by the trustees, which is the effect of the judgment. There are, indeed, cases (as is said in the note to the place first cited) where, though "all the beneficiaries consent, (yet) the court may for good equitable reasons refuse to discharge a trust"—as, for example, in the case of "infants, lunatics, and married persons restrained from anticipation" (*Underhill on Uses of Trusts*, supra)—and perhaps in the cases provided for in Civ. Code, § 867, and others. But the case here is not of a kind to come within any exception to the rule. Here the plaintiffs are of age, and no reason appears why they should not be permitted to exercise the right of disposing of their property. Nor has the defendant any standing in court to dispute their application.



He was a mere bare trustee, without interest, except that he might but for the decree have become entitled to compensation for services as trustee; but this furnishes no reason for the continuance of the trust. *Slater v. Hurlbert*, 146 Mass. 314, 15 N. E. 790. Nor, as he has failed to answer or otherwise set up any right to compensation for the brief period in which he was trustee, can he complain that no compensation was allowed him by the judgment.

It may be added that, in addition to the facts stated in the opinion, others are alleged which, it is claimed, show that the execution of the trust as designed has become impracticable, and that its continuance would result, if not in the total loss of the trust property, at least in the unnecessary sacrifice of a great part of its value. But, under the view we have taken of the case, it will be unnecessary to consider the effect of these allegations.

We advise that the judgment be affirmed.

We concur: HAYNES, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

(142 Cal. 43)

**MURPHY v. HOPCROFT. (S. F. 3,457).\***

(Supreme Court of California. Jan. 29, 1904.)

TRUSTS—ENFORCEMENT—TRANSFER OF TITLE  
—DECREE—CONVEYANCE—ACTION FOR RENT  
—LANDLORD AND TENANT—RELATION.

1. Where the relation of landlord and tenant did not exist between the plaintiff, who was the beneficiary under a trust deed, and defendant's intestate, who held the land under a lease from the trustee for a certain period, during which a suit was pending between plaintiff and the trustee to enforce the trust, which the latter repudiated, plaintiff, after obtaining title, could not recover rent *eo nomine* for such period from intestate's estate.

2. Where a decree in an action to enforce a trust required the trustee to convey the property to plaintiff, the decree did not affect a transfer of the title, which was not transferred until the delivery of the deed in execution of the decree.

Department 2. Appeal from Superior Court, San Benito County; M. T. Dooling, Judge.

Action by Henry B. Murphy against Charles Hopcroft, as administrator of the estate of Peter Brereton, deceased. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A. H. Jarman, for appellant. Briggs & Hudner, for respondent.

HENSHAW, J. A general demurrer to the complaint was sustained, and from the judgment which followed plaintiff appeals. The action is for rent *eo nomine*, and the complaint discloses the following facts: Bernard

Murphy, under a deed of trust, was the trustee of the estate of John Murphy. The beneficiaries under the trust were the sons of John Murphy, one of whom is the plaintiff herein. In July, 1896, Bernard Murphy held, and for a long time prior thereto had held, the legal title of the land for the use of which rent is here sought. Bernard Murphy acquired the title by a deed absolute to him individually. It is not averred that there was anything of record to show that Bernard Murphy was not in fact the absolute owner of the property. At the date mentioned he leased the land by written lease to Peter Brereton, defendant's intestate, for a period of five years at a certain yearly rental. In August, 1897, plaintiff, then a minor, commenced his action in the superior court of Santa Clara county against Bernard Murphy, praying a decree that the property was held by Bernard Murphy as trustee of the estate of plaintiff's deceased father; praying further that Bernard Murphy be compelled to execute a deed conveying the legal title to plaintiff, and to the administratrix of the estate of plaintiff's deceased brother, beneficiaries of the asserted trust. As an outcome of this litigation, upon December 6, 1898, it was decreed that Bernard Murphy was estopped from denying that he was the trustee of the property in question. The decree provided further that Bernard Murphy be removed, his office as trustee be vacated, and the trust be terminated. It was declared that the property was trust property, and belonged to the trust estate of John Murphy, deceased, and Bernard Murphy was directed to execute and deliver within 30 days a good and sufficient deed conveying the property, an undivided one-half to Isabel Hanna, guardian of plaintiff herein, the other moiety to Isabel Hanna as administratrix of the estate of the deceased brother. In 1899, six months after, the decree was amended so as to direct conveyance to be made one-half to plaintiff directly. An accounting was also had in the action, and judgment entered against Bernard Murphy for \$168.82. From this decree Bernard Murphy appealed, and in July, 1901, his appeal was dismissed, and the decree became final. Thereafter, under compulsion of the court rendering judgment by a deed dated October 9, 1900, Bernard Murphy conveyed the property as directed. The property was farming land. Peter Brereton was in possession of, it under lease from Bernard Murphy at the time of the commencement of the action, and retained possession until his death in April, 1901, acknowledging Bernard Murphy as his landlord, and holding adversely to plaintiff's claim of title, as evidenced by his refusal to pay him rent. Plaintiff succeeded to the interest of his deceased brother, and brings this action against the administrator of the estate of Peter Brereton for rents under the lease so made by Peter Murphy to Brereton for the years 1898, 1899, 1900, being the

\*Rehearing denied February 27, 1904.

years during which the status of the property was in litigation between this plaintiff and Bernard Murphy, trustee. The trial court sustained the demurrer upon the ground that the relation of landlord and tenant did not exist between plaintiff and Peter Brereton, that the rents followed the legal title, and that this title did not vest in plaintiff until after the time for which a recovery of rent is here sought.

In this ruling we think the court was correct. This is not an action for mesne profits, but is admittedly an action for rent *eo nomine* under the terms of the lease executed by Bernard Murphy with Peter Brereton. Rents as such cannot be recovered by one who has not succeeded to the legal title of the lessor, or between whom and the lessee the conventional relation of landlord and tenant does not exist. Where such a relation does not exist, or where the possession is adverse or tortuous, the action by the owner of the land must be for the mesne profit. *O'Conner v. Corbitt*, 3 Cal. 370; *Ramirez v. Murray*, 5 Cal. 222, *Emerson v. Weeks*, 58 Cal. 439; *Warnock v. Harlow*, 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209.

It is to be noted that the complaint charges that the ranch was conveyed to Bernard Murphy as an individual by deed from one Michael Tynan, and not to him as trustee of the estate, or as trustee of the estate of the minors. It will be observed, moreover, that Bernard Murphy asserted that the fee was conveyed to him untrammelled by any trust; that he took the title in repudiation of the trust; and that litigation became necessary to establish, and the litigation resulted in establishing, a resulting trust. It thus appears that Bernard Murphy took and held, and claimed the right to hold, the full legal title to the property, and the decree of the court which established the resulting trust declared in terms that the land belonged of right to the property of the trust estate created by William Murphy. The decree further provided that the trustee should make conveyance to plaintiff and his brother, as directed by the court. Section 3367 of the Civil Code specifies the modes of giving specific relief. Subdivision 2 is "by compelling a party himself to do that which ought to be done." This was the method adopted here by the court, and is in accord with the fundamental rule of equity that its decrees operate upon the person, and not upon the thing. This decree, therefore, did not change the legal title. It merely declared to whom in equity it ought to go. *Pomeroy's Equity Jurisprudence*, §§ 134, 135, 170, 1317. A conveyance executed under a decree operates by force of the conveyance, and not of the decree. The decree does not alter the legal position of the parties until consummated by a conveyance. *Tardy v. Morgan*, 3 McLean, 358, Fed. Cas. No. 13,752; *Prewitt v. Ashford*, 90 Ala. 294, 7 South. 831; *Mummy v. Johnston*, 10 Ky. 220; *Wallis v. Wilson*, 34

Miss. 357; *Morris v. White*, 96 N. C. 91, 2 S. E. 254; *Proctor v. Ferebee*, 36 N. C. 143, 36 Am. Dec. 34. Plaintiff then obtained the legal title by virtue of the deed which ultimately Bernard Murphy made, but that deed was not executed in time to cover the rent for any of the years here sued upon. After the execution of the deed, it appears that Brereton's representative attorned to the plaintiff, and this later rental is not in controversy.

It thus appearing that at the time when this claim for rent arose plaintiff had not succeeded to the legal title of Bernard Murphy, that the conventional relation of landlord and tenant did not exist between plaintiff and Peter Brereton, but that, to the contrary, Peter Brereton was holding under Bernard Murphy, and in hostility to the claim of title asserted by plaintiff, it follows that the demurrer was properly sustained, and the judgment appealed from is therefore affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.

(142 Cal. 47)

PRICE v. OLCOVICH. (S. F. 2,869.)

(Supreme Court of California. Jan. 29, 1904.)

DECEDENT'S ESTATES—INTEREST—VOLUNTARY PAYMENT—RIGHT TO RECOVER—ADMINISTRATORS.

1. Where decedent and defendant were jointly interested in a number of separate and independent ventures in pursuance of a written agreement, and on settlement and final division of the profits decedent paid interest on a portion of the amount advanced by defendant to the firm, and expressed his gratification that defendant had not required interest on the whole amount, decedent's administrator was not entitled to recover the amount so voluntarily paid, in the absence of fraud, concealment, or mistake.

Department 2. Appeal from Superior Court, City and County of San Francisco; George H. Bahrs, Judge.

Action by Merton S. Price, administrator of the estate of C. Hinsberg, deceased, against Herman Olcovich. From a judgment for defendant and an order denying a motion for new trial, plaintiff appeals. Affirmed.

W. H. Barrows, for appellant. Charles P. Eells, for respondent.

McFARLAND, J. It is averred in the complaint that about March, 1892, the defendant and plaintiff's intestate, C. Hinsberg, entered into a copartnership in the importing business in San Francisco, which continued until about the month of August, 1898, when it was dissolved by mutual consent; and that by the terms of the copartnership the net profits were to be divided between the parties as stated in the complaint. It is further averred that during said time many shipments of merchandise were made by the firm, and the profits divided between the partners; but that during the last two years other shipments were made, the business

connected with them completed, and the proceeds received by defendant, and that the profits thereof were not divided among the partners, but are held by defendant. It is averred that Hinsberg's share of these last shipments is \$1,431.75, for which sum plaintiff prayed judgment against defendant. In his answer defendant denies any general partnership, but avers that between the dates named Hinsberg and defendant were jointly interested in a number of separate and independent ventures in the business of shipments of goods, in pursuance of a certain written agreement set forth in the answer; and he avers that all of the business was settled and the profits divided before the death of Hinsberg; and that the latter, before his death, received his share of the profits of said ventures. The trial court found in accordance with the defendant's denials and averments, and rendered judgment that plaintiff take nothing by this action, and that defendant recover his costs. From an order denying a new trial, plaintiff appeals.

The record does not present an exceedingly clear case, but we see no good reason for reversing the order appealed from. There was certainly evidence in support of the findings. The respondent advanced all of the capital, which amounted to a very large sum, by which the various joint ventures were carried on; and the court, having found that the profits of all the ventures had been divided between the partners, added that by mutual agreement respondent "was allowed and paid interest on a portion of the capital supplied by him to the firm." It is upon this latter part of the finding that appellant mainly bases his claim for a new trial; his contention resting on the general rule—not disputed by respondent—that, in the absence of an agreement otherwise, a partner is not entitled to interest on money advanced to the firm. But it appears that Hinsberg always supposed that interest was to be paid, and that on the settlement and final division of the profits he paid such interest, and was pleased that respondent had not required interest on the whole amount which he had advanced. Having voluntarily done so with full knowledge of all the facts, his administrator cannot now recover back the amount so voluntarily paid. There was no mistake, or fraud, or concealment, and no inequitable advantage taken. The books of the partners had been entirely in charge of Hinsberg, and kept by him. If it had been otherwise, the rule is, as held in *Belt v. Mehen*, 2 Cal. 159, 56 Am. Dec. 329, that "where, in the settlement of a partnership, a mistake occurs, and both parties were ignorant, or had equal knowledge of, or equal opportunities of knowing, the mistake, and there has been no fraud or concealment, equity will not correct the mistake." Indeed, it is not clear that the original written agreement is not, on its face, susceptible of the construction which the partners gave to it. That instrument com-

mences with a reference to a past venture of the partners, and speaks of the "net profits" as arising "after" deducting certain money as respondent's "compensation for moneys advanced in this shipment"; and it would not be a strained construction to say that the "net profits" thereafter mentioned meant the same kind of net profits as those mentioned in the first part of the instrument. However, that view having been entertained and acted upon by the partners, and the interest having been paid by Hinsberg as before stated, the whole matter was thereby concluded.

The order appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(142 Cal. 34)  
**CREIGHTON v. GREGORY.** (L. A. 1,380.)  
 (Supreme Court of California. Jan. 28, 1904.)  
 ACCORD AND SATISFACTION—EXISTING DIS-  
 PUTES—ACCEPTANCE OF CHECK.

1. Where there is a genuine dispute between a debtor and creditor as to the price of goods sold, and the debtor has sent to the creditor an itemized account, together with his check for the amount according to the debtor's contention, with the intention that the creditor's acceptance of the amount represented by the check should be in full of the account, the act of the creditor in cashing the check and appropriating the proceeds amounts to an accord and satisfaction.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by C. J. Creighton against A. Gregory. From a judgment for defendant and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Eugene C. Campbell, for appellant. Hight & Swing and J. P. Hight, for respondent.

**CHIPMAN, C.** Plaintiff sues upon a written contract reading as follows:

"Redlands, Cal., December 1, 1900.

"This is to certify that A. Gregory has bought and Dr. C. J. Creighton has sold his entire crop of navel oranges, now growing on his nineteen-acre place on Brookside Avenue at \$1.92 per hundred pounds, delivered at the packing house of A. Gregory at Redlands. All fruit to be accepted and paid for, but it is agreed that C. J. Creighton will use due diligence in picking not to put in any split oranges that are not merchantable. Five hundred dollars (\$500) paid down on contract, balance paid cash on delivery of fruit. All fruit to be accepted before March 15th, 1901.

"A. Gregory, Buyer.

"C. J. Creighton, M. D., Seller."

In his complaint, for a first cause of action, plaintiff alleges delivery under the contract of part of the fruit between December 2 and December 6, 1900, and the balance between March 15, 1901, and April 4, 1901, except

¶ 1. See *Accord and Satisfaction*, vol. 1, Cent. Dig. § 76.

certain fruit referred to in a second cause of action. He alleges that there remains unpaid \$690.26. In the second cause of action it is averred that by the terms of said written contract the defendant was liable for certain other oranges which became overripe and decayed because plaintiff was not permitted to deliver the fruit, to plaintiff's damage of \$330.25. Defendant answered, admitting the execution of the alleged written contract; alleged that by its terms defendant was bound to receive only merchantable oranges; that on January 1, 1901, a severe frost greatly damaged the fruit then on plaintiff's trees, and rendered them unsound and not merchantable, and therefore not within the contract; that thereupon, for the purpose of adjusting the loss by frost, an oral contract was entered into by the parties altering the written contract so that plaintiff should deliver, within a reasonable time, all of the fruit except split oranges, and except such fruit as had become or should become by reason of said frost so split that it could not be delivered, and that defendant would accept the fruit so delivered and pay for the same as follows, to wit, \$1.92 for each 100 pounds of the first 1,500 boxes of said oranges delivered, and \$1.42 for all of said oranges except the first 1,500 boxes delivered as aforesaid; that plaintiff paid in full for all the said oranges, and in full execution of said oral contract. Facts as to the final payment are set forth, which it is alleged constituted accord and satisfaction of plaintiff's claim. The answer to plaintiff's second cause of action is that the fruit therein referred to was damaged and unsound by reason of the frost visitation already referred to, and could not be delivered for that reason, and for like reason could not have been accepted if tendered.

Finding 1 is that the written contract was entered into between the parties, and finding 2 is that pursuant to the contract plaintiff delivered and defendant accepted between December 2, 1900, and December 6, 1900, 18,230 pounds of oranges, and that no more were delivered until March 15, 1901. These findings are not challenged. Finding No. 3 is that about January 1, 1901, a severe frost visited plaintiff's orchard, and defendant at all times thereafter contended that much of the orange crop was so badly frozen as to be unmerchantable, and that, as the damaged oranges could not with certainty be sorted from the good ones, defendant could not be compelled to receive any of them, and, in any event, was not obliged to accept oranges that had been rendered worthless by frost; and that his contention was based on legal advice given defendant. The court also found that during the latter part of February, 1901, defendant notified plaintiff and the latter admitted that some of the oranges were frozen, and therefore worthless; that on March 5, 1901, defendant stated to plaintiff that defendant was not obliged to take any of said frozen fruit, but was willing to take the first

1,000 boxes at the contract price if plaintiff would consent to take \$1.42 per 100 pounds for the remainder of the crop; that plaintiff declined this offer, but stated that, if defendant would pay him the contract price for 1,500 boxes, and would pay him at the rate of \$1.42 per 100 pounds for the remainder, he would consent thereto; that defendant accepted this proposition, and so notified plaintiff on March 17, 1901, and that thereafter plaintiff delivered the remainder of the orange crop at defendant's packing house in Redlands. The foregoing facts found in finding 3 are challenged as not supported by the evidence. It is found, and the facts are not disputed, that after March 17, 1901, plaintiff delivered the remainder of the crop at defendant's warehouse in Redlands, and completed the delivery about April 4, 1901; that he delivered 203,187 pounds in all, and defendant paid at different times to plaintiff prior to April 20, 1901, the sum of \$2,400. Finding 6 is that on April 20, 1901, plaintiff came to defendant to make a final settlement, and plaintiff then insisted on payment at \$1.92 per 100 pounds for all the oranges; that the interview was "stormy," in which defendant accused plaintiff of bad faith, and that defendant reminded plaintiff of his offer as found in finding 3 and of defendant's acceptance, and that he "had received all fruit which he had received after such acceptance on that understanding. Plaintiff then and there admitted the offer and acceptance, but stated that he made the offer for the sole purpose of getting defendant to receive the oranges. Defendant then and there told plaintiff that he would only settle in accordance with the modified agreement, \$1.92 per 100 pounds for the first 1,500 boxes of oranges and \$1.42 per 100 pounds for the excess over the first 1,500 boxes. *Plaintiff thereupon departed without making any response thereto.*" Plaintiff challenges only the last paragraph of this finding marked in italics. It is then found (finding 7) that on the departure of plaintiff, and on the same day (April 20th), defendant had his bookkeeper make out the account between plaintiff and defendant, which showed 1,500 boxes (65,174 pounds) at \$1.92 (the written contract price), \$1,251.34, and 3,190 boxes (138,013 pounds) at \$1.42 (the price as modified), \$1,959.78, making in all \$3,211.12, on which it was stated as paid \$2,400 in cash, leaving still due \$811.12. This statement was stamped, "Paid Apl. 20, 1901. A. Gregory," and, together with a check for the balance, was mailed to plaintiff, but by an oversight the check was not signed. *"On the following day plaintiff returned to defendant's office with this check,"* and called attention to the omission of the signature, "whereupon defendant affixed his signature thereto, and personally handed the check to plaintiff, who took the check without making any objection thereto." Plaintiff then went away with the check, and on April 22, 1901, "received payment thereof at

said bank in full satisfaction of his demand against defendant, and applied the proceeds thereof to his own use." Plaintiff made no further demand on defendant prior to the commencement of the action May 17, 1901. The only parts of this finding objected to as not supported by the evidence are marked in italics.

The court in its conclusions of law found: That "there was a genuine dispute 'between the parties as to the actual amount which was due from defendant to plaintiff,' which dispute was bona fide and in good faith on the part of defendant. Said dispute was in existence on April 19, 1901, and theretofore, and was still in existence on April 22, 1901, at the time plaintiff cashed the said check"; that "when defendant mailed said check and statement of account to plaintiff defendant intentionally thereby tendered said check to plaintiff as an accord and in full satisfaction of the said contract between plaintiff and defendant," and that "when plaintiff took the said check back to defendant for the signature of defendant thereto, and received back from defendant the check signed by defendant, and cashed said check, and appropriated the proceeds thereof to his own use, that plaintiff did so in full satisfaction of plaintiff's claim against defendant on account of said contract," and "that by reason thereof said contract became extinguished." Plaintiff claims in his specifications that these conclusions are unsupported by the evidence. Counsel for the respective parties argue at some length the question whether the risk of damage to the fruit by frost fell upon plaintiff or defendant under the terms of the contract. Much evidence was offered by defendant, and admitted without objection, fully sustaining the finding of the court as to damage of the fruit by frost. A motion was made by plaintiff, after this evidence as to frost was all in, that "as a defense to the action of plaintiff" it be stricken from the record as irrelevant, incompetent, and immaterial, and on the further ground "that there is no warranty on the part of plaintiff that the fruit would not become frosted—even if it were frosted—and that that is not an issue in the case." The motion was granted, and plaintiff urges that it was error for the court to find as to this evidence and that the finding No. 3 is unsupported because the evidence was stricken from the record, and also that the finding of facts relating to the oral modification of the contract is not supported by the evidence.

The decision finally reached by the trial court, with which we agree, makes it unnecessary to determine the meaning of the contract in respect of the point first above noted. This very point may have contributed to the dispute which arose between the parties, and it is immaterial which one of the parties was right or which was wrong, for they could agree to the terms of settlement in any event. For like reason it became immaterial to find

as the court did concerning the damage by frost, and it is immaterial whether these findings are sustained by evidence. Indeed, plaintiff's motion to strike out the evidence as to frost was on the ground that it was immaterial as a defense in the case, and also because the contract contained "no warranty on the part of plaintiff that the fruit would not become frosted." So, also, are we relieved from determining whether the finding as to the modification of the contract is supported by the evidence. This finding may be unsupported, and yet there have been accord and satisfaction. The same may be said as to the point that there is no finding as to the second cause of action.

Plaintiff's objection to the facts found in finding 6, as shown by his specifications, was confined to the portions marked in italics. The other facts found must be taken as admitted. Whether plaintiff returned after the "stormy interview" to defendant's office "the following day," or two days later, as he claims, is not material. There is sufficient evidence that what took place is correctly found by the court. The only objection made in the specifications to finding 7 is not to the fact that plaintiff took the check given him, and went away with it, and collected the money on it, but that it was not "in full satisfaction of his demand against defendant," which is perhaps a question of mixed law and fact, and may be disposed of in considering what are designated as the conclusions of law of the trial court, which are also in some respects both conclusions of fact and law, and which plaintiff claims are unsupported by evidence. We are thus brought to the principal question in the case: was there an accord and satisfaction? "An accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled." Civ. Code, § 1521. Though bound to execute such agreement, "yet it does not extinguish the obligation until it is fully executed." Id. § 1522. "Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation and is called satisfaction." Id. § 1523. The admitted findings of facts show beyond question that there was a dispute between the parties as to what was due under the contract, and that there was by plaintiff an acceptance of "something different from or less than that to which the person agreeing to accept" was entitled, and this acceptance extinguished the obligation and constituted satisfaction. The intention of the parties must be determined from all the circumstances attending the transaction, and the legal effect of the conduct of the parties is for the court to pronounce. That defendant regarded his payment as final, and in extinction of his obligations under the contract, might well have been found by the court. And we do not think that plaintiff can now, in view of the facts found, be heard to say that he regarded the payment as hav-

ing been made on account. When plaintiff came to defendant, it was for final settlement, and he contended for payment at the contract price for all of the fruit, while defendant contended for the modified price. Defendant informed plaintiff that he would settle on no other terms, and plaintiff then left him. The account was made out in accordance with defendant's contention, and sent to plaintiff with a check for the balance, which, by an oversight, was unsigned. Plaintiff's counsel says in his brief: "Sending an account through the mail is nothing more than evidence of the way the sender understands the account between the parties. In this case it was, 'I owe you so much,' and the check (if it had been signed) would have impliedly said, 'And this pays the amount which I owe you.'" The failure to sign the check, in view of the conduct of plaintiff in returning to get it signed and subsequently collecting the money on it, is immaterial. Defendant signed it at plaintiff's request, and plaintiff must be held to have known that defendant signed it on the supposition that it closed the whole transaction, and it is a reasonable inference from the evidence that defendant would not have parted with the check had he not been led by plaintiff to suppose that it ended their dealings under the contract. Under the circumstances disclosed plaintiff has placed himself under the provisions of subdivision 3, § 1962, Code Civ. Proc., and is estopped to deny the effect of his deliberate act.

Certain specifications of errors at law occurring at the trial are referred to in plaintiff's brief. He fails to state the names of the witnesses whose evidence was admitted or excluded over his objections, both in the specifications and in his brief. There is nothing in the brief to show where the evidence is to be found in the record. This court ought not to be required to grope through the transcript in order to identify the particular errors complained of. We have, however, endeavored to do this, and, so far as we can see, the evidence related to matters which do not in any way affect the question of accord and satisfaction.

We advise that the judgment and order be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion the judgment and order are affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

(142 Cal. 50)

MARIPOSA COUNTY v. MADERA COUNTY. (Sac. 1,106.)

(Supreme Court of California. Jan. 29, 1904.)  
COUNTIES—BOUNDARIES—STATUTES—AMENDMENT—REPEAL—CONSTRUCTION—DEFINITENESS—VALIDITY.

1. Act April 1, 1872 (St. 1871-72, p. 891, c. 602), as amended by Act Feb. 11, 1874 (St.

1873-74, p. 100, c. 88), establishing the boundary between Mariposa and Fresno counties, which line was thereafter adopted by Act 1893 (St. 1893, p. 168, c. 143) establishing Madera county, was not superseded by Pol. Code, §§ 3938, 3939, defining a conflicting boundary, since, though the act of 1874 was not approved until after the Political Code, it went into operation before the Code.

2. Since Act April 1, 1872 (St. 1871-72, p. 891, c. 602), as amended by Act Feb. 11, 1874 (St. 1873-74, p. 100, c. 88), defining the boundary line between Mariposa and Fresno counties, was passed at the same session of the Legislature as the Political Code, such act was entitled to precedence over conflicting provisions of the Code by virtue of sections 4478, 4479, thereof, providing that with relation to laws passed at such session the Political Code must be construed as though passed on the first day of the session, and, if the provisions of any other law passed at such session are inconsistent with the Code, the provisions of the law should prevail.

3. Where a statute is not an amendment to another statute, but an independent statute complete in itself, it could not be repealed by implication by an earlier statute.

4. Where the original boundary line between Mariposa and Fresno counties had been defined by Act April 19, 1856 (St. 1856, p. 183, c. 127), creating the latter county, Act April 1, 1872 (St. 1871-72, p. 891, c. 602), as amended by Act Feb. 11, 1874 (St. 1873-74, p. 100, c. 88), defining the boundary line between such counties, was not objectionable for uncertainty of description in using the term "present boundary line" immediately following the words "original boundary line" between such counties.

In Banc. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Suit by Mariposa county against Madera county. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

J. J. Trabucco, Dist. Atty., and Congdon & Congdon, for appellant. R. R. Fowler, Dist. Atty., and F. H. Short, for respondent.

BEATTY, C. J. This is a suit in equity to determine a disputed boundary. It is alleged in the complaint that plaintiff and defendant are counties of California created by law, that the territory of Madera is contiguous to and next south of Mariposa, that the true dividing line is that defined in section 3938 of the Political Code, and that Madera has been encroaching upon the rights of Mariposa by claiming and attempting to exercise jurisdiction over a strip of territory north of the boundary 30 miles long and of an average width of six miles. Upon these and other pertinent allegations a decree is prayed establishing the boundary as described in the complaint, and enjoining Madera county from claiming or exercising jurisdiction to the north of it. To this complaint the defendant demurred upon the ground, among others, that it failed to state a cause of action, and upon this ground the demurrer was sustained. From the judgment entered thereon plaintiff appeals. The only question argued by counsel, and the only question to be considered, is the proper construction of certain special statutes and certain sections of the

Political Code relating to the disputed boundary. We have, in other words, merely to determine the intention of the Legislature according to the established rules of statutory construction. This, however, is a task of some difficulty, owing to the confused and imperfect descriptions contained in some of the acts by which the Legislature has attempted to express its meaning, with reference to which it may be remarked—paraphrasing the language of Judge Story in *Blanchard v. Sprague*, 3 Sumn. 285, Fed. Cas. No. 1,517—that while as private citizens we may have no doubt of what the Legislature really intended, we yet must feel considerable doubt whether that intention can be extracted from the terms of its enactments by any judicial process of interpretation.

Before entering upon a discussion of the particular statutory provisions in question here, it may be of advantage to describe briefly the subject of the legislation: Mariposa was one of the counties created by the act of February 18, 1850, subdividing the state into counties. St. 1850, p. 58, c. 15. It was of very great extent, including the territory bounded by the coast range on the west, the boundary of the state on the east, the ridge between the Tuolumne and Merced rivers on the north, and the counties of Los Angeles and San Diego on the south. Since that time a number of new counties have been carved out of the territory originally included in Mariposa—Tulare, Kern, Merced, and Fresno on the south and west, and Mono and Inyo on the eastern slope of the Sierras, with their western boundary following the summit line of that range. The county of Fresno was formed in 1856 out of territory taken from Mariposa and Merced on the north and from Tulare on the south, and the act, of course, defined the dividing line between Fresno and Mariposa. This was done by a description perfectly definite and consistent in every respect, but by subsequent enactments other descriptions were substituted which have given rise to the present controversy between Mariposa and Madera. For, in creating the county of Madera in 1893 (St. 1893, p. 168, c. 143), out of territory constituting the northern portion of Fresno county, the line of delimitation between that and Mariposa county was not otherwise described than as "the line now established between the counties of Mariposa and Fresno." So that the question to be here determined is, what line had been legally established as the common boundary of Mariposa and Fresno at the date of the creation of Madera county on March 11, 1893?

By the act of April 19, 1856 (St. 1856, p. 183, c. 127) creating the county of Fresno, its northern, or rather its northwestern, boundary (constituting the dividing line between it and Mariposa county), was a mathematical line extending from the point where the Stockton and Millertown road crosses the Chowchilla north 45 degrees east to the east-

ern boundary of the state. By an act to better define the boundary line between Fresno and Mariposa counties, approved March 29, 1870 (St. 1869-70, p. 449, c. 341), the following change was made: The line of 1856 was retained from the Chowchilla crossing to the southwest corner of section 11, township 6 south, range 20 east, M. D. M., from which point it was required to run east on section lines to the main ridge, dividing the waters of the Merced and San Joaquin rivers, and thence, following said ridge, to the eastern boundary of Fresno county, which at that time was the summit line of the Sierras, the territory east of the summit having been detached for the creation of the county of Mono. This brought the eastern, or northeastern, end of the line of division to the summit of Mt. Lyell, one of the loftiest peaks of the Sierras, from which not only the ridge dividing the San Joaquin and Merced projects, but also the ridge dividing the Merced and the Tuolumne; and, since the latter ridge forms the dividing line between Mariposa and Tuolumne counties, the summit of Mt. Lyell became thenceforth the common corner of the three counties Tuolumne, Mariposa and Fresno, and was so designated in several acts of the Legislature relating to these boundaries. At the next session of the Legislature our Political Code was adopted (March 12, 1872), containing, among other things, careful descriptions of the various county boundaries. By sections 3938 and 3939 the common boundary of Mariposa and Fresno counties was defined in substantially the same terms as in the act of March 29, 1870, and in both sections Mt. Lyell was referred to as the common corner of Tuolumne, Mariposa, and Fresno. These provisions of the Code, therefore, left the line where it had been placed by the act of 1870. But at the same session of the Legislature, on April 1, 1872, a special act was passed "to better define the boundary line of Mariposa and Fresno counties." St. 1871-72, p. 891, c. 602, the first section of which reads as follows: "The line at present known as the boundary line between Mariposa and Fresno counties, from the westerly junction of said counties running easterly to the southwest corner of section eleven, and the northwest corner of section fourteen, in township six south, range twenty east, of Mount Diablo meridian; thence east to the northwest corner of section fourteen, in township six south, range twenty-one east, thence north to the northwest corner of section thirty-five, in township five south, range twenty-one east; thence east to the southwest corner of section thirty, in township five south, range twenty-two east; thence north to the southwest corner of Mariposa Big Tree Grant; thence east along the line of said grant to the southeast corner of said grant; thence north along the line of said grant to the northeast corner of the same; thence north to the original boundary line between the counties of Mariposa

and Fresno; thence along said line to the present boundary line, is hereby declared and constituted the boundary line between said counties." The second section provides for a survey of the line by the official surveyors of the two counties. The third section repealed the act of March 29, 1870. The fourth section put the act in force immediately. It is the territory lying between the Code line (Pol. Code, §§ 3938, 3939) and the line described or attempted to be described in this special act and an amendment thereto that is in dispute between the two counties, Mariposa contending that the Code provisions are in force, and Madera that they were superseded even before they went into effect by the special act of April 1, 1872, or, at any rate, that they have been superseded by the amendment to that act approved February 11, 1874 (St. 1873-74, p. 100, c. 88), by which the words "of Tuolumne county" were inserted in the first section of the act of 1872 (above quoted) after the words "thence along said line to the present boundary line."

Upon the case thus presented, the argument of appellant is directed to two main propositions: First, that the act of 1872 would not have superseded the Code provisions, even if it had been a valid law; but, second, that, standing alone, it could never have had any force or effect, being absolutely void for uncertainty in the description of the line it professed to establish, for which reason also, appellant contends, it was incapable of amendment, and derived no force or validity from the correction attempted to be made by the act of 1874.

The first of these propositions is easily disposed of. The political Code was approved March 12, 1872, but by its own terms (section 2) was not to take effect until January 1, 1873. Several acts were, however, subsequently passed at the same session, putting particular portions of the Codes in operation at earlier dates, among others the act of March 22, 1872 (St. 1871-72, p. 481, c. 350), by which the whole of title 1, pt. 4—embracing sections 3938, 3939—was given force and effect from and after May 1, 1872. Thus it will be seen that the act of April 1st was approved after the Political Code, though it took effect before the Code; and, assuming its validity, there can be no question that its provisions prevail over conflicting Code provisions, not only because it is a subsequent enactment, but because, under the rule of construction prescribed by the Code itself (sections 4478, 4479), it would have had the same effect if it had been passed and approved on the first day of that session. And the provisions of the Code were not saved from the operation of any act passed at that session, as an express repeal or repeal by implication, by the fact that they were not in force at the date of the passage of such act. *Goodwin v. Buckley*, 54 Cal. 295; *Smith v. McDermott*, 93 Cal. 421, 29 Pac. 34. Appellant, however, contends that this case does

not fall under the rule of *Goodwin v. Buckley*, but rather under the rule of *Hemstreet v. Wassum*, 49 Cal. 273, where it was held that an amendment to an old statute passed at the same session at which the Code was adopted perished with the statute which it amended as soon as the Code went into effect, the statute itself being repealed by the Code. Section 18. But the distinction between that and the present case is very clear. The act of April 1, 1872, was not an amendment to another statute into which it was incorporated, but was an independent statute complete in itself, and could not be repealed by an earlier statute. This distinction is pointed out in *People v. Salvador*, 71 Cal. 16, 11 Pac. 801.

There being no question that the act of April 1, 1872, prevails over the Code provisions, if valid and operative in itself or by virtue of the amendment of February 11, 1874, it remains only to consider the objections to those acts. There is no room for a difference of opinion as to the meaning of the words "present boundary line" in the latter part of the first section of this act as above quoted. It is elliptical, but by a perfectly allowable usage it stands for the full expression "present boundary line between the counties of Mariposa and Fresno," and this because it follows almost immediately after the words "original boundary line between the counties of Mariposa and Fresno." Understood in this way, the section presents in itself no difficulty as to its construction. The original boundary line was the line defined in the act of 1856 creating Fresno county, and the present boundary line was the line defined by the act of 1870, by which the original boundary east and north of the southwest corner of section 11, township 6 south, range 20 east, M. D. M., was deflected from the mathematical line extending from the Chowchilla, crossing north 45 degrees east to the eastern boundary of the state, so as to run east on section lines to the summit of the ridge between the Merced and Tuolumne rivers, and thence along said ridge to the summit of the Sierras at the peak of Mt. Lyell. It is evident that the framers of the act supposed that the "original" line would intersect the "present" line before reaching the summit of the Sierras, and that they intended to retain the "present line" from such point of intersection to Mt. Lyell. It appears, however, from a map accompanying the record, and which is admitted by counsel to be correct, that in this matter the Legislature was mistaken. The peak of Mt. Lyell, instead of standing to the north of the "original" line, is about three miles to the southeast of it, so that the "original line," to whatever distance projected, never could intersect the "present line." It is for this reason alone, because one definition of the boundary—although not faulty in terms—does in point of fact involve a mathematical impossibility, that counsel con-



tends that the act is totally void, in legal contemplation nonexistent, and incapable of amendment.

It is greatly to be feared that a rule of construction so strict as that insisted upon by appellant would, if generally enforced, have the effect of invalidating many acts of our Legislature which have long been the sole support of important public and private interests. If a strict scrutiny were made of the various acts creating counties and defining their boundaries, especially the earlier ones, there is little doubt that many errors and absurdities would be discovered. As an instance, it may be mentioned that the original boundary line of Fresno county cut off from Tuolumne county that portion of its territory between said line and the summit of Mt. Lyell, and transferred it to Fresno county, but when this line was altered by the act of 1870 that part of Tuolumne county, though cut off from Fresno, was not restored to Tuolumne by any express provision of the statute, and therefore, upon a strict construction, has ever since remained derelict—a no man's land. But the rule contended for by counsel is not supported by the authorities he cites. They go no further than to show that an act is sometimes found to be so incomplete, equivocal, or indefinite as to be incapable of enforcement without amendment, but they are not placed upon a par with acts that have been expressly repealed, and which, being out of existence, cannot be revived by acts professing to amend them. They are inoperative, and, in that sense only, void; but if by amendment they can be made certain, definite, unambiguous, there is no reason why they may not be made operative by that means as well as by the passage of a new act. If, therefore, the act of 1872 had been inoperative owing to the mistake above indicated, it would have been cured by the act of 1874. But in truth it would have required no greater liberality of construction than is frequently indulged in support of the evident intention of the Legislature to support the act of 1872. It is clear that the Legislature intended by that act to restore the original boundary line between Fresno and Mariposa as far as it could be followed without intersecting the (then) "present" line. It happened, contrary to the belief of the Legislature, that the original line could be followed all the way to the line of Tuolumne—the common eastern boundary of both Mariposa and Fresno—without intersecting the then present line of division between them, but this fact did not deprive it of the essential quality of a fixed, certain, and definite boundary—the sole purpose of the act.

The contention of counsel for appellant, that the act of 1872 never took effect, either as originally enacted or as amended in 1874, is supposed to be strongly corroborated by the circumstance that, in the act of 1893 creating Madera county, its eastern boundary

is traced from the southeast corner only to the "corner common to the counties of Tuolumne, Mariposa and Fresno" (i. e., to the summit of Mt. Lyell), "thence following the line now established between the counties of Mariposa and Fresno, to," etc. This certainly proves that the Legislature of 1893 had relapsed into the same mistake made by the Legislature of 1872, viz., that the original boundary between Mariposa and Fresno would pass to the south instead of to the north of Mt. Lyell, but it proves nothing more, and, clearly, is not a construction of existing laws which the courts are bound to follow.

The judgment of the superior court is affirmed.

We concur: McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; VAN DYKE, J.; HENSHAW, J.

(142 Cal. 222)

SAN FRANCISCO & S. M. ELECTRIC RY.  
CO. v. SCOTT, Tax Collector.  
(S. F. 2,285.)

(Supreme Court of California. July 1, 1903.)

TAXATION—STREET RAILWAYS—RAILROADS—  
CONSTITUTION—CONSTRUCTION.

1. Const. art. 13, § 10, provides that the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which said railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts. *Held*, that in view of the differences in the nature of franchises of railroads and of street railways, and of the fact that the value of the different portions of a street railway line varied according to the density of the population of the localities traversed, "street railways" were not included within the term "railroads" in said section, as being of the class of subjects intended to be dealt with by its provisions.

McFarland and Henshaw, JJ., dissenting.

In Banc. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Proceedings by the San Francisco & San Mateo Electric Railway Company against Joseph H. Scott, tax collector. From the judgment, plaintiff appeals. Affirmed.

Morrison & Cope, for appellant. Franklin K. Lane, City Atty., for respondent.

HENSHAW, J. This appeal is on the judgment roll. The facts are undisputed, and the single question presented for determination is whether, under the Constitution of this state, the franchises, rails, and rolling stock of a street railroad operated in more than one county should be assessed by the state board of equalization or by the assessors of the several counties through which the railroad passes. It is conceded that if the word "railroads," as used in section 10, art. 13, of the

Constitution of the state, includes street railroads, the judgment should be reversed. The section of the Constitution to which reference has been made reads as follows: " \* \* \* 'The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state, shall be assessed by the state board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, towns, townships and districts.'"

It has been said by this court (Ferguson v. Sherman, 116 Cal. 176, 47 Pac. 1023, 37 L. R. A. 622) that the word "railroad," as used in law, is broad enough to include street railroads, and many cases have arisen where the courts have held that the word does in its signification include such. Each case is to be determined upon its own facts, having in view the circumstances, the context, the presumed intention of the lawmakers, and the general policy of the state in regard to the particular matter. There being no question, therefore, that the word employed by the Constitution embraces in proper cases street railways, our inquiry is narrowed to a determination of the intention of the framers of our Constitution, and here, by reference to the constitutional debates, all doubt upon the question would seem to be eliminated. The end sought to be attained was a just and uniform method of taxation for railroads operated in more than one county. The section of the Constitution, as originally presented, provided that the value of all the property of all railroad corporations should be assessed by the state board of equalization. Much debate followed, and it was pointed out that, where a railroad was operated in but one county, the assessor of that county was as competent to fix the value as he was that of any other property within his territory; that there was an essential difference between railroads so operated and those which traversed two or more counties of the state. The debate, in short, revolved about the single question of assessment for purposes of taxation. Finally, the amendment was offered which now finds place in the Constitution, and debate upon this followed, always upon the same lines, as to the wisdom and justice of the plan of assessment. For example, Mr. Estee in opposition protested "because the very fundamental doctrines of taxation rest upon the proposition that every dollar shall be taxed by a rule which shall be uniform throughout the state." Mr. West, of Los Angeles, discussing the proposed amendment and answering Mr. Estee, declared: "I fully agreed with the gentleman that we should adopt a rule that will be uniform in its operation. But certainly I disagree with him when he says we cannot have the railroad property in this state assessed by a state

board of equalization. In that particular it would be a state board of assessors. Now, it is well known that the railroad property is peculiar property in itself. It does not bear any relation to the localities as other property does. It is considered as an entirety. The rolling stock and all belong to the road as a whole, and ought to be assessed as a part of the entire line. All the property used is a part of the road, and the value can be much better ascertained by assessing it as a whole." And Mr. Justice Van Dyke, at that time a member of the constitutional convention, opposing the original section and favoring the amendment, said, amongst other things: "There are many railroads in this state, and gentlemen seem to forget, in their efforts to drive at the main railroad, that in some counties there are short lines of railroad for local purposes which will come within the provisions of this section as it now stands. Why take a local railroad in Humboldt county that runs but a few miles, and throw the assessment of that property upon the state board? It is not the office of that board. It ought to be assessed by the county assessor the same as all other property in Humboldt county. \* \* \* For that reason I am in favor of the amendment proposed by the gentleman from Los Angeles."

It is thus an assured and ascertained fact that the framers of the Constitution recognized a broad distinction, for purposes of taxation, between railroads operated in but one county and railroads operated in more than one county, and that they set forth a different scheme of taxation for the different kinds of roads. In *People v. Central Pacific R. R. Co.*, 105 Cal. 576, 38 Pac. 906, further differences and distinctions are pointed out in justification of the classification made by the Constitution, and practical examples given of the difficulties that would arise were it attempted to enforce by delinquent tax sales the assessments, if made in the separate counties by the local assessors.

It may be here noted that the Constitution itself nowhere employs the phrase "street railroad" or "street railway," but, when it speaks at all upon the subject, uses the word "railroad." True, some provisions could in their nature have no application to street railroads operated within a single city or a single county, but this is no argument against the proposition that, where the Constitution speaks generally of railroads, all railroads, of whatever class, which by fair interpretation and intentment come within the meaning of the word, are meant to be included; for, as was said by the Supreme Court of Maryland in *Oler v. R. R. Co.*, 41 Md. 583, where it is decided that "railroad" did include "street railroad": "Had they not been made parts of the law, it might have furnished an argument that would not have been without weight, that such railroads were intended to be excluded from its operation; but we do not understand that their being in the law can

furnish any sound reason for the exclusion of other classes of railroads, when the language of its general provisions, as is the case with the law before us, is broad enough to embrace them." Nor should much weight be given to the argument that the framers of the Constitution could not have had in contemplation such interurban and intercounty roads as now exist, because at the time the Constitution was adopted there were only steam railroads operating in one or more counties of the state, and street railroads running wholly within the streets of a single municipality, generally with horses for motive power. It is true that electricity as a motive power was not then in use, but no one would contend that a newer mode of propulsion would operate to affect the terms of this constitutional provision. If any one of our present steam railroads running through several counties of the state should change its motive power to electricity, it would hardly be contended that by reason of that change they were withdrawn from the operation of this provision, and it would be an altogether unjustifiably narrow construction of our Constitution to hold that its provisions, or that this provision, must be construed solely in the light of facts existing at the time of its adoption. The Constitution is the organic and governing law of our state. It is never to receive a technical construction like a common-law instrument or a statute. It is always to be so interpreted as to carry out the great principles of government which it embraces and expresses, or, as Judge Story says: "A constitution of government does not and cannot from its nature depend in any great degree upon mere verbal criticism, or upon the import of single words. \* \* \* While we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of government we are to construe, and that must be the truest exposition which best harmonizes with its design, its objects, and its general structure." Black on Interpretation of Laws, p. 14. It is in strict consonance with this principle of interpretation that courts hold, and that in this case it should be held, that the instrument was not fixed, set, and hardened upon the day of its adoption, but is, and was meant to be, flexible enough to meet the changing conditions of our civilization. The English cases are common where their statutes, which have something of constitutional force, have been held to embrace new conditions, nonexistent at the time of the passage of the act. Thus, in *Bishop v. North, Mees. & W.* 418, a statute passed in 1792, of course long before the existence of steam railways, provided that the proprietor of any estate containing any mines of coal or other minerals could build a railway over the land of another for carrying his coals or other minerals, by first paying or tending satisfaction for the damages to be thereby occasioned, and the question

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arose whether under this act a railway could be built over lands of another on which steam cars and locomotives were to be used. The court held: "I cannot think it [the act] can be qualified by showing that at the time of the passage of the act a particular species of railway, unlike the one contemplated, was in use. The power is general to make railways over the lands or grounds of any person or persons making satisfaction for the damages to be occasioned thereby." And so, too, in *Taylor v. Goodwin, L. R. 4 Q. B. Div. 228*, a statute passed before bicycles were known, and which imposed a penalty for "furiously driving any sort of carriage," was held to apply to the furious driving of a bicycle.

Electric roads themselves were first operated upon the streets of a municipality. They next extended out upon the suburban roads and county highways. They now run freely between counties. They are projected over all parts of the state, and, if the expressed conviction of many prominent engineers is to be credited, it will not be long before even between states they will to a great extent have supplanted the present steam railroads.

Nor can any well founded distinction be made because they run, where possible, along and upon streets and highways. They do not always do so. They frequently traverse lands upon their own acquired rights of way; and, when they are operated in two or more counties of the state, no reason appears why they should not be held to come within the provisions of the section of the Constitution under consideration, and many reasons, as above pointed out, demand that they should be.

The judgment is therefore reversed, and the cause remanded.

We concur: McFARLAND, J.; SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.; LORIGAN, J.

BEATTY, C. J. I dissent. The question whether street railways are covered by the provisions of the Constitution empowering the railroad commissioners to regulate fares and freights of railroad and other transportation companies was before this court in the case of *Railroad Commissioners v. Market Street Ry. Co.*, 132 Cal. 677, 64 Pac. 1065, and it was there held—all the justices except Temple concurring—that, although within the literal terms of the Constitution, a street railroad company was not within the intention of its framers. The opposite view was very cogently presented in the dissenting opinion of Judge Temple, but the court was satisfied that the members of the convention in framing, and the people in adopting, the Constitution, did not intend to subject to the control of a state board the holders of a franchise granted by local authority upon special conditions varying with the locality. The reasons which induced that decision

apply with still greater force to the present case. If it is right that the city granting a franchise should retain the exclusive power to regulate the conditions upon which it may be exercised, it is right that the city to whose bounty the holders of the franchise are indebted for whatever value it possesses should retain the power to assess and tax that value for municipal purposes. And there is no difficulty in distinguishing street railroads from railroads "operated in two or more counties"—the test by which the jurisdiction of the state board of equalization is defined. The essential difference between the railroad of the Constitution and a street railroad does not consist in the difference of motive power employed or of traffic conducted, but in the origin and nature of their respective franchises. A railroad franchise is obtained upon terms and conditions equally applicable to all roads of its class by compliance with the general state law which empowers the corporation to construct and operate a railroad between the designated termini, located, it may be, in counties widely separated. A street railroad is constructed and operated entirely within the limits of a municipal corporation, under a special franchise granted by the local authority, and subject to such special conditions as the local authority may choose to impose. The corporation or individuals holding the franchise cannot under their charter extend their road beyond the city limits, nor can they possibly operate it in two or more counties unless it should happen that one municipal corporation should be partly situated in one county and partly in another—a contingency which it is safe to say no member of the constitutional convention ever thought of. All they can do, and all they have done in this case, is to buy another road, chartered by a different local body and situated in another county, unite the ends of the two roads, run some of their cars over it, and call it a road operated in two or more counties. But does it therefore become one road for purposes of taxation? Does the mere accident of common ownership of two roads, entirely independent in their origin, work a complete revolution in the mode of assessing and taxing them, and at once release from the burdens of municipal taxation a portion of the municipal franchise corresponding to the mileage of the county road? I should think a court would hesitate to come to such a conclusion. The finding of the trial court in this case is that the predecessors of the plaintiff obtained a franchise from the county of San Mateo empowering them, subject to the orders of the supervisors of that county, to lay and operate a track along certain county roads, and that at different dates the predecessors of plaintiff (not necessarily the same predecessors, though that is wholly immaterial) obtained franchises from the city and county of San Francisco empowering them to construct and operate a street railroad over certain streets

of the city. Now, suppose that the mileage of the road in San Mateo was equal to the mileage of the road in San Francisco, but, owing to the density of population in the city and the volume of traffic there, the franchise, road, and rolling stock of the city road were worth in the market \$1,000,000 and the franchise, road, and rolling stock of the San Mateo road were worth only \$100,000. Before the consolidation by transfer from its predecessors to the plaintiff I suppose it will be conceded the two roads were separately assessable—the one by the assessor of San Mateo county at \$100,000 for state and county purposes, and the other by the assessor of San Francisco city and county at \$1,000,000 for state and county and municipal purposes. By the consolidation and operation of the two roads under a common ownership this change is effected: The two roads, with their distinct franchises and all their rolling stock, pass under the jurisdiction of the state board, by whom they are assessed in a lump at \$1,100,000, which is assigned half and half—in proportion to mileage—to San Francisco and San Mateo. Four hundred and fifty thousand dollars of taxable value is transferred from San Francisco to San Mateo for state and county purposes, and the same amount is absolutely exempted from any contribution to the burdens of municipal administration. The value created by San Francisco—the value dependent upon municipal conditions and justly chargeable with its share of municipal expenses—is by the mere act of the recipients of the city's bounty emancipated from any share of the municipal burdens.

This unjust consequence of the present decision may perhaps be better illustrated by the effect of coupling a county road with a street railroad of a city not consolidated with a county, and whose boundaries are not coincident with the county boundaries. Suppose a street railroad company holds its franchise from the city of Los Angeles; that it has 30 miles of track within the city, which, with its franchise, its rolling stock, used and necessary for its city traffic, is worth \$10,000,000. Suppose a county road constructed and operated under a separate franchise granted by a different body and upon different conditions, subject to visitation by a different authority and forfeitable upon different contingencies, extending from the city boundary 30 miles through the county, and a short distance into Orange county, is worth \$1,000,000. While these roads are separately owned, the road in the city is assessed by the city assessor at its full value for city purposes, and contributes its fair share towards sustaining the burdens of municipal administration. But if the company that owns the city franchise buys the country road and connects it with the city tracks, so that it can run cars over it to accommodate the country traffic, the state board at once becomes the sole assessor for all purposes, and this consequence ensues: The consoli-

dated road is assessed for \$11,000,000, and for state and county purposes pays the same taxes it did before the change, but the city taxes must be levied upon only \$5,500,000 instead of \$10,000,000; \$4,500,000 is struck from the city roll, and, if the rate of city taxes is 1 per cent., the city loses, and its creature gains, \$45,000 a year by its own act. It subsidizes itself at the expense of its patrons in a large sum annually in aid of the construction of country roads, which may or may not yield operating expenses. And if, with such encouragement, it extends its connecting road through Orange county into Riverside and San Diego or San Bernardino, the relative share of the city of Los Angeles in the total assessment continually diminishes and for city purposes is entirely lost, while for state and county purposes it is transferred in increasing proportion from Los Angeles county to Orange, Riverside, and San Diego. The situation indeed offers infinite possibilities, and in the future development of the state it is not to be doubted that city railroad corporations will avail themselves freely of a means placed in their power to evade taxation for municipal purposes upon the property originating in municipal grant, and deriving its value from the same conditions which make municipal administration necessary and costly.

These considerations, in my opinion, call much more loudly for the construction given to the word "railroad" in the Market Street Case than did the considerations upon which that decision was based.

#### On Rehearing.

(Feb. 15, 1904.)

SHAW, J. This is an appeal by the plaintiff from the judgment of the court below in favor of the defendant. This appeal is on the judgment roll alone. The plaintiff is the owner of a street railroad running from the intersection of Market street and Stewart street, in the city and county of San Francisco, to the town of Baden, in San Mateo county, with a branch at the intersection of Eighteenth and Guerrero streets to Golden Gate Park, a total distance of 23 miles, of which 18.4 is situated in San Francisco and the remainder in the county of San Mateo. During the times here involved the plaintiff was operating the road in more than one county; that is to say, it was operated as a continuous line running from the terminus in San Francisco to Baden in San Mateo county. The assessor of San Francisco for the year 1899 made an assessment of the property of the plaintiff, including its franchise, roadway, roadbed, rails, and rolling stock situated in the county of San Francisco. In the same year the state board of equalization made a valuation of the entire line of the plaintiff's road, and apportioned the same between the county of San Mateo and the city and county of San Francisco, according to the mileage

of the road situated in each county, respectively. The question which of these two assessments is the one sanctioned by law is the sole question in the case. It is conceded that if the word "railroads," as used in section 10, art. 13, of the Constitution, is to be construed to include street railroads, the assessment of the state board of equalization must prevail, and the judgment must be reversed. The entire section in question is as follows: "All property except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which said railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

At the time of the adoption of the Constitution there was not within the state a street railway operated in more than one county; nor was there any apparent probability that there ever would be such a street railroad. The Civil Code, at that time, classified street railroads and ordinary commercial railroads separately, designating one by the term "railroad" and the other by the term "street railroad." The constitutional convention was composed largely of lawyers, who must be presumed to have been familiar with the nomenclature used in the Civil Code. The street railroads then in operation were confined entirely to the limits of cities and towns. The debates in the convention show that there was there no suggestion that the provision in question was intended to refer to street railroads, nor any reference other than to ordinary commercial railroads. In view of these facts, it cannot be said that either the convention or the people, in adopting this section of the Constitution, were looking forward to a possible condition, and adopting a regulation for the assessment of a possible street railroad which might at some future time be operated in more than one county. There was therefore clearly an absence of actual intention in using the word "railroads" to make a provision which also should apply to street railroads, if, peradventure, in the future one should come within the description. If the word is to be extended so as to include street railroads, it is not because of the actual intention of those who framed and adopted the Constitution to give the word that meaning, but because of the rule of law that where a provision is made by law for a certain class of subjects, and thereafter a new but similar subject is created, coming within the general description, and within the particular purpose and object

of the law, it is to be considered as having been intended to be included in the original description. Thus, for illustration, a statute which imposes a penalty for "furiously driving any sort of carriage" was held to include and apply to bicycles, although at the time the statute was adopted bicycles had not yet come into existence. *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228.

A good deal is said in the briefs with respect to the rule of construction to be applied to such cases, but there is no better statement of the rule to be found than that given by this court in *Railroad Commissioners v. Market St. R. R. Co.*, 132 Cal. 678, 64 Pac. 1065, in these words: "In order to correctly determine this question we must look to the words used, the context, the object in view, and the evils that were intended to be remedied." The rule is stated in this language in *Mass., etc., v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46: "The meaning of the word must always depend upon the context and the legislative intent of the statute in which it is used, and must be ascertained from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view."

As to the word used, it is manifest from an examination of the numerous cases cited on each side of the question that the word "railroad" may or may not include street railroads, according to the circumstances, and that, in order to determine whether it does or not, we cannot consider the word itself as of any consequence, but must in every case look to the "context, the object in view, and the evils intended to be remedied." The context of the Constitution, as a whole, apart from this particular section, affords us little aid. It nowhere refers to street railroads in express terms. It was held in *Railroad Commissioners v. Market St. R. R. Co.*, *supra*, that the word, as used in sections 22 and 23 of article 12, providing for the supervision of railroads and railroad corporations by a board of commissioners, did not include street railroads. Yet it is not unlikely, notwithstanding what is said in the opinion in that case, that the same word, as used in some of the other sections in the same article, would be properly construed to include street railroads. We must, therefore, look to the immediate context of the article and section in question, and to the "object in view and the evils to be remedied."

The general subject of article 13, in which the section involved occurs, is the taxation and assessment of property and persons. Section 1 declares the general policy of the law to be that all property is to be taxed in proportion to its value, and that the value is to be ascertained in the manner provided by law. The general rule with respect to the manner of ascertaining the value is declared in the section here involved to be that all property shall be assessed by the local authorities of the place where it is situated.

This general rule would suffice to give a uniform and just assessment of all ordinary property, but in considering the subject of the property of railroads extending from one county into another, and operated as a whole, as was the case with the greater number of the railroads, other than street railroads, then in operation in the state, it is manifest from the debates that the convention perceived that this method would cause much inequality in the valuation of the same kind of property, having substantially the same value, in the different counties, and would produce conflicts between the authorities of different counties concerning the exact location of the movable property, described as rolling stock, on the day its liability to assessment accrued, and probably some double assessments of such property in the respective counties. These were the evils which the convention sought to remedy by the provision under consideration. The density of population and the value of lands at any point along the line of an ordinary railroad does not materially enhance the value of the roadway of that part of the line above its value in other places. Although it may cost more in one place than in another, its value for railroad purposes is substantially the same. The same is true of the roadbed and rails. Although absolute perfection may not have been attained, a substantially just and uniform assessment in the respective counties is thereby secured, and the result of the working of the method adopted has, on the whole, been reasonably satisfactory to the people in its application to this class of property of the ordinary railroads of the state.

Since the adoption of the Constitution, the growth of the state in population and wealth, and the ingenuity of man in making applications of the power of electricity, have made feasible and profitable the operation of ordinary street railroads in more than one county. The railroad in question is strictly a street railroad. It is expressly found by the court that it is a street railroad throughout its entire length, and if at any place it operates upon a roadway obtained from private individuals and not upon the public streets, or in any other manner than as a street railroad, that fact does not appear in the record. The question presented is whether or not such a road comes within the object and purpose of the constitutional provision. It is conceded, of course, that the mere matter of the motive power for the propulsion of the cars is entirely immaterial. There is nothing in the purpose of the provision, nor in the evils which it was designed to remedy, nor in its practical application, which gives to the means of moving the cars the least significance in the decision of the question before the court. So, also, we think it must be conceded that, with respect to the evils of double assessments, conflicting claims, and inequality in values between the different counties, there is no

reason apparent why a street railroad should not be held to come within the scheme provided by the Constitution for the assessment of railroads operating in more than one county. It was chiefly upon these grounds that the decision was placed in the opinion first rendered in this case. If there were no greater distinctions between the two classes of railroads than these, the conclusion that street railroads come within the object and purpose of the constitutional provision would be correct. Upon further consideration of the subject, however, we are of the opinion that other differences exist which were not considered in the former prevailing opinion, and which are sufficient to prevent the operation of the rule of construction contended for by the appellant. That rule cannot properly be applied where the new subject possesses characteristics so different from the old that to bring it within the scope of the pre-existing law would cause serious and substantial injustice. The different character of the franchise possessed by one class of roads from that possessed by the other, and the very serious interference with one of the fundamental principles upon which the power of taxation rests, which would arise from the operation of the constitutional plan, present sufficient reasons why a street railroad should be considered as not within the terms of this section of the Constitution. The franchise of an ordinary railroad is obtained upon terms and conditions equally applicable to all roads of its class by a compliance with the general law which empowers corporations to construct and operate a railroad between the designated termini, located, it may be, in counties widely separated. Civ. Code, § 291. At the time the Constitution was adopted the law provided that franchises for the construction and operation of street railroads along the streets and public highways could be obtained only from the governing body of the city or town in which it was situated. *Id.* § 497. The law has been changed in some respects since that time, but the substantial provision still remains that the franchise can only be obtained through the action of the council or governing body of the municipality. Civ. Code, § 497; St. 1901, p. 265, c. 103; St. 1903, p. 90, c. 82. This franchise, of course, cannot extend beyond the city limits, and it is made subject to special conditions imposed by the local authorities—conditions which may be different in the case of each railroad of this character. It gives no authority whatever for the operation of a street railroad in more than one county. The only way by which a company can operate a street railroad in more than one county is by obtaining separate franchises from the local authorities of the respective counties, so located that the ends of the two roads coincide at the county line, so that the two can be in fact operated as a continuous line running from one county into another. But the franchises

must remain separate and distinct, and local in origin, situation, and character.

The incorporation of a street railroad company, of course, gives the corporation the power to do the business of operating street railroads, or some particular street railroad, as the case may be, as a natural person might do, and this power is doubtless a part of its general corporate franchise. But it is not to this that we now refer, but to the special permission to lay tracks in the streets, without which the power included in the grant of incorporation cannot be exercised. In the case of an ordinary railroad the right which it may acquire to operate its road along a public street is, strictly speaking, a mere right of way, similar to the right it may acquire from landowners along the route. It is a part of its roadway, and not a part of the franchise, within the meaning of the word in the phrase in question. It imposes no implied obligation upon the grantee or donee to facilitate the local public use of the street by carrying persons from place to place thereon. The right which a street railroad obtains from the city to lay its track and operate its road on a street, on the contrary, is the most valuable part of its franchise. It carries the obligation to serve the public in the use of the street, and is in furtherance of the original use. It does not receive this franchise by becoming incorporated, as an ordinary road receives its franchise to operate its road between its termini, but obtains it afterward by special grant from the municipality, and the thing thus obtained includes both the roadway and the franchise.

It is plainly the general policy of the law that property situated in one county or city should be taxable in that county or city for local purposes for its actual value, and that that local subdivision alone should have the benefit of this value for the purpose of raising its revenue. This, indeed, is the basis of all local taxation, and it is recognized by the section in question that the property which receives the benefit of local government shall pay its proportion of the expenses thereof, apportioned according to actual value. It would be a very anomalous condition of affairs, therefore, if a franchise granted by one municipality, and entirely local to that municipality, should be assessed by a system which would permit a part of its value to be taken from the assessment of the municipality in which it is situated and transferred to another municipality, and there made the basis of an assessment for the benefit of that local government. Yet this is precisely what the proposed system would do. If the differences in the amounts were very small as compared to the whole, as could justly be said in the case of an ordinary railroad, perhaps this would not be a sufficient reason for supposing that the constitutional convention did not intend to include street railroads in the scheme. But

a consideration of the different circumstances existing in the case of the respective classes of railroads, and the difference in the character of business transacted by them, shows that in the case of street railroads the difference in value would be very considerable. A street railroad in a city, as its name implies, operates its cars over the streets in common with the public, and as a part, and in furtherance, of the public use to which such streets are dedicated. The value of the system does not rest to any great extent upon the value of the space of ground which is occupied by the track. That space is also subject to general public use as a part of the street, and, considered merely as land, the interest of the railroad therein is of very little value. The valuable part of the privilege arises from the fact that the ground is already dedicated to public use, and is used for public travel; from the fact that it is situated on a public way along which persons are wont to travel from place to place, and that it is intended to facilitate this use and this travel by carrying persons to and fro along the street as they may desire. It is this local traffic from which the earnings of the company are derived. It is the existence of this demand and the opportunity to supply it by reason of its situation on and along the street which gives value to the privilege of using the street as a roadway. In this respect there is no similarity between a street railroad and an ordinary railroad. The latter does not do a local business, nor facilitate local travel along the street. If it occupies the streets at all, as it may do under permission of the local authorities, it is not for the purpose of serving a local use or travel from place to place along that particular street. It is in reality an obstruction to such local travel. It uses the streets merely as a convenient route by which to reach its depot, and usually it takes the street instead of a right of way over private land, not from choice, but from necessity. Its use of the street has no relation whatever to the local public use, and the fact that it is on a street does not add to, but rather detracts from, the value for railroad purposes of that part of its roadway, and it adds nothing at all to the revenues received from the operation of the road.

It is easily seen that in the dense population of a city the value per mile of track of a street railroad must necessarily be very much greater than in the more sparsely populated country outside of the city. In the case of a street railroad operated partly within and partly without a city, whether in more than one county or not, it is evident that if the entire value of the franchise and roadway of the railroad as a whole is ascertained, and the amount divided between the portion inside the city and the part outside, in proportion to the length of track in each territory respectively, a large part of the value of property situated within the city

would be arbitrarily, taken from the city valuation and transferred to that of the county, thus, if the road is operated in more than one county, causing an injury to the city and a benefit to the county, which it cannot be supposed was intended. In this particular case, for instance, if the value of the 18 miles of the plaintiff's franchise, roadway, roadbed, and rails in San Francisco is \$8,000 per mile and the 5 miles in San Mateo county is worth only \$4,000 per mile, the total value in San Francisco would be \$144,000, and in San Mateo county \$20,000, and the only fair and just assessment would be upon those values in the respective counties. But the average value per mile of the entire road would be approximately \$7,130, and, if valued by the arbitrary method provided in the Constitution, the result would be that \$15,655 of the value of the property within the city would be taken from the San Francisco assessment and added to that of San Mateo county, thus depriving the city of San Francisco of a part of the revenue to which it is entitled, and giving to San Mateo county revenue to which it has no just claim, and enabling the plaintiff to avoid city taxation to the extent of the difference.

The possibilities of escaping taxation in the particular case here before the court may be of slight importance to the plaintiff, because the rate of taxation may be substantially the same in the city and county of San Francisco as in San Mateo county, but in the case of a railroad operated in a city situated far from the county line the method of assessing such a railroad operated in more than one county would enable such a road to escape taxation upon a large proportion of the value of its property. For instance, in the county of Los Angeles, a street railroad system having lines extending in many directions throughout the city of Los Angeles might run a branch outside of the city, but within the county, for a distance of 30 miles before reaching the county line. So long as it was operated only within the county it would be assessed according to its value in the city and county, respectively, by the assessor of that county for county and state taxation, and by the assessor of the city for municipal purposes. But, by extending the line for one mile beyond the county line, and thus making it a road operated in more than one county, the comparatively larger value of that part of the road situated within the city goes into the general sum, and becomes merely a part of the value of the entire system. The trackage within the city would then be valued at the average value of the entire system, which would be very much less than the real value of the mileage within the city. This much of the city values would, therefore, be taken from the city assessment and added to the assessment for county purposes, and to that extent the road would entirely escape assessment for municipal purposes. For instance, if the value



of the tracks within the city was \$1,000,000, and the value of the tracks outside of the city \$500,000, the total length being 60 miles, one-half in the city and one-half outside, the average value per mile of the whole system would be \$25,000. By this plan the mileage within the city would be valued at only \$750,000, and the city would lose for assessment purposes \$250,000 of its value, and to that extent the railroad would escape taxation and the city would lose its legitimate revenue. We do not believe that the Constitution was intended to give the opportunity for such consequences, and for these reasons we think the section does not apply to street railroads.

There has recently come into existence a certain class of railroads, known as "interurban roads," which are a sort of hybrid, having in some respects the characteristics of the ordinary railroad and in others those of the street railroad. Within the limits of the cities which they enter they usually pass along the streets, and perform the ordinary functions of street railroads, stopping where desired to let passengers on or off, and serving the public need for local street travel. Outside the cities, on their way from one city or town to another, they frequently travel upon a roadway obtained from private persons, not upon a public road, and stop, as in case of ordinary railroads, only at stations established by them for that purpose. They also often convey freight as well as passengers. Whether or not these railroads, when operated in more than one county, are to be classed as street railroads, or as ordinary railroads to be assessed by the state board of equalization, and, if the latter, whether they may be attached to a system of street railroads, and so make the entire mileage of such system subject to assessment by the state board, or must, for the purpose of such assessment, be limited exclusively to the part of the system traversed by the cars of the interurban line, are questions which do not here arise and need not be considered. The railroad in question is not one of this class.

The judgment of the court below is affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.; ANGELLOTTI, J.; VAN DYKE, J.

McFARLAND, J. (dissenting). I dissent, and adhere to the former decision and to the opinion then delivered (75 Pac. 575), and I desire to add only the following, which seems to be too obvious to be surmounted by any kind of reasoning: The word "railroad" is frequently used in the Constitution without any other defining or qualifying phrase, and where the meaning of the word, standing alone, comes in question in determining the application of some provision of the law, it is, no doubt, occasionally difficult to decide whether, in the particular matter involved,

it should be construed to include "street railroad." But in the provision here in question—"all railroads operated in more than one county in this state"—the word "railroads" does not stand alone; the important, significant, and controlling part of the phrase is "operated in more than one county." The thought in the minds of the framers of the Constitution, as shown by the language used, was to provide for the assessment of a railroad, with its rolling stock, franchises, etc., running through and being operated in more than one county. And the thing intended to be provided for is, in its very nature, applicable to any railroad which is operated in more than one county.

I do not see the force of the suggestion that the dense population of a city makes a mile of track within it more valuable than a mile in a more sparsely settled country outside of the city. The same fact exists as to all railroads. The great overland railroads pass through counties which are thickly settled and cities having dense populations, and also through almost entirely unsettled mountain and desert regions, and the parts of these railroads lying within the former are more valuable than those lying within the latter. If they were divided, for the purpose of taxation, into sections corresponding with county and city lines, cities, and some counties, would receive more revenue from taxation of these roads than they do now. But under that system other evils would occur; and the constitutional convention, after a full consideration of the whole matter, determined that the more practicable, just, and equitable way was to tax each railroad operated in more than one county, with its rolling stock, etc., as a whole. This being the rule declared by the Constitution, it cannot be disregarded on the ground that it is not the best way to assess such a railroad.

I concur: HENSHAW, J.

(142 Cal. 22)

LACKMANN, Sheriff, v. SUPREME COUNCIL O. C. F. et al. (S. F. 3,664).\*

(Supreme Court of California. Jan. 26, 1904.)

BENEFICIAL ASSOCIATIONS — INSOLVENCY — CLAIM OF CREDITORS — FOREIGN RECEIVER — RIGHTS — ATTACHING CREDITOR — PLEADING.

1. As between the receiver of an insolvent foreign corporation appointed under the laws of another state, not in force in California, and a domestic attaching creditor claiming a fund situated in California, the court will decree the fund to the domestic creditor without reference to the legality of the receiver's appointment, or as to his rights under the laws of the state of his appointment.

2. Where other California creditors were not parties to the suit, it was immaterial that such creditors might be benefited by a recovery of the fund by the receiver.

\*Rehearing denied February 25, 1904.

¶ 1. See Receivers, vol. 42, Cent. Dig. § 414.

3. A beneficiary of a member of a beneficial association after the member's death is a creditor of the association.

4. An answer alleging that plaintiff's claim was based on and grew out of a membership certificate in a certain benevolent association, and not otherwise, amounted to an admission of the claimant's allegation that he was a creditor of the association.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John Lackmann, sheriff of the city and county of San Francisco, against the Supreme Council of the Order of Chosen Friends and others, to determine adverse claims to certain moneys in his hands. From an order sustaining a demurrer to the claim of Cyrus J. Clark as receiver for the order, and sustaining the claim of Matilda Koelzer, Clark appeals. Affirmed.

Rothchild & Ach and Van Ness & Redman, for appellant. F. D. Brandon, for respondent.

GRAY, C. The Order of Chosen Friends is a fraternal beneficiary order, which was organized under the laws of the state of Indiana with its home office at Indianapolis, and conducting its operations in that state and the other states and territories of the Union. The plaintiff is the sheriff of the city and county of San Francisco. One of the defendants herein, Koelzer by name, commenced an action against the supreme council of said order, based upon a certificate of membership therein, in which she, the said Koelzer, was named as beneficiary. Under a writ of attachment issued in said action the plaintiff seized and took into his possession as sheriff, \$2,519.60 in money belonging to the said defendant, the supreme council of said order. The defendant and appellant, Clark, is the receiver appointed by the superior court of Marion county, Ind., in insolvency proceedings brought by the Attorney General of that state against said supreme council. This action was brought by plaintiff to compel the defendants to interplead and have their adverse claims to this money determined by the court. The sheriff paid the money into court. The defendants Clark and Koelzer filed their answers and claims to the fund, respectively. The defendant Koelzer demurred to the amended claim of Clark, and, the demurrer being sustained, Clark failed to further amend. The other defendants defaulted.

The court found and adjudged as follows: "That all the allegations of said claim of defendant Matilda Koelzer herein are true; that the moneys paid into court in this action as aforesaid were attached by plaintiff herein under and by virtue of a writ issued in an action brought in this court by said defendant Koelzer, and that at the time of said attachment there was no lien or other attachment upon or against said moneys or any part thereof; that thereafter said defendant

Koelzer in her said action recovered judgment in this court for a sum greatly in excess of the amount paid into court as aforesaid; that she is entitled to said moneys, and to have the whole amount thereof paid over to her in part satisfaction of said judgment obtained by her as aforesaid; and that the defendants herein, other than said defendant Koelzer, have not, nor has any or either of them, any lien, claim, right, title, or interest of any kind in or to said moneys, or any part thereof. It is therefore ordered, adjudged, and decreed by this court that said defendant Matilda Koelzer is entitled to the moneys heretofore paid into court in this action," etc. The defendant Clark appeals from the judgment.

We think the judgment is correct, and that the demurrer to Clark's amended claim was properly sustained; and it will be necessary to notice only one of the grounds discussed upon this appeal and urged in support of the demurrer. It must be treated as the settled law of this state that, as between the receiver of an insolvent foreign corporation, appointed under the laws of another state not in force here, and a domestic attaching creditor, both claiming a fund situated in this state, the fund will be decreed to the domestic creditor without stopping to inquire into the legality of the appointment of the receiver, or as to his rights under the laws of his state. Under the laws of our own state the domestic creditor had the right to attach the property, and no rule of state comity or of law requires us to set aside this right in deference to a foreign receiver claiming under the laws of another state. *Ward v. Pacific Mut., etc., Ins. Co.*, 135 Cal. 235, 67 Pac. 124; *Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. 892, 6 L. R. A. 792, 15 Am. St. Rep. 76; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338. It is claimed that all the California creditors of the defendant order, except the particular one whose attachment was levied, are benefited by a recovery by the receiver, and that hence in this case the reason for the rule refusing to recognize the claims of foreign receivers is wanting. But we take it that, if that question were submitted to the other California creditors of the order, there might be some dispute between them and the Indiana receiver in relation to it. Besides, it will be time enough to consider the interest of the other California creditors when they are brought before the court in some manner and through some agency recognized by the law of California. They are not parties to this action, and cannot be represented by a receiver appointed under the law of another state, presumably without their knowledge or consent.

The beneficiary suing after the death of the member of the order was a creditor. *Solis v. Blank*, 199 Pa. 600, 49 Atl. 302. Not only was she a creditor when the suit was commenced, but pending the final hearing she

became a judgment creditor, as the judgment appealed from discloses. The claim or answer of Clark to which the demurrer was sustained in no way controverts the allegations of the complaint showing that the defendant was an attaching creditor, but alleges "that the claims asserted in said action by said Koelzer and sued on herein were based upon and grew out of membership certificates in said order and not otherwise." This amounts to an admission of Koelzer's claim to being a creditor. The demurrer was properly sustained, and the judgment is correct.

We advise that the judgment be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion the judgment is affirmed: ANGEL-LOTTI, J.; SHAW, J.; VAN DYKE, J.

(44 Or. 265)

### DIGHT v. CHAPMAN.

(Supreme Court of Oregon. Feb. 1, 1904.)

**BANKRUPTCY — DISCHARGE — PROVABLE CLAIMS—DULY AUTHORIZED AGENT —IMPUTING NOTICE.**

1. Const. Minn. art. 10, § 3, makes each stockholder of an insolvent corporation liable for its debts to an amount equal to his stock. In a suit in that state pursuant to its statutes by creditors of an insolvent corporation against the corporation and its resident stockholders to charge its stockholders with such liability, there was a decree establishing the indebtedness of the corporation at about two-thirds of its stock, and awarding a recovery against it for that sum, and against the stockholders severally for an amount equal to the par value of the stock held by each. *Held* that, as against a non-resident stockholder, who was not made a party to and who did not appear in said suit, the decree rendered prior to his being adjudged a bankrupt made the claim against him on account of such stockholders' liability a provable debt, within Bankr. Act 1898, § 17 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), providing that a discharge in bankruptcy shall release a bankrupt from all his provable debts.

2. A receiver for collection and enforcement of the liability of stockholders appointed by the court, pursuant to the statutes of Minnesota, in a suit by creditors of the insolvent corporation against it and its stockholders to charge the stockholders with their liability for its debts, is a "duly authorized" agent of the corporation's creditors to prove their debt against the estate of a bankrupt stockholder.

3. Knowledge of bankruptcy proceedings acquired by one while cashier of a bank which is a creditor of the bankrupt will be imputed to the creditors of an insolvent corporation of which the bankrupt is a stockholder, the cashier having no personal interest, and having been appointed a receiver, under the Minnesota statute, for collection and enforcement of the liability of stockholders for the debts of the corporation; so that under Bankr. Act 1898, § 17, the discharge in bankruptcy releases the bankrupt from the claim of the corporation's creditors, though it was not scheduled.

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

Action by John H. Dight, as receiver for the collection and enforcement of the liability of the stockholders of the Duluth Dry

Goods Company, insolvent, against Simcoe Chapman. Judgment for defendant. Plaintiff appeals. Affirmed.

This is an action by a receiver of an insolvent foreign corporation to recover the par value of certain shares of stock in that corporation. The complaint states the facts constituting the plaintiff's right to maintain this action, and the defendant's liability for the sum demanded. The answer, after admitting almost all the allegations of the complaint, for a separate defense alleges that the defendant was duly adjudged a bankrupt, of which fact the plaintiff, as such receiver, had actual knowledge and notice, and that the defendant's discharge therefrom constitutes a plea in bar. The reply denies the allegation of new matter in the answer, and, the cause having been tried without a jury, the findings of the court are, in effect, that about September 1, 1890, the Duluth Dry Goods Company was incorporated in Minnesota under the laws thereof, and issued 1,309 shares of capital stock of the par value of \$100 each, for 50 shares of which the defendant subscribed and became the owner, paying therefor the sum of \$5,000; that under the Constitution and laws of that state a stockholder in such a corporation is liable for its debts to the extent of the par value of his stock, which obligation is enforceable by a receiver appointed for that purpose on behalf of the creditors of such corporation, who may recover such par value in the courts of any sister state that can secure jurisdiction of the person of such stockholder; that Luther Mendenhall, a creditor of the Duluth Dry Goods Company, in behalf of himself and of all other creditors who might join therein, instituted a suit in the state court of Minnesota against the corporation and its stockholders residing in that state, and, other creditors having intervened, a decree was rendered February 25, 1899, establishing the indebtedness of the corporation at \$81,717.76, and awarding a recovery against it for that sum, and against the stockholders severally for sums equal to the par value of the stock owned by each; that in pursuance of the decree the plaintiff herein was appointed receiver to collect the sums so awarded and to enforce the liability against nonresident stockholders, and, having duly qualified May 6, 1899, he has ever since been and now is such officer; that the defendant, at the time this suit was instituted, was a resident of Chicago, and, not having been made a party thereto, though the owner of stock in the corporation, he, on January 19, 1900, filed in a federal court his petition in bankruptcy, together with a schedule of his assets and liabilities and a list of his creditors, but failed to include therein his liability on account of such stock, or to name the creditors of the corporation; that he was thereupon adjudged a bankrupt, and on notice to creditors a trustee was elected, who, having duly qualified, took charge of and sold his assets, real-

izing therefrom a sum sufficient to pay his secured debts and to distribute the sum of \$10 among his other creditors, and, the estate having been settled, the defendant was discharged March 19, 1900; and that soon after filing the petition in bankruptcy, and during the pendency of the proceedings, plaintiff had actual knowledge and notice thereof, obtained while cashier of the First National Bank of Duluth, one of the defendant's creditors, by reading notices sent from time to time by the referee in bankruptcy to the bank. From these findings the court concluded that at the time the decree was rendered establishing the indebtedness of the corporation the defendant was liable to its creditors in the sum of \$5,000, which was a provable debt against his estate; that plaintiff's actual knowledge of the proceedings was equivalent to naming the creditors of the corporation in the schedule; that the defendant's discharge in bankruptcy released him from all liability on the obligation sued on; and that he was entitled to a dismissal of the action; and, judgment having been rendered in accordance therewith, plaintiff appeals.

John M. Gearin, for appellant. E. E. Covert, for respondent.

MOORE, C. J. (after stating the facts). Section 17 of the act of Congress to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898 (30 Stat. 550 et seq., c. 541 [U. S. Comp. St. 1901, p. 3428]), is, so far as material herein, as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as \* \* \* (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." The first inquiry presented is whether or not the claim here sought to be enforced is a debt "provable" against the bankrupt's estate, within the meaning of the term as used in the statute. To answer the question necessitates an examination of the Constitution and laws of Minnesota in respect to the liability of stockholders of insolvent corporations in that state. "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him." Const. Minn. art. 10, § 3. The statute of that state regulating proceedings to enforce the liability of stockholders of an insolvent corporation, as stated in the findings and admitted by the pleadings, is, in substance, as follows: Whenever a creditor of any corporation seeks to charge the stockholders thereof with any liability created by law, he may maintain an action for that purpose, and secure an order requiring all creditors to exhib-

it their claims and become parties within a reasonable time; and, if it appear that the corporation is insolvent, the court may ascertain the liabilities of the respective stockholders, and adjudge the sum payable by each, and, when necessary, may appoint one receiver to take charge of the assets of the corporation, and another to enforce the liability of stockholders. The statute of Minnesota denominates the procedure specified "an action," but, as the distinction between suits and actions has been abolished in that state, it is evident that the mode prescribed partakes of the character of a suit in equity. *Allen v. Walsh*, 25 Minn. 543; *Johnson v. Fischer*, 30 Minn. 173, 14 N. W. 799; *Hanson v. Davison* (Minn.) 76 N. W. 254. The findings admit that the decree of the Minnesota court established the insolvency of the corporation, the amount of its indebtedness, and the number of shares of capital stock issued by it, from which it follows that a payment by each stockholder of 62½ per cent. of his capital stock, if solvent, would have discharged the entire indebtedness, notwithstanding which he was required to pay a sum equal to the par value thereof. Though the defendant was not a party to the decree rendered against the corporation, he cannot, in his own defense, deny such liability; for a judgment against the corporation is, in effect, a judgment against the stockholder. *Holland v. Development Co.*, 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. 576; *Hanson v. Davison* (Minn.) 76 N. W. 254. Such decree, however, as to the ultimate question of a nonresident stockholder's liability and the measure thereof, is not conclusive as against such stockholder who was not made a party to the suit, and will be regarded as open in the trial of an ancillary action based on the decree. *Hale v. Hardon*, 95 Fed. 747, 37 C. C. A. 240. Under the Constitution and statute of Minnesota, stockholders of corporations in that state occupy a relation tantamount to sureties to its creditors for the payment of its debts, for which each stockholder is severally liable to the extent of the par value of his stock. *Allen v. Walsh*, 25 Minn. 543; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069. "Such liability," says *Aldrich, J.*, in *Hale v. Hardon*, *supra*, in construing the law of Minnesota, "is not like that of being assessed for nonpayment of the full amount of subscription to stock, for the reason that it is not an asset of the corporation." The measure of the corporation's indebtedness properly chargeable to the defendant is proportionate to the number of shares of stock owned by others from whom the pro rata share, augmented by the insolvency of others, could have been collected. This ratio must remain uncertain until it is determined who cannot pay their just proportions, thereby imposing upon the solvent stockholders the burden of discharging the entire obligation if the par value of their

stock equals a sum sufficient for that purpose. Such uncertainty, however, does not prevent the Minnesota court from rendering a decree against each stockholder for a sum equal to the par value of his stock, though the aggregate awarded exceeds the amount of the indebtedness of the insolvent corporation. *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069. In that case, Mr. Justice Cauty, in speaking upon this subject, says: "Then one of two propositions must be true: First, the creditors are entitled to successive judgments for successive assessments until the full limit of such statutory liability is exhausted, if such successive assessments and judgments are made necessary by reason of the insolvency of stockholders; or, second, the creditors are entitled to one judgment for the full amount of such statutory liability. We are of the opinion that the latter is the proper method of procedure, and that but one judgment should be rendered, which should cover the utmost possible liability of each stockholder to the creditors." The liability assumed by a person when he secures stock in a Minnesota corporation is to pay, in case of its insolvency, a ratable share of its indebtedness; but, as its creditors ought not to be subjected to unnecessary delay in the collection of their demands, this liability, in an ancillary action based on the decree establishing the indebtedness of an insolvent corporation, is measured by the par value of the stock issued, and, if any sum remains after the creditors have been fully paid, the ratable part thereof can be returned to the stockholders who have contributed more than their just proportion. *Allen v. Walsh*, 25 Minn. 543; *Marr v. Bank of West Tennessee*, 4 Lea, 578. Mr. Chief Justice Start, in *Hanson v. Davison* (Minn.) 76 N. W. 254, in speaking of this method of enforcing payment of the par value of stock from a non-resident holder thereof, says: "The only objection, in justice, such stockholder could make to such a procedure, would be that his right of contribution could not be worked out in such ancillary action. If he were called on to pay only his pro rata share of the deficiency, treating all the stockholders as solvent, the objection would wholly fail; but it would seem that his right to contribution, in case he was required to pay more than his share as between himself and the other stockholders, is subordinate to the equities of the creditors, as he can secure such contribution by appearing in the original action." It will be remembered that the defendant did not appear in the original suit, but, as the decree in that case was rendered prior to his being adjudged a bankrupt, whereby all the stockholders were required severally to pay a sum of money equal to the par value of their stock, such decree resolved the uncertainty, imposed the contractual liability, and, in our opinion, rendered the sum so awarded a "provable" debt within the meaning of the bankruptcy act. *Riggin v. Magwire*, 15 Wall.

549, 21 L. Ed. 232; *In re Fife* (D. C.) 6 Am. Bankr. R. 258, 109 Fed. 880.

The next question to be considered is whether or not plaintiff was such a representative of the creditors of the insolvent corporation as to authorize him to prove the indebtedness so established against the bankrupt's estate. The act of Congress of July 1, 1898, § 7, subd. 8 (30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]), requires a voluntary bankrupt to make under oath and file in court, with his petition, a schedule of his property and a list of his creditors, etc. This act, in construing the meaning of certain words therein used, contains the following declaration: "'Creditor' shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy." Section 1, subd. 9 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]). *Bouvier*, in his *Law Dictionary*, in defining the term "creditor," says: "He who has a right to require the fulfillment of an obligation or contract." See, also, 8 Am. & Eng. Ency. Law (2d Ed.) 240. If the definition of this distinguished lexicographer be accepted as correct, plaintiff is the creditor, for his appointment vested in him the right to require the fulfillment of the defendant's obligation. However the word "creditor" may be defined in other cases, Congress, in proceedings of this kind, has limited it to one owning a demand or claim provable in bankruptcy. It cannot be consistently contended that plaintiff was the owner of the claims which formed the basis for determining the amount of the corporation's indebtedness, and hence he is not a creditor within the meaning of the act under consideration. The word "creditor," as defined by Congress, also includes his duly authorized agent, attorney, or proxy. None of the debts against the bankrupt's estate being owned by plaintiff, so as to make him a creditor, it is proper to consider whether or not, by reason of his appointment as receiver, he represents the creditors, and comes within any one of the included classes. Section 56a of the bankruptcy act (30 Stat. 560 [U. S. Comp. St. 1901, p. 3442]) is as follows: "Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided." A text-writer, in construing the language quoted in connection with a prior clause of the act says: "By section 1, subd. 9, it is declared that the term 'creditor' shall include not only the owner of the demand himself, but 'his duly authorized agent, attorney or proxy.' Any person, therefore, who assumes to represent a creditor in the functions referred to in section 56a, must be a 'duly authorized agent, attorney, or proxy' of the creditor. By General Order 21, subd. 5 (89 Fed. x, 32 C. C. A. xiii), it is provided what such due authorization shall consist of, as follows: 'The execution of any letter of at-

torney to represent a creditor \* \* \* may be proved or acknowledged before a referee or a United States commissioner or a notary public." Collier on Bankruptcy (3d Ed.) 304. Section 30 of the bankruptcy act (30 Stat. 554 [U. S. Comp. St. 1901, p. 3434]) is as follows: "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States." That court having prepared forms to evidence the appointment of representatives of creditors, it was held in *In re Henschel*, 7 Am. Bankr. R. 662, 113 Fed. 443, 51 C. C. A. 277, that, when the acknowledgment attached to a proxy conformed literally to the form so prescribed, it was not defective because it contained no venue; Wallace, J., saying: "We agree with the Circuit Court of Appeals for the Sixth Circuit that of the creditors giving proxies those only are to be counted whose powers of attorney were regarded as authorizing the attorney to appear and participate in the meeting." Forms Nos. 20 and 21 (18 Sup. Ct. xxvii, xxviii) prepared by the Supreme Court of the United States prescribe the mode of constituting general and special attorneys respectively, and form No. 35 (18 Sup. Ct. xxxiv) indicates the manner of making proof in support of a claim by such attorney for a creditor. *Brandenburg, Bankruptcy* (2d Ed.) 869 et seq. From the rules and forms mentioned it might seem that an agent or proxy could not be "duly authorized" to prove a creditor's claim in bankruptcy, except on the production of a power of attorney executed and acknowledged in the manner indicated; and, if this be so, plaintiff did not sustain that relation to the creditors of the Duluth Dry Goods Company. Such cannot be the rule, however, for creditors of a bankrupt who are infants or lunatics, and therefore incompetent to appoint a representative to prove their claims against his estate, are not to be denied the right to share in the distribution of the fund because of their minority or mental infirmity. Guardians, administrators, executors, and other legal representatives, who have been appointed by competent authority to prove claims against a bankrupt's estate, must necessarily be the "duly authorized" agents, etc., within the meaning of the act of Congress under consideration. Rule 38 promulgated by the Supreme Court of the United States (18 Sup. Ct. x) provides that the forms prescribed shall be observed and used, "with such alterations as may be necessary to suit the circumstances of any particular case." Thus provision has been made in these instances for proving claims against a bankrupt's estate; and to assume that federal or state courts would not, in such cases, consider the appointee "duly authorized" is to imply a denial of justice. Whether or not the plaintiff was "duly authorized" to represent the insolvent corporation's creditors

must depend upon the duty his appointment imposed on him, and the relation he sustained to them. It is impossible to determine whether the Minnesota statute in relation to the duties of a receiver appointed to enforce a stockholder's liability was offered in evidence, for the bill of exceptions contains none of the testimony given at the trial; but the pleadings admit, and the court finds, the substance of that law, from which it appears that plaintiff was authorized to collect from the resident stockholders of that state, who were parties to the decree, sums equal to the par value of their stock, and also empowered to maintain actions for that purpose in sister states against nonresident stockholders. In *Hale v. Hardon*, 95 Fed. 747, 37 C. C. A. 240, in construing the Minnesota statute a distinction between a general receiver and a person appointed to enforce, in a foreign jurisdiction, payment of the par value of stock, is observed; the court holding that neither, unless expressly authorized by statute, was empowered to enforce the individual liability of stockholders for the purpose of paying the debts of the corporation. In that case, Aldrich, J., in speaking of the title of a person appointed under the Minnesota statute to enforce such payment, and of the duties enjoined upon him, says: "It is of little consequence whether the person designated as the instrument or conduit through which equity runs from the court to the stockholders, and from recovery from the stockholders to the creditors, is called a receiver, an agent, a trustee, or an assignee. If some legal and equitable means of recovery was intended and reasonably described, and the statutory agency called a 'receiver' is a convenient, safe, and reasonable agency to that end, it is of little consequence whether his duties here, as to the newly-created statutory right, are precisely those which have been heretofore exercised and discharged by the ordinary common-law or equity receiver; provided, of course, he may be said to fairly represent the legal and equitable idea intended by the statute. If a receiver, or this agency for this purpose, answers the statute, and the name does not offend the general law to such extent that the manifest intended statutory relief should be denied, the action should be upheld in his name and for the benefit of the creditors." Elsewhere in the opinion, after examining the law of that state in respect to the authority conferred upon such agent, it is said: "Therefore, by virtue of the law of Minnesota and the insolvency proceedings in that state, the court and its proceedings were subrogated to the rights and interests of all the creditors, and their right to sue stockholders, if an independent right to sue ever existed under this statute, was, at least for the time being, merged or suspended by operation of the law which involved their interest in such proceeding." The pleadings admit that Mendenhall, having secured a judgment against

the Duluth Dry Goods Company for the sum of \$12,808.76, caused an execution to be issued thereon which was returned wholly unsatisfied, whereupon in behalf of himself and all other creditors who might join therein he instituted a suit against the corporation and its resident stockholders, resulting in a decree in their favor for the sum of \$81,717.76. Though this decree evidently awarded a specific sum to each creditor, the right to control the subsequent proceedings was vested in the court. *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 69 N. W. 331, 38 L. R. A. 415. In that case Mr. Chief Justice Star, speaking on this subject, says: "While the liability of the stockholders must be enforced on the application of creditors, and not on that of the receiver, except in cases where the statute otherwise provides, yet it does not follow that the trial court has not the same control of the litigation as if it was conducted by the receiver. The creditor who first takes action to have such liability enforced, where he is plaintiff or subsequently comes into the action, has no exclusive right to control the litigation; and whenever the stockholders are once brought into the action the trial court should so far control the conduct of the litigation as to conserve and protect the rights and equities of both creditors and stockholders." The defendant's liability was limited in amount, and not to any particular creditor, but in favor of all creditors of the insolvent corporation (*Hanson v. Davison* [Minn.] 76 N. W. 254), and, though the debt of each was evidently distinguishable in the decree, the several debts were nevertheless embraced in the aggregate sum, thereby extinguishing the authority of an individual creditor to prove his claim against the bankrupt's estate. But as the right to share in the distribution thereof should not be denied him, the plaintiff, as the representative of the court appointing him, and also of all the creditors, was, in our opinion, the "duly authorized" agent within the meaning of the act of Congress of July 1, 1898, and therefore the only person empowered to prove the debt evidenced by the decree in favor of all the creditors and against the defendant's estate. This conclusion is fortified when it is remembered that plaintiff was appointed to enforce the liability of the stockholders, and, as such obligation had become fixed by the decree, thereby constituting it a debt, it could have been proved against the bankrupt's estate, which was one of the means provided for the collection thereof; and it was just as incumbent on plaintiff to pursue this remedy, if the schedule had named the entire list of creditors, as it was to institute the action in the case at bar.

The remaining question is whether or not plaintiff's knowledge of the bankruptcy proceedings, acquired while cashier of a bank which was also a creditor of the defendant, was received under such circumstances as to

impute notice thereof to the creditors of the Duluth Dry Goods Company. The general rule is that knowledge of an agent, acquired while acting within the scope of his authority, relating to matters entrusted to him and over which his authority extends, is constructive notice to his principal. Story on Agency (9th Ed.) § 140; *Angell & Ames, Corporations*, § 305; *Wood v. Rayburn*, 18 Or. 3, 22 Pac. 521; *Rayburn v. Davison*, 22 Or. 242, 29 Pac. 738; *Willis v. Vallette*, 4 Metc. (Ky.) 186; *National S. Bank v. Cushman*, 121 Mass. 490. The reason for this rule is based on the theory that it is incumbent on the agent to impart to his principal all information that he may obtain which would affect his interests; and by invoking the presumption that such obligation has been performed the conclusion is reached that the principal is chargeable with notice thereof. *Pennoyer v. Willis*, 26 Or. 1, 36 Pac. 568, 46 Am. St. Rep. 594. There are several well-recognized exceptions, however, to this general rule. Thus, if the agent sustain a confidential relation to a third party, knowledge which he may obtain from the latter, and which it is his duty not to disclose, will not be imputed as notice to his principal. *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388; *Ford v. French*, 72 Mo. 250; *Hood v. Fahnestock*, 8 Watts, 489, 34 Am. Dec. 489; *The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167. If the agent conspire with a third party to defraud his principal, or if on his own behalf he intends to do so, the knowledge which he may obtain, and which it was his duty to disclose to his principal, will not be imputed to the latter. *Platt v. Birmingham Axle Co.*, 41 Conn. 255; *Thomson-Houston Electric Co. v. Capitol Electric Co.*, 65 Fed. 341, 12 C. C. A. 643; *Dillaway v. Butler*, 135 Mass. 479; *Allen v. South Boston Ry. Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158; *National Life Ins. Co. v. Minch*, 53 N. Y. 144. So, too, if an agent has an interest to subvert that is adverse to his principal, any knowledge that he may have acquired from a third party during the time of and relating to the matter of the agency will not be imputed to his principal. *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *Lyne v. Bank of Kentucky*, 28 Ky. 545; *Winchester v. Baltimore, etc., Ry. Co.*, 4 Md. 231; *Stevenson v. Bay City*, 26 Mich. 44; *Barnes v. Trenton Gas Co.*, 27 N. J. Eq. 33. The reason upon which these exceptions rest is founded on the assumption that an agent is not supposed to communicate any knowledge he may have received, when by doing so he would betray a confidence reposed in him, reveal an intent to defraud his principal, or disclose an interest adverse to him; for, unless it can be presumed, in the light of attending circumstances, that an agent will impart the knowledge so secured,



the law will not impute notice thereof. It will be remembered that notice of defendant's bankruptcy was sent to his creditor the First National Bank of Duluth, of which the plaintiff was cashier. If this bank had been appointed the statutory agent to enforce the liability of the stockholders of the insolvent corporation, it would undoubtedly have been to its advantage to secure for itself as large a percentage of the bankrupt's estate for distribution as possible. By neglecting to prove the claims of creditors of the corporation, the bank would thereby augment the ratio to which it was entitled; and on account of its adverse interest no presumption can be indulged that it would communicate to them the knowledge of the defendant's bankruptcy which it has obtained, and hence notice thereof would not be imputed to them. The findings do not show that plaintiff was a stockholder of the bank, and therefore indirectly interested in pursuing the course which is assumed it might have adopted, but, so far as it can be discovered, he had no personal interest either in the bank or in the creditors of the corporation, and owed to each a corresponding duty that imposed on him the obligation to disclose to the court and to such creditors the knowledge he had obtained, thereby imparting to it and them notice of the defendant's insolvency, whereby the latter's discharge in bankruptcy liberated him from their claims.

The findings of the court being sufficient to support the judgment, it is affirmed.

(32 Colo. 77)

**NESMITH et al. v. MARTIN.**

(Supreme Court of Colorado. Feb. 1, 1904.)

CONTRACTS—WRITTEN AGREEMENT—VARIATION—STATUTE OF FRAUDS—SALES—OPTION TO PURCHASE—IMPROVEMENTS—ESTOPPEL.

1. In a suit to quiet title to a pipe line and the right to use water by it, it appeared that defendant had contracted with plaintiff, in writing, to take an option on a lease and bond which plaintiff had on mining claims, but defendant had not purchased. The agreement contained no reference to water rights. *Held*, that extrinsic evidence was not admissible to show that it had been agreed that a water right located at the time of the negotiation for the option, and which defendant improved, should be turned over by defendant to plaintiff in the event that defendant did not purchase under the option.

2. Plaintiff claimed that the location certificate of the water right was prepared in plaintiff's name, but that it was erased, and defendant's name inserted. Defendant denied making any such agreement as claimed. It appeared he had refused to have it inserted in the written contract, and the evidence was conflicting as to whether the location certificate bore any such erasure as claimed. *Held*, that there was no ground for equitable interference, taking the case out of the statute of frauds and establishing a trust for plaintiff; the evidence not being sufficiently convincing.

3. Where plaintiff, claiming to be the owner of a certain pipe line, sued to quiet title thereto,

alleging that defendant claimed some right or title therein, and based his claim on a written contract between the parties, which contained no mention of the water right, and such contract gave defendant an option for a lease of the property, and it appeared that, at the time of its execution, defendant had stated that he was building the pipe line for his own benefit, and that, if the property was not taken under the option, it would be sold to the highest bidder, and that, after the execution of the contract, plaintiff had attempted to buy the pipe line from the defendant, he could not be heard to say that on the expiration of the option the pipe line became his property.

Appeal from District Court, San Juan County; James L. Russell, Judge.

Action by Samuel G. Martin against John W. Nesmith and others. From a judgment for plaintiff, defendants appeal. Reversed.

Reese McCloskey, Thomas A. Dickson, and W. H. Dickson, for appellants. B. W. Ritter, for appellee.

STEELE, J. The plaintiff, claiming to be the owner of a certain pipe line, together with the head gate of said pipe line, on the Las Animas river, and the right to use water from the Animas river by and through the said pipe line, and claiming to be in the possession thereof, brought suit in the district court of San Juan county, where the property is situated, to quiet his title thereto; alleging that the defendants claimed some right or title therein. The defendants answered, and denied that the plaintiff was the owner of said water right and pipe line, or that he was in the lawful possession thereof, and, in a cross-complaint, alleged that the plaintiff had unlawfully taken possession of said pipe line in the temporary absence of the defendants, that the said pipe line was the property of the defendant John W. Nesmith, and that the pipe line had been constructed by him with his own money, with the knowledge and consent of the plaintiff. In an answer to the cross-complaint, the plaintiff sets up a contract and agreement between himself and J. W. Nesmith, which he claims was entered into between the parties on the 22d of September, 1899, and alleges that the said J. W. Nesmith holds the said property as a trustee for the use and benefit of him (the plaintiff), and, further, that the said pipe line is constructed across the property of the plaintiff, and that, under the written contract entered into between the plaintiff and the defendant Nesmith, it was agreed that the said pipe line should become the property of the plaintiff in the event that the said defendant Nesmith did not purchase the mining property under the agreement. The material matters of the answer to the cross-complaint are denied in the replication. The trial was to the court without a jury, and resulted in judgment in favor of the plaintiff, and the plaintiff was decreed to be the owner of the water right and the pipe line mentioned in the pleadings. From the judgment, the defendants appealed to this court.

¶ 3. See Estoppel, vol. 19, Cent. Dig. § 208.



From the testimony of the plaintiff, it appears that he and J. W. Nesmith entered into a verbal agreement on the 2d of September, 1899, and the court permitted the plaintiff to introduce in evidence a memorandum of the agreement made, as he alleges, at the time the agreement was entered into; the memorandum being as follows:

"Grand hotel. Silverton Colorado, Sep. 2nd 18 . . . preliminary agreement between John W. Nesmith and S. G. Martin. Nesmith agrees to buy Tom Moore Group of mines lease and bond. 4000 cash. 10000 in 12 months 10000 in two years. 200 paid to bind bargain. agrees also to protect water right and return same to Martin if contract on mines is not complied with or forfeited. S. G. Martin."

We shall not consider the objection made to the introduction of this memorandum, because the decision will be based upon other grounds. According to the undisputed testimony, the plaintiff had a lease and bond on certain mining claims, and had located several other claims in the vicinity of the property upon which he had a lease and bond; and the defendant J. W. Nesmith, desiring to become interested in the property, took an option to purchase the same from the plaintiff, paying therefor at the time of entering into the agreement to take the option the sum of \$200. It was mutually agreed between the parties that a written agreement would be prepared later, to be signed by the parties. According to the plaintiff's testimony, he had located a claim for 500 miner's inches of water for power and domestic purposes during the preceding month of August, 1899; and, at the time Nesmith and he entered into the agreement for an option upon the mining property, the plaintiff located at another point on the Animas river, several thousand feet from the first location, another claim for 500 miner's inches of water, for the purpose of supplying water for power and domestic purposes to the Tom Moore group of mines. When Nesmith, on the 2d of September, was making a preliminary inspection of the property, it was decided to change this second place of location of the head gate to a point on the river several thousand feet distant, and farther from the first head-gate location. The plaintiff testified that he prepared his location certificate, and wrote it upon a board, which he described, and placed it upon the bank of the river at a place designated by Nesmith and a surveyor; that Nesmith and the surveyor said to him that it would be better to have the location of the water right in Nesmith's name, and that Nesmith agreed that he would protect Martin, and hold the water right for him; that thereupon the writing on the board was changed, and the name of John W. Nesmith substituted for that of Samuel G. Martin, and the name of the J. W. Nesmith Ditch & Pipe Line substituted for that of the Tom Moore

Ditch & Pipe Line. Two witnesses for the plaintiff testified that they, some time after the second of September, 1899, saw the location stake, and that it bore evidences of erasures; and they testified that the word "J. W. Nesmith" was written over the name "Tom Moore." The plaintiff further testified that he received the \$200 on the 2d of September, and, after the execution of the written contract for the purchase of the mining property, received the sum of \$4,000; that at the time he signed the written agreement he read it over, and, noticing that it contained no mention of the water right or pipe line, demanded of Nesmith that a provision to correspond with the verbal agreement they had entered into be inserted in the written contract; that Nesmith declined to do so, and stated to him that he expected to build a pipe line, and that, if he did not purchase the property under the terms of the option, he would sell the pipe line to the highest bidder. Martin's testimony upon the subject appears in the abstract as follows: "I asked him if he was going to sell, and to whom he was going to sell, and he said, 'To the highest bidder.' I asked him if he would deed it to any one, and he said he would sell it to the highest bidder. I wanted to know what he intended to do. I wanted to get an option on it if he intended to give any one an option. I never offered to buy it, but I talked with Mr. Nesmith a good deal to find out what his intentions were." When recalled, Martin said: "On September 22d, Mr. Nesmith and Mr. Dickson got out an agreement for me to sign. \* \* \* I took it to my attorney in Denver, \* \* \* and then the discussion about the water right come up—about its being a verbal agreement—and he refused to put anything in about it. And in talking about the water right, Nesmith got hot—seemed to be mad about it—and he said he wouldn't do anything, and he would sell it to the man he could get the most money of, and that I had nothing to do with it. Mr. McNair told me it was a lawsuit, anyway, and maybe Mr. Nesmith would take the option. But I signed the contract as it was. After signing the contract, I went to Mr. Nesmith, after the ranting was over about the water right, and asked him if he would not transfer it to me, and give me an option on it, or if he would sell it to me if he turned down the option. He said no one had an option on it; he was holding it for speculation." The plaintiff claims that, although Nesmith refused to give any writing, he agreed before the execution of the written contract to protect the water right, and do whatever work was necessary to hold it. It is shown by the testimony that the defendant Nesmith did not purchase the property under the option; that he expended twelve or thirteen thousand dollars in the development of the property, and, in addition thereto, spent the sum of about thirteen thousand dollars in

the building of the pipe line. At the time it is alleged that Nesmith agreed to protect the water right and turn it over to the plaintiff, the plaintiff had only an inchoate right to the use of 500 inches of water from the Animas river. Nesmith and the surveyor who accompanied him at the time when the water right was located testify positively that Martin's name did not appear on the board; that no writing was on the board at the time the location certificate was written upon it; that there was no erasure. And the surveyor testified that he wrote upon the board a location certificate; that it was signed by J. W. Nesmith, and witnessed by him and by Martin. Nesmith says that at no time did he ever have any conversation with Martin in which he expressly or impliedly agreed to locate a water right for him, or to build a pipe line and turn it over to him.

We are of opinion that the facts stated by the plaintiff do not entitle him to recover, and that any preliminary agreement entered into between Martin and Nesmith must be presumed to have been included in the written agreement executed on the 22d of September. It is a familiar rule that extrinsic evidence is not admissible either to contradict, add to, subtract from, or vary the terms of a written contract. The rule applies with greater force to all instruments required by the statute of frauds to be in writing. "All oral negotiations or stipulations between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it, and the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves." *Randolph v. Helps*, 9 Colo. 29, 10 Pac. 245.

Moreover, it was a contract which, under the statute of frauds, should be in writing; and while, under some circumstances, parties by their conduct are estopped to set up the statute of frauds, no such case is presented by the record here. It is stated in the case of *Whitsett v. Kershaw*, 4 Colo. 423, that, to establish a trust by parol evidence alone, in order to take the case out of the statute of frauds, the contract must be established by clear, certain, and conclusive proof, unequivocal in all its terms. "This branch of equity jurisdiction requires nice discrimination, and will not be exercised unless all the facts relied on to give relief are established beyond a reasonable doubt; and this even where the ground of relief is mistake."

The plaintiff insists that the pipe line should be regarded as improvements made under the option, and that it became his property because not removed within the time specified by the written contract. The plaintiff placed an entirely different construction upon the contract. He insisted that the alleged verbal agreement concerning the water right and pipe line should be incorporated in the written contract. He says that Nes-

mith denied there was such an agreement, and refused to mention the pipe line in the instrument. According to plaintiff's testimony, Nesmith told him that he was building the pipe line for his own benefit, and that, if the property was not purchased under the option, it would be sold to the highest bidder; that he afterwards signed the written contract, which contains no mention of the water right or pipe line; and that after he signed the contract he asked Nesmith for an option, and that Nesmith again told him that he would sell to the highest bidder. A considerable portion of the pipe line is constructed through property held by the plaintiff under locations made about the time the agreement was entered into, the defendant understanding that the locations were to be made. Under these circumstances, we do not think the plaintiff should be heard to say that the pipe line became his property after the expiration of the time mentioned in the contract.

For these reasons, therefore, we must reverse the judgment. Reversed.

(19 Colo. App. 414)

# **PATTERSON v. MORRELL HARDWARE CO.**

(Court of Appeals of Colorado. Feb. 8, 1904.)

## **ERROR—PARTIES—JUDGMENT WITHOUT OBJECTION.**

1. Defendants who were not served with process, and as to whom the cause was dismissed at plaintiff's cost, cannot be made plaintiffs in error.

2. Where the court had jurisdiction of a cause, and rendered judgment against a defendant for individual indebtedness, without any objection to the proceedings being entered by him, he cannot complain of the judgment, though the complaint alleged a joint indebtedness.

## **Error to Teller County Court.**

Action by the Morrell Hardware Company against George H. Patterson and others. From a judgment against defendant Patterson, he brings error. Affirmed.

A. Macon, for plaintiff in error. Henry Trowbridge, for defendant in error.

THOMSON, P. J. The Morrell Hardware Company brought this suit against George H. Patterson, J. H. Mason, and M. A. Shipman, alleging that the plaintiff sold and delivered to the defendants goods, wares, and merchandise of the value of \$410.30, for which they promised to pay that sum to the plaintiff. A writ of attachment was issued in the cause, and levied upon the individual property of the defendant Patterson. Summons was issued, but never served on any of the defendants. Patterson, however, voluntarily appeared, and answered, denying that he ever purchased goods, wares, or merchandise from the plaintiff. The plaintiff dismissed the cause as to defendants Mason and Shipman, and trial was had between the

plaintiff and Patterson. After hearing the evidence, the court rendered judgment against Patterson for the amount of the plaintiff's claim. Nearly three years after the rendition of the judgment, the cause was brought to this court by writ of error sued out in the names of all of the defendants. The errors assigned consist in permitting the action to continue against Patterson after its dismissal as to the others, and the rendition of an individual judgment against Patterson upon a joint indebtedness of all of the defendants.

The defendants Mason and Shipman were improperly made plaintiffs in error. They were never served with process, and they never appeared to the action. They were dismissed from the case at the plaintiff's costs, and there was nothing in the proceedings upon which error could be predicated by them. The only plaintiff in error is Patterson.

There is no bill of exceptions here. So far as is shown, after Patterson's appearance the proceedings were conducted throughout without objection from him. We must presume it to have been established by the evidence that the purchase was made and the indebtedness incurred by him as an individual. It is true that the complaint charged a joint indebtedness, but, if he chose voluntarily to submit to a trial of the question of his individual liability, he is in no position to complain of the result. The court had jurisdiction to try the cause and render the judgment, and he cannot be heard to allege error as to proceedings in which he acquiesced.

Let the judgment be affirmed. Affirmed.

(19 Colo. App. 416)

# HUFF v. HARDWICK.

(Court of Appeals of Colorado. Feb. 8, 1904.)  
BROKER—COMPENSATION—MINGLING OF PROCEEDS—STATUTE OF FRAUDS.

1. In an action for services rendered, where defendant had agreed to pay plaintiff for his services one-half of the proceeds of the sale of two mining claims, but, in the sale of these claims together with others, the interests were not separately valued, evidence that they were treated as of equal value per acre, that the price was calculated on the total acreage, what the total acreage was, and what was the acreage of the two claims, was admissible.

2. Where defendant agreed to pay plaintiff for his services one-half the proceeds of the sale of two mining claims, but in the sale of these with others the interests are not separately valued, the plaintiff is entitled to recover one-half of the entire proceeds of the sale, if it is impossible to determine what proportion should be credited to the claims in which he is interested.

3. Where plaintiff, at defendant's request, procured the title to real estate, taking it in his own name, and afterwards conveying it to defendant, defendant's agreement to pay him for his services one-half of the sum for which the real estate might be sold is not within the statute of frauds.

Appeal from District Court, El Paso County. Action by C. E. Huff against J. O. Hardwick. From a judgment of nonsuit, plaintiff appeals. Reversed.

T. J. Black, for appellant. J. W. Ady and J. W. Sheafor, for appellee.

THOMSON, P. J. According to the evidence, in November, 1895, the appellee employed the appellant to negotiate, in appellee's behalf, an exchange of certain mining stocks belonging to the appellant, for the interest of one Fletcher in the Blackbird, Bonanza, Kiowa, and Carbonate placer mining claims, in Cripple Creek Mining District, Colo. The appellant accordingly proceeded to execute the commission with which he was intrusted, and succeeded in effecting the exchange, taking the titles to the several claims in his own name. After having so acquired title, he reported what he had done to the appellee. At the time appellant was employed, there was no agreement as to his compensation for his services; but when he had concluded his work and made his report it was agreed between the parties that the appellant should handle the Blackbird and Bonanza and the appellee the Kiowa and Carbonate placer, and that the appellant should give the appellee one-half of what he realized from the former claims, and the appellee should give the appellant one-half of what he realized from the two latter. The appellant thereupon conveyed the Kiowa and Carbonate placer to the appellee. The appellant soon afterwards sold the Blackbird for a certain sum in money and a number of shares of mining stock. He gave appellee one-half of the money, and offered him one-half of the stock, but he declined to receive it, saying he had plenty of that kind of stock. The appellee then conveyed the interests he had received from the appellant, together with his individual interest in three other claims, to the Montreal Gold Mining Company, in consideration of the issuance to him of 501,000 shares of the capital stock of that company, and afterwards sold this stock for \$28,000. He refused to account to the appellant for any portion of the money. The appellant brought this suit to recover the share of the money to which he was, as he alleged, entitled by virtue of his agreement with the appellee. When the plaintiff had concluded his evidence, on motion of the defendant, judgment of nonsuit was rendered against him.

The foregoing statement of facts is derived from the evidence introduced by the plaintiff, which was the only evidence introduced, and which the motion for a nonsuit admitted to be true. It was shown that in the transaction between the defendant and the mining company the interests conveyed were not separately valued, but that they were taken by the company at a gross sum for the whole. The plaintiff sought to prove that the claims were treated as of equal value per acre, and

1. See *Frauds, Statute of*, vol. 23, Cent. Dig. § 126.

that the amount of stock allowed for them was calculated upon the total acreage; and then undertook to show what the total acreage was, and what was the acreage of the claims in the proceeds of which he was interested. All the evidence so offered was, on objection by the defendant, excluded, except as to the acreage of the Carbonate placer. In so ruling, the court erred. If it be true that the property was received by the company at the same valuation per acre, then proof of the total acreage, and of the acreage of the claims out of the proceeds of which plaintiff was to be paid, would render the amount to which he was entitled a simple matter of computation, and we know of no other method by which such amount could be ascertained. We infer, however, that, in the opinion of counsel, the plaintiff could not have made the proof he attempted. They say that he not only did not show, but could not show, what he was entitled to receive; and, from his supposed inability to make the necessary proof, they argue that there could be no recovery in his favor. We have never so understood the law. The plaintiff had no part in the transaction between the defendant and the mining company; and if, in the sale to the company, the defendant so combined his individual property with the claims respecting which he owed a duty to the plaintiff as to put it beyond the power of the latter to show what proportion of the whole consideration should be credited to those claims, then as between the two, on the principle applicable in the case of a willful confusion of goods, the share to which the agreement entitled the plaintiff would extend to the entire amount received, and one-half of it would belong to him. The law is well settled that where one so intermixes his own chattels with those of another, without the latter's consent, as to render a just division impossible, the party responsible for the mixture must bear the whole loss. *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233; *Jenkins v. Steanka*, 19 Wis. 126, 88 Am. Dec. 675; *Beach v. Schmultz*, 20 Ill. 186; *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639; *Hawkins v. Spokane Hydraulic Mining Co.*, 3 Idaho (Hasb.) 650, 33 Pac. 40. In *Graham v. Plate* the defendant manufactured pistols bearing the trade-mark of the plaintiff's intestate, without any authority to use the trade-mark, and it was held that because it was impossible to determine how much of the profits from the sale of the articles resulted from their intrinsic value, and how much from the credit given them by the trade-mark, the owner of the trade-mark should have the whole. In *Hawkins v. Spokane Hydraulic Mining Company* the corporation worked a mining claim, in which it had a minority interest, against the protest of the representative of the majority interest, and, without the consent of the other party, mingled with the gold taken from that claim gold extracted from its own claim, the amount of which was

undeterminable, and it was held that it was entitled to nothing on account of the gold taken from its own claim.

Another point made is that the agreement between the plaintiff and the defendant was within the statute of frauds, and therefore not enforceable. Counsel seem to suppose that the intention of that agreement (which was not in writing) was to vest in the plaintiff an interest in real estate. But it had no such purpose. The plaintiff, at the request of the defendant, procured for the latter the title to certain real estate, taking such title at first in his own name, and afterwards conveying it to the defendant. Having performed this service for the defendant, the agreement was that he should receive as his compensation, not an interest in the ground, but one-half of the proceeds of the property when it should be sold by the defendant. The agreement of the defendant was simply to pay the plaintiff for his services, instead of a fixed sum, an amount dependent on what should be realized from the property. We are not referred to any provision of the statute of frauds, and we know of none, which renders void a parol agreement to pay for services performed, whether the amount to be paid be agreed upon at the time or made contingent on something to occur in the future.

The judgment is reversed. Reversed.

(19 Colo. App. 388)

#### BUZANES v. FROST.

(Court of Appeals of Colorado. Feb. 8, 1904.)  
TRIAL—VERDICT—STATUTORY REQUIREMENTS  
—INSTRUCTIONS—APPEAL—PRESUMPTIONS.

1. Mills' Ann. Code, § 200, provides that when a verdict is for plaintiff in an action for the recovery of money the jury shall find the amount of the recovery. *Held*, that where, in an action on a note the only fact in issue was whether the note had been delivered, a verdict that the jury "do find the issues joined in favor of plaintiff" was not error available to defendant.

2. Mills' Ann. Code, § 192, enacts that if the jury, after retirement, desire to be informed on any point of law, they shall be brought into court and instructed. *Held*, that where, on appeal, neither the instructions given nor the request of the jury for additional instruction is contained in the abstract, it will be presumed that no error was committed in refusing to further instruct the jury.

Appeal from Teller County Court.

Action by H. O. Frost against John Buzanes. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

George H. Kohn, for appellant. Charles J. Perkins, for appellee.

GUNTER, J. Action upon promissory note by indorsee. Verdict and judgment for plaintiff. Defendant appeals.

1. Mills' Ann. Code, § 200, prescribes that when a verdict is for plaintiff in an action for the recovery of money the jury shall find the amount of the recovery. The verdict rendered was: "We, the jury duly impanel-

ed and sworn to try the above-entitled cause, do find the issues therein joined in favor of the plaintiff. J. D. Bransford, Foreman." It is contended that this verdict violates the section of the Code cited, and that such violation is fatal to the judgment. The only question of fact before the jury was whether or not the note was delivered. If the verdict upon this question was for the plaintiff, then he was entitled to a judgment for the full amount of the note, principal and interest; if for defendant, then he was entitled to a judgment of dismissal and for costs. The verdict was responsive to the only issue before the jury, and the omission to find the amount of the recovery therein worked no prejudice to the defendant. As this omission worked no prejudice, it does not constitute reversible error. *Hutchinson v. Inyo County*, 61 Cal. 119.

2. It is said the jury, being unable to agree, returned into court, and asked to be further instructed; that the court denied the request, and therein violated section 192, Mills' Ann. Code, which provides that if the jury, after retirement for deliberation, desire to be informed on any point of law arising in the cause, they shall be brought into court and receive such desired information. Neither the instructions given by the court nor the request of the jury for an additional instruction is contained in the abstract of the record. For aught that appears in the abstract, the court may have covered the point upon which additional information was requested in its charge, or it might have constituted error by the court to instruct upon the point submitted. This being true, we must presume that no error was committed by the court in refusing to further instruct the jury. Seeing no reason for a reversal upon either of the alleged errors argued, the case must be affirmed.

Affirmed.

(19 Colo. App. 371)

**MONTROZONA GOLD MIN. CO. et al. v. THATCHER.**

(Court of Appeals of Colorado. Feb. 8, 1904.)

**MINING LEASE—COVENANTS—TIME ESSENCE OF CONTRACT—RELIEF FROM FORFEITURE—TRESPASSERS.**

1. Lessees, in a mining lease for two years, covenanted to sink the shaft 200 feet during the term of the lease, the first 100 feet to be completed on or before a certain day, and that if they failed to sink it as so required, or in any respect to keep any agreement therein, expressed or implied, it should be lawful for the lessor to declare the lease forfeited. *Held*, that the sinking of the shaft 100 feet by the day stipulated was of the essence of the contract.

2. Where a mining lease for two years stipulates that the lessees shall sink the shaft 200 feet during the term of the lease, the first 100 feet to be sunk by a day 14 months after the making of the lease, relief from forfeiture for failure to sink the first 100 feet by the time stipulated will not be granted where the work was not commenced till 11 months after the lease was made, though this was early enough but for the encountering of running ground.

3. Where a mining lease makes the sinking of the shaft 100 feet by a certain day of the essence of the contract, the sinking of it that far 9 days later will not relieve the lessees from the forfeiture.

4. Lessees of a mine who continue to mine it after notice of forfeiture for failure to sink the shaft a certain number of feet by a certain day are not willful trespassers, though mistaken in their contention that there was not a forfeiture; so that, on an accounting for ore, they should be allowed for expenses of mining it.

Appeal from District Court, Pitkin County.

Action by Mary E. Thatcher against the Montrozona Gold Mining Company and another. Judgment for plaintiff, and defendants appeal. Reversed in part.

W. D. Reid and J. G. McMurphy, for appellants. H. W. Clark and E. E. Edmonds, for appellee.

MAXWELL, J. Appellee, owner of an undivided  $\frac{1}{16}$  of the Midnight lode mining claim, Highland Mining District, Pitkin county, joined with the owners of the undivided  $\frac{31}{32}$  interest in the property in granting a mining lease to McGregor & Shields, dated — November, 1899, for a term of two years from January 1, 1900, upon the following covenants, inter alia: "To sink the shaft upon said premises, known as the Midnight shaft, from its present depth (now 425 feet) at least two hundred (200) feet, during the term of this lease. The first one hundred (100) feet of said sinking to be completed on or before the 1st day of January, 1901. Said lessees furthermore agree that in case they fail to commence work on said premises as aforesaid, \* \* \* or to sink said shaft, as above required, or in any respect keep and fulfill any or all agreements herein expressed or implied, then and in that case it shall be lawful for the parties of the first part \* \* \* to declare this lease void and of no effect, and thereafter, and without process of law, to enter upon and take possession of said premises." By assignment, October 4, 1900, the lease was transferred to appellants, who entered into possession of the property and prosecuted work under the lease. January 4, 1901, appellee caused to be served upon appellant a written notice of forfeiture for the alleged failure upon the part of the original lessees and appellants to sink the shaft 100 feet by January 1, 1901, to properly timber the shaft, and to pay royalty as required by the terms of the lease. Coupled with the notice of forfeiture was a demand for possession. This written notice of forfeiture and demand for possession purported to be signed by the owners of  $\frac{1}{16}$  of the property, including appellee. July 1, 1901, appellee commenced this action in the court below to recover possession of her undivided  $\frac{1}{16}$  interest in the property, for an injunction to restrain further working of the property by appellants, for \$5,000 damages for its detention, and for an accounting of the proceeds of the ore mined, shipped, and sold from the property by appellants. The other owners

who signed the notice of forfeiture were not parties to this suit. The complaint alleged the making of the lease, set forth its covenants, the breaches thereof by appellants, service of notice of forfeiture, and other matters immaterial to a determination of this case. The answer denied the breaches alleged, except the failure to sink the shaft 100 feet by January 1, 1901, which breach was confessed, alleged a substantial compliance with this covenant, and averred matters in avoidance. A jury trial resulted in a verdict in favor of appellee, that she was the owner in fee of  $\frac{1}{16}$  of the property and entitled to the occupation and possession thereof. December 14, 1901, judgment was entered on the verdict in favor of appellee, and an order was made for an accounting before the court, which accounting resulted in a judgment in favor of appellee for \$1,146.02.

It will be unnecessary to discuss in detail the 71 errors assigned by appellants, as most of them have been abandoned, and this opinion will be confined to a presentation and decision of such matters only as appear to be decisive of this appeal. Appellants contend that time was not of the essence of the covenant to sink the shaft 100 feet by January 1, 1901, and, even if it was, that there was a substantial compliance with this covenant upon their part, and that appellee waived a strict performance of this covenant. The jury, upon conflicting testimony, in answer to an interrogatory submitted, found that there had been no waiver, and, as there was no error in the instructions upon this point, the finding of the jury precludes investigation of this question.

The testimony shows that appellants' assignors commenced to sink the shaft the latter part of September, 1900; that sinking the shaft was diligently prosecuted until January 10, 1901, when the 100 feet was completed; that running ground was encountered which necessitated a drift around the shaft to catch up and hold this running ground; that, on account of this bad and running ground, the bottom of the shaft was lost two or three times; that every possible effort was made by appellants to complete the shaft within the time required by the lease, without avail; and it is conceded that January 1, 1901, the shaft had not been sunk 100 feet as required by the lease, although it appears from the testimony that the 100 feet was completed on January 10, 1901. The language of the lease does not, in express terms, make time of the essence of the contract, but it would be difficult to conceive of language which would more clearly imply that such was the intention of the parties in the contract under consideration. To hold otherwise would be to make a contract for the parties which they have not made for themselves, which the courts will never do. The lease provides that in case lessees fail to sink the shaft in the time required, or fail in any respect to keep and fulfill any or all

agreements therein expressed or implied, it shall be lawful for the lessor to declare the lease void and of no effect. It would seem that the parties to this lease could not have used language more pertinent than the above to express their intention to make time of the essence of the contract. "It is now thoroughly established that the intention of the parties must govern; and if the intention clearly and unequivocally appears, from the contract, by means of some express stipulation, that time shall be essential, the time of completion or of performance or of complying with the terms will be regarded as essential in equity as much as at law. No particular form of stipulation is necessary, but any clause will have the effect which clearly and absolutely provides that the contract is to be void if the fulfillment is not within the prescribed time." *Pomeroy on Specific Performance*, 462.

The authorities cited by appellants in support of the contention that neither time nor the manner of performance of covenants is construed as the essence of a contract, unless made so by the terms of the instrument or clearly implied, upon examination are found to be cases in which specific performance of contracts for the conveyance of land was sought to be enforced, or cases involving oil leases, the facts of which cases make them clearly and easily distinguishable from the case under consideration.

Appellants do not contend that they could purposely or negligently fail to comply with the terms of the lease, but assert that the equitable principle is well established that, when there is an excusable failure to perform, and when the status of the parties is not changed by such failure, then a court of equity will relieve the party in default from a forfeiture, and appellants insist that the facts in this case bring them within this equitable principle. The undisputed facts are that sinking the shaft was not commenced until the latter part of September, 1900; that under ordinary circumstances and conditions 90 days would afford ample time to complete the 100 feet; and that running ground prevented the completion of the 100 feet within the time limited by the lease. While it is true that appellants did not acquire the lease by assignment until after October 1, 1900, they must be held to have taken it with full knowledge of all its covenants and the duties thereby imposed. It cannot seriously be contended that one who stands idly by during three-fourths of the time within which he has contracted, under penalty of forfeiture, to complete his work, is excusable for failure to perform his contract, within the time limit, by reason of the fact that conditions were encountered which he did not anticipate. Having speculated with chance, he must suffer the consequences. If parties will make contracts involving forfeitures, they must comply strictly with the terms of such contracts, or show good and sufficient rea-

sons for noncompliance, which do not appear in this case, and they must not expect to get relief by interposition upon the part of the courts. We have been cited to no authority, and we know of none, which holds that a substantial compliance with a covenant, such as the one herein involved, or a compliance after the expiration of the time limit, in face of the clear and concise expression of the agreement of the parties as written, will relieve from the penalty of forfeiture imposed by equally clear and concise language.

The jury having found, under proper instructions, against appellant upon the question of waiver, it was the province of the court to declare the meaning of the agreement, which it did in accordance with the views herein expressed. The verdict of the jury and the judgment of the court upon this branch of the case were right.

As hereinbefore stated, an accounting was had before the court, which resulted in a judgment against appellants for \$1,142.06. The accounting was for the purpose of determining the amount of ore mined, shipped, and sold from the property by appellants, and presumably the expenses incident thereto. The bookkeeper for appellants testified that all the ore mined, shipped, and sold from the property by appellants was shipped to the Taylor & Brunton Smelting Works Company, Aspen, and not elsewhere; that 994,610 pounds of ore and 557,550 pounds of concentrates were shipped, giving the date, number of pounds, and returns of each shipment; that the total receipts of appellants from such shipments were \$12,512.97, which amount was exclusive of treatment charges, sampling, hauling, and railroad transportation; that the concentration was about four tons to one ton. This witness produced and identified vouchers, pay rolls, and checks which were introduced in evidence, and were said to represent the disbursements by appellants in the prosecution of the work under the lease from January 6 to December 31, 1901, the period covered by the accounting, which disbursements total \$21,320.37, as stated by counsel for appellants in their brief, and not disputed by counsel for appellee, although appellee filed exceptions to a large number of the items represented by the vouchers, etc., and contested the same, upon the ground that they did not represent expenses incurred in operating the lease.

Two witnesses for appellee testified that, accompanied by the superintendent of appellants, the afternoon of the day before they testified, they had made certain measurements and estimates of the amount of ore which had been extracted by appellants, from which measurements and estimates they estimated that 1,580 tons of ore had been so extracted. One of the witnesses, the husband and agent of appellee, testified that the value of this ore was \$33,305.00, which value was based upon some six or eight assays of

ore which he had taken at various times preceding the day on which the examination of the property was made, and upon his general knowledge of the ore. These two witnesses of appellee also testified that the cost of mining and hoisting the ore to the surface was \$2.50 per ton. It appears, from some 16 settlement sheets found in the transcript of record, that the average cost for treatment, sampling, hauling, and railroad freight of the ore shipped and sold by appellants was approximately \$17.50 per ton. If we accept the testimony of the bookkeeper as to the receipts of appellants—\$12,512.97—deduct therefrom \$2.50 per ton, the cost of mining, tramping, and hoisting to the surface 994,610 pounds, or 497 tons, of crude ore, and 1,115 tons of ore concentrated to 557,550 pounds of concentrates at four to one, a total of 1,612 tons, we have remaining \$8,482.97,  $\frac{1}{16}$  of which is \$530.18. In other words, deduct from \$12,512.97—the total receipts—\$4,030, the cost of mining, etc., 1,612 tons at \$2.50 per ton, and we have \$8,482.97,  $\frac{1}{16}$  of which is \$530.18. If, on the other hand, we accept the testimony of appellee's witnesses, that 1,580 tons of ore were extracted and sold by appellants of the value of \$33,305, and deduct therefrom the cost of treatment, sampling, hauling, and railroad freight (\$17.50 per ton), and mining, tramping, and hoisting to the surface (\$2.50 per ton), we have \$705,  $\frac{1}{16}$  of which is \$44.06.

Again, if appellants be regarded as willful trespassers after the service of notice of forfeiture and demand for possession and refusal to surrender, and all expenses of mining and hoisting the ore be disallowed, the results are, accepting appellants' testimony as to the receipts, \$12,512.97,  $\frac{1}{16}$  thereof would be \$782.06; or, accepting appellee's testimony that the value of the ore extracted was \$33,305, and deducting therefrom the cost of treatment, etc.—\$17.50 per ton— $\frac{1}{16}$  of the value of the ore is \$353.43.

In all of the foregoing computations no allowance has been made for cost of concentration of the ore. The learned judge before whom the accounting was had does not disclose the method of computation adopted in arriving at the judgment rendered upon the accounting. In any view taken the judgment rendered upon the accounting is erroneous, and must be reversed.

For the guidance of the court and counsel in the event of further proceedings in court below, an expression of the views of this court is deemed proper. Under the facts as disclosed by this record, appellants cannot be considered willful trespassers within the ordinary legal acceptance of that term, and therefore should be allowed, upon an accounting, the cost of mining, tramping, and hoisting the ore to the surface. The value of the ore is the amount received from the smelter or ore buyer after deduction has been made for the cost of treatment, sampling, hauling, and railroad freight. If any portion

of the ore has been concentrated, the cost of concentration is a legitimate item of expense for which credit should be allowed appellants.

The judgment rendered upon the verdict will be affirmed, the judgment rendered upon the accounting will be reversed, the parties to pay their own costs, and the cause will be remanded for further proceedings in accordance with the views herein expressed.

Reversed.

(19 Colo. App. 380)

**Ogilvy Irrigating & Land Co. v. Insinger.**

(Court of Appeals of Colorado. Feb. 8, 1904.)

**IRRIGATION—APPROPRIATION—DRAINAGE—LACHES—DEMURRER—ANSWER.**

1. Where one has appropriated water from a river, a tributary thereof, the waters of which he is entitled to prevent another from diverting, need not be a running natural surface stream which empties into the river.

2. That defendant in an action for injunction by an appropriator of water for irrigation has diverted only percolating, drainage, and seepage waters, the right to which he has acquired by appropriation under Mills' Ann. St. § 2269, is a matter to be raised by answer, and not by demurrer to the complaint.

3. That the diversion, by defendant in an injunction suit by the appropriator of water for irrigation, of the discharge of the sewer of a city, was as its licensee, is not ground for demurrer to the complaint, but of defense to be raised by answer.

4. Laches is not ground for demurrer, but is to be raised by answer.

Appeal from District Court, Larimer County.

Action by the Ogilvy Irrigating & Land Company against W. Albrecht Insinger. Judgment for defendant, and demurrer to the complaint, and plaintiff appeals. Reversed.

H. E. Churchill, for appellant. H. N. Haynes, for appellee.

**MAXWELL, J.** The complaint avers the corporate capacity of plaintiff; the ownership of an irrigating canal constructed in 1882, whereby 91,066 cubic feet per second of time of the waters of the Cache la Poudre river were appropriated for irrigating 3,500 acres of land owned by the stockholders of plaintiff and others, lying under the canal, for whom and itself action was brought; that the head gate of plaintiff's canal is in the northeast bank of the river; that the source of supply for plaintiff's canal is the Cache la Poudre river, together with its several tributaries, and the waste, seepage, surface, and drainage water coming into the said river above the head gate of plaintiff's canal; that, owing to the lateness of plaintiff's appropriation, its supply of water, except during the flood season, is almost entirely dependent upon the accretions to said river below the dam and head gate of No. 3 Canal,

which dam and head gate are located upon said stream about nine miles above the head gate of plaintiff's canal; that, between plaintiff's head gate and the head gate of No. 3 Canal, the only appropriation prior to plaintiff's is that of Mill Power Canal; that, except during the flood season, the amount of water which plaintiff's canal is able to obtain and divert during the irrigating season has been from 30 to 40 cubic feet of water per second of time, which has been used for the irrigation of lands lying under plaintiff's canal; that its entire appropriation, and all the water it can derive from the river and its accretions, are necessary to be diverted to irrigating the lands lying thereunder, and the continued use and enjoyment of all the accretions of the said river below the head gate of No. 3 Canal are necessary for such purposes; that in November, 1893, defendant commenced the construction of an irrigation ditch; that such ditch does not have its head gate in the Cache la Poudre river, but said ditch is so constructed as to intercept waters flowing into said river, and augmenting the water supply thereof; that the initial point or head gate of said ditch is located about a mile above the head gate of appellant's canal (describing the point), and at a point about 1,000 feet west of the Cache la Poudre river; that from said point said ditch extends in an easterly direction and crosses said river a distance of about a mile and a half; that said ditch so constructed has a carrying capacity of upwards of 5 cubic feet of water per second of time, and such quantity of water is collected, diverted, and used by defendant's ditch; that the water so collected, diverted, and used by defendant's ditch consists of the waste and seepage water arising under certain sections of land south and west of the Cache la Poudre river; also the drainage waters from said lands collected by drainage ditches and otherwise, and discharged into the said river; also the sewer and waste water from the sewer system of the city of Greeley, which is located upon said land; also the waste, seepage, and drainage water from the lateral ditches of No. 3 Canal used in irrigating said lands, and the waste and seepage water from the Mill Power Canal, used in part for the irrigation of said lands, and in part for mechanical purposes; that for many years prior to the construction of defendant's ditch all of said waste water flowed into the river above the head gate of plaintiff's canal, and was a part of the water diverted by its canal, and had been a source of supply for said river, augmenting the water supply thereof, and during each irrigating season had been used by plaintiff and its stockholders in irrigating the lands lying under its canal; that since the construction of defendant's ditch all of the said water, to the amount of upwards of 5 cubic feet per second of time, has been diverted thereby, to the injury and damage of plaintiff, its stockholders and customers; that

¶ 4. See *Equity*, vol. 19, Cent. Dig. § 498.



all of the water of said river and its tributaries and accretions from every source, and of every character and nature whatsoever, are necessary to be diverted and used by plaintiff in the irrigation of the lands lying under its canal; that, since the construction of defendant's ditch, and the diversion and use of the water thereby, plaintiff and its water consumers have not been able to procure from said river a sufficient supply of water to irrigate and water the crops growing upon the lands lying under its canal; that the continued diversion of said water by defendant will result in irreparable injury and damage to plaintiff, its stockholders and water consumers; and that plaintiff has no speedy and adequate remedy at law. Prayer, that defendant be enjoined from diverting and using any water by means of said ditch from the Cache la Poudre river, or any of its sources of supply, and from intercepting or diverting any waste, seepage, flood, or drainage water or water from the sewer system of the city or Greeley, which are sources of supply for said river. A demurrer was interposed to the complaint, predicated upon the grounds, first, that it did not state facts sufficient to constitute a cause of action; second, that it was ambiguous, unintelligible, and uncertain—specifying wherein. The demurrer was sustained. Plaintiff electing to stand by its complaint, the complaint was dismissed, and the cause brought to this court by appeal.

The argument in support of the first ground of demurrer is based upon several propositions set forth therein, and a statement here of these propositions, in the language of the demurrer, may aid to clearness of statement, accuracy of conclusion, and perhaps remove some elements of debate:

"(a) It does not appear from said complaint that defendant derives the water supply for his irrigating ditch from the Cache la Poudre river, or any natural stream or tributary thereof.

"(b) It does not appear from said complaint that this defendant, by means of his irrigating ditch or otherwise, diverts any waste, surface, seepage, or drainage water from the Cache la Poudre river after the same has found its way into said river.

"(c) It does not appear from said complaint that at the time of the construction of plaintiff's ditch, or when an appropriation therefor vested and was first utilized, any waste, seepage, surface, percolating, drainage, or sewerage water on the lands mentioned in complaint, now drained by means of defendant's ditch, found their way to the Cache la Poudre river from any natural channel or otherwise.

"(d) It is shown in said complaint that the principal part, if not all, of the waters appropriated by defendant through his ditch, is the result of a drain and sewer of the city of Greeley, and it does not appear therefrom that defendant did not receive a license from

said city to discharge the water resulting from said artificial sewer and drain onto his land.

"(e) It appears affirmatively from said complaint that defendant for six years and six irrigating seasons has been using said sewerage and drainage water for the irrigation of his lands, during all of which time plaintiff has taken no steps to restrain said use, whereby plaintiff is guilty of such laches as to estop it from prosecuting this action, and is without standing in a court of equity."

An examination of the complaint discloses that it avers that the five cubic feet of water collected, diverted, and used through and by means of defendant's ditch is derived from five sources: (1) Waste and seepage waters arising under certain sections of land; (2) the drainage water from said lands collected by drainage ditches and otherwise, and discharged into said river; (3) the sewer and waste water from the sewer system of the city of Greeley, which is located upon said lands; (4) the waste, seepage, and drainage water from the lateral ditches of No. 3 Canal, used in irrigating said lands; (5) the waste and seepage water from the Mill Power Canal used in part for the irrigation of said lands, and in part for mechanical purposes.

Conceding that it is necessary that the complaint should allege that defendant derives his water supply from the river, or some natural stream or tributary thereof, it appears from the complaint that, previous to the construction of defendant's ditch, all the water from the sources above enumerated was discharged into the river above appellant's head gate, constituted a source of supply thereof, and was diverted and used by appellant by and through its ditch for irrigating purposes. In the sense of contributing to the water supply of the river, the above-enumerated waters were tributary to said supply.

Appellee, however, insists that "tributary" must be construed to mean "a running natural stream which empties into another stream." This limited definition of "tributary" cannot be adopted. A condition of affairs can be conceived whereby an irrigating canal or ditch, without head gate or intake from a natural stream or tributary thereof, might be constructed parallel to a natural stream, or parallel to an existing canal or ditch, and thereby appropriate and divert large volumes of water which prior to its construction found their way, by seepage, drainage, and percolation, to the stream, to the detriment and injury of appropriations prior to the construction of such canal or ditch. No case has been cited, and an exhaustive examination of the authorities has failed to disclose one, which holds that the limited construction of "tributary" contended for by appellee is applicable to our irrigation laws, or that it must be alleged and proven that waters diverted by the junior appropriator constituted a running surface stream,

within well-defined banks or channels. In *McClellan v. Hurdle*, 3 Colo. App. 430-434, 33 Pac. 280, 282, this court has said: "It is probably safe to say that it is a matter of no moment whether water reaches a certain point by percolation through the soil, by a subterranean channel, or by an obvious surface channel. If by any of these natural methods it reaches the point, and is there appropriated in accordance with law, the appropriator has a property in it which cannot be divested by the wrongful diversion by another, nor can there be any substantial diminution. To hold otherwise would be to concede to superior owners of land the right to all sources of supply that go to create a stream, regardless of the rights of those who previously acquired the right to the use of the water from the stream below." The foregoing is decisive, adversely to the contention of appellee, of the first proposition advanced in support of the general demurrer.

If it be true that appellee has appropriated only percolating, drainage, and seepage waters, and that his rights were acquired under the act of April 17, 1889 (Mills' Ann. St. § 2269), as is contended in argument in support of the second proposition, this is a matter of defense, and should be raised by answer, and cannot be raised by demurrer.

An examination of the complaint clearly indicates that it is alleged that appellee is diverting and appropriating water from four other sources than the drain and sewer of the city of Greeley; and while it may be true that the real bone of contention in this case is the discharge of a sewer of the city of Greeley, and that appellee is the licensee of such city, and in this regard, this is likewise a matter of defense, and should be raised by answer, and, in any event, cannot be urged as a defense to the allegations of the complaint as to the appropriation and diversion of water arising from the other four sources of alleged supply.

We cannot perceive the applicability to the record before us of the principles of the law of percolating water and sewage, and for this reason do not discuss the numerous authorities cited by counsel upon these points.

The remaining proposition urged in support of this ground of demurrer is the laches of appellant. Laches is not a ground of demurrer. The usual and proper method of raising it is by answer. *French v. Woodruff*, 25 Colo. 339-352, 54 Pac. 1015; *Fairplay v. Park Co.*, 29 Colo. 57-60, 67 Pac. 152.

From a critical examination of the complaint, we cannot say that it presents defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever. *Herfort v. Cramer*, 7 Colo. 483-488, 4 Pac. 896.

From a careful examination of the complaint, we arrive at the conclusion that the second ground of demurrer, that the com-

plaint is ambiguous, unintelligible, and uncertain, is not well taken.

The judgment will be reversed, and the cause remanded. Reversed.

(19 Colo. App. 380)

**CITY COUNCIL OF CRIPPLE CREEK et al. v. HANLEY et al.**

(Court of Appeals of Colorado. Feb. 8, 1904.)

**ELECTION CONTEST—OFFICE OF ALDERMAN—POWER OF CITY COUNCIL—STATUTES—VALIDITY—REVIEW ON CERTIORARI—QUESTIONS FOR THE COURT.**

1. Const. art. 7, § 12, empowering the General Assembly to designate the courts and judges by whom the several classes of election contests shall be tried, and regulate the manner of trial, authorizes the General Assembly to enact 2 Mills' Ann. St. § 4490, conferring on the city councils the right to be the judges of the election and qualification of their members.

2. Under Mills' Ann. Code, c. 28, § 303, declaring that the review on certiorari shall not be extended further than to determine whether the inferior tribunal has regularly pursued its authority, the court, on certiorari to review the action of a city council in an election contest for the office of alderman, cannot consider whether the evidence before the council justified its action, but is confined to the sole question of the jurisdiction of the council of the subject-matter of the contest, and of the parties thereto.

Appeal from District Court, Teller County.

Certiorari by James E. Hanley and another to the city council of Cripple Creek and others to review the action of defendants in unseating plaintiffs; each holding a certificate of election as alderman. From a judgment annulling the action of the council, defendants appeal. Reversed.

Temple & Crump, James Owen, George H. Kohn, and Charles C. Butler, for appellants. Frank J. Hangs and G. Q. Richmond (E. C. Stimson, of counsel), for appellees.

GUNTER, J. A contest before the council of the city of Cripple Creek resulted in that body unseating contestees (appellees), aldermen holding certificates of election, and seating opposing candidates (contestants, Van der Weyden and Storey). Contestees brought certiorari in the district court to review this action, and therein, by judgment, obtained its annulment. From such judgment is this appeal.

The return made to the writ of certiorari showed the filing of the petitions of contest with the city council, the issuance and service of notice of contest, the appearance of contestees in person and by counsel, the hearing upon the merits, and the resolution of the council unseating contestees and seating contestants. After this return was in, on motion of appellees (contestees and plaintiffs below) the court ordered, and appellants made, a supplemental return, containing the evidence heard before the council upon the trial of the merits of the contest. The case was heard in the district court upon such original and supplemental returns. Appel-

lants have brought to this court the record upon which the case was heard in the district court; that is, the record of the proceedings before the council as set out in the return to the writ of certiorari, except the evidence heard before the council upon the trial of the merits of the case.

"The members of the city council \* \* \* shall be judges of the election returns and qualification of their own members." 2 Mills' Ann. St. § 4490; Booth v. County Court, 18 Colo. 561, 564, 33 Pac. 581. It was competent for the Legislature to confer this jurisdiction upon the city council. Const. Colo. art. 7, § 12; People v. Londoner, 13 Colo. 312, 313, 22 Pac. 764, 6 L. R. A. 444.

The facts pertinent to the jurisdiction of this case by the city council are ascertained from the return to the writ of certiorari. People ex rel. v. Co. Com'rs, 27 Colo. 86, 89, 59 Pac. 733; Com'rs v. Harper, 38 Ill. 103; Com'rs v. Supervisors, 27 Ill. 140. The return to the writ of certiorari shows that the question of jurisdiction in the city council to determine the contest was not raised before that body; that the evidence adduced went to the merits of the action; and it further shows jurisdiction in the city council of subject-matter and of parties.

Appellees contend that the district court had power, upon certiorari, to determine whether the evidence taken before the council was sufficient to justify it in ousting appellees and seating contestants; that the evidence did not justify the city council in such action; and that therefore the district court was right in annulling the action of the city council, and the judgment of the district court to such effect should be upheld. If the district court was confined to the question of the jurisdiction in the city council of the subject-matter of the contest and of the parties thereto, and it appeared from the return to the writ of certiorari that the city council had such jurisdiction, then the district court should have dismissed the writ. If it acted otherwise under such conditions, its judgment should be reversed.

Chapter 31, Civ. Code Colo. 1877, entitled "Writ of Certiorari and Prohibition," is a literal copy of the then existing Code of California upon the same subject. Cal. Pr. Act (Parker) §§ 455, 465. "In adopting the laws of a sister state, the general rule is that the Legislature adopts also the settled construction given those laws by the courts of such state, and our Legislature is presumed to have done so in these instances." Stebbins v. Anthony et al., 5 Colo. 348, 356; Bradbury v. Davis, 5 Colo. 265, 270. In Henderson v. Johns, 13 Colo. 280, 285, 22 Pac. 463, in interpreting a provision of the Code of Civil Procedure of 1877, it was said: "This was the established rule in California, from which state our Code is largely borrowed. \* \* \* By a familiar rule of construction, by taking this statute our Legislature will be held to have adopted it as construed at that

time by the court of last resort in the state from which it was taken." In Orman v. Bowles, 18 Colo. 463, 468, 33 Pac. 111, in construing a statute in accordance with the interpretation thereof by the courts of the state from which it was taken, it was said: "Under a familiar rule, by adopting this statute we accepted this construction." Germania Life Ins. Co. v. Ross-Lewin, 24 Colo. 43, 50, 51, 51 Pac. 488, 65 Am. St. Rep. 215; Shreve v. Cheesman, 69 Fed. 785, 788, 16 C. C. A. 413. In 1860, in Whitney v. B. of D., 14 Cal. 480, 496, Mr. Justice Stephen J. Field participating, sections 456 and 462 of the California practice act, literally the same as sections 291 and 297 of our Civil Code of 1877, were construed; the court, at pages 490 and 500, saying: "We have already seen that the writ can be granted only where the jurisdiction of the inferior tribunal has been exceeded; and, taking these two provisions together, it is clear that the courts are confined to the determination of the question of jurisdiction. Beyond this, they have no right or authority to go; and they have nothing whatever to do with the proceedings before the inferior tribunal, except so far as an examination of such proceedings is necessary for the determination of this question. \* \* \* It brings up no issue of law or fact not involved in the question of jurisdiction. Under no circumstances can the review be extended to the merits. Upon every question, except the mere question of power, the action of the inferior tribunal is final and conclusive. \* \* \* The cases are numerous to the effect that the review may be extended to every issue of law and fact involved in the question of jurisdiction, and that not only the record, but the evidence itself, when necessary to the determination of this question, must be returned. The latter is the more reasonable, and, we think, the true, rule." See, also, Henshaw v. Board of Sup. of Butte Co., 19 Cal. 157, decided in 1861. "Has exceeded the jurisdiction of such tribunal, board,' etc., and 'has regularly pursued the authority of such tribunal, board,' etc., as expressed in these two respective sections of the practice act, present substantially the same idea. Mere irregularity intervening in the exercise of an admitted jurisdiction—mere mistakes of law committed in conducting the proceedings in an inquiry which the board had authority to entertain—as, for instance, the admission of evidence not the best in degree, or not applicable to the issue in hand, are not to be considered here upon certiorari; otherwise that writ is to be turned into a writ of error. \* \* \* Jurisdiction is the power to hear and determine. This is its general definition. Jurisdiction, as applied to a particular claim or controversy, is the power to hear and determine that controversy. The mere grounds upon which the determination is reached may or may not be correct in themselves. These may be supported by evi-

dence inadmissible when tested by the rules governing the introduction of evidence. The reasons given for the conclusion arrived at may or may not be such as address themselves to the judgment of others, but erroneous views entertained, or incorrect reasons assigned, or evidence erroneously admitted in deciding the controversy, do not make a case of want of jurisdiction." *C. P. R. Co. v. Placer Co.*, 43 Cal. 365 (decided in 1872).

Sections 403 and 409 of the civil practice act of Nevada, as it stood in 1866, and as it still stands, was a literal adoption of the above sections from the California practice act. The sections were construed in 1866 in *Maynard v. Railey*, 2 Nev. 314. Therein it is said: "If it appear that the jurisdiction of such tribunal, board, or officer has not been exceeded, there is no foundation for the writ. The expression employed in the latter section above quoted, that the inquiry shall extend no further than to determine whether the inferior tribunal 'has regularly pursued its authority,' certainly does not authorize an inquiry into any irregularity or question beyond that of jurisdiction. If the issuance of the writ is only permitted when an inferior tribunal, board, or officer has exceeded his or its jurisdiction, it is clear that no other question but that of jurisdiction can be inquired into upon its return. A mere irregularity, however gross it may be, cannot properly be the subject of inquiry upon it. Hence we will confine our considerations to the question of jurisdiction simply." Also *Phillips v. Welsh*, 12 Nev. 158, and *Reilly v. Tyng* (Ariz.) 25 Pac. 798.

The settled interpretation of chapter 31, Civ. Code 1877, in the state from which it was taken at the time of its adoption, was that upon certiorari could be considered only the question of jurisdiction in the tribunal, the judgment of which was sought to be reviewed. The province of certiorari, as defined by chapter 31, is substantially the same as at common law; and it seems to be "well settled that a common-law certiorari tries nothing but the jurisdiction, and incidentally the regularity of the proceedings upon which the jurisdiction depends. It brings up no issue of law or fact not involved in the question of jurisdiction." *Whitney v. B. of D.*, *supra*.

Chapter 28—"Of the Writ of Certiorari and Prohibition"—of our present Code is substantially the same as chapter 31 of the Code of 1877. Section 303 of chapter 28, which section defines the extent of the review by certiorari, is literally the same as section 297 of the Code of 1877. The Code of 1887, as to certiorari, is substantially the same as the common-law writ of certiorari. "The writ of certiorari provided by chapter 28 of the Code of Civil Procedure is the same in substance as the common-law writ, which lies for the removal of causes from an inferior to a superior tribunal." In *re Rogers*, 14 Colo. 18, 19, 22 Pac. 1053. "It is quite true proceedings

by way of certiorari are regulated by our Code, but in no general particular do the proceedings differ from those which prevailed before its enactment, nor are they governed by any other principles than those which formerly controlled its exercise. This is the result of the adjudications in the several courts." *Ellis v. People*, 15 Colo. App. 342, 344, 62 Pac. 233. At common law the writ of certiorari presented for review only the question of jurisdiction. 4th Enc. P. & P. 90; 6th Cyc. 807.

We are justified, then, in concluding that, under the California practice act, only the question of jurisdiction could be considered in the review provided through the writ of certiorari. This was the established construction when we adopted the chapter as to certiorari of the California practice act, and by the adoption we are committed to such construction. Our present and past sections of the Code with reference to certiorari are substantially the same as at common law. There only the question of jurisdiction could be inquired into upon certiorari. We would be justified in following the California construction and the common-law construction if our appellate tribunals had failed to rule the question. We think, however, that our appellate tribunals have expressly committed themselves to the same rule as obtained at common law and in California. In *Aldermen of Denver v. Darrow*, 13 Colo. 460, 22 Pac. 784, 16 Am. St. Rep. 215, *Darrow*, an alderman removed by resolution of the board of aldermen, filed a petition for certiorari in the district court to review such action. A general demurrer to the petition was overruled, and judgment entered in accordance with the prayer thereof. Therefrom respondents appealed. One of the points ruled upon appeal was whether the court was confined upon certiorari to the question of jurisdiction in the tribunal, the action of which was sought to be reviewed. In determining this question, section 329 of the Code (Gen. St. 1883), being section 297 of the Civil Code of 1877, section 462 of the practice act of California, and section 303 of our present Code (*Mills' Ann. Code*, defining when certiorari will lie), was quoted and construed, and in doing so the court said: "It is clear that the courts are confined upon certiorari to the question of jurisdiction, and the regularity of its exercise." And after quoting *Whitney v. Board of Delegates*, *supra*, and *R. Co. v. Placer Co.*, *supra*, it approvingly proceeds: "While power is vested in the courts by certiorari to review the proceedings of all inferior jurisdictions, to correct jurisdictional errors, they will not rejudge their judgments on the merits. The correctional power extends no further than to keep them within the limits of their jurisdiction, and to compel them to exercise it with regularity." The action of the lower court is then approved, in granting the writ of certiorari, because it appeared from the record that the council, in

passing the resolution complained of, was without personal jurisdiction of Darrow. In *U. P. Ry. Co. v. Bowler*, 4 Colo. App. 25, 27, 34 Pac. 940, 941, the court said: "The writ of certiorari, under our practice and statute, is undoubtedly designed to be what it is defined in the act—a writ of review. \* \* \* It cannot be issued, however, according to the express limitations of the act, except where the inferior tribunal is entirely without jurisdiction, and where, also, no appeal will lie from the judgment, and no other plain, adequate, and speedy remedy is provided by the statutes of the state. It seems to us that neither of these considerations exists." In *Ellis v. People*, 15 Colo. App. 341, 344, 62 Pac. 233, it was said: "It is quite true, proceedings by way of certiorari are regulated by our Code, but in no general particular do the proceedings differ from those which prevailed before its enactment, nor are they governed by any other principles than those which formerly controlled its exercise. This is the result of the adjudications in the several courts. \* \* \* The sole object of these proceedings is to review the judgment of the court below. The proceedings are not had on the merits of the controversy. \* \* \* " *State Board of Land Commissioners v. Carpenter*, 16 Colo. App. 436, 66 Pac. 165, was an original action against the State Board of Land Commissioners and the lessee to cancel a lease. It resulted in a judgment of cancellation. On appeal it was contended by appellants (defendants below) that the remedy of appellees (plaintiffs below) to review the action of the State Land Board was certiorari. The court thought differently, affirmed the action of the trial court, and in the course of the opinion said: "This suit goes to the merits of the case, to determine whether, on the facts, the board could cancel the lease of appellees and relet to Joyce [one of appellants]. Upon an investigation of the merits of the case, the relief of appellees is dependent. Such is not the province of certiorari." See, also, *People ex rel. v. Co. Com'rs*, 27 Colo. 86, 59 Pac. 733.

At common law, upon certiorari, only the question of jurisdiction could be considered. The California practice act, in effect, re-enacted the common law as to the province of certiorari. The California practice act was adopted by Colorado, as to certiorari, in 1877, and such act is substantially the law to this date. This act had been repeatedly construed before its adoption by our state. We are presumed, in adopting the statute, to have adopted such construction, unless some strong reason appears to the contrary. Such reason does not appear. The courts of this state, in construing our chapter upon certiorari, and the particular provisions now under consideration, have cited approvingly the California decisions construing this chapter, and particularly the sections under consideration. Our appellate courts have held that the province of certiorari is to inquire only into the ques-

tion of jurisdiction. We conclude, therefore, that the lower court should have confined itself to this question. If it had done so, as it appeared that the city council had jurisdiction of the contest, the district court should have dismissed the writ. This it did not do, and therein erred. For this reason the decision should be reversed. Reversed

(19 Colo. App. 399)

**CITY COUNCIL OF CRIPPLE CREEK et al. v. PEOPLE ex rel. FERGUSON.**

(Court of Appeals of Colorado. Feb. 8, 1904.)

**MEMBERS OF CITY COUNCIL—ELECTION CONTEST—UNSEATING—MANDAMUS—RESTORATION TO OFFICE.**

1. Where, in an election contest for the office of alderman, the council unseated the contestee who had received a certificate of election and had qualified, and seated the contestant, who qualified and entered on the discharge of his duties as alderman, mandamus will not lie to compel the council to restore contestee to his office.

Appeal from District Court, Teller County.

Mandamus by the people, on the relation of R. F. Ferguson, against the city council of the city of Cripple Creek and others, to compel defendants to restore relator to the position of alderman. From a judgment in favor of the relator, defendants appeal. Reversed.

Chas. C. Butler, Jas. Owen, Geo. H. Kohn, and Temple & Crump, for appellants. Frank J. Hanks and G. Q. Richmond (E. C. Stimson, of counsel), for appellee.

GUNTER, J. Relator, candidate for the position of alderman of the city of Cripple Creek, received a certificate of election and qualified. A contest before the council by his opponent, Matthews, resulted in a resolution purporting to unseat relator and to seat Matthews. After such action of the council, Matthews entered upon the discharge of his duties as a member thereof, and was in the discharge of such duties at the time of the bringing of this action. Relator brought this action (mandamus), whereby he sought to be restored to the position of alderman. The action was against the council of the city of Cripple Creek, the mayor thereof, and the members of the council other than Matthews. An alternative writ of mandamus was issued. To this appellants (defendants below) demurred, and the demurrer was overruled. Appellants answered, setting up two grounds of defense. Relator demurred to the second ground, which demurrer was sustained. Error is assigned by appellants to the ruling sustaining this demurrer to their second ground of defense, and, as the ruling upon the question thus presented will probably finally dispose of the case, we confine ourselves to its consideration. From this second defense, it appears that relator received

¶ 1. See *Mandamus*, vol. 33, Cent. Dig. §§ 161, 162, 167.

a certificate of election as member of the council of the city of Cripple Creek, and qualified as such. Thereafter Matthews, his opponent, instituted against him a contest before the council, which ended in a resolution unseating relator, and awarding the seat to the contestant, Matthews. The latter qualified pursuant to such action of the city council, and entered upon the discharge of his duties as a member thereof, and was in such discharge on the 27th of May, at the time of the institution of this proceeding (mandamus) brought to compel the restoration of relator, the office then being filled by Matthews.

This court cannot compel the council in this proceeding to admit relator and exclude Matthews, without inquiring into the title of such respective parties. The chapters of our Code upon "Actions for the Usurpation of an Office or Franchise," and "Of the Writ of Mandamus" were adopted from the Code of California. Practice Act Cal. (Parker) cc. 27, 49; Civ. Code Colo. 1877, cc. 25, 32; Mills' Ann. Code, cc. 27, 29. These chapters had been construed by the courts of California before their enactment here. Such construction we adopted with the chapters, and should follow. The City Council of the City of Cripple Creek et al., Appellants, v. Hanley et al., Appellees (decided at the present term) 75 Pac. 600, and authorities there cited.

"It is a rule of general application that, where there is any other specific legal remedy for the party complaining, the writ of mandamus will not lie. But where there is no other adequate specific remedy, resort may be had to this high judicial writ. \* \* \* The principle which seems to lie at the foundation of applications for this writ and the use of it is that, whenever a legal right exists, the party is entitled to a legal remedy, and, when all others fail, the aid of this may be invoked. \* \* \* The established rule of the common law upon this subject stands unshaken and unimpaired by any of the modern cases. But if any doubt can remain upon this question, or if the mere weight of authority, either as regards the number of authorities, or the respectability of their source, is against the proposition, the statutes of this state unquestionably settle the point beyond all further controversy. \* \* \* While the defendant is actually in possession of the office, duly sworn and admitted, and exercising the duties as officer de facto, he is prima facie entitled to it. Such is the presumption of law. And in the second place, while the defendant is thus in the office under the color of lawful right, and claiming to be the lawful incumbent, his title to the office cannot be tried upon mandamus. And, thirdly, the statute has provided a plain, speedy, and adequate remedy at law, by the practice act, which provides for an action 'against any person who usurps, intrudes into, or unlawfully holds or exercises, any public office, civil or military, or any franchise

within the state.' We consider that it is a well-settled rule of the common law that the title to an office cannot be tried by mandamus. A mandamus can give no right—not even the right of possession—although it may enforce one. \* \* \* The authorities to sustain the position that mandamus will not lie when the office is full are very numerous, but we propose to cite only a few of them. \* \* \* Though a mandamus to admit to an office gives no title, yet it will not be granted when there is an officer de facto, though that officer be in under a temporary mandamus, obtained by collusion and claim under the same election with the applicant, for the remedy is to try the title to the office de facto, or on information in the nature of a quo warranto. \* \* \* Where the office is already filled by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person. The proper remedy in the first instance is by an information in the nature of a quo warranto, by which the rights of the parties may be tried." People v. Olds, 3 Cal. 167, 58 Am. Dec. 398; People v. Scannell, 7 Cal. 432; Meredith v. Board of Supervisors, 50 Cal. 433. These cases were decided before the adoption of our Code. Kelly v. Edwards, 69 Cal. 460, 11 Pac. 1, decided since, shows an adherence to the doctrine enunciated in the above cases. "When a person is in actual possession of an office under an election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested on mandamus. This is the established doctrine both in England and the United States, and might be supported by almost innumerable decisions." Henderson v. Glynn, 2 Colo. App. 303, 305, 30 Pac. 285. In this opinion the following citation (High Extra. Rem. § 49) is quoted approvingly: "And the rule may now be regarded as established by an overwhelming current of authority, that, when an office is already filled by an actual incumbent, exercising the functions of the office de facto, and under color of right, mandamus will not lie to compel the admission of another claimant, nor to determine the disputed question of title." People v. Londoner, 13 Colo. 314, 22 Pac. 764, 6 L. R. A. 444, construes the chapter on usurpation of an office (quo warranto) in harmony with the California decisions.

We are justified in holding the law to be as above announced; that is, if Matthews was in actual possession of the office of alderman under an election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested on mandamus. "An officer de facto is one who executes the duties of an office under some color of right—some pretense of title—either by election or appointment." Hooper v. Goodwin, 48 Me. 79, 80. "A person actually in office by some right or title—not a mere usurper or intruder—although not legally ap-

pointed or elected thereto, or qualified to hold the same, is still an officer de facto, or in fact; and, as a matter of public convenience and utility, his acts while so in office are held valid and binding as to third persons." In re Ah Lee (D. C.) 5 Fed. 890, 6 Sawy. 410; Jeffords v. Hine (Ariz.) 11 Pac. 351.

According to the allegations of the second defense we think Matthews was a de facto officer; that is, was in actual possession of the office of alderman under an election or commission, and exercising its duties under color of right. This being true, and it being necessary to inquire into and determine the legality of his title in order to determine whether mandamus should issue, then this action involved the determination of the title of a de facto officer. As this could not be done in a proceeding of this nature, the action was misconceived, and the lower court erred in overruling the demurrer to such second ground of defense. Board of Trustees v. People ex rel. Keith, 13 Colo. App. 553, 59 Pac. 72, is cited as contra the conclusion we have reached. We think not. The point here decided was not made or ruled in that case. Further, the facts there involved were different from those here presented.

We have not ruled other points made, because the determination of this one question, it is thought, will be decisive of the case.

Judgment will be reversed, with instructions to the lower court to overrule the demurrer to the second ground of defense in appellants' answer. Judgment reversed. Reversed.

(19 Colo. App. 413)

**LEPPEL v. LUMLEY.**

(Court of Appeals of Colorado. Feb. 8, 1904.)

**PARTNERSHIP—DISSOLUTION—CLAIM AGAINST FIRM—VALIDITY—SUFFICIENCY OF EVIDENCE.**

1. An alleged claim for damages against a partnership formed on December 17, 1898, and in process of dissolution, was based on a failure of title to a horse sold by one of the partners to the claimant in 1895 or 1896, and taken from the latter by a replevin action in 1897. In support of the claim he proved certain conversations with the partner in question in 1897, in which he promised to make good the loss, and also certain statements of a similar nature by a person of the same surname as the other partner, but who he was does not appear. *Held*, that the alleged damages could not be a claim against the partnership, for it was not in existence when they were sustained, and, even if it had been, the evidence would have established nothing against it.

Appeal from District Court, Garfield County.

Action between B. Leppel and O. Stoddard for dissolution of partnership. Charles S. Lumley presented a claim against the firm, and from a judgment in his favor the first-named partner appeals. Reversed.

C. W. Darrow, for appellant.

**THOMSON, P. J.** In an action to dissolve a partnership existing between B. Leppel and

O. Stoddard, and in which a receiver was appointed, Charles S. Lumley presented a claim against the firm for damages on account of failure of title to an animal he had purchased from Stoddard. His theory seems to have been that the partnership was in some way responsible to him for the loss he sustained. The partnership was formed on the 17th day of December, 1898, and the sale by Stoddard to Lumley took place in 1895 or 1896. The animal had been taken from Lumley by a writ of replevin in 1897, and the court had adjudged it to the replevin plaintiff. Lumley proved certain conversations with Stoddard in 1897, in which the latter promised to make good the loss; and certain statements made in the same year by one M. Leppel of a similar nature. Who M. Leppel was we are not advised. Upon this evidence the court allowed Lumley's claim, and entered judgment for the full amount against the partnership. The record furnishes no explanation of this judgment. The damages alleged by Lumley could not be a claim against the partnership, for at the time they were sustained it was not in existence; and, even if it had been, the evidence would have established nothing against it.

The judgment is reversed. Reversed.

(19 Colo. App. 405)

**BIG HATCHET CONSOL. MIN. CO. v. COLVIN et al.**

(Court of Appeals of Colorado. Feb. 8, 1904.)

**MINES—ACTION FOR POSSESSION—INSTRUCTIONS.**

1. In ejectment to recover possession of a lode from which plaintiffs claimed they had been ousted by underground workings from an adjoining claim, it was undisputed that the end lines of plaintiffs' claim were parallel, and that the lode entered the location across one of its end lines, and there was submitted to the jury a map which showed an irregular line formed by the end lines of other claims within that of plaintiffs. The court instructed that the end lines of a claim must be parallel to each other in order to give the lode location any extralateral rights. *Held*, that the instruction was erroneous, inasmuch as there was no question of parallel or other end lines, and the jury might have been led to suppose that the irregular lines on the map were the end lines of plaintiffs' claim.

2. Where the instructions are given in writing, and separately paragraphed and numbered, an exception that "plaintiff excepts to the giving of instruction No. 7 as asked and given by the court" was sufficient.

Appeal from District Court, Gilpin County.

Action by the Big Hatchet Consolidated Mining Company against Clarence K. Colvin and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Chase Withrow and Morrison & De Soto, for appellant. W. H. Davis, for appellees.

**THOMSON, P. J.** Ejectment by appellant to recover the possession of a lode the top or apex of which, as it alleged, lay within the exterior boundary lines of its Washing-

ton lode mining claim, and from which it complained that it had been ousted by the appellees through underground workings from an adjoining claim. The defendants were the owners of the Cook lode mining claim through a patent older than that under which the Washington was held. Both claims were laid in a northeasterly and southwesterly direction; the Cook, however, trending somewhat more towards the north than the other, so that its northwesterly side line, whether located as claimed by the plaintiff or by the defendants, crossed the southeasterly side line of the Washington approximately 127 feet southwest of the northeast corner of the latter claim, and crossed its northeast end line approximately 32 feet northwest of the same corner. The ground within these lines of conflict was excluded from the Washington patent, and belonged to the Cook. Two other claims, held under older patents—the Fisk and the Bobtail—encroached for a short distance upon the northeast end of the Washington location, embracing portions of the territory contained within the original location of the Washington, and which were likewise excluded from the Washington patent, so that the northeast boundary of the territory conveyed by that patent was a zig-zag line, which, by reason of the directions given to the encroaching end lines of those claims, was not parallel with the other end line of the Washington. However, the two end lines of the Washington, as shown by its original location, and with reference to which it was described in the patent, were parallel with each other. The trend of the vein was approximately parallel with the northwest side line of the Cook, and in its downward course extended beyond that portion of the side line of the Cook which was laid within the Washington location, and into the ground conveyed by the Cook patent. The controversy was concerning the ownership of the portion of the vein which so extended into the Cook; the plaintiff asserting that the apex of the vein between the point of intersection of the Cook northwest and the Washington northeast side line and the point where it left the Washington ground on the northeast was wholly within the territory belonging to the Washington, and the defendants maintaining that it was within the territory embraced in the Cook patent. The northwest side line of the Cook, in so far as it lay within the Washington location, was also the southeast side line of the territory conveyed by the Washington patent; but the stakes by which the boundaries of the claims were originally marked had mostly disappeared, and it was necessary to fix disputed lines by surveys from objects in existence, outside of both claims, and with reference to which the claims were described by the patents. The line found by the surveyors for the plaintiff was some four or five feet farther to the southeast than that found

by the surveyors for the defendant. If the former was the true line, the apex was wholly within the Washington territory, but, if the latter was the true line, the apex was at least partially within the Cook. The right to follow a vein on its dip into territory belonging to another is dependent upon the full ownership of the apex, and the departure of the vein from the side line of the owner's claim, the end lines of which must be parallel.

The jury found for the defendants, and, if the only question submitted to them had related to the true location of the line between the claims, and the consequent situation of the apex with reference to the claims, we would be without authority to disturb their verdict. The court, among other instructions, gave the following: "No. 7. The jury is instructed that in applying the law to the surface area of any lode location there are but two classes of lines, namely, end lines and side lines. The end lines perform the office of determining the length of vein which a claim may have upon its strike; the side lines perform the office of defining the surface area of said location; and all lines that are not end lines are side lines. The end lines of a claim must be parallel to each other in order to give to the lode location any extralateral right by virtue of its having within its surface area the top or apex of any lode. And if you believe in this case that any lode has been shown to enter the Washington claim at any point other than across one of its parallel end lines, and the said lode in its strike does not reach either one of said end lines, then and in that case the plaintiff is bound by the vertical planes of said location, and cannot pursue said vein upon its dip beyond the surface boundaries thereof." That instruction first defined the conditions upon which the owner of an apex would be entitled to follow the vein on its dip beyond the side line of his claim, and then submitted the question whether such conditions existed in this case. The definitions were simply introductory to the submission, and explanatory of the question the jury were to determine. They had no other significance, so that the instruction must stand or fall as a whole. As a merely abstract statement of the law, and of questions which might arise upon the law as stated, the instruction may be correct; but there was no evidence in the case to warrant it. The end lines of the Washington, for the purposes of its extralateral rights, were those laid upon the ground when it was located. The fact that its northeast end line crossed territory belonging to other and older valid locations is immaterial. The line so laid was nevertheless its end line for the purpose of securing to it underground or extralateral rights not in conflict with the senior locations. *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72. Now, it was un-



disputed that this end line was parallel with the other end line of the Washington, and it was undisputed that the lode did enter the Washington location across its end line. The evidence left no question of parallel or other end lines, or a crossing of the Washington end line by the lode, for the jury to determine. The instruction was calculated to divert the attention of the jury from the real issue to one which was not in the case. It would naturally lead them to suppose that there was something in the evidence which would warrant them in finding that the end lines were not parallel, or that the lode did not cross the Washington end line. With a map before them, showing an irregular line formed by the end lines of the Bobtail and Fisk within the Washington location, bounding territory which belonged to them, and not the Washington, they may have supposed that that line constituted the Washington northeastern end line; and, as it was nowhere parallel with the other end line of the Washington, they may have felt impelled to find for the defendant, notwithstanding they may have believed that the apex was wholly within the surface boundaries of the Washington. An instruction which assumes the existence of evidence which was not given, or submits a question not in the case, is erroneous. *Gibbs v. Wall*, 10 Colo. 153, 14 Pac. 216; *Burlock v. Cross*, 16 Colo. 162, 26 Pac. 142; *Railroad Co. v. Robinson*, 6 Colo. App. 432, 40 Pac. 840.

But it is said that the plaintiff cannot now avail itself of the error, because the instruction was met by no proper exception. It was excepted to as follows: "The plaintiff excepts to the giving of instruction No. 7, as asked by the defendants, and given by the court." This exception follows the instruction. If we understand counsel correctly, the objection to the foregoing exception is that it does not specify the grounds on which it was taken. The precise question here made was considered by the Supreme Court in *Ritchey v. The People*, 23 Colo. 314, 47 Pac. 272, 384. There, as here, the instructions were in writing, in separate paragraphs, and separately numbered, and were excepted to as follows: "To the giving of which instructions, and to each and every of them, the defendant, by his counsel, then and there duly and severally excepted." It was held that such exceptions to instructions given in writing, and which were separately paragraphed and numbered, were sufficient. The court, however, drew a distinction between the case of written instructions separately paragraphed and numbered and the case of one general charge delivered orally; citing *Keith v. Wells*, 14 Colo. 321, 23 Pac. 991; *Edwards v. Smith*, 16 Colo. 529, 27 Pac. 800; *Miller v. People*, 22 Colo. 530, 45 Pac. 408—in which such exceptions to a charge which was oral and general were adjudged insufficient, and saying: "These cases proceed upon the basis that an oral charge is

not as carefully prepared as a written charge, and that counsel, being listeners, are more apt to detect errors than the court." That case was followed by this court in *Bradbury v. Alden*, 13 Colo. App. 208, 57 Pac. 490, and the same ruling applied to an exception separately taken to one of the instructions in the following form: "To the giving of which instruction the plaintiff then and there excepted." These cases are decisive of the question here raised, unless they are overruled, as counsel insists they are, by the more recently decided case of *Beals v. Cone*, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92. Upon a careful examination of the latter case we are unable to discover any inconsistency between it and the others. The following quotation from the opinion in that case shows clearly what the question before the court was, and what was its ruling on that question: "At the conclusion of the instructions given by the court of its own motion, which embraced the one under consideration, an exception in this form was preserved: 'To the giving of which instructions, and to each and every thereof, the plaintiff, by his counsel, then and there duly excepted.' This is equivalent to saving an exception to each instruction separately, but it cannot avail as against any instruction to which it is directed which contains a correct statement of the law, because it is insufficient to point out that which is incorrect from that which is correct. Without attempting to state fully the instruction which contains the direction of which appellant complains, it is sufficient to say that it embraces other distinct statements of law which are manifestly correct. Therefore the exception noted was wholly insufficient to present the question for review, which it is now sought to have us pass upon and determine." By an analysis of the foregoing excerpt we find that the court held that the effect of a general exception to each and every of the instructions is the same as a separate exception to each instruction, but that a purely general exception to an instruction containing a correct statement of the law is insufficient; and that where an instruction embraces more than one legal proposition, one of which is correct, the exception must be directed specially to the proposition or propositions which counsel regards as incorrect. The question of the necessity of stating the specific grounds of objection was not before the court, but upon the question which was before it it affirmed the necessity of designating the specific portion of an instruction good in part and bad in part to which objection is intended to be directed; and its decision went no farther than this. We may say, however, that the restriction by the court of its ruling as to the effect of the exception it was considering to the case of an instruction which was partly correct carries with it an implication that such an exception to an instruction wholly incorrect is sufficient. As we have seen, instruction No. 7

was, in view of the evidence, bad throughout; and, entertaining the views we have expressed, we are constrained to reverse the judgment.

Reversed.

GUNTER, J., not sitting.

(9 Idaho, 555)

HALL v. BLACKMAN et al.

(Supreme Court of Idaho. Feb. 2, 1904.)

LAW OF THE CASE—PRIOR APPEAL.

1. A decision by the appellate court upon a point distinctly made and essential to its determination upon a previous appeal is in all subsequent proceedings in the same case a final adjudication, from the consequences of which the court cannot depart.

2. The appellate court is at liberty in a subsequent and independent case to depart from a rule or principle which it may have announced, that it afterward determines unsound or unwise to follow, but a conclusion once reached becomes final and the law of the case in which it is announced.

(Syllabus by the Court.)

Appeal from District Court, Elmore County; K. I. Perky, Judge.

Action by Adin M. Hall against William H. Blackman and others. Judgment for defendants, and plaintiff appeals. Affirmed.

N. M. Ruick, for appellant. Hawley & Puckett and Wyman & Wyman, for respondent Blackman.

AILSHIE, J. This case was decided upon a former appeal by this court on January 31, 1902, and is reported in 68 Pac. 19. After an extended discussion of the various questions involved in the case, this court announced its conclusion in the following language: "It is apparent that a new trial would entail a great expense upon the parties, and would fail to benefit them, and for that reason we think it is to the interest of all parties that the cause be remanded to the trial court, with instructions to modify the findings of fact and judgment in accordance with the views expressed in this opinion, and it is so ordered. The judgment in all other respects is affirmed." After the original opinion was filed, the respondent Hall, who is the appellant here, filed his petition for a rehearing, and accompanied the same with an exhaustive brief covering the same questions which are discussed in the brief upon this appeal. The court, after an examination of the petition for rehearing, filed a further opinion (68 Pac. 24), wherein it adhered to the conclusions reached in the former opinion, and denied the application for a rehearing. Thereafter the remittitur was sent to the trial court, and the case was brought on at the next term thereof for further proceedings in accordance with the conclusions announced by this court. When the cause was called in the trial court, the plaintiff, Hall, appeared and asked leave of the

court to introduce further evidence for the purpose of showing the court "the extent and area of the lands included in the so-called Ethel tract, which lies south and southerly from the line of road referred to in the evidence in this case and in the opinion of the Supreme Court." He also asked the court to find that the water right claimed for the Fielding Ethel homestead was subsequent to 1879, and subsequent to the perfection of plaintiff's water appropriation. The court declined to hear any further evidence in the case, and proceeded to make its findings of fact and conclusions of law upon the evidence as introduced upon the previous trial, and thereupon entered judgment accordingly. The plaintiff, Hall, prepared, and had settled, a bill of exceptions, and thereafter appealed from this latter judgment.

Appellant here contends that the trial court should have taken further testimony in the case, and that he also erred in awarding the respondent Blackman a water right for the Fielding Ethel homestead of a date prior to the right of plaintiff. Counsel for respondent insist that the only question which the court can consider upon this appeal is whether or not the trial court has followed the opinion as announced by the Supreme Court upon the former appeal, and that this court is powerless and without jurisdiction to re-examine any of the facts of the case, or to reconsider the law as applied to the case. There is no doubt but that the identical questions presented upon this appeal for our consideration were passed upon in the former appeal. As before stated, the same questions are discussed in appellant's brief that were discussed upon his petition for a rehearing on the first appeal. It is true that the appellant in this case was a respondent in the first appeal, but that can make no difference as to the application of the principles of law involved in the case. In passing upon the petition for a rehearing in the former appeal, this court said: "Thus it is made to appear that Fielding and David B. Ethel entered under the laws of the United States 480 acres of land on Bennett creek as early as 1874, and obtained patent for the same from the United States; and it also appears that they diverted as early as 1872 500 inches of the waters of said Bennett creek for the irrigation of lands owned or claimed by them. It also appears from the complaint of the petitioner, Adin M. Hall, that he claims no water earlier than 1879, and, as Ethel Bros. had received patents from the United States to 320 acres of their said land, and had made final proof at the proper United States land office for another 160-acre tract prior to 1879, they certainly were the owners of said 480 acres of land prior to 1879, and had prior to that date diverted and taken upon said land water sufficient to reclaim the same."

From the foregoing it will be seen that there can be no mistaking of the fact that

this court passed directly upon the question of priority as between Adin M. Hall, the appellant here, and the grantees and successors of the Ethel Bros. who entered and made final proof upon the two pre-emption claims and one homestead claim, comprising an aggregate of 480 acres, and held that the water right for this 480-acre tract attached prior to 1879, and prior to the appropriation and claim of Hall. This question was directly raised upon that appeal, and was squarely before the court, and its determination was essential to a determination of that appeal. The questions there determined have become *res adjudicata*, and are no more open to re-examination or reconsideration by this court than they would be open to re-examination and reconsideration by the trial court. The case was not sent back for a retrial, but merely for a modification of the judgment in accordance with the conclusions reached by this court; and the opinions filed upon that appeal became the law in this case, and, whatever the opinion of the court might be at this time as to the correctness of the conclusions there reached, or the soundness of any legal principle there announced, its judgment cannot now be invoked to disturb such questions as have become a final adjudication in the case.

In *Phelan v. San Francisco*, 20 Cal. 40, Chief Justice Field, in passing upon the power and authority of the Supreme Court to re-examine a question which had been determined by the same court upon a prior appeal, said: "The decision on that point, which in fact disposed of the entire question of ratification on its own merits, is the law of the case, by which we are bound, whatever our views might be upon an original consideration of the matter. A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits; but in the case in which it is made it is more than authority—it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves." This case was cited with approval in *Heinleu v. Martin*, 59 Cal. 181, where the syllabus to the case says: "The judgment of this court upon an appeal, whether right or wrong, becomes the law of the case for all subsequent proceedings in it, and is a final adjudication, from the consequences of which the court cannot depart." In the last-mentioned case, in commenting upon the fact that no new trial had been ordered upon the first appeal, the court makes use of the following language: "But no new trial was ordered, and none was necessary, for the Supreme Court had determined the rights of the parties, and that determination was a final adjudication of the case itself, which only required to be embodied in form by the entry of a proper judgment in the lower court, to make it enforceable. The entry of such a

judgment was the only duty devolved upon the court, under the mandate of the Supreme Court. *Keller v. Lewis*, 58 Cal. 466. If, upon the going down of the remittitur from the Supreme Court, the lower court had retried the case, and upon such new trial had rendered a judgment, it would have been void. *Argenti v. San Francisco*, 30 Cal. 460." In 2 *Ency. P. & P.* p. 371, the author says: "The doctrine of *res adjudicata*, and the principles upon which it rests, apply, therefore, to appellate judgments. The principles and questions adjudicated on an appeal are binding, and will not be reviewed, as between the parties and their privies, on a subsequent appeal in the same cause. The law so declared controls all further proceedings in the cause until the termination." The authorities to this effect are too numerous to require further citation. There must necessarily be an end to litigation in any given case, but that object can never be obtained if an appellate court can re-examine upon subsequent appeals the same questions which it has previously examined, and the fact that it may have made a mistake or committed an error will not warrant a re-examination and reconsideration upon another appeal in the same case. The court is at liberty, in a separate and independent case, to depart from any rule or principle which it may have announced that it afterward determines unsound or unwise to follow, but the conclusion reached becomes final and the law of the case in which it is announced.

Applying this principle to the present appeal, we find no authority for a re-examination of the questions argued by appellant. All the questions here presented were ably and comprehensively presented to the court upon the original appeal, and were there determined adversely to the appellant, who was there a respondent. The judgment entered by the trial court was in harmony with the former opinion of this court.

For the reasons herein announced, the judgment appealed from is affirmed, with costs to respondent.

SULLIVAN, C. J., concurs. STOCKSLAGER, J., having tried the case in the district court, and the original appeal being from a judgment rendered by him, expresses no opinion.

(9 Idaho, 561)

#### CANYON COUNTY v. TOOLE.

(Supreme Court of Idaho. Feb. 4, 1904.)

HIGHWAYS—PROCEEDINGS TO CONDEMN LAND FOR—PETITION—NONCONSENTING LANDOWNERS—APPEARANCE—COUNTY COMMISSIONERS—APPEAL FROM ORDER OF BOARD—PROCEEDINGS IN COURT.

1. Under the provisions of sections 920 and 921, Rev. St. 1887, a petition for establishing a public road must contain substantially all of the facts required to be stated therein by the provisions of said section in order to give the board of county commissioners jurisdiction,

2. If the nonconsenting landowners appear at the hearing of such petition and introduce evidence against the granting of the same, and the decision of the board is against them, and they fail to appeal from the order of the board, they cannot collaterally attack such decision in a suit brought under the provisions of section 930, Rev. St. 1887, on the ground that the petition failed to state all of the facts required by sections 920 and 921.

3. When the nonconsenting landowner fails to appear at the hearing of the petition, the board has no jurisdiction to hear the same unless it contains substantially the statement of facts required by said sections 920 and 921.

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Geo. H. Stewart, Judge.

Action by Canyon county against J. J. Toole to condemn a right of way for a public road. Judgment for defendant, and plaintiff appeals. Reversed.

W. A. Stone, Co. Atty., and Griffith & Griffith, for appellant. Frank J. Smith and Rice & Thompson, for respondent.

SULLIVAN, C. J. This action was commenced, by order of the board of county commissioners of Canyon county, to condemn the right of way for a public road over the lands of respondent situated in Road District No. 1 of said county. This action was before this court on a former appeal, the decision of which is reported in 60 Pac. 320. In the complaint are alleged the facts of filing a petition for the location of said public road under the provisions of sections 920 and 921 of the Revised Statutes of 1887, and of the action of the board of county commissioners on said petition. Said petition is as follows: "To the Honorable Board of County Commissioners—Gentlemen: We, your petitioners, citizens and taxpayers of Canyon county, respectfully ask that a county road be opened running through lands described as follows." Then follows a description of the lands, which it is not necessary to insert here, and at the end of said description the following clause or sentence is found, to wit, "as more particularly shown on map attached hereto," and "we would also represent that this proposed road will open up for settlement hundreds of acres of land, and a schoolhouse has already been built thereon, and your petitioners will ever pray." Then follow the names of 30 petitioners. On the plat attached to said petition the lands over which said road is proposed to be extended are platted in 40-acre tracts, and the names of certain persons are written on all of the 40-acre tracts over which said road extends.

It appears from the allegations of the complaint that after filing said petition, and on the 10th day of April, 1899, at a regular meeting of said board, the said petition was considered by said board, and found by it to be in proper form and substance, and on motion an order was made appointing three persons to view and survey the said proposed road and submit their report to said board.

That thereafter, and on April 7, 1900, the said viewers filed their report, which showed that the viewers had obtained the written consent to give the right of way for said road from all of the landowners over which it passed, except four, the respondent being one of them. Said viewers had estimated the damage to the nonconsenting landowners, and estimated the total cost of constructing the said road at \$485, and recommended the said road to be laid out over the route shown by said plat. Thereafter, on the 19th day of July, 1900, at a regular meeting of said board, the report of said viewers came on for hearing, and it was ordered that the hearing of said report be set for the 11th day of September, 1900, and directed legal notice to be given to said nonconsenting landowners and all persons interested. Thereafter, on said 11th day of September, the hearing of said matter was continued to the 9th day of October, 1900, and on that day the hearing was had, and the nonconsenting landowners appeared personally and introduced certain evidence in their behalf. And it is alleged that, after due and deliberate consideration of all of the evidence and facts presented to said board, it was found that said road was a necessity and a great public benefit, and it was ordered that said report and said petition be approved and granted. It appears that the matter was again reheard by said board on February 25, 1901, and, after rehearing the evidence of the nonconsenting landowners, the board approved said report and reaffirmed their former decision, and ordered the amount of damages estimated by said viewers be retendered to the nonconsenting landowners, and directed that the said tender be kept good, and that, in case said nonconsenting landowners refused to accept said sums so awarded them, the county attorney was ordered to institute proceedings by law to procure the said road. It is further shown that all of said nonconsenting landowners accepted the sum so tendered, except J. J. Toole and J. L. Johnson, the grantee of Stewart, one of the nonconsenting landowners. J. L. Johnson, one of the defendants, filed a disclaimer, and the respondent, J. J. Toole, answered, denying generally each allegation of the complaint, except that Canyon county was a municipal corporation, and averred that the opening and constructing of said highway across his land would damage him in the sum of \$350, and prayed for judgment against the plaintiff for said sum, with costs of suit. The issues as thus made were tried before the court with a jury. During the trial the appellant county offered in evidence the said petition and other documentary and oral testimony in support of the allegations of the complaint, all of which was excluded on the objection of counsel for the respondent. Counsel objected to the introduction of the petition for the reason that it failed to state who the owners of the land were over which said road should pass, and

whether the owners consented thereto, and the probable cost of the right of way; and, further, that it did not comply with nor show or state the facts required by the statute, which objections were sustained by the court.

Said section 921 sets forth what a petition of the kind under consideration must contain, and is as follows: "The petition must set forth and describe particularly the road to be abandoned, discontinued, altered, or constructed, and the general route thereof, over what lands, and who the owners thereof are, whether the owners consent thereto, and if not, the probable cost of the right of way, and the necessity for and the advantages of the proposed change." It is contended by counsel for respondent that each of the requirements of said section is a separate and distinct statement of facts, and that the petition must contain each and every of said statements. It is contended that the petition must contain: First, a particular description of the road to be constructed; second, the general route thereof; third, over what land it is to pass; fourth, the names of the owners of the land; fifth, whether the owners consent to the laying out of such road; sixth, if they do not so consent, the probable cost of the right of way; seventh, the necessity for and the advantages of such road. It is contended that the fourth, fifth, and sixth statements of facts as above indicated are totally lacking in said petition, and for that reason the board of county commissioners had no jurisdiction to act in said matter; and, further, that a petition containing substantially the statement of facts required by the statute is necessary to give the board jurisdiction of the subject-matter, and without it the board has no power to act in the matter, and cite, in support of this contention, *Gorman v. County Commissioners*, 1 Idaho, 553. That case arose out of the action of the board of county commissioners in removing from office the assessor and tax collector of Boise county, and the court held, in reviewing its action, that such board is a tribunal created by statute, with limited jurisdiction and only quasi judicial powers, and cannot act except in strict accordance with the statute. *Gorman* appealed from the order of the board, thus directly attacking such order.

In *re Grove Street*, 61 Cal. 438, is also one of many other cases cited in support of respondent's contention. That is a very instructive case, and was commenced as a proceeding under the statutes of California for the condemnation of land for an extension of a street in the city of Oakland. A number of questions were raised in that case, and the controlling one was whether the petition presented by the city council to the county court was fatally defective in that it did not state all the facts required by statute to be stated therein. In that case, under the laws of California, the city council filed in the county court a petition praying the appointment of

commissioners to assess the compensation to be paid to the several landowners of the land sought to be condemned, and to make the assessment against the land to be benefited by the improvement. The court appointed the commissioners, and they subsequently made their report to the court. When the report came on for hearing a number of the landowners appeared and filed their objections in writing, and moved to quash all of the proceedings upon the ground, among others, that the petition was defective in that it did not contain all of the facts required by the statute to be stated therein. The county court overruled said objections, and entered judgment against the defendant landowners, from which an appeal was taken. Thus the landowners attacked said proceeding and petition directly, and not collaterally, as in the case at bar, and on that state of facts the court there held as follows: "It was for the Legislature to prescribe, and the Legislature has prescribed, what the petition shall contain. Until a petition has been presented containing substantially all that the law declares shall be inserted in a petition to initiate the proceedings, the council has no power or jurisdiction to act with reference to the opening of a street."

In the case at bar, if the respondent had failed to appear, or, when he appeared before the board to contest the granting of the petition, had objected to the sufficiency of the petition, and on the decision being against him had appealed from the order, the decision in *Re Grove Street*, supra, would have been in point. But having appeared and contested the laying out of the proposed public highway, and not having appealed from the decision of the board against him, he cannot collaterally attack such proceedings in a suit brought under the provisions of section 930.

Counsel for respondent cite many authorities in support of their contention that the petition for a public road must contain substantially the statement of facts required by the statute. That is the well-established rule, especially when the nonconsenting landowners fail to appear at the hearing of the petition, and also when they do appear and object to the sufficiency of the petition on the ground that it does not contain a statement of the facts required by the statute, and in the latter case, if the decision is against them, they appeal therefrom, then the question of the sufficiency of the petition is directly raised. By appealing they attack the decision of the board directly, and not collaterally, as was done in this case; and, in case they fail to appear at the hearing of the petition, the board obtains no jurisdiction in the matter, unless the petition contains a substantial statement of the facts required to be stated therein by the statute.

It must be borne in mind that this is a condemnation proceeding under special provision of our statute, and in such cases the

general rule is the petition must contain substantially all the statements of facts required by the statute, and, if it does not, the board has no jurisdiction unless the nonconsenting landowners appear and proceed as though the petition was not defective. It appears from the record before us that the respondent personally appeared before the board at the time said petition was heard and considered, and was sworn and testified in said matter against the granting of said petition, and introduced all the evidence that he desired to introduce in said matter. It is not shown that he objected to the form of said petition, or that it did not contain all of the facts required to be stated by the provisions of the said section of the statute. It appears that the board decided that there was a necessity for such road, and awarded the appellant damages in the sum of \$75, from which order and decision of the board no appeal was taken by this respondent. It also appears that in his answer he does not specifically deny the allegations of said complaint in regard to said proceedings of the board of county commissioners, although he denies them generally; and it is also averred in said answer that the laying out of said road across his land would damage him in the sum of \$350, and he prayed for judgment for that amount. The question arises, then, whether the action of said board of county commissioners did not finally determine the rights of the respondent except as to the damages he would sustain, he having appeared in said proceedings and failed to appeal from the decision and the order of said board.

There is no question but what a petition for the laying out of a public road must substantially contain the substantive facts required to be stated therein by the provisions of said section 921 in order to give the board jurisdiction of the subject-matter where the nonconsenting landowner failed to appear and contest the laying out of the highway; but where, as in this case, the nonconsenting landowner appears and raises no objection to the form of the petition, and proceeds as though it were sufficient, and introduces his testimony before the board of commissioners against the laying out and the establishment of such highway, and prays for damages in a much greater amount than was awarded him by the viewers, we are of the opinion that he cannot in this action raise the question of the sufficiency of such petition; that he cannot attack said order or decision of the board collaterally in a proceeding like the suit at bar.

Section 930 of the Revised Statutes of 1887 provides that, if any award of damages is rejected by the landowner, the board must by order direct proceedings to procure the right of way to be instituted by the district attorney of the county in which said road is located. The provisions of that section provide for a suit in which and by which the award of damages made by the county com-

missioners may be contested by the landowner, and in that suit the landowner cannot set up as a defense the defects in the petition, where he has appeared before the board and contested the granting of the petition. If he was not satisfied with the action of the board, his remedy was by appeal from its order, and if he failed to appeal he cannot attack the decision of the board collaterally in a suit brought under the provision of section 930, Rev. St. 1887. The evident intent of the Legislature was that all matters pertaining to the laying out of public roads, except as to the damages to be awarded to nonconsenting landowners, must be settled by the board of county commissioners at a hearing of the petition for the road, subject, however, to an appeal by any landowner dissatisfied with the order of the board therein. In the case at bar we think the board would not have acquired jurisdiction had the respondent not appeared and contested the allowance of said petition when the hearing was had thereon before the board, and in that case he would not have been bound by the action of the board. But under all of the facts in this case we conclude that the respondent was bound by the action of said board, and was estopped from raising any question as to the sufficiency of said petition, or the sufficiency of any of the proceedings before said board in this suit or proceeding, except as to the damages awarded by the board.

For the reasons above stated, the judgment must be reversed, and it is so ordered, with costs in favor of the appellant, and the cause is remanded for further proceedings in accord with the views expressed in this opinion.

STOCKSLAGER and AILSHIE, JJ., concur.

(9 Idaho, 571)

CARTIER v. BUCK et al.

(Supreme Court of Idaho. Feb. 5, 1904.)

APPEAL—NEW TRIAL—CONFLICTING EVIDENCE.

1. Where it is shown by the record that there is a substantial conflict in the evidence on the material issues involved, a new trial will not be granted; neither will the judgment be modified under the facts established in the case.

(Syllabus by the Court.)

Appeal from District Court, Fremont County; J. C. Rich and J. M. Stevens, Judges.

Action by Levi Cartier against W. W. Buck and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hawley & Puckett, for appellants. F. S. Dietrich, for respondent.

STOCKSLAGER, J. This is an action brought in the district court of Fremont county, and was originally commenced by the plaintiff against a few of the defendants for the purpose of restraining them from using the waters of Camas creek, and by such use

lessening the plaintiff's water supply. After the suit had been commenced, an order of the court was made, bringing in all other parties who were users of the waters of said stream as defendants. By agreement made in open court defendants were permitted to deny the allegations of the complaint by general denial. The several defendants, in addition to their answers, filed cross-complaints setting up their several rights to the use of the waters of said stream and the dates of their appropriations. The cause was tried before the court without a jury, and the court, by its findings of fact, found the relative rights of the parties in and to the use of the waters, following it up with a decree founded upon such facts. A large number of defendants, represented by Hawley & Puckett as their attorneys, gave notice of their intention to move for a new trial, and thereupon prepared a statement on motion for a new trial, which was settled and allowed. An order denying a new trial was made. From the order denying the new trial and from the judgment said defendants appealed.

This statement is taken from the brief of appellants, and is adopted by the court, as it is conceded by respondent to be, in the main, correct. Respondent supplements the statement by the further statement that in the years 1883, 1884, and 1885, about the time the railroad was built through Idaho from Utah to Montana, a number of settlers entered lands three or four miles west of Camas railroad station along Camas creek, near its lower end. After all of the waters of Camas creek were appropriated at the lower end of the stream, settlers upon the tributaries gradually began to use the water regardless of the rights of the lower claimants, though prior appropriators. Settlement at the upper end of the stream progressed slowly until about the year 1897 or 1898, when both settlement and increase in the area of irrigation seem to have been given a considerable impetus, and the plaintiff, being unable to get water even up as late as the 1st of July each year, brought this suit to have his rights determined, and to have the upper and late appropriators enjoined from interfering with his rights. After decree was entered, plaintiff sold and transferred all of his holdings to the Wood Live Stock Company, and he now asks that it be now recognized as the respondent in the place and stead of the plaintiff in the lower court.

Counsel for appellant say in their brief that the statement on motion for a new trial shows that there is no dispute as to the amount of water decreed to the various parties to the suit by the decree of the court, nor is there any dispute as to the time from which the several rights of the parties should date. It is argued, however, that the use of the water by the subsequent appropriators—among them the appellants—has been bene-

ficial to respondent and its predecessors, creating what might be termed an underground reservoir, thereby retaining the water that seeps into the ground or reservoir from the early spring irrigation of the lands near the head of the stream. Gradually this water finds its way back into the channel, and passes on down, thereby prolonging the life of the stream. If the theory is true, the users at the lower end of the stream are certainly benefited. I have very frequently heard this theory advanced in the district court, and have heard much evidence on the subject. This, however, is the first time the question has reached this court. One thing seems to be noticeable in all cases where this question arises; that is, that this peculiar system of reservoirs or spongy condition of the soil is always discovered by the parties at the upper end of the stream, and as vigorously disputed and denied by the lower appropriators. If this contention of appellants is true, it is certainly a good and sufficient defense to this action. Before the plaintiff in the lower court could obtain injunction relief, it was incumbent on him to show that the use of the waters of Camas creek, or some of its tributaries, by the defendants, prevented the water from flowing down to him in the natural channel, and also that, had they not disturbed it, it would have found its way to his premises. This being the question upon which the rights of the parties to this action must be determined, it will be necessary to examine the evidence at some length. The fourth finding of the court is: "That of the several amounts of water so appropriated the plaintiff and his predecessors in interest, during the several years in which said several amounts of water were first appropriated and diverted as aforesaid, and continuously ever since said several dates of appropriation, except when prevented from so doing by the unlawful interference of the defendants and other persons, have continued to divert and use during the whole of the irrigating season each year for domestic and stock purposes, and for the purpose of irrigating certain of said tracts of land and raising agricultural crops thereon, the following amounts during and from the dates set opposite thereto, to wit: 75 inches, dated April 1, 1883; 75 inches, dated April 1, 1884; 350 inches, dated April 1, 1885; 100 inches, dated April 1, 1886; 75 inches, dated April 1, 1895. That of the several amounts of water so appropriated, as set out in the foregoing paragraph 3, the plaintiff and his predecessors in interest, during the years in which said several amounts of water were first appropriated and diverted as aforesaid, and continuously ever since said several dates of appropriation, except when prevented from so doing by the unlawful interference of the defendants and other persons, have continued to divert and use during each and every irrigating season up to July 1st of each year, for the purpose main-

ly of irrigating wild hay upon certain of said lands, which the court finds to be a paying crop when irrigated, and needs irrigation up to, but not after, July 1st, the following amounts during and from the dates set opposite thereto, to wit: 85 inches, dated April 1, 1883; 85 inches, dated April 1, 1884; 475 inches, dated April 1, 1885; 60 inches, dated April 1, 1887; 200 inches, dated April 1, 1895. That the rest of said water so appropriated, to wit, 300 inches April 1, 1883, and 150 inches April 1, 1887, was never appropriated or used except during the spring high-water season, and the same has during the high-water season every year been used by plaintiff and his predecessors in interest in producing hay and pasture for stock." The statement on motion for new trial says that: "Plaintiff and his predecessors appropriated of the waters of Camas creek, 75 inches from April 1, 1883, 75 inches from April 1, 1884, 350 inches from April 1, 1885, 500 inches from April 1, 1895, 400 inches from April 1, 1886; and that said amounts of water are necessary for the successful cultivation of said lands over and above the water appropriated for use upon said hay lands."

We have read the evidence of the witness Ross, who was state engineer, and whose business was devoted to the important subject of irrigation in this state. He testifies to the theory advanced by appellants that the use of water at the head of a basin or stream in the early spring seems to hold the water in check, and thereby prolongs the life of the stream, thus benefiting the settlers below, rather than otherwise; that he made some examination of the lands in the vicinity of Kilgore, and which is the property of the appellants, and expresses the opinion that the soil is of a spongy nature, and the result of early irrigation in that vicinity should prolong the flow of water in the creek below, and thus furnish water later in the season to the settlers below. Much evidence was introduced by appellant and respondent as to the condition of this stream in the vicinity of the respondent's lands, dating from the early 60's down to the time of the trial. It is shown that the settlement in and about Kilgore is of but recent date. The evidence of the condition of the stream from July 1st until in September, when the water begins to increase, is very conflicting, some witnesses testifying that when they first knew the stream at the old stage crossing near respondent's lands there was water there at all seasons of the year; others testifying that at about the same dates they had to go miles above the crossing to get water for their horses. It is shown that trees were planted at the old town of Camas, or in that vicinity, and that they grew and prospered until after the settlements above referred to, when, for the want of water, they died. A careful reading of the evidence leads us to the conclusion that a jury might have had some difficulty in arriving at the true state

of facts as to this question. Under the well-settled and oft-repeated rule that this court will not disturb the findings of the trial court where there is a substantial conflict in the evidence, we should have no difficulty in arriving at a conclusion in this case. The judgment of the lower court upon the order overruling the motion for a new trial is affirmed, with costs to respondent.

It appears from the record that the appeal from the judgment was not taken within one year, as provided by the statute (section 4807, Rev. St. 1887). It is therefore ordered that that appeal be dismissed, with costs in favor of respondent.

SULLIVAN, C. J., and AILSHIE, J., concur.

(9 Idaho, 703)

BEAR LAKE COUNTY v. BUDGE, Judge.

(Supreme Court of Idaho. Feb. 24, 1904.)

APPLICATION FOR WRIT OF PROHIBITION—ACTIONS TO SETTLE WATER RIGHTS—SERVICE OF SUMMONS—CONSTRUCTIVE SERVICE BY PUBLICATION—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—POLICE POWER.

1. The provisions for the service of summons in actions brought under the provisions of an act entitled "An act to regulate the appropriation and diversion of the public waters and to establish rights to the use of such waters and the priority of such rights," approved March 11, 1903 (Sess. Laws 1903, p. 223), held unconstitutional and void.

2. The remedy by due course of law guaranteed by both the federal and state Constitutions requires, before there is a judicial determination affecting the right to life, liberty, or property, that process to obtain jurisdiction must be issued and personally served when practicable; constructive service can only be made effective when actual service is impracticable.

3. Before constructive service of summons can be legally made, some necessity therefor must appear.

4. That provision of section 13, art. 1, of our state Constitution which declares that no person shall be deprived of life, liberty, or property without due process of law prohibits the Legislature from dispensing with personal service of summons in actions to quiet title or to settle private adverse rights to property when personal service is practicable and is usual under the general laws of the state.

5. Under certain facts, constructive service of summons must, of necessity, be sufficient to give a court jurisdiction, and the general law of the state provides for such service.

6. The rule here laid down does not apply to cases of taxation.

7. The provisions of said sections 34, 35, and 36 (pages 247-249) of said act are repugnant to the provisions of section 26, art. 5, of our state Constitution, which requires all laws relating to courts to be general and of uniform application, and that the organized judicial powers, proceedings, and practices of courts of the same class shall be uniform.

8. The Legislature has no authority to compel a county to pay the costs, disbursements, and attorney's fees in an action to settle the right to the use of water and the priority of such rights between private parties, when such county is not properly a party to such action.

9. Under the police power of the state the Legislature cannot authorize a public officer to bring a suit to settle private rights to the use of water or the priority of such rights.

(Syllabus by the Court.)



Original application by Bear Lake county for writ of prohibition to restrain Alfred Budge, judge of the Fifth Judicial District of Idaho in and for Bear Lake county, from proceeding to try an action brought under the provisions of an act concerning the regulation of waters appropriated for a beneficial purpose, approved March 11, 1903. Writ granted.

John A. Bagley, Atty. Gen., James E. Babb, E. M. Wolfe, and Jesse R. S. Budge, for plaintiff. N. M. Ruick and Standrod & Terrell, for defendant.

SULLIVAN, C. J. This is an application for a writ of prohibition to the judge of the Fifth Judicial District of the state of Idaho. The writ is sought to prohibit the judge of said court from further proceedings in an action pending in Bear Lake county, wherein one Edward J. Turner, as water commissioner for the First District of Idaho, is plaintiff, and all claimants to the use of water of a certain creek known as "Dairy Canyon Creek," situated in said county, were defendants, none of which defendants are named in said action. The petition or affidavit for said writ sets forth, among other facts, that the said Edward J. Turner is the duly appointed, qualified, and acting water commissioner of said water division No. 1 of the state of Idaho; that under and by virtue of an act of the Legislature of the state of Idaho (Sess. Laws 1903, p. 223) entitled "An act to regulate the appropriation and diversion of the public waters and to establish rights to the use of such waters and the priority of such rights," approved March 11, 1903, the said water commission, as plaintiff, did on or about the 15th day of June, 1903, commence in the district court of the Fifth Judicial District in and for Bear Lake county said action. It is also alleged in said affidavit that said suit was brought for the purpose of quieting title to the right to the use of the waters of said stream among the claimants thereof; that said Turner, as such water commissioner, in order to bring and prosecute said action and to carry out and enforce the provisions of the act aforesaid, did, under the powers therein conferred, employ as his attorneys therein D. W. Standrod and Thomas F. Terrell, Esqs.; that said Turner, as water commissioner, caused to be published in the Paris Post, a weekly newspaper published at Paris, Bear Lake county, Idaho, a notice of the nature and pendency of said action in the manner and form and for the time required by said act, and, after due return of said notice and proof of publication thereof in said court, said action was placed upon the calendar of said court for trial, and the same was set for trial on the 30th day of October, 1903. It is further alleged that under the provisions of said act, and by the bringing of the action aforesaid, heavy costs and attorney's fees are sought to be charged

against said county of Bear Lake, and that the same will be charged against said county and judgment rendered against it for such costs and fees if said action is permitted to be tried by said court; that such costs consist of clerk's fees, attorney's fees, charges for the publication of the notice aforesaid, and other fees necessarily incidental to the trial of said action. It is also alleged that said act of the Legislature is unconstitutional and void, and confers no power upon said district court to hear said cause, and that said court is without jurisdiction to hear and determine the same, for the reason that said act seeks to have determined by judicial decision the rights of claimants in and to the waters of said creek without due process of law, and imposes costs and expenses of the litigation involved in said action upon Bear Lake county, which county is not a party to said action, and is no wise interested therein. And, after stating other facts, the affiant prays for the issuance of said writ of prohibition against the defendant. Upon the presentation of said petition or affidavit, the court issued the alternative writ of prohibition, to which writ the said judge, by his counsel, filed a general demurrer, thus admitting that the allegations of said petition were true.

The question submitted for decision involves the constitutionality of the act above referred to, and particularly that part of said act which authorizes the bringing of said action. See Sess. Laws 1903, p. 223. Said act is divided into 42 sections, and by its varied provisions it is sought to regulate the appropriation and diversion of the public waters of the state, and to establish rights to the use thereof and the priority of such rights. The constitutionality of said entire act is questioned on numerous grounds by counsel for plaintiff. But the court has concluded that the question presented by the petition, and the only one in which the plaintiff county is interested, can be disposed of by passing upon the sections of said act that authorize the bringing and maintenance of suits like the one now pending before the defendant judge, and to prevent the trial of which the writ of prohibition is sought in this proceeding. Said sections are numbered 34, 35, and 36, inclusive, and may be stricken from said act and leave the remaining part of said act a complete and operative act; and we shall not in this opinion pass upon the constitutionality of any part of said act except the three sections above numbered. We shall consider three questions as follows: (1) The sufficiency of the service of summons as provided by said section 34; (2) the provisions of section 35 requiring the costs and disbursements incurred in the prosecution of said suit and attorney's fees to be paid, in the first instance, by the county; and (3) whether the provisions of said three sections come within the police powers of the state.

Then (1) as to the provisions of said section

34 authorizing the service of summons by publication thereof. Said section is as follows:

"Sec. 34. In cases where the waters of any stream used for irrigation, domestic or milling purposes have, by a decree of a court of competent jurisdiction, been adjudicated and allotted, it is hereby made the duty of the water commissioner of the district in which such stream is situated, within three months after the taking effect of this act, to forthwith institute an action in the district court of the county wherein such decree was entered and recorded, and if in more than one county, then in the county to be selected by such water commissioner, against any and all persons claiming a right to the use of the waters of said stream or streams or either of them for purposes of irrigation, or for domestic or other purposes, and which persons shall not, for any reason, have been included in, or his right shall not have been settled and adjudicated by said decree, and against each and every party to said decree who shall claim or assert any right in addition, or of a date subsequent to the date of such decree. In entitling said action, it shall be sufficient to refer to the defendants as 'all claimants of a right to the use of the water of —' (giving the name of the stream as given in said decree) whose rights have not yet been adjudicated.' Service of summons upon said parties shall be by publication in a newspaper of general circulation published in the county where such decree is entered and through which said stream flows, and if in more than one county, then in some newspaper of general circulation published in each of said counties, in the same manner and for the same length of time as is now provided for publication of summons out of the district court, except that no affidavit to obtain order for publication of said summons, and no order for the publication of the same shall be required, and the affidavit of the publisher, proprietor, business manager or editor of such newspaper that such summons has been duly published in such newspaper at least once a week for a period of not less than one month shall be conclusive evidence of such publication and of due service of said summons upon each and every of the defendants."

It is contended that the service of summons as provided by said act is unconstitutional and void, and does not give the court jurisdiction of the defendants, and would result in depriving a person of property without due process of law, in contravention of the state and federal Constitutions, and that said provision for the service of summons by publication is not uniform with the provisions of the statute of the state for service of summons in other actions. The state as well as the federal Constitution prohibits the deprivation of private property without due process of law. They contemplate reasonable service of summons upon all defend-

ants. And reasonable service of summons is actual service upon all known defendants who reside in and can be found in the county when the suit is brought; and we think it requires personal service upon all known defendants residing within the state if such defendants can be found therein. The act in question does not require the defendants to be named in the complaint, and, in the case pending before the defendant judge, the defendants in that suit are designated as follows: "All claimants to the right to the use of water of Dairy Canyon creek whose rights have not yet been adjudicated." The summons in said action designates the defendants in the same manner, and does not contain the name of any defendant, and provides for constructive service thereof without any showing whatever for its necessity. No doubt personal service might be had upon many of the defendants, if not all of them, in the county where such suit is pending or through which the decreed stream runs. We know of no precedent for service of summons as provided in this act, where the title to property is directly involved between private individuals.

We are not without authority on this question. In *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756, it is held that "the remedy by due course of law guaranteed by section 16 of the Bill of Rights extends to all the adversary rights of persons in property, and requires that, before there is a judicial determination affecting such right, process to obtain jurisdiction of the person claiming it shall be issued and served, except that the Legislature may provide for a substituted or constructive service to be made when actual service is impracticable." The above doctrine was approved by the Supreme Court of Illinois in *People v. Simon*, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175.

The former case arose under an act to provide for the registration of land titles. By the provisions of that act one known to claim the title in fee need not be named in the application nor receive a copy of the notice, though his place of residence was within the county and known. As to him the only requirement was that he might have a chance to see a notice signed by the applicant, addressed "To whom it may concern." After stating the above facts, among others, the court then propounded the following question: "Is it such notice as the law of the land requires to be given to persons claiming interests in property of the pendency of a judicial proceeding, in which such interests are to be the subject of adjudication, and in which, unless they appear, a decree will be entered precluding their further assertion?" The court then proceeds to answer that question as follows: "It is said that it is because the proceeding to register land under the act is in rem. Whether it is in rem or in personam is de-

terminated by its nature and purpose. To say that the Legislature may prescribe such notice as is appropriate to proceedings in rem, and thus invest the proceeding with that character, is to affirm its power to annul the constitutional requirement. In this aspect of the case, and considering the effect of registration upon interests adverse to those of the applicant, the proceeding to register does not, in any substantial respect, differ from a suit *quia timet* to settle title. It bears the least possible analogy to a proceeding in rem. The res is not taken into the possession of an officer of the court. No charge or lien is asserted against it. It is not to be sold with a view to the distribution of its proceeds, and partakes, therefore, less of the nature of a proceeding in rem than does the foreclosure of a mortgage."

In *Brown v. Board*, 50 Miss. 468, the court held that the provision of the Bill of Rights "that no person shall be deprived of life, liberty or property without due process of law," inhibits the Legislature from dispensing with personal service where it is practicable, and has been usual under the general law.

In *Tyler v. Judges* (Mass.) 55 N. E. 812, 51 L. R. A. 433 (which was a proceeding for a writ of prohibition and involved the registration laws of that state), referring to the service of notice, the court said: "It would hardly be denied that the statute takes great precautions to discover outstanding claims, as we have already shown in detail, or that notice by publication is sufficient with regard to claimants outside the state. With regard to claimants living within the state, and remaining undiscovered, notice by publication must suffice, of necessity."

It cannot be said that the section under consideration takes great precaution to discover the unnamed defendants residing in the county where the suit is pending. It fails to require the personal service of summons on known defendants residing in such county, and is in conflict with those provisions of our state Constitution, as well as the Constitution of the United States, which provide that no person shall be deprived of life, liberty, or property except by due process of law. Those provisions prohibit the Legislature from dispensing with the personal service of summons when it is practicable. That is required to give courts jurisdiction under the general laws of the state in regard to procedure in suits brought to quiet title or to settle adverse rights.

This act, so far as actions are concerned, proceeds upon the hypothesis that it is necessary for a public officer to go into court and ascertain and settle titles to water rights between private parties, whether the private owners desires to have them settled or not. And said act provides that the court shall obtain jurisdiction of the persons and property of such private owners without naming them in the complaint or summons, and without

personal service thereof, even though their names and residences are known, and they reside in the county where such action is pending, and when personal service of summons may be readily and easily made. It thus establishes a different rule for the service of summons than exists for the service of summons when the suit is brought by one of the private owners against others claiming rights to the use of water from the same stream, and for that reason is a special law for special cases.

The court is authorized, by said act, to procure jurisdiction of the person, and to settle by judgment and decree valuable property rights, not by due process of law—not by service of summons as provided by the general law of the state for the service thereof, which operates alike upon all citizens of the state and others desiring to have their titles quieted—but by a special, limited, and constructive service that is not permitted by the general law of the state. Of course, if defendants are in reality unknown, or if known and reside outside of or cannot be found within the state, publication of summons must, of necessity, be sufficient, as provided by our statutes. But in such cases, when the name and post-office address of the defendant is known, a copy of the summons and complaint must be sent to him by mail.

If the power assumed by the Legislature in the provisions of this act in regard to the service of summons be sustained by this court, it would lead to most fearful results, as it would enable them by special and limited law to settle controversies over titles to private property, and to take the property of one person against his consent and give it to another. Whatever the Legislature may have concluded the exigencies that required the passage of said sections of said act to settle the conflicting claims of private individuals to the use of certain water, it had no right under said provisions of our Constitution to pass a special and limited act, confined to a particular class of individuals or case, by which they could be deprived of their property in the way provided by said sections. The individual owners of water rights can only be divested of them by judicial proceedings which proceed according to the course of the general law of this state for settling such rights and titles. We know that requirements less rigid than those above indicated may be found in cases of taxation and eminent domain, but we know of no precedent for such a notice as is provided in said act, where the title to property is directly involved, and the object and purpose of the suit is to quiet titles and settle conflicting private claims to private property.

Said provisions for the service of summons clearly violate the provisions of section 26, art. 5, of our state Constitution, which provides that all laws relating to courts shall be

general and of uniform operation throughout the state, and the organized judicial powers, proceedings, and practices of all the courts of the same class or grade shall be uniform; and is in violation of the provisions of paragraph 4 of section 19 of article 3 of our Constitution, which prohibits special or local legislation regulating practice of courts of justice. We have a general law providing how a summons must be served in cases to quiet title or determine adverse interests to private property, and the provisions therefor in the act under consideration provide a different method in cases brought by a water commissioner for that purpose. Said provisions also violate the provisions of our statute which requires suits to be brought in the name of the real party in interest. The water commissioner, a public official, is not the real party in interest in a suit to quiet title or to determine adverse interest in property not claimed by or belonging to him or the state.

As to the constitutionality of the provision requiring the county to pay costs, disbursements, and attorney's fees incurred in the prosecution of such suits: Section 35 of said act provides for the payment of such costs, disbursements, and attorney's fees, and is as follows:

"Sec. 35. Upon the filing of the said complaint by the said water commissioner, any person or persons, parties to said decree or claiming any right or rights thereunder, may appear by complaint in intervention, or answer, and contest the right of any or all of the parties defendant in said action to use the waters of said stream or any part or portion thereof, and the proceedings henceforth shall be conducted in the same manner as actions for the adjudication of water rights upon the streams of this state, and the decree rendered in said action shall be deemed a part of and supplementary to the original decree, to be enforced in the same manner. The costs and disbursements incurred by said water commissioner in the prosecution of said action, including a reasonable attorney's fee to be allowed by the court, shall be included in the sworn statement provided by law to be filed by the water commissioner with the auditor and recorder of the county or counties through or into which said stream or streams shall flow, and shall be apportioned, collected and paid in the same manner as the expenses of water master and his deputies are apportioned, collected and paid, and the same shall constitute a lien upon real estate in the same manner and to the same extent as such expenses of the water master and his deputies."

Said section provides that such costs, disbursements, and attorney's fees shall be included in the sworn statement provided by law to be filed by the water commissioner with the auditor, and shall be apportioned, collected, and paid in the same manner as the expenses of water masters are paid, and

that the same shall constitute a lien upon real estate, etc.

In order to ascertain how water masters' expenses are paid we must turn to sections 29 and 30 of said act, and there we find that they are paid out of the general expense fund of the county upon the sworn statement of the water master, verified by the water commissioner, upon which the board of county commissioners shall order a warrant to be issued to the water master.

We do not think the Legislature has the authority to compel, by legislation, a county to pay the costs, disbursements, and attorney's fees in a suit to settle and adjudicate the private rights of persons in and to the use of waters appropriated under the laws of this state. But it is contended by counsel for defendant that the question of due process of law has no application to the act here involved; that the question is one purely of police power; and, that being true, neither the fourteenth amendment of the federal Constitution nor section 13, art. 1, of the Declaration of Rights of the Idaho Constitution, has any application; that said prohibitions do not impose any restraint upon the exercise of police power of the state in cases where such power is properly invoked. We cannot consent to that contention of counsel. While it is a part of the history of this state that crimes have been committed in personal contests between claimants to the right to the use of water, that fact is not sufficient to authorize the state under the police powers to settle the rights of conflicting claimants to private property in a suit brought by a public official, and on the service of the notice or summons by publication upon known defendants residing in the county where such suit is brought and pending.

There is no doubt that the Legislature has power to regulate, to a certain extent, the use of private property under what is denominated the "police power of the state." But under the act in question it has attempted to go beyond its legitimate police power, and sought to determine private rights to private property without due process of law, which it is prohibited from doing by the fourteenth amendment of the federal Constitution, and that provision of our state Constitution which provides that no person shall be deprived of life, liberty, or property except by due process of law. If we were to concede that said provisions were intended as a police regulation, that would not permit the settlement of adverse interests or titles to private property without reasonable notice to the parties interested.

For the reasons above given, said sections 34, 35, and 36 of said act are unconstitutional and void, and the court declines to pass upon the constitutionality of any other sections or provisions of said act, for the reason it is not necessary to do so in order to decide all questions raised by the pleadings in which Bear Lake county is directly interested.

The peremptory writ of prohibition is granted, and directed to issue as prayed for in the petition.

STOCKSLAGER and AILSHIE, JJ., concur.

(27 Utah, 261)

STEPHENS et al. v. STEVENS et al.  
(Supreme Court of Utah. Feb. 10, 1904.)  
APPEAL—NOTICE—SERVICE—ADVERSE  
PARTIES.

1. An action to enforce a stock subscription was brought against three defendants, who prayed that three others be made parties. Their prayer was granted, two of the added parties appearing and answering, and the others defaulting. A judgment was entered for plaintiffs in which it was provided that, if any of the defendants should be compelled to pay a sum in excess of their pro rata share as shown by the findings of fact and conclusions of law, judgment would be entered against the other defendants for such excess on application to the court. A new trial was denied, and the three original defendants appealed. *Held*, that the added defendants were adverse parties within the meaning of Rev. St. 1898, § 3305, as amended by Laws 1899, p. 83, c. 62, providing for the service of notice of appeal on adverse parties, as they were interested in maintaining the judgment for the purpose of enforcing contribution against the appealing defendants, in case they (the added defendants) should be compelled to pay more than their share of the judgment.

Appeal from District Court, Weber County; W. M. McCarty, Judge.

Action by Mary E. Stephens and Zylpha J. Stephens against Sidney Stevens, Frank J. Stevens, Sidney O. Stevens, and others. From an order refusing to vacate a judgment for plaintiffs and denying a new trial, the defendants named appeal. Dismissed.

P. L. Williams and Henderson & Macmillan, for appellants. T. D. Johnson and A. G. Horn, for respondents.

LEWIS, District Judge. This action was brought by the respondents against the appellants to recover an alleged liability on stock subscription in the South Ogden Land, Building & Improvement Company. Appellants in their answer and cross-complaint set up, among other things, that there was a nonjoinder of parties defendant in the action, alleging that Solomon C. Stephens, William J. Stephens, and David Kay were stockholders in said corporation at all times since the organization thereof, and were necessary parties defendant in the action, equally liable with the appellants, in proportion to the shares respectively held and owned by them in said company, and that a complete determination of the matters involved in the action could not be had without the presence of the said Solomon C. and William J. Stephens and said David Kay as parties thereto; and thereupon prayed that said Solomon C. and William J. Stephens and said Da-

vid Kay be made parties defendant in the action. After a hearing said Stephenses and said Kay were made parties defendant. Solomon C. and William J. Stephens appeared in person and filed their answer; David Kay made no appearance, no process having been served upon him, he being absent from the state of Utah and a nonresident thereof at all times during the pendency of the action. Judgment was rendered in favor of the plaintiffs, and against the defendants Sidney Stevens, Frank J. Stevens, Sidney O. Stevens, William J. Stephens, and Solomon C. Stephens, for the sum of \$12,903.96, subject, however, to the following: "That the defendant Sidney O. Stevens in no event shall be liable for or compelled to pay of the principal amount of said judgment to exceed \$850.00, and that the defendant Frank J. Stevens in no event shall be liable for or compelled to pay of the principal amount of said judgment to exceed \$850.00, it being the intent hereby that in no event shall the defendants Sidney O. Stevens and Frank J. Stevens be compelled to pay, or that this shall be construed to be a judgment against either of them for a sum greater than \$850.00 each, which is hereby determined to be the amount of their liability to the South Ogden Land, Building & Improvement Company, and to the plaintiffs herein. It is further ordered and decreed that plaintiffs recover of and from the defendants their costs taxed at \$—; also that in case any of the defendants in this action shall pay or be compelled to pay a sum in excess of their pro rata share as shown by the findings of fact and conclusions of law in this case, that after such payments have been made, and upon application to the court, a judgment of this court may be entered against the other defendants for such excess." The defendants Sidney Stevens, Frank J. Stevens, and Sidney O. Stevens, moved the court to vacate the judgment and to grant a new trial, and upon the denial of the motion gave notice of an appeal to this court. The notice of appeal was directed to and served upon the attorneys for the plaintiffs only, and no notice of appeal was served upon the defendants Solomon C. Stephens and William J. Stephens, or either of them. The evidence shows that said defendants, Solomon C. and William J. Stephens, are the husbands, respectively, of Mary E. Stephens and Zylpha J. Stephens, the plaintiffs and respondents herein; that the answer of defendants Solomon C. and William J. Stephens was drawn and filed for them by one of the attorneys for the plaintiff; that said Solomon C. and William J. Stephens had no objections to the plaintiffs' getting judgment against the Stephenses, but they, Solomon C. and William J. Stephens, testified that they had no interest in the plaintiffs' recovery in the action.

Respondents move this court to dismiss the appeal, for the reason that no notice of appeal was served upon the defendants Solo-

¶ 1. Bank v. Savings Loan & Building Company, 12 Utah, 189, 44 Pac. 1043.

mon C. and William J. Stephens, they being "adverse parties" within the meaning of section 3305 of the Revised Statutes of Utah of 1898, as amended by the Laws of 1899, p. 83, c. 62. Adverse parties, within the meaning of this section, are all parties whose interests require that the order, judgment, or decree appealed from be sustained. It is immaterial whether such party appeared as one of the original parties to the action, or was brought in by order of the court. "It is obvious that to reverse the final judgment and grant the appellant a new trial will be to overturn all the proceedings and leave the parties in the same situation as though the case had never been tried. No one could know what the ultimate result would be, and it will not be presumed that codefendants who have not been served with notice of appeal have no interest in the judgment which would be in conflict with the reversal. Any aggrieved party may, without joining any one else, regardless of the character of the judgment against him, appeal from the whole or any specific part thereof; but in order to maintain his appeal he must serve notice on all other persons who are interested in opposing the relief which he seeks, and a person who has once appeared in an action is a necessary party to the appeal, unless after his appearance he has ceased to have an interest in such action." *Bank v. Savings, Loan & Building Co.*, 13 Utah, 189, 44 Pac. 1043. Appellants made their codefendants parties for the purpose of enforcing contribution from them in the suit in case the plaintiffs succeeded, and these codefendants are now interested in maintaining the judgment against the appellants for the purpose of enforcing contribution against the appellants in the event of the nonappealing defendants paying more than their proportionate share of the judgment.

We are of the opinion that the notice of appeal should have been served upon the defendants Solomon C. and William J. Stephens, and therefore the motion to dismiss the appeal is sustained, at appellants' costs.

BASKIN, C. J., and BARTCH, J., concur.

(27 Utah, 252)

**CULMER v. SALT LAKE CITY.  
UTAH STOVE & HARDWARE CO. v.  
SAME.**

(Supreme Court of Utah. Feb. 10, 1904.)  
HIGHWAYS—INTENTION—IMPLICATION—OP-  
ERATION OF LAW.

1. To make a dedication complete, there must not only be an intention on the part of the owner to set apart the land for the use and benefit of the public, but there must be an acceptance of the dedication by the public.

2. An alley opened as a private way, being closed by owners of part of the property, was reopened in part by a compromise between the different owners, in which the public took no

part. Conveyances of abutting property were made "subject to a right of way," and "subject to a right of way for use of all the owners" of certain of the land, running "with the land forever in favor of the heirs." The alley was over-arched by the owners, basements excavated beneath, and all costs of repairs were borne by the owners. The use of the alley was practically confined to the owners of a portion of the block, and the use was regulated by the owners, as to weight of wagons and loads passing over it, and the owners had sometimes closed the alley for periods of two months. *Held*, that no intention of dedication as a highway was shown.

3. The alley did not become a highway by operation of 1 Comp. Laws 1888, § 2006, providing that a highway shall be deemed and taken as dedicated and abandoned to the use of the public when it has continuously and uninterruptedly been used as a public thoroughfare for a period of 10 years.

Appeal from District Court, Salt Lake County; W. C. Hall, Judge.

Bills by H. L. A. Culmer and by the Utah Stove & Hardware Company against Salt Lake City to enjoin the collection of a tax. From decrees for plaintiffs, defendant appeals. Affirmed.

H. L. A. Culmer brought this action against Salt Lake City to restrain the collection of a special tax, and to have the levy and assessment of such tax declared illegal and void. Another action, involving the same questions of law, and practically the same questions of fact, was commenced against the city by the Utah Stove & Hardware Company. The two cases, by stipulation, were consolidated and tried together. After taking evidence, the trial court found the issues in favor of plaintiffs, and enjoined the collection of the tax, and from that judgment defendant has appealed to this court.

The record, in brief, shows the following facts: The tax mentioned was levied by Salt Lake City against certain property abutting on a certain alley, for the purpose of paving such alley. The alley was originally laid out and established as a private way, for the use and convenience of the parties owning the ground over which it passed, and extended from Second South street through block 70 of the City Survey to First South street. About 1879 the heirs of Emiline Free Young, who claimed to be the owners of the land fronting on, and extending back 100 feet from, First South street, and over which land the alley passed, closed up that part of it. Other parties, who owned property abutting on the alley, and who claimed an easement in it, protested against the closing of the alley at this point. In order to avoid a threatened lawsuit, the parties who had thus closed 100 feet of the north end of the alley, as a compromise, opened up and extended the alley from where it had been closed to Commercial street, a street running north and south through the same block, viz., block 70. Neither the city nor the public in general, so far as the record discloses, took part or showed any interest in this controversy, which resulted in changing the course of the north

¶ 1. See Dedication, vol. 15, Cent. Dig. § 64.

end of the alley. One of the deeds to plaintiff Culmer of the land over which the alley passes contains the following clause or proviso: "Subject to a right of way [referring to the alley in question] for travel by wagon and foot passengers." A deed to plaintiff of another parcel of land contains the following proviso: "Subject to a right of way for use of all the owners of the land owned by the late Emiline Free Young; \* \* \* said right of way runs with the land forever in favor of the heirs and assigns of said testatrix." Each of the plaintiffs herein, in order to keep the alleyway open for their own convenience and that of other parties owning property abutting thereon, in the construction of their buildings (business houses) on the land sought to be taxed, arched and built over the alley, leaving a space large enough for teams and wagons to pass through. Each of these parties also excavated and extended the basement of their buildings back under this alleyway. Therefore, the space both above and beneath the alley is, and for 13 years past has been, occupied and utilized by the plaintiffs. The plaintiff Culmer testified on this point, in part, as follows: "The north side of the alley includes a number of buttresses and structures on the south of our inside wall. It takes in a permanent stairway, ventilator, and chute for the delivery of goods. We have a stairway leading from the archway down into our engine room. We have a coal chute right in the middle of the alley, leading into the coal bin. \* \* \* The floor of the alley is 2x6 stuff nailed together on edge, resting on steel beams for bearings underneath the roadway." Respecting the use that has been made of the alley for the last 13 years, he testified as follows: "This alleyway back of my building has not been open continuously since 1889. We did not have much use for it ourselves in the summer time, and it was frequently closed for weeks. Closed by barriers being put across either one end or the other; padlocked sometimes, usually by my engineer, and I think it was closed up every year. I remember particularly in 1896 it was closed up for two months. It was closed up in 1897. It was closed up year before last, closed up last year, closed this year, and is closed now. The right of way has been open for the use of the heirs of the estate of Emiline Free Young." Samuel E. Hill, a witness for the plaintiff, testified that he "had more or less to do with the alleyway in question. The alleyway has not always been open. It was closed from 1893 to 1895. There was continual travel through the lane. Heavy wagons would shake dirt onto the machines. \* \* \* I used to stop teams going through the alley. \* \* \* That was when the teams were so heavy that they would shake the dirt down and interfere with the lights. It was closed in 1896, in the spring, for two or three months. Closed by putting barriers

across. \* \* \* It has been closed more or less every year the last two years. Frequently we put boards up to prevent them going through, and they were taken down for our own teams to go out from the store." Spencer Clawson, chairman of the board of public works of Salt Lake City, was called as a witness for defendant, and testified that he had been a resident of Salt Lake City for more than 30 years. "Have been familiar with the alley for many years, and have known it to be used generally by people who owned property on it. I have known it to be used by the general public, and particularly by those who abutted on it between Second South and First South—all through there. I do not recollect ever seeing any one in there unless he had some business." And again: "I have seen obstructions there at intervals for the last six or eight months." Joseph A. Sanborn, another witness for defendant, testified that he had been familiar with the alley for eleven years, and, during the last four years of the time, it was kept in repair by private parties owning or occupying property between First and Second South street, and within close proximity to the alley, and further said: "The city never did any repairing to my knowledge. It was always done by private individuals—people who lived along or had property or were using property along the alley. I never called the city's attention to the condition of the alley; never made any effort to get them to repair it." In fact, all the evidence, as a whole, tends to show that the alley has been, and is, used almost exclusively by parties owning or occupying property within its immediate vicinity, and that it never has been used as a thoroughfare by the general public. And the record shows that the first and only time the city ever indicated that it claimed the right to supervise and control the alley as a public highway was when it gave notice of the levy and assessment of the tax under consideration.

G. L. Nye, City Atty., and W. C. Shoup, Asst. City Atty., for appellant. Whittemore, Bierer & Cherrington, for respondents.

McCARTY, J., after stating the facts, delivered the opinion of the court.

The first question presented by this appeal is, was there a dedication by the plaintiffs or their grantors of that portion of the alley which passes over and through their premises, and an acceptance by the public? Land is held to be dedicated when it is set apart by the owner for a public use. "A dedication may be either express or implied. It is express when there is an express manifestation on the part of the owner of his purpose to devote the land to the particular public use, as in the case of a grant evidenced by writing. It is implied when the acts and conduct of the owner clearly manifest an intention on his part to devote the land to

the public use." *Schettler et al. v. Lynch et al.*, 23 Utah, 305, 313, 64 Pac. 955. And the authorities all hold that, to make a dedication complete, there must not only be an intention on the part of the owner to set apart the land for the use and benefit of the public, but there must be an acceptance of the dedication by the public.

It is claimed by appellant that the facts in this case establish an implied dedication on the part of the plaintiffs and their grantors. Applying the foregoing rules as declared by this court in the case of *Schettler et al. v. Lynch et al.*, supra, to the facts in this case, can it be successfully maintained that the acts and conduct of the plaintiffs and their predecessors in interest in relation to this alley were of such a character as to induce or justify a well-founded and reasonable belief that they intended to dedicate their interests in the alleyway to the public, to be used as a public highway? We think not. *Elliott on Roads & Streets* (2d Ed.) §§ 124, 125.

The evidence is undisputed that the use of the alley has been practically confined to parties who owned or occupied property within that portion of block 70 of Salt Lake City Survey which lies west of Commercial street, and through which the alley passes. Of these parties, the heirs and their grantees of the estate of Emiline Free Young have an interest in and a right to use the alley, which right has never been denied or questioned by the plaintiffs herein. And while others owning property in that neighborhood may have used the alley under circumstances and to such an extent as to create an easement therein, which, however, is a question not involved herein, and not necessary for us to decide, yet it is plain that the limited uses made of the alleyway, when considered in connection with the conduct and acts of plaintiffs in relation thereto, were not such as would warrant or justify a belief that they intended to throw it open as a public highway. The expense of keeping the alley open and in repair has always been borne by private parties who owned or occupied property abutting on or within the immediate vicinity thereof, and never by the public.

Appellant further contends that the alleyway in question became a public highway by operation of law, under section 2066, vol. 1, Comp. Laws 1888, which provides that "all roads, streets, alleys and bridges laid out or erected by others than the public, and dedicated or abandoned to the use of the public, are highways. A highway shall be deemed and taken as dedicated and abandoned to the use of the public when it has been continuously and uninterruptedly used as a public thoroughfare for a period of ten years." In order to bring a case within the foregoing provisions of the statutes, it will be noticed that it must be made to appear that a highway "has been continuously and uninterruptedly used as a public thoroughfare for a

period of ten years." Now, the uncontradicted testimony in this case shows that the plaintiffs have not only claimed, but have exercised, the right to close and open at will that portion of the alley which passes over and through their property. This they have repeatedly done, without any protest being made by either the city or people. On some occasions they have closed the east end of the alley for two months at a time. They have also imposed certain restrictions on parties who desired to take loaded wagons through the alley, which, so far as the record shows, have always been complied with. Therefore we do not think there has been the continuous and uninterrupted use of the alley in question as a public thoroughfare, as is contemplated by the provisions of the statute above referred to.

The judgment is affirmed, with costs.

BASKIN, C. J., and BARTCH, J., concur.

(27 Utah, 236)

#### MONMOUTH POTTERY CO. v. WHITE.

(Supreme Court of Utah. Feb. 9, 1904.)

SALES — ACTION FOR PRICE — NEW TRIAL — NEWLY DISCOVERED EVIDENCE — DILIGENCE — APPEAL — REVIEW — DISCRETION — ABUSE.

1. Under Const. art. 8, § 9, providing that on appeals to the Supreme Court, in cases at law, the appeal shall be on questions of law alone, where there is a substantial conflict in the evidence the Supreme Court cannot review questions of fact except to determine questions of law presented by the record.

2. A buyer of certain crockery notified the seller in July, 1901, that he would not receive same, as not complying with his order, and suit was begun for the price in January, 1902. Judgment was entered in favor of plaintiff for a part only of the relief demanded, on December 18th of that year, and plaintiff made no effort until February 19, 1903, to discover whether or not defendant had sold the goods, when plaintiff's attorney visited defendant's place of business, and was unable to find a large part of them. *Held*, that plaintiff's diligence in discovering that defendant had sold such part of the goods, which was contrary to his testimony on the trial, was insufficient to entitle plaintiff to a new trial on the ground of newly discovered evidence.

3. The refusal of the court to grant a new trial because of such facts was not an abuse of the trial court's discretion, since it did not show that the buyer did not have all of the goods mentioned in the affidavits on hand at the time of the trial, when he so testified.

4. An order denying a motion for a new trial will not be reversed on appeal in the absence of an abuse of the trial court's discretion.

Appeal from District Court, Weber County; H. H. Rolapp, Judge.

Action by the Monmouth Pottery Company against H. L. White. From an order denying plaintiff's application for a new trial, after the rendition of judgment for plaintiff for less than the relief demanded, it appeals. Affirmed.

A. G. Horn, for appellant. V. C. Gunnell, for respondent.



MCCARTY, J. On December 15, 1900, respondent, who was defendant in the lower court, gave to appellant a written offer, signed by himself, to buy about 4,400 pieces of crockeryware, which appellant accepted, and in due time filled the order and shipped the goods, which consisted of churns, jugs, fruit jars, flowerpots, and a number of other classes of crockery. The entire bill as shipped amounted to \$361.37. When the goods arrived at Ogden, respondent discovered, so he claimed, that some of the goods were of a different kind and inferior in quality to the goods ordered by him. He at once notified the appellant company of this fact, and informed it that he held the goods subject to their order, he in the meantime having had to pay for the entire car lot in order to get the goods which he claimed were shipped according to his order. Considerable correspondence passed between the parties, respondent insisting that he had received goods which were not included in the order, and appellant as persistently insisting that only such goods were shipped as were mentioned in the order. After making repeated demands for payment of the entire bill, which respondent declined to comply with, appellant brought suit. The case was tried by the court without a jury, and, after hearing the evidence introduced by the respective parties, rendered judgment in favor of appellant for the sum of \$189.34, having deducted from the amount claimed by appellant certain freight charges paid by respondent on the goods which he claimed he never ordered, charges for storage, and a certain discount or cut in price on certain of the wares which respondent claimed was agreed upon between the parties when the goods were ordered. Appellant filed its motion for a new trial, alleging insufficiency of the evidence to justify the judgment, and "newly discovered evidence material to the plaintiff which could not with reasonable diligence have been produced at the trial."

This court has held repeatedly that under section 9, art. 8, Const., it is prohibited from reviewing questions of fact in law cases brought here on appeal, when there is a substantial conflict in the evidence, except only so far as it may be necessary to decide questions of law presented by such appeals, and never for the purpose of determining on which side, in our judgment, is the preponderance of the evidence. As this record shows a substantial conflict in the evidence, the only question for our determination is, did the district court abuse its discretion in overruling appellant's motion for a new trial?

The affidavit of A. G. Horn, filed in support of appellant's motion for a new trial, recited, in substance: That he is the attorney for the plaintiff (appellant), and had charge of all proceedings; that on the 19th day of February, 1903; at Ogden City, Utah, he, in company with two employes of the Ogden

Transfer Company, went to the defendant's place of business in said Ogden City, for the purpose of taking possession of the goods mentioned and described in the pleadings, findings, and judgment in this action, to wit, 310 half-gallon fruit jars and covers, 325 one-gallon fruit jars and covers, and 300 two-gallon fruit jars and covers; that defendant stated to affiant that the goods were all in a pile together, and then and there pointed out a large pile of crockery as the goods; that, on separating said crockery according to size, he discovered that none of the said half-gallon fruit jars was found on hand, and only 65 of the one-gallon fruit jars, and nearly all of the two-gallon jars, the balance of said jars, as affiant believed, having been sold and disposed of by defendant; "that said defendant, during the course of the trial of said cause, testified that all of said goods were stored in his cellar or basement, and that none of said merchandise had been sold or disposed of; that affiant relied upon the statement of the said defendant that he would truthfully testify with reference to said merchandise and its disposition, and he could not with reasonable diligence have discovered and produced the evidence aforesaid, nor the fact that said defendant had sold and disposed of said goods." The two employes of the transfer company who were present and assisted in sorting and separating the crockeryware at the time and place mentioned in the foregoing affidavit made affidavits to the same facts respecting the amount and kinds of crockeryware in question that the respondent had on hand on that occasion.

It appears from the record that respondent in July, 1901, notified appellant that he would not receive and pay for the goods in question, and that they would be held subject to appellant's order. Suit was commenced in January, 1902, to recover the price of the goods, and judgment entered December 18, 1902. On February 19, 1903, three months after the cause was tried and judgment entered, appellant's attorney went to respondent's place of business, and discovered the facts set out in the affidavits filed in support of the motion for a new trial. During all this time appellant made no effort to examine the goods over which the controversy arose, to ascertain what disposition, if any, had been made of them, notwithstanding they were in the same city in which the cause was tried. Under these circumstances we do not think that the degree of diligence has been shown in this case that the law requires in order for a party to excuse himself for not producing the newly discovered evidence at the trial. And further, even though appellant had used due diligence to produce the evidence mentioned in the affidavits, it would not be entitled to a new trial, as the affidavits themselves do not contain facts sufficient to warrant it. For aught that appears

in the affidavits, respondent, at the time of trial, may have had on hand all of the goods mentioned in the affidavits.

A motion for a new trial is always addressed to the sound discretion of the trial court, and, unless it clearly appears that there has been an abuse of discretion, the action of the trial court will not be disturbed. *State v. Haworth*, 26 Utah, 310, 73 Pac. 413, and cases cited. It clearly appears that in this case there was no abuse of discretion whatsoever.

The judgment is affirmed; the costs of this appeal to be taxed against appellant.

BASKIN, C. J., and BARTCH, J., concur.

(27 Utah, 248)

HARKNESS v. GUTHRIE et al.

(Supreme Court of Utah. Feb. 9, 1904.)

NATIONAL BANKS—VISITORIAL POWERS—  
STOCKHOLDERS—EXAMINATION OF BOOKS—  
STATUTES—CONSTRUCTION.

1. An application by a bona fide stockholder of a national bank to examine its books, accounts, loans, etc., in order to determine the value of his stock, is not a visitation of the corporation, within Rev. St. U. S. § 5241 [U. S. Comp. St. 1901, p. 3517], providing that no national banking association shall be subject to any visitorial powers, etc., so as to prevent the stockholder from obtaining such relief under Rev. St. Utah, § 329, declaring that all books of any corporation shall be subject to the inspection of any bona fide stockholder at all reasonable hours.

Appeal from District Court, Weber County; H. H. Rolapp, Judge.

Application by Henry O. Harkness for mandamus against J. W. Guthrie and others, as officers of the Commercial National Bank of Ogden City, Utah, to compel defendants to permit plaintiff to inspect the books, accounts, and loans of the bank. From an order awarding a mandatory writ after hearing, defendants appeal. Affirmed.

Heywood & McCormick, for appellants. Henderson & Macmillan, for respondent.

BASKIN, C. J. On the application of the plaintiff, an alternative writ of mandamus was issued, commanding the defendants to permit the plaintiff to inspect all of the books, accounts, and loans of the Commercial National Bank of Ogden City, Utah, or show cause on the 25th day of April why they had not done so. On the day mentioned the defendants appeared, and, in answer to plaintiff's affidavit and the alternative writ, alleged "(1) that this court has no jurisdiction to hear or determine any of the matters complained of by plaintiff, or any issue that could be joined thereby; (2) that the matters complained of by plaintiff do not constitute a cause of action of any kind against these defendants, or any of them; (3) that the plaintiff is not entitled to the relief prayed for in his said action, or any relief, and that the court has no jurisdiction to grant the relief which plaintiff seeks."

The material facts alleged in the affidavit of the plaintiff upon which the alternative writ was issued, and upon which at the hearing a mandatory writ was granted, are as follows: That the defendants are the officers of the bank, and that the books, accounts, and notes are in possession and under the control of defendants; that the plaintiff is a stockholder in said bank, and, as such, "on or about the 1st day of February, 1903, made a demand upon said directors, and also upon said J. W. Guthrie, as president, A. R. Heywood, vice president and general manager of said bank, and also upon R. T. Hume, as assistant cashier of said bank, for permission to permit affiant to inspect all books, accounts, and loans of said bank, and affiant made demand for such inspection at such time or times as would not interfere with the proper conducting and operating of said bank; that each and all of said persons refused permission to affiant to inspect the books, accounts, and loans of said bank at any time or at all, and still refuses to permit such inspection; that he seeks this inspection for the purpose of ascertaining the value of his stock in said bank, and for the purpose of ascertaining whether the business affairs of said bank have been properly conducted according to law; that loans have been made to a favored few of the patrons of said bank of more than one-tenth of the capital stock to each of said patrons, which is contrary to law; and that he believes the said directors and officers of said bank have been guilty of other irregularities, which can only be stated after an inspection of the books, accounts, and loans of said bank."

The only question involved is shown by the following quotation from appellants' brief, to wit: "At the trial the only issue presented was whether a stockholder of a national bank created and controlled by acts of Congress possesses the same powers and rights of access to and inspection of the books as are possessed by the stockholders of other corporations."

The right of inspection is a common-law right, and, unless restricted by statute or the corporation's charter, will not be denied when sought by a stockholder for a proper purpose. The provision that "all books of any corporation shall at all reasonable hours be subject to the inspection of any bona fide stockholder," contained in section 329 of the Revised Statutes of Utah of 1898, does not restrict the common-law right, but is in harmony therewith. Therefore, unless, as claimed by appellants' counsel, inspections of the character sought in this case are prohibited by the following provisions of the national bank act (section 5241, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3517]), viz., "no association shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in courts of justice," the writ in question was properly granted. Visitorial powers and the stockholders' right of inspection

tion are not one and the same thing. In 7 Am. & Eng. Ency. Pl. & Pr. 855, visitation of corporations is correctly defined, and its purposes aptly stated as follows: "By 'visitation of corporations' is meant the act of examining into its affairs. The person authorized to make such examination is called the visitor. The purpose of visitation is to supervise, direct, and control the management of the corporation." Numerous cases and authorities are cited which support the text. See, also, text and cases cited in 1 Abbot's Digest of Law of Corp. 873. The visitorial power over private eleemosynary corporations vests in the founder or his heirs, but they may appoint others to act. In the United States visitorial power over all except private eleemosynary corporations existing under and by virtue of the laws of a state vests in the state, and, as to those formed under an act of Congress, it vests in the general government, and is exercised through the medium of the courts, or by visitors appointed for that purpose by or in pursuance of statutes. It is correctly stated in Merrill on Mandamus, § 175, that "visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings. In America there are very few corporations which have private visitors, and, in the absence of such, the state is the visitor of all corporations." The common-law right of inspection by the stockholder is a personal privilege arising from his ownership of stock of the corporation, and can be exercised for any legitimate purpose beneficial to him, without any special appointment for that purpose; but he cannot, in its exercise, as the state, through the medium of the courts, or a visitor, may do, interfere with or direct the general operations of the corporation. The difference between the visitorial powers over corporations and the stockholder's right of inspection is obvious. We are clearly of the opinion that section 5241 of the Revised Statutes of the United States, before quoted, does not apply to, or in any way affect, the common-law right of stockholders. Winter v. Baldwin, 89 Ala. 483, 7 South. 734; Matter of Tuttle v. Iron Nat. Bank, 170 N. Y. 9, 82 N. E. 761.

The judgment granting the writ of mandamus is affirmed, with costs.

BARTCH and McCARTY, JJ., concur.

(27 Nev. 379)

GOLDEN v. MURPHY et al. (No. 1,651.)

(Supreme Court of Nevada. March 1, 1904.)

MINES-LOCATORS' RIGHTS-NEW TRIAL-APPEAL-REVIEW-TRIAL COURT'S DECISION-CONFLICTING EVIDENCE.

1. Though small pieces of quartz, narrow seams, and little pockets of ore embodied in porphyry be sufficient to sustain a location, the locator has no greater rights against veins

apexing on other claims than if his location were based on a well defined ledge, and has no right to veins existing between walls apexing in other locations, on the theory applied to blanket ledges, and prevailing in regard to others under the civil law.

2. Where, on appeal from an order granting a new trial in an action for damages for extraction of ores within the lines of plaintiff's location, it appeared from the trial court's decision that his order might have been based on the ground that the verdict was contrary to the evidence and on his own observation of the premises, but the former ground was sufficient to sustain the order, a contention that the court was not warranted in considering its own views, based on an inspection of the premises, was unavailable.

3. On appeal from an order granting a new trial on the ground that the verdict was not warranted by the evidence, the action of the trial court will not be disturbed where there was a material conflict of evidence.

Appeal from District Court, Lyon County.

Action by Frank Golden against J. C. Murphy and others. From an order granting a new trial, defendants appeal. Affirmed.

Alfred Chartz, for appellants. Torreyson & Summerfield and W. E. F. Deal, for respondent.

TALBOT, J. This action was brought to recover \$7,000 damages for the extraction of ores by the individual defendants within the exterior lines, extended downward vertically, of the Table Mountain mine, upon a part of which they held a lease from the owner, the Royal Mining Company, and for an injunction restraining them from further working upon the ledge which plaintiff claims has its apex in the Canyon mining claim owned by him. The case was tried with a jury, and a verdict rendered in favor of the defendants. This appeal is upon an order granting a new trial on the ground that the verdict is not in accordance with the evidence. In the decision on the motion for a new trial the district judge states:

"The evidence further shows, without a substantial conflict, that a lode or vein exists in said Canyon mining claim, which extends from a point about 300 feet north of the southerly end line of said claim, northerly in its course from said point about 1,000 feet, and passes through the north end line of the said Canyon mining claim; and that the apex of said lode at the surface, for the distance of about a thousand feet, is within the exterior boundary lines of said Canyon mining claim described in the complaint. The evidence shows that the ore in dispute was extracted by Murphy and Beyers from a point within the exterior lines of the Table Mountain mining claim, extended downward vertically, and being that portion of the claim held by them under a lease. The evidence further shows that some time, within a few years, prior to the taking of the lease by Murphy and Beyers from the Table Mountain Mining Company, they had a lease from the plaintiff and his predecessors in interest of the Canyon mining claim, and extracted ore

from a slope within a few feet of a point where the ore in dispute was extracted. The evidence further shows, without conflict, that communication in ore in place has been made from the point where the ore in dispute was extracted and the stopes worked by Murphy and Beyers under the lease of the Canyon mining claim. The testimony further shows, without any conflict, that the ledge upon the Canyon claim can be traced upon the surface from the point where it crosses the side line of the Canyon claim about 300 feet north of the southerly end line of said claim through said mining claim northerly in its course from said point about 1,000 feet, where it passes through the north end line of said mining claim. The evidence shows, without any conflict, the matter having been testified to by practically all of the plaintiff's witnesses and a great number of the defendants' witnesses, that the ore body from where it apexes on the surface of the Canyon mining claim can be followed in drifts, tunnels, and inclines clear to the point where the ore in dispute was taken out, and that three different routes can be followed, all in ore, from the surface of the Canyon claim to the point where the ore in dispute was taken out. The evidence shows conclusively the continuity of the vein in the Canyon ground from the apex on the surface to the point where the ore was extracted by the defendants Murphy and Beyers. This proposition was practically admitted by the defendants and their witnesses upon the trial of the case.

"The defenses made by the defendants in this action were three in number, and, in the judgment of the court, absolutely antagonistic one to the other. One contention was that, running in a northerly direction, there existed a lode, the apex of which was wider than both claims. Another defense was that the vein testified to by the plaintiff's witnesses as existing within the lines of the Canyon claim split at a point near the northerly end line of the Canyon claim, a portion of the vein passing on through the northerly end line of the Canyon claim, the other passing through the side line of the Canyon claim into and across the Table Mountain claim, and that the ore in dispute was extracted from that portion of the split vein after it passed the side line of the Canyon claim into the Table Mountain claim. The other defense was that the strike of the vein was across the Table Mountain and Canyon ground. Witnesses of defendants testified in support of each one of these theories. \* \* \*

"It is undoubtedly true that the surface of that portion of the Canyon mining claim on the slope of the hill below the apex of the Canyon vein, and the surface of the Table Mountain claim which is lower than the Canyon claim, contain more or less mineral. It may be, and probably is, such ground as would sustain a mineral location, but that is not the question that was to have been determined by the jury in this case. The ques-

tion to be determined by the jury was as to whether the ore in dispute was in a vein whose apex was within the Canyon claim or the Table Mountain claim, and the determination of that question, if it ever entered into the deliberation of the jury, was contrary to the great weight and preponderance of the evidence. \* \* \* A careful inspection of that winze by the court, with the jury, convinced the court that no ledge or seam was followed by that winze continuously to the point from which the ore was taken, and that no seam exists, the top of which is in the Table Mountain claim, which continues to the ore body in question. The country passed through seems to be, as the court has before said, a mass of country rock, porphyry, which had been disintegrated, and small fissures formed in width from the thickness of a thin knife blade to two or three inches, these fissures being filled with gypsum and ore from that sloughed off from the Canyon vein. The burden rested in the first instance upon the plaintiff to establish the existence of a vein whose top or apex was in the Canyon claim, and to demonstrate that that vein continued on its dip to the point from which the ore was taken out. That proposition, in the judgment of the court, was, by the workings of the plaintiff, absolutely and conclusively demonstrated; and not only was the continuity of the ore body established by the different workings of the plaintiff, but in numerous places that which was undoubtedly the hanging and footwall of the vein was exposed. The fact that, back of the hanging wall in this disintegrated mass of country rock, small seams or fissures could be found containing gypsum and ore, does not destroy the integrity and continuity of plaintiff's vein. In the neighborhood of every large vein, particularly where much erosion has taken place, small seams and fissures of gypsum and quartz containing ore must necessarily exist, for if by disintegration crevices are formed, and the vein and ore body is sloughed off, by the processes of nature these crevices will be filled with the gangue of the vein, containing more or less mineral."

On behalf of appellants it is urged that the order granting a new trial is error, because an invasion of the province of the jury, even if the evidence is conflicting; that the court was unwarranted in considering its own views gained from an inspection of the premises; and that under the testimony of the witnesses of the plaintiff, as well as of those for the defendants, the mass above the point of extraction of the ore in dispute contained seams of ore and impregnations of mineral sufficient to make it locatable, and that therefore the owners of the Table Mountain are entitled to all ore within the boundaries of the claim, extended downward vertically. Several experts of long experience, and practical miners, testified for the plaintiff that the ore was taken from a place under the

surface of the Table Mountain mine in a vein with well-defined walls which apexed on the Canyon claim. Others, for the defendants, testified that the ledge was wider than both claims, and in different ways contradicted the theory advanced for the plaintiff; and, if they agreed that the formation above the place of extraction contained small pieces of quartz and mineralized seams, they still disagreed regarding the important and controlling fact as to whether the ore was taken from a vein existing between defined walls apexing on the Canyon. If small pieces of quartz, narrow seams, and little pockets of ore embodied in porphyry be deemed sufficient to sustain a location, we do not understand that they give the owner any greater rights against veins apexing on other claims dipping under this ground than he would have if his location were based upon a substantial and well-defined ledge. In either case he would be entitled to all veins which apexed within the boundaries of his claim, and in neither would he have any right to those existing between walls apexing in the locations of other claimants, on the theory applied to blanket ledges, and also prevailing in regard to others under the civil law. It is not difficult to discern between that which is essential to a valid location and the rights which it bears, and, if the witnesses substantially agree as to the former, they materially differ regarding the latter, which was essential, and was properly considered by the trial judge. We have quoted enough to show that his order may be considered as having been placed upon the two grounds that the verdict was contrary to the weight of the evidence and to his own observations in these mines. The former of these being sufficient to sustain the order, we need not determine regarding the latter.

It was held in *Worthing v. V. Cutts*, 8 Nev. 121, that, when a new trial is granted in the lower court upon the ground that the verdict is not warranted by the evidence, the rule invariably governing the appellate tribunal is not to disturb the action of the judge below if there is a material conflict in the evidence. In *Treadway v. Wilder*, 9 Nev. 70, this court stated: "It must be borne in mind that the *nisi prius* courts, in reviewing the verdicts of juries, are not subject to the rules that govern appellate courts. They may weigh the evidence, and, if they think injustice has been done, grant a new trial, where appellate courts should not or could not interfere. The question under consideration has been so often presented that opinions have become stereotyped. Nothing need be added to, or taken from, the rule, so well established, often declared, and always followed." The numerous cases in this state and California cited in respondent's brief, and *Hayne on New Trial and Appeal*, § 97, and *Hilliard on New Trials*, p. 488, are to the same effect.

The order of the district court granting a

new trial is affirmed, with costs in favor of respondent.

BELKNAP, C. J., and FITZGERALD, J., concur.

(34 Wash. 166)

# RUSSELL & CO. v. STEVENSON.

SAME v. STEVENSON et al.

(Supreme Court of Washington. Feb. 29, 1904.)

ACCORD AND SATISFACTION—CONSIDERATION—AGENCY—AUTHORITY—MUTUAL MISTAKE.

1. Where the whole of a debt is not due, the payment in cash of less than the whole amount is sufficient consideration for release of the whole debt.

2. Where a general agent of a corporation authorized another agent to use his own judgment as to a contemplated settlement with a debtor of the corporation, the latter agent had authority to accept as full settlement a cash payment less than the full amount of the debt.

3. On settlement of an account consisting of several notes secured by chattel mortgages on which partial payments had been made, the creditor's agent had an itemized statement showing dates and amounts of payments, and the debtor produced a receipt for a payment of \$500, no credit for which appeared on the statement. Credit had in fact been given, but owing to being applied on two notes, \$285.35 on one and \$214.65 on another, neither party recognized these credits as representing the \$500 payment. Believing that this payment had not been credited, a settlement was effected, giving the debtor credit again for this sum, and accepting a cash payment in full for the balance, part of which was not due. Thereafter the creditor sued to foreclose, ignoring the settlement. Held, that the mistake in the settlement was mutual, not avoiding the settlement, but entitling the creditor to recover in the foreclosure suit the amount for which credit had erroneously been given.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Separate actions by Russell & Co. against O. A. Stevenson and against O. A. Stevenson and another. From an adverse judgment in each action, plaintiff appeals. Reversed.

Crow & Williams, for appellant. Danson & Huneke, for respondents.

MOUNT, J. These actions were begun to foreclose four chattel mortgages securing several promissory notes. The complaints are in the usual form of foreclosure actions. After the service of the summons, the actions were consolidated upon motion of the defendants. The defendants thereupon answered, admitting the execution of the notes and mortgages, but denying that there was anything due thereon, and for an affirmative defense pleaded a settlement with the plaintiff and satisfaction of the notes and mortgages prior to the bringing of the action. The plaintiff for reply denied the settlement, and alleged that, if any settlement had been made, it was procured by reason of false and fraudulent representations made by defendants, and that it was without consideration. Upon a trial the lower court found for the defendants, sustaining the plea of

settlement and satisfaction, and dismissed the action. Plaintiff appeals.

The facts are substantially as follows: Appellant, Russell & Co., is engaged in the manufacture and sale of threshing machinery. It maintains a branch house at Portland, Or., a warehouse at Spokane, and agencies at other places. The branch house at Portland is in charge of Mr. A. H. Averill, who is a general agent of the company, and has general charge of all the business of the company in the states of Oregon and Washington, and controls all the agents in that territory. In the years 1898 and 1900 the respondents purchased certain threshing machinery from appellant, and, to secure the payment of the purchase price of such machinery, executed and delivered the notes and mortgages sued on herein. Some of the machinery so purchased was destroyed by fire after the purchase, and some returned to appellant, and respondents purchased certain extras for repairs. Partial payments were made from time to time by respondents, which payments were credited to their account. On or about October 20, 1902, one A. Mitchell, who was a traveling salesman for appellant, and who had charge of collecting the notes involved in this action, went to Reardon, a town where appellant maintained an agency, and near where respondent Stevenson was then residing, and demanded payment of the amount due on the notes. After some dispute as to the amount due, respondent Stevenson paid the said Mitchell \$300 on account of the indebtedness. Thereupon Mr. Mitchell requested from respondent Stevenson a settlement of the whole amount owing to appellant. Mr. Mitchell at that time had in his possession an itemized statement of the whole account, showing the credits which appellant had given on the account, the amount due, and the amount not due. Mr. Stevenson disputed this statement, for the reason that certain machinery and extras returned had not been credited for their value; and also contended that a payment of \$500 had not been credited at all, and produced a receipt for that amount from the agent in charge of the Spokane office. This item did not appear on Mr. Mitchell's statement as a credit of \$500. It seems that when the \$500 payment was made by Stevenson it was credited upon two notes in separate items, one for \$285.35 and the other for \$214.65. Neither Mr. Mitchell nor Mr. Stevenson recognized these items as being the \$500 payment for which Stevenson claimed an additional credit. At Mr. Stevenson's request Mr. Mitchell deducted this \$500 from the amount of appellant's claim. Mr. Mitchell also made other deductions for which Mr. Stevenson was in no wise at fault, and concluded that there was still owing from Mr. Stevenson to the appellant about \$1,100, a part of which was not then due. He then offered to settle and satisfy the whole claim for \$900 cash. Mr. Stevenson proposed to

pay \$800 in full settlement. Mr. Mitchell thereupon called Mr. Averill, at Portland, Or., over the long-distance telephone, and stated that Mr. Stevenson had offered to settle the whole claim for \$1,100. This amount included the \$300 already paid and the \$800 offered. He also told Mr. Averill that the amount of principal owing on the notes was \$1,110. Mr. Averill replied that Mr. Mitchell should use his own judgment about the matter. Mr. Mitchell thereupon agreed to settle and satisfy the whole claim for \$800, which Mr. Stevenson thereupon paid to Mr. Mitchell. Subsequently, on the same day, Mr. Averill discovered that the amount of principal on the account was largely in excess of \$1,100, and notified Mr. Mitchell not to settle on that basis. Afterwards, on the next day, Mr. Mitchell, having sent the money to Portland, Or., notified Mr. Stevenson that the settlement was rescinded and that his money would be returned. Mr. Stevenson objected to a rescission, and said he would not receive back the money. Within 10 days thereafter Mr. Mitchell tendered the money back to Mr. Stevenson, and it was refused. Appellant then credited the \$1,100 upon the account, and sued for the balance, disregarding the settlement.

Appellant contends that there was no consideration for the settlement of the larger sum for a smaller one in cash, and that Mitchell had no authority to make the settlement. Neither of these contentions can be sustained. The whole of the debt was not then due, the settlement was made and acted upon, and the appellant received the money. *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798; *Price v. Mitchell*, 23 Wash. 742, 63 Pac. 514; *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393. When Mr. Averill, the general agent, authorized Mr. Mitchell to use his own judgment in making the settlement, this was sufficient proof of Mr. Mitchell's authority to make the settlement. We think the evidence fails to show any fraud on the part of respondent, or any bad faith which would justify the setting aside of the settlement by the appellant. The evidence, however, is conclusive that there was a mutual mistake of \$500 made by respondent and Mr. Mitchell in reckoning up the account. Mr. Stevenson knew he had made a payment of \$500. He had a receipt therefor, which was shown to Mr. Mitchell. He found no credit of that amount on the itemized statement. He kept no books or accounts of his own, and does not appear to have been informed of the manner in which the credit was given. He was therefore justified in his belief that a mistake of \$500 had been made against him. Mr. Mitchell did not know that the \$500 payment had been separated into two items. These items did not appear to have been credited upon the date of the \$500 payment. He was therefore justified in believing and relying upon the statement of Mr. Stevenson that the \$500 had been paid and had not been

credited on the account. Both parties were mistaken, but, honestly believing that this item had been paid, were willing to settle, and did settle, upon that basis. This item was a material item of the account, but the mistake by which it was omitted does not appear to have influenced the settlement of other items of the account, which were agreed to, and a settlement thereof effected upon a satisfactory basis. The mistake in this item is therefore not shown to have affected or stained the other items of the transaction. In such cases it has been held that a court of equity "will allow the account to stand, with liberty to the plaintiff to surcharge and falsify it; the effect of which is to leave the account in full force and vigor as a stated account, except so far as it can be impugned by the opposing party, who has the burden of proof on him to establish errors and mistakes." 1 Story's Eq. Jur. (13th Ed.) § 523. See, also, *McDougall v. Cooper*, 31 N. Y. 498; *Carpenter v. Kent*, 101 N. Y. 591, 5 N. E. 787; *Conville v. Shook* (N. Y.) 39 N. E. 405; *Reid v. Beyle*, 39 Kan. 559, 18 Pac. 614; *Reed v. Horn*, 143 Pa. 323, 22 Atl. 877; *Rehill v. McTague* (Pa.) 7 Atl. 224, 60 Am. Rep. 341. It is true that this case was not brought in the form of an action to correct the account. The action was brought to foreclose the mortgage for the full amount claimed to be due thereon. The appellant entirely ignored the settlement. Respondent relied upon the settlement, and based his defense thereon. The court had jurisdiction of the parties and of the subject-matter, and was therefore, under the practice, authorized to enter such judgment as the facts warranted. The court found that a mistake of \$500 was made in calculating the amount due, but that this mistake was due wholly to the negligence and carelessness of appellant's agent. With this finding we cannot agree, for reasons hereinbefore stated. The court should have found that the mistake was a mutual one, but one which did not avoid the settlement, and should have entered a judgment in favor of the plaintiff for the amount thereof and for costs, but without attorney's fees.

The judgment is therefore reversed, and the cause remanded to the lower court with instruction to enter a judgment in favor of appellant for \$500, with interest from October 20, 1902, at the legal rate, together with the costs of the action; appellant to recover the costs of this appeal.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

(34 Wash. 173)

REED v. SLOCUM et al.

(Supreme Court of Washington. Feb. 29, 1904.)  
SPECIFIC PERFORMANCE—EVIDENCE—MUTUAL MISTAKE.

1. In a suit for specific performance of a contract for the sale of land, evidence held to show that 10 acres in controversy were included in the contract by mutual mistake.

Appeal from Superior Court, Clarke County; A. L. Miller, Judge.

Action by S. A. Reed against C. W. Slocum and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

E. M. Green, for appellant. W. W. McCredie, for respondents.

MOUNT, J. Plaintiff brought this action in the lower court to enforce specific performance of a contract of purchase of real estate. The complaint sets up the contract, and alleges a compliance therewith on the part of the plaintiff, and a refusal by defendants to convey the lands described by the contract. Defendants by their answer admit the making of the contract, but allege that they were not at that time, and are not now, the owners of all the lands therein described, and that 10 acres of land, not owned by them, and not intended to be sold by them, and which plaintiff did not intend to purchase, were by mutual mistake included in the contract; and also allege a readiness and offer to comply with the contract as the same was intended to be made by all the parties thereto, and ask for a reformation of the contract sued upon. The reply denied the allegations of the answer. At the trial the court found in favor of the defendants. Plaintiff appeals.

The only question involved on this appeal is one of fact, viz., was there a mutual mistake made by the parties in describing the lands which they intended to include in the contract? We have carefully examined the evidence, and are convinced that the finding of the lower court on this question was right. The whole tract of land described in the contract is a rectangular tract containing  $87\frac{1}{2}$  acres. It is described in the contract as follows: "Beginning at the northeast corner of the Michael Hartigan homestead claim 334, running thence south 30 chains, thence west 29 chains and 15 links, thence north 30 chains, thence east 29 chains and 15 links to the place of beginning, containing eighty-seven and one-half acres of lands." Before defendants acquired the title to this tract of land they held a mortgage upon it. In order to avoid foreclosure of the mortgage, they took a deed from the mortgagors for the whole tract, and immediately, as a part of the same transaction, reconveyed to a Mrs. Laws 10 acres in rectangular form out of the southwest quarter of the tract. This 10 acres was cleared and improved land upon which Mrs. Laws lived. The balance of the tract was timber lands. The controversy here is over this 10 acres. When plaintiff and defendants entered into the contract involved in this action, the whole tract was described, without excepting therefrom this 10 acres. There can be no doubt at all from the evidence that the defendants did not intend to include this 10 acres in the contract of sale with the plaintiff. The only possible question in the case is whether the plaintiff intended to pur-

chase, and thought at the time the contract was drawn that he was purchasing, this 10 acres, in addition to the 77½ acres owned by defendants. We are of the opinion that his own evidence discloses the fact that he knew he was not to have this 10 acres. He testified in substance that at the time the contract was entered into he was in the wood business; that he bought the land for the timber upon it; that he had known the 10-acre tract for two or three years prior to the time of the contract; that he knew where Mrs. Laws lived; and that when he purchased the land he did not think he was getting the house and land around it. There are other strong circumstances in the case tending to show that plaintiff intended to purchase the land owned by the defendants, which contained but 77½ acres; but the foregoing evidence of the plaintiff himself is conclusive of the question.

The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

(34 Wash. 175)

#### BROWN et al. v. CALLOWAY.

(Supreme Court of Washington. Feb. 29, 1904.)

APPEAL—NOTICE—BRIEF—SPECIFICATION OF ERROR—SUFFICIENCY—ACTION FOR RECOVERY OF LAND—ELECTION OF CAUSE OF ACTION—PROPRIETY OF COMPELLING.

1. 2 Ballinger's Ann. Codes & St. § 6503, provides that a party desiring to appeal shall give notice "that he appeals," and section 6518 provides that no appeal shall be dismissed for any informality or defect in a notice if it appears that the adverse party has had sufficient notice, etc. *Held*, that a notice reading "you are hereby notified that the plaintiffs \* \* \* hereby give notice of their application to appeal," while defective, because no such thing as an application to appeal is known, was not fatally so.

2. Under Supreme Court Rule 8 (40 Pac. x), requiring errors to be clearly pointed out in appellant's brief, a brief will not be stricken from the files where but one error is relied on, which is stated clearly at the close of the statement of facts.

3. 2 Ballinger's Ann. Codes & St. § 5500, provides that any person having a valid subsisting interest in realty and a right to the possession thereof may recover the same by action to be brought against the tenant in possession, and may have judgment quieting or removing a cloud from his title. Section 5508 provides that the plaintiff shall set forth in his complaint the nature of his estate, claim, or title, and the defendant may set up a legal or equitable defense, and the superior title, whether legal or equitable, shall prevail. Plaintiffs alleged that a mortgage made by their ancestor was foreclosed against his administrator only, and that the title acquired by the purchaser at the foreclosure sale constituted a cloud on their title, but they did not allege possession in themselves. "For a further and separate and second cause of action," they alleged that their immediate ancestor was the owner and in possession of the property, and that defendant took possession and has ever since held it, and that they were the ancestor's sole heirs and entitled to the possession. The prayer was for a decree quieting title, and for damages as alleged in the second cause of action. *Held*, that though the

pleading was defective in separating into two causes of action what under the statute constituted but one, yet since reading the pleading as a whole it was sufficient under the statute, it was error to compel plaintiffs to elect on which cause of action they would proceed, and, on their refusal, to dismiss the suit.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Suit by J. J. Brown and others against J. D. Calloway. From an order dismissing the suit, plaintiffs appeal. Reversed.

Hartson & Holloway, for appellants. Graves & Graves, for respondent.

MOUNT, J. Respondent moves to dismiss this appeal for the reason that the notice is not sufficient. The part of the notice to which objection is made is as follows: "You are hereby notified that the plaintiffs in the above-entitled action hereby give notice of their application to appeal to the Supreme Court," etc. The statute provides, at section 6503, 2 Ballinger's Ann. Codes & St., that a party desiring to appeal from a judgment or an order shall give notice "that he appeals from such judgment or order to the Supreme Court," etc., and it is argued that a notice of an application to appeal is not a notice of appeal. There is no such practice in this state as an application for an appeal. The appeal goes as a matter of course when notice is given and bond filed. No order or allowance of the appeal is necessary, and none was asked for or made in this case. Section 6518, 2 Ballinger's Ann. Codes & St., provides: "\* \* \* And no appeal shall be dismissed for any informality or defect in the notice of appeal or the service thereof, if from the notice or other parts of the record on appeal it appears that the adverse party has had sufficient notice of the appeal, describing the judgment or order appealed from," etc. The respondent was not misled by this notice. He knew what was intended, and had sufficient notice of the appeal. The judgment appealed from was described with certainty. We think the notice was sufficient under the statute named. *Ranahan v. Gibbons*, 23 Wash. 255, 62 Pac. 773; *In re Murphy's Estate*, 26 Wash. 222, 66 Pac. 424.

Motion is also made to strike the brief of appellants and affirm the case, because each error is not clearly pointed out as required by rule 8 (40 Pac. x). But one error is relied upon, viz., that the trial court compelled the appellants to elect between two alleged causes of action, and this is the only question discussed on the appeal. It is true that this error is not stated separately from the "statement of facts," but it is stated clearly at the close thereof, and for that reason the motion should be and is denied.

The complaint in form attempts to set out two separate causes of action. For the first it is alleged that one Edward Quinn died in 1892, seised of certain described real property in Spokane county; that title there-



to passed by descent to one Bridget Brown, and upon her death, in 1901, it passed to the plaintiffs, her sole heirs; that in 1895 a mortgagee of the premises, under a mortgage made by said Quinn, commenced an action to foreclose his mortgage, making no one a party but the administratrix of Quinn's estate; that the foreclosure proceedings, which are set out in full, culminated in a judgment of foreclosure and a sale of the mortgaged property to the mortgagee; that the defendant claims some title to the premises by virtue of mesne conveyances from the purchaser at said sale; that this claim, and the foreclosure proceedings and conveyances upon which it is based, are a cloud upon plaintiffs' title. It is not alleged in this cause of action who was in possession of the property. The complaint then, "for a further and separate and second cause of action," alleges substantially that plaintiffs' ancestor, Bridget Brown, was, on December 2, 1895, the owner and in possession of the property described (the same as in the first cause of action), and that in 1900 the defendant took possession of said realty without right, and has ever since held it; that in 1901 said Bridget Brown died, and that plaintiffs are her sole heirs and are entitled to possession of said realty; that plaintiffs have been damaged in the sum of \$300 on account of being deprived of said real estate. The prayer is for a decree quieting title to the realty in plaintiffs, for \$300 damages, and for general relief. It appears to be conceded in the briefs that a demurrer to each of these causes of action was denied, but no record thereof appears in the transcript. Subsequently an order was made by the court upon motion of the defendant, requiring the plaintiffs to elect upon which of the stated causes of action they would proceed. Plaintiffs refused to make the election, and the court thereupon dismissed the action. Plaintiffs appeal from this order of dismissal.

The only question presented on this appeal is whether or not the court erred in requiring plaintiffs to elect between the causes of action stated, and to proceed upon one without regard to the other. The court below evidently sustained this motion upon the theory that two separate, inconsistent causes of action were stated in the complaint. In *Povah v. Lee*, 29 Wash. 108, 69 Pac. 639, this court held that a party out of possession of real property could not maintain an equitable action to remove a cloud and quiet title to such realty, but the remedy of a person out of possession was to bring an action under the provisions of sections 5500-5508, 2 Ballinger's Ann. Codes & St., for possession of the property, and in that action set up his title, so that the court in one action may determine the superior title, both legal and equitable, of the contending parties. Under these statutes it is not necessary for a plaintiff to split up a cause of action into legal and equitable causes

and state them separately. It is only necessary to state the facts. Under the rule in *Povah v. Lee*, in order to state facts sufficient to constitute an equitable cause of action to remove a cloud from the title, it is necessary to allege possession in the plaintiff, or that the property was not in the possession of any one. In order to state a cause of action for possession of realty, it is necessary to allege that the plaintiffs are wrongfully and unlawfully dispossessed of the property. It will thus be seen that when the plaintiffs in this case undertook to state two separate causes of action, one asking for the removal of a cloud from the title and the other for possession of the property, the two causes as stated were necessarily inconsistent, because by the one plaintiffs must be in possession, and by the other they must be out of possession. Plaintiffs, however, in stating their first cause of action, did not allege which of the parties was in possession. In stating their so-called second cause, they allege that defendant is in possession. It is apparent from reading the complaint that the pleader undertook to state a cause of action for possession and to set forth the nature of the plaintiffs' estate and claim and title to the property under the statutes above referred to, and this has been done in the two causes when they are taken together and read as one. The pleader evidently endeavored to bring himself within the provisions of the statute above cited, but unfortunately, thinking that the facts entitling him to equitable relief must be set up separately from those entitling him to legal relief, stated his facts as two separate and distinct causes of action, when in fact he has but one cause. This court has said, under the liberal rules of pleadings contained in the statute, that, "if the plaintiff sets forth facts constituting the cause of action and entitling him to some relief, he is not to be turned out of court because he has misconceived the nature of his remedial right." *Damon v. Leque*, 14 Wash. 253, 44 Pac. 261; *Watson v. Glover*, 21 Wash. 677, 59 Pac. 516; *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. 123. We might add that the substance of the facts stated in a complaint will control the form of it, and the court will construe all the facts stated, without reference to the number of causes of action into which the pleader may have erroneously divided his complaint. The result of the order of the court requiring the plaintiffs to elect upon which cause of action they would proceed has been to deprive the plaintiffs of their remedy under the statute. This was error. The court should have disregarded the statement in the complaint that there were two causes of action, and treated the complaint as stating but one cause.

The judgment of dismissal is therefore reversed, with instructions to the lower court to reinstate the action for further proceedings. Since the error herein was the result

of the confused condition of appellants' pleadings, the costs of the appeal should abide the result of the action in the court below.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

((34 Wash. 191)

**CROOKER v. PACIFIC LOUNGE & MATTRESS CO.**

(Supreme Court of Washington. Feb. 29, 1904.)

**MASTER AND SERVANT—DEFECTIVE MACHINERY—EVIDENCE OF CUSTOM—ADMISSIBILITY—CONTRIBUTORY NEGLIGENCE—JURY QUESTION—ASSUMPTION OF RISK—EFFECT OF PROMISE TO REPAIR—APPEAL—DISMISSAL.**

1. An appeal will not be dismissed for failure to serve and file a motion for new trial, where the record discloses that a paper was served and filed which was treated by the parties and the trial court as such a motion, without objection.

2. A servant alleged that he was injured through the negligence of his master in not placing a spreader or guard before a ripsaw at which he worked, thus protecting the saw from splinters, etc., and protecting the operator; and that plaintiff was injured within such time after his master had promised to guard the saw as would be reasonable to allow for the improvement to be made. *Held*, that evidence of the custom or usage as to placing guards or spreaders on ripsaws to prevent injury to operators was admissible under the complaint.

3. In a servant's action for injuries from an unguarded ripsaw at which he was working, evidence of the custom or usage as to placing guards or spreaders on ripsaws for the operator's protection is relevant on the issue of the master's negligence, though a noncompliance therewith would not necessarily charge the master with negligence.

4. In a servant's action for injuries from an unguarded ripsaw at which he worked, expert witnesses testified for him that spreaders or guards were necessary adjuncts to hand-fed ripsaws, for the protection of the operator. The master's witnesses testified that spreaders were antiquated devices, impracticable, and augmenting danger, and were being generally discarded. *Held*, that it was proper to permit respondent's witness to testify in rebuttal that, out of 27 ripsaws examined in the mills and factories of a certain city, he found 24 guarded.

5. Where, on a previous appeal in a servant's action for injuries, it has been held that defendant's motion for a nonsuit was improperly granted, such decision is conclusive on a subsequent appeal on the issue of contributory negligence presented practically on the same evidence, though on the first appeal the principal question discussed was the negligence of the defendant.

6. Evidence in an action by the operator of a hand-fed ripsaw for injuries from a flying splinter, caught and projected by the saw on account of the absence of a guard or spreader, examined, and *held* sufficient to take the issue of plaintiff's contributory negligence to the jury, in view of his testimony that he was operating the saw in the customary manner when injured.

7. Where a workman using a defective machine complains to the foreman, who promises to remedy the defect, and the workman continues at work, the danger not being so imminent that a reasonably prudent man would have refused to continue the work, and, while relying on the promise and within such time as would be reasonably allowed for its performance, is injured, he does not assume the risk.

8. The operator of a dangerous machine who has secured his employer's promise to supply a device to lessen the danger must, if he continues to operate the machine before the device is attached, do so with proper care, considering its unprotected condition, or otherwise he forfeits the promise, and cannot recover for an injury.

9. In an action by a 19 year old boy for an injury from an unguarded ripsaw which he was feeding, his experience at such work covering about 3½ weeks, it is not ground for reversal to instruct that in considering the question of contributory negligence the jury may consider the plaintiff's age and experience, and whether or not he was an expert in the operation of ripsaws.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Walter V. R. Crooker against the Pacific Lounge & Mattress Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Reynolds & Griggs and Stiles & Doolittle, for appellant. Govnor Teats, for respondent.

**PER CURIAM.** This action was brought by plaintiff, Walter V. R. Crooker, a minor, by his father as guardian ad litem, against defendant, the Pacific Lounge & Mattress Company (a corporation), to recover for personal injuries. The cause was before this court on a former appeal, and is reported in 29 Wash. 30, 69 Pac. 359. The plaintiff was nonsuited at the first trial in the superior court, and on his appeal to this court the judgment of nonsuit was reversed, and the cause was remanded for a new trial. When the case was subsequently called for trial on the 17th day of November, 1902, the superior court made an order discharging W. G. Crooker as guardian ad litem for plaintiff, and directing that the cause proceed in the individual name of Walter V. R. Crooker as sole plaintiff. At the last trial a verdict was rendered in favor of plaintiff for \$2,500. Judgment having been rendered on this verdict in favor of plaintiff, the defendant appeals.

The respondent moves to dismiss the appeal because appellant failed to serve and file a motion for a new trial. The record discloses that there was a paper served and filed in this action, which was treated by the parties and considered by the trial court on its merits as a motion for a new trial, without any objections being interposed by respondent. Moreover, this court has decided that where matters alleged as error were involved in the disposition of the case, and were fully presented to the court below, rulings had thereon, and exceptions taken, a motion for a new trial is unnecessary in order to obtain a review of such rulings on appeal. *Tullis v. Shannon*, 3 Wash. 716, 29 Pac. 449; *Dubcich v. Grand Lodge A. O. U. W.* (Wash.) 74 Pac. 832. The motion to dismiss the appeal is therefore denied.

The plaintiff suffered the injuries of which he complains while in the employ of the defendant corporation operating a ripsaw in its

factory. The allegations in the pleadings of the respective parties to this controversy are fully stated in the former opinion. There has been no change in the issues since the cause was heard in this court on the former appeal. The testimony in plaintiff's behalf was of the same general character on the last trial as upon the first one, wherein the plaintiff was nonsuited in the superior court. The testimony on this last trial in behalf of defendant company was in direct conflict with plaintiff's evidence on all the material points in the controversy.

1. In his complaint the respondent alleged: "That he was injured through the negligence of the defendant in not placing the spreader or guard before the said saw, and thus protecting the saw from the splinters, sticks, and boards from coming against it, and thus protecting the operator of the said saw, and allowing the said saw to remain unguarded, by reason of which the said saw caught and threw the splinter which struck and injured the plaintiff; and that the said plaintiff was injured within such a time after said defendant had promised to guard the said saw as it would be reasonable to allow the said defendant to place on the said saw the spreader or guard; and that the said plaintiff was not injured through any negligence on his part."

In the court below, the appellant's counsel objected to the admission of evidence pertaining to the custom or usage of placing guards or spreaders on ripaws to prevent accidents happening to operators, such as is complained of in the case at bar, on the ground "that this case is based entirely upon a promise, and it does not make any difference whether this sort of appliance has ever been used by anybody else or not. The only question is whether it was stipulated for, and whether the promise was kept, and whether the injury was caused by the absence of this guard. There is only one point to which such testimony could go, and that would be to show what was the usual form of guard." At subsequent stages of the trial, while respondent's witnesses were being examined in chief, appellant objected to the reception of testimony of this character on the grounds of its immateriality and irrelevancy. In this court it contends that the evidence was inadmissible on the grounds that it was not embraced within the pleadings, and did not tend to establish negligence on its part. But we think neither ground is tenable. It is not necessary to set out the negligent acts in detail, but a general averment that the defendant was negligent in doing or not doing the particular act complained of is sufficient. We so held in *Collett v. Northern Pacific Ry. Co.*, 23 Wash. 600, 63 Pac. 225. And in *Coates v. Railroad Company*, 62 Iowa, 486, 17 N. W. 760, it was held that, when the negligence complained of was that defendant had failed to block a frog in its track, it was proper to allow plaintiff to prove, without

averring it in his petition, a custom on the part of defendant to block all frogs along its line, for the purpose of showing an admission that frogs unprotected are dangerous to employes. See, also, *Kelly v. Southern Minn. Ry. Co.*, 28 Minn. 98, 9 N. W. 588; *Flanders v. Chicago, St. P., M. & O. Ry. Co.*, 51 Minn. 197, 53 N. W. 544; 21 Am. & Eng. Ency. of Law (2d Ed.) 524.

As to the second objection, we think the proof complained of was relevant on the question whether the appellant had exercised reasonable care in not following a custom in guarding ripaws; not that a compliance with the particular custom would necessarily exonerate or noncompliance necessarily charge it with negligence, but its conduct in that regard was a material fact for the consideration of the jury in connection with the other facts and circumstances developed by the evidence in the case. See *Bodie v. Charleston & W. C. Ry. Co. (S. C.)* 39 S. E. 715, wherein the court observes: "It was for the jury to say whether such usual or customary method was such as a careful and prudent person should adopt under the circumstances."

2. It is next urged that the trial court erred in admitting, over appellant's objections, the evidence of James Batcheler, a witness for respondent called in rebuttal. Expert witnesses on behalf of respondent testified that spreaders were necessary adjuncts to hand-fed ripaws in order to prevent edgings and splinters from catching on the teeth of the saw and being thrown where they were liable to strike the operator. Witnesses of the same class on behalf of appellant testified that spreaders were antiquated devices on ripaws, impracticable, and augmented the danger to operators, and were being generally discarded. Respondent thereafter put Batcheler on the stand, who testified that about the last of June, 1901, he visited some of the mills and factories in Tacoma, and that out of the 27 ripaws he examined he found 24 of them guarded. We think the trial court committed no error in admitting this evidence. It tended to show that spreaders were still in use and practicable, in contradiction of the testimony in appellant's behalf to the effect that such guards had been abandoned in the manufacturing establishments using hand-fed ripaws.

3. Appellant complains that the trial court erred in not granting its motion for a nonsuit on the ground that the evidence in respondent's behalf showed him to be guilty of contributory negligence. The theory of appellant's counsel is that the testimony showed that the silver which struck respondent and caused the injury did not come from the back of the saw, but from the side, where the spreader would have had no effect upon it; that it was carelessness on respondent's part to leave the silver lying where it could be caught in the teeth of the saw while engaged in sawing the next cut. The respondent testified to the manner of his in-

jury as follows: "And I went down and started to work on the rip saw, and ripped a piece, and the saw was very dull, and it didn't work very good, and I tried another saw, and it was in the same condition; and I went to him [meaning Mr. Parker, the foreman] and told him it would not work, and I spoke to him about the saw not having a spreader on, and asked him how it was that he hadn't put the spreader on, and he said he didn't have time, but was going to do it as soon as he got time, and he told me that he would file one of the saws, and for me to use the other one until he got that one done; and I went back and started to rip, and I ripped four or five pieces, and then the saw caught the edge that I ripped off, and threw it up and hit me in the eye, and put my eye out." Witness further testified that the splinter which struck him was about 10 inches long; that it lay between the saw and the gauge alongside of the saw, and while respondent was ripping another piece of board, instead of the splinter being pushed off the table, it got around behind the saw, catching in its teeth, which threw it forward; that, if there had been a guard on the saw at the time, it would not have been possible for the splinter to have got caught in that manner; that ripsawyers depend upon the pieces which are being ripped off to clear the board, and there is no appliance for knocking these edgings away from the saw. On cross-examination respondent testified, in response to questions put to him by appellant's attorney regarding this sliver, as follows: "Q. Why didn't you push it out of the way? A. It wasn't the proper thing to do. Q. You knew that there was danger that things of that kind might get on the saw? A. Yes, sir; there is danger of it, but there is more danger in putting your hands down in there and pushing it out." There was also other testimony in respondent's behalf, tending to corroborate him, that a spreader on a ripsaw lessened the danger to the operator, and that it was unsafe to use such ripsaw without a guard. There was also some evidence on behalf of respondent to the effect that to allow these slivers and edgings to remain alongside of the rapidly revolving saw without a guard was attended with more or less danger to the operator, unless such slivers and pieces were pushed off the table by the hand or with a stick before ripping the next cut. The above matters were in the record before this court on the first appeal, and the question of contributory negligence was elaborately argued by the respective counsel on both sides of the controversy from the same standpoint as now presented here by appellant. It is true that in the former opinion the duty of the then respondent to have provided a guard or spreader for the saw pursuant to the promise of its foreman was the principal question discussed and considered by this court; still, evidence of the above character was properly

in the record, and as we reversed the decision of the trial court granting respondent's motion for a nonsuit, and remanded the case for a new trial, it seems to us that under the well-settled rule this holding has become the law of the case, and we are bound by it on this appeal, even though it may not meet with our approval at this time. *Wilkes v. Davies*, 8 Wash. 112, 15 Pac. 611, 23 L. R. A. 103; *Furth v. Snell*, 13 Wash. 660, 43 Pac. 935; *Dodge v. Gaylord*, 53 Ind. 365; *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; note to *Hastings v. Foxworthy*, 34 L. R. A. 321.

But were it otherwise we think the question was properly submitted to the determination of the jury. We appreciate fully the force of the argument of appellant's counsel, that where there are two ways of working about machinery, one absolutely safe and the other way attended with peril and danger, an employé who voluntarily chooses the perilous method rather than the safe one cannot recover for injuries thereby sustained; but whether, in the case at bar, the respondent did do this, was a debatable question. The respondent testified—and in this he was supported by other evidence—that he was operating the ripsaw in question in the customary manner when injured; and, this being so, the question of his negligence was one for the jury, and not for the court. It must be made to appear, by evidence which leaves no room for dispute, that the injured person was guilty of contributory negligence, before a court is warranted in taking that question from the jury.

4. Appellant further contends that the trial court erred in giving certain instructions to the jury at the trial. The criticisms as to the eighth and tenth instructions have been heretofore considered and answered in this opinion in the discussion relating to the usage and custom in guarding of ripsaws. These instructions are consistent with the rules of law declared by this court on the former appeal, which have become the law of the case.

The ninth instruction given by the trial court, of which appellant complains, is as follows: "A general rule of law is that a person working with a defective or unguarded machine, and without complaint, and knowing of the dangers of the same, assumes the danger of the defect or unguarded part; but there is no longer any doubt that, where an operator of machinery has expressly promised to repair a defect, the workman does not assume the risk of an injury caused thereby, within such a period of time after the promise as would be reasonably allowed for its performance; nor, indeed, is any express promise or assurance from the master necessary. It is sufficient that the workman may reasonably infer that the matter will be attended to. So you are instructed that if the plaintiff, at the time of his employment and at the time of the accident,

saw the danger from the lack of the guard, and complained of the same to the foreman, and the foreman promised to put on a guard, and the plaintiff went to work, and continued at work, on the promise, and you further find that the danger was not so imminent and immediate that a reasonably prudent man would not go to work or continue at work on the saw, and that at the time of the accident the plaintiff was relying upon the foreman's promise to place on a guard, then you are instructed that the plaintiff did not assume the risk and danger of an injury resulting from the lack of a guard." This instruction is sustained by the principles of law announced in the former opinion and the authorities therein cited. To the same effect, see, further, *Johnson v. Anderson & Middleton Lumber Co.*, 31 Wash. 554, 72 Pac. 107; *Indianapolis & St. Louis Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578; *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 69 N. W. 993, 60 Am. St. Rep. 66.

The court also instructed the jury in the following language: "The operator of a dangerous machine, who has received from his employer a promise to supply a device calculated to lessen the danger, must, if he elects to operate the machine before the device is attached, operate his machine with due and proper care, considering its unprotected condition, in order that he may avoid injury. Therefore it was the duty of the plaintiff, while he was relying upon the promise to attach the spreader or guard, if such promise was made him, to handle the machine with reasonable care, in view of the fact that the spreader or guard had not been attached; and, if he did not so handle it, he forfeited the promise and cannot now recover for his injury." These principles of law are amply sustained by courts and elementary writers of the highest authority. See *Indianapolis & St. Louis Ry. Co. v. Watson*, supra.

The following instruction is also assigned as error by appellant: "In considering the evidence on the question of contributory negligence you may take into consideration the age of the plaintiff and his experience in the work he was at at the time of the accident, and whether or not he was an expert in the operation of rip-saws." While the practice of trial courts in calling a jury's attention to particular items of evidence is not to be generally commended, we think that the superior court committed no prejudicial error in doing so in this instance.

5. Error is assigned because the trial court refused to give certain instructions requested by the appellant. These we have examined in detail, and think all that is material in them was given in the general charge of the court.

There is no reversible error in the record, and the judgment is affirmed.

(34 Wash. 181)

## NELSON v. McLELLAN.

(Supreme Court of Washington. Feb. 29, 1904.)

## APPEAL—COSTS—STENOGRAPHER'S FEES—TAXATION—MODE OF ESTIMATE.

1. Under Laws 1893, p. 132, c. 61, § 29, providing that the prevailing party on appeal may recover any sum actually paid or incurred as stenographer's fees, not exceeding 10 cents a folio, for making a transcript of the evidence, where the amount paid or incurred for the transcript is less than 10 cents a folio only the amount so paid can be recovered, and if the amount paid or incurred equals or exceeds 10 cents a folio, the amount recoverable is limited to 10 cents, irrespective of the actual outlay.

2. The clerk, on taxing the prevailing party's stenographer's fees, properly estimated the number of folios by counting a number of pages of the transcript, and taking the average of those counted as the average for the whole.

Appeal from Superior Court, King County; W. R. Bell, Judge.

Action by Royal C. Nelson against F. McLellan. From a judgment for plaintiff, defendant appealed, and secured a reversal. 71 Pac. 747. On defendant's motion to retax costs. Denied.

Roberts & Lechey, for appellant. Preston, Carr & Gilman and J. W. Rayburn, for respondent.

FULLERTON, C. J. The judgment appealed from in this cause was reversed, and costs were awarded to the appellant. In taxing these costs the clerk found the transcript to contain 1,211 folios, and allowed therefor the sum of \$121.10, being at the rate of 10 cents per folio. The appellant excepts to the amount allowed, and shows that he actually paid a stenographer for a transcript of the evidence the sum of \$200, and asks that he be reimbursed in this amount for this item. He contends, first, that the amount allowed by the clerk, viz., 10 cents per folio, is less than the statute authorizes; and, second, that the clerk miscounted the folios, allowing only 2½ folios to the page while the stenographer charged him for 3. That part of the statute regulating the costs to be allowed on appeals to this court reads as follows: "Costs shall be allowed in the Supreme Court, irrespective of any costs taxed in the case in the court below, to the prevailing party in the Supreme Court, on any appeal in any civil action or proceeding as follows: The fees of the clerk of the Supreme Court paid by the prevailing party, the fees of the clerk of the court below for preparing, certifying and sending up the records on appeal, or any supplementary record, paid by the prevailing party, and twenty-five dollars attorneys' fees, besides his necessary disbursements for the printing of briefs, and any sum actually paid or incurred by the prevailing party as stenographer's fees, not exceeding ten cents a folio, for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement

of facts. \* \* \* Laws 1893, p. 132, c. 61, § 29. It seems to us that this statute is so plain as to leave no room for doubt as to its meaning. The statute has two limitations. If the amount paid or incurred for the transcript is less than 10 cents per folio, only the amount so paid or incurred can be recovered as costs; but if the amount paid or incurred equals or exceeds 10 cents per folio, the amount to be recovered is limited to 10 cents per folio. It may be true, as the appellant contends, that this sum will not reimburse him for the amount of his actual outlay, but that is not a matter with which the court can concern itself. The regulation of court costs is for the Legislature, and that body must be appealed to if the costs allowed by it are either burdensome or insufficient. The courts can do no more than follow its mandate so long as it acts within its constitutional powers.

As to the second question, neither the appellant nor the clerk determined the number of folios by actual count. While the appellant does not make the method by which he estimated the number very clear, it seems from the affidavits filed that three folios per page was taken as the average, because it was found that such was the general average of similar work. The clerk made his estimate by counting a number of pages of the transcript, and taking the average of these as an average for the whole. This latter method, it seems to us, is more apt to be correct for the particular work, and we shall for that reason allow his estimate to stand. The motion to retax is denied.

**HADLEY, MOUNT, and ANDERS, JJ.,**  
concur.

(34 Wash. 124)

**BELDEN v. KROM.**

(Supreme Court of Washington. Feb. 29, 1904.)  
**SALES OF STOCK—BREACH OF CONTRACT—**  
**MEASURE OF DAMAGES.**

1. Where defendant sold plaintiff's assignor shares of stock, receiving the price, plaintiff's measure of damages on defendant's refusal to deliver the stock was its value at the time of demand.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Russell G. Belden against S. S. Krom. From a judgment for plaintiff, defendant appeals. Affirmed.

E. M. Heyburn, for appellant. Crow & Williams, for respondent.

**MOUNT, J.** This action was brought by the plaintiff to recover from defendant the value of certain stock which defendant sold and agreed to deliver to plaintiff's assignor. Plaintiff had judgment below, and defendant appeals. Upon the trial the court found that on August 16, 1902, for a valuable consideration then and there paid by one Worth Belden, defendant sold and agreed to deliver

to said Belden certain shares of the capital stock of the New Century Drug Company; that Worth Belden subsequently assigned the said agreement to the plaintiff, who demanded the said stock, and defendant refused to deliver the same; that the value of the stock at the time of the contract, and when demand therefor was made, was \$1,475. Judgment was thereupon entered against defendant for that amount. But one question is presented on this appeal, and that is the measure of plaintiff's damages. Appellant contends that the measure of damages is the consideration paid, together with such special damages as are shown. This is the rule adopted by this court in reference to the sale of real estate where there is a breach of covenants of warranty, as in *Morgan v. Bell*, 3 Wash. St. 534, 28 Pac. 925, 16 L. R. A. 614, and *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 31 Wash. 610, 72 Pac. 455. But where there is a sale of personal property, and payment of the purchase price, and thereafter a refusal by the vendor to deliver the property, the measure of damages is the market value of the property at the time of default. 24 Am. & Eng. Enc. of Law (2d Ed.) p. 1150; 2 *Sutherland on Damages* (2d Ed.) §§ 651-656; 2 *Sedgwick on Damages* (8th Ed.) §§ 734-736; *Saunders v. U. S. Marble Co.*, 25 Wash. 475, 65 Pac. 782. This was the rule adopted by the lower court.

The judgment is therefore affirmed.

**FULLERTON, C. J., and HADLEY and ANDERS, JJ.,** concur.

(34 Wash. 163)

**PEOPLE ex rel. PROSECUTING ATTORNEY OF KING COUNTY v. CITY OF SOUTH PARK.**

(Supreme Court of Washington. Feb. 27, 1904.)

**QUO WARRANTO—TEST OF CORPORATE EXISTENCE—INFORMATION AGAINST CITY.**

1. Under 2 Ballinger's Ann. Codes & St. § 5780, providing for informations in quo warranto against persons usurping offices or franchises, or where any association or number of persons acts as a corporation, without being legally incorporated, an information will not lie against a city in its corporate name to test its legal existence, for by suing the city in that name its existence is admitted.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Proceeding in the nature of quo warranto by the people, on the relation of the prosecuting attorney of King county, against the city of South Park. From a judgment of dismissal, relator appeals. Affirmed.

P. C. Ellsworth and J. E. McGrew, for appellant. Granger & Helfner, for respondent.

**HADLEY, J.** This is a proceeding in the nature of quo warranto, the purpose of which, as stated in appellant's brief, is to "test the

incorporation of respondent, and to determine whether it is properly incorporated as a city of the fourth class under the laws of Washington." The information charges irregularities as to notice and amendment of petition for incorporation; also that illegal votes were cast at the incorporation election, and that votes were illegally counted for incorporation. The answer denies these charges. At the trial the issues were narrowed by the statement of relator's counsel that they desired to present but two questions of fact: First, that ten ballots were wrongfully counted by the election board in favor of incorporation; and, second, that three illegal votes were cast by persons not residents of the territory sought to be incorporated. Counsel stated to the court that when relator had established the above facts he would ask that the incorporation be declared void. Thereupon the city moved for judgment in its favor, and for the dismissal of the action. The motion was granted, and judgment entered accordingly. This appeal is from that judgment.

This suit was brought against the corporation in its corporate name. No individual is made a party as assuming to illegally discharge municipal functions. Section 5780, 2 Ballinger's Ann. Codes & St., enumerates the grounds for which an information in the nature of quo warranto may be filed. It may be filed against "any person or corporation," but all the subdivisions of the section relate to the usurpation of official or corporate functions by individuals, except the fifth, which relates to acts on the part of corporations by which they forfeit their privileges, or to the exercise of powers not conferred by law. In the latter case the information may be directed against the corporation, but it must recognize that the corporation has theretofore had a legal existence. An information cannot be directed against a corporation which it charges does not exist. In such case there is no entity in existence upon which service can be made, or which can plead to the information. It is illogical to sue an alleged artificial person for the purpose of obtaining an adjudication that there is no such person. Either there is or is not a corporation. If there is not a corporation, it cannot be sued. The suit then must be against the persons who assume to act in a corporate capacity. By bringing the suit against the corporation, appellant admits its existence. The information therefore does not state facts sufficient to constitute a cause of action, since it simply seeks an adjudication that there is not now, and never was, such a corporation.

In *Ferguson v. Snohomish*, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795, the appellant sought to remove an alleged cloud for illegal taxes on the ground that the city of Snoho-

mish, which imposed the taxes, never had a legal existence. The attack against the corporate existence was in that case a collateral one, and this court, in holding that such a collateral attack could not be sustained, also gave a further reason for its decision as follows: "But we are of the opinion that the appellant is not in a situation to question the validity of the incorporation of the city of Snohomish, for the reason that he has brought his action against it as a municipal corporation, and alleged it to be such in his complaint." "But the weight of authority may now be regarded as sustaining the proposition that the effect of filing an information against a corporation by its corporate name to procure a forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchise, is to admit the existence of the corporation. When, therefore, the information is filed against the respondent in its corporate name, and process is issued and served accordingly, and the respondent appears and pleads in the same corporate character, its corporate existence cannot afterward be controverted." High's Ex. Leg. Rem. (3d Ed.) § 661. The following cases, cited in Mr. High's valuable work as supporting the above, we have examined and find to be in point: *People v. City of Spring Valley*, 129 Ill. 169, 21 N. E. 843; *State ex rel. v. Cincinnati Gas, etc., Co.*, 18 Ohio St. 262; *State v. Commercial Bank, etc.*, 33 Miss. 474; *Rolling Stock Co. v. People*, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462; *People v. Stanford*, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92. As being also directly in point, see the following cases: *State v. School District, 44 Iowa*, 227; *Mud Creek Draining Co. v. State ex rel.*, 43 Ind. 236; *People v. R. & S. R. Co.*, 15 Wend. 113, 30 Am. Dec. 33; *State ex rel. v. Uridil (Neb.)* 55 N. W. 1072. In *People v. City of Spring Valley*, supra, mention is made of the fact that some authorities seem to draw a distinction between private and municipal corporations, holding that an information may be brought against a municipal corporation by its corporate name, even where its corporate existence is challenged; the proceeding in such case being held to be against the city as a corporation de facto, and not as a corporation de jure. It was held, however, that no exception to the general rule exists in the case of municipal corporations. We are also unable to see any good reason in principle why such exception should exist unless a statute shall so declare.

For the foregoing reasons the court did not err in granting the motion for judgment of dismissal. The judgment is affirmed.

FULLERTON, C. J., and ANDERS, MOUNT, and DUNBAR, JJ., concur.

(34 Wash. 147)

**TOZER v. SKAGIT COUNTY.**

(Supreme Court of Washington. Feb. 24, 1904.)

**TAXES—VOLUNTARY PAYMENT—RECOVERY BY TAXPAYER.**

1. Payment of a tax against land after protest, when the tax is due and payable, though not delinquent, with notice that the taxpayer will sue to recover, is not voluntary, where the tax is at once a lien on the land, but cannot be enforced till three or five years after penalties are added, and it has become delinquent.

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by David Tozer against Skagit county. Judgment for defendant, and plaintiff appeals. Reversed.

Million & Houser, for appellant. J. C. Waugh, for respondent.

**FULLERTON, C. J.** In this action the appellant sought to recover from Skagit county the sum of \$464.88, paid as taxes on certain lands belonging to him situated in and subject to taxation in that county. The facts shown by the record upon which the appellant bases his right to recover are substantially these: In 1900 the lands mentioned were regularly assessed for taxation by the assessor of Skagit county, and their values duly equalized and fixed by the board of equalization for the ensuing biennial period. In 1901 the board conceived that the lands were not assessed at their actual value, and proceeded to and did, without notice to the appellant, raise the value of the lands between 15 and 20 per centum over the valuation fixed in 1900. The auditor carried out the taxes for the year 1901 on the new valuation, increasing the tax on the property over what it would have been had the valuation of 1900 been allowed to remain by the amount above stated. In March, 1902, the appellant tendered to the treasurer a sum of money sufficient to pay the taxes on the land at the valuations of 1900, which sum the treasurer refused to receive, notifying the appellant that he would not accept any sum in payment of such taxes less than the full amount shown by the rolls to be due thereon. The appellant thereupon paid the full amount assessed against the land, notifying the auditor that he paid the difference between the sum actually paid, and the sum he would have been required to pay had the assessment been made on the valuation of 1900, under protest, and that he would forthwith bring an action against the county to recover back the same. Thereafter he presented to the county his claim for the amount overpaid, and on its rejection by the board of county commissioners brought this action. On the trial he was nonsuited, and a judgment of nonsuit entered against him, from which judgment he appeals.

It is not disputed that, in so far as is shown by the record before us, the attempted increase in the valuation of the appellant's property was without authority and there-

fore void, but it is contended that under the rule heretofore laid down by this court the payment was voluntary, and cannot be recovered, even though the assessment be void; and it was on this ground that the trial court granted the nonsuit. The case which was thought to be controlling is *Montgomery v. Cowlitz County*, 14 Wash. 230, 44 Pac. 259. In that case we did hold that a payment of taxes to the county treasurer before they became delinquent, and before any proceedings were instituted looking to their enforcement, was a voluntary payment, although nominally paid under protest, and could not be recovered back even if the tax paid was illegal. That case undoubtedly followed the rule as announced in a majority of the states having statutes similar to the one then existing in this state relating to the assessment and collection of taxes, and, if the statute had been suffered to remain as it then was, we would be contented to follow it. But a radical, if not fundamental, change has been made in the statute since the time of that decision. Then all taxes were personal and assessed against the person, and it was necessary to exhaust the personal property of the individual against whom the taxes were assessed before real property could be sold in satisfaction thereof; the statute especially enjoining the tax collector to "use due diligence and search to find said personal property." The delinquent list was placed in the hands of the sheriff for collection immediately after the taxes became delinquent, and that officer proceeded to enforce collection at once. It was thus possible under that system to have a determination of any question touching the legality of a tax within a reasonable time after the same became a lien on real property, and the rights of the taxpayer were not seriously jeopardized by being obliged to wait, before instituting a proceeding for that purpose, until it was certain that the collecting officers would undertake to enforce collection of the tax. But under the system for the levy and collection of taxes now provided by statute, taxes on land values are charged directly to the land and not the person of the owner, and the owner's personal property is not liable nor can it be sold for the satisfaction of such taxes. While a period is fixed when penalties are added and taxes become delinquent, no active steps can be taken looking to the enforcement of the tax until three years after that time, and then only in the case where some individual has purchased the certificate of delinquency; the county itself not being permitted to enforce collection until five years have elapsed from date of delinquency, notwithstanding the law makes the tax a lien on the land from the 1st day of March in the year in which it is levied until it is paid. If, therefore, it be the rule that a landowner cannot contest in the courts the validity of a tax levy before active steps are taken to enforce its collection, the present law will in many



instances prove a practical confiscation of property; for, no matter how unjust or how illegal the tax may be, the necessity of removing its apparent lien before the time the courts can take cognizance of it will compel its payment by the owner. While the state has the right to insist, and must insist, that each parcel of property bear its just proportion of the public burden, it requires no unjust exactions, and has no intent to frame its laws so as to require them, and we do not think such was the purpose of this statute. But looking at the question from the state's point of view, it would seem that the change in the statute has made a change in the rule desirable. It is surely to the interest of the state, as well as the individual, that disputes concerning the validity of a tax be speedily determined. If payment of taxes in any considerable amount is withheld, a deficiency is created which results in the accumulation of interest-bearing obligations, and the consequent diversion of money to the payment of interest on obligations which was intended to be and should have been applied to the obligations themselves. But, more than this, it is a matter of common knowledge that errors in the assessment and levy of taxes, even when sufficient to render the tax uncollectible, can be and generally are remedied when discovered within a reasonable time after they are made, while a discovery after a long delay usually results, not only in a total loss of the tax attempted to be levied, but in the loss of the amount of tax the property assessed in justice ought to pay.

It has seemed to us, therefore, that the change in the statute has rendered the case relied upon inapplicable; but if it be true, as the respondent argues, that no right distinction can be made between the statutes existing at the time the case above cited was decided and the present statute in regard to the time protest should be made, we think the change in the statute requires that the case be overruled. While to depart from precedent is always a serious matter, we can do it in this instance with less regret, as we think there was not much reason for the rule as applied to the former statute. The purpose of protest under any system of taxation is to give notice that the right to collect the tax is disputed. This is required that the state may not unwittingly receive payment of a tax to which it has no legal right, and thereby subject itself, against its will, to the costs of an action brought to recover it back. But it would seem that protest made at a time when the tax was due and collectible and the state was actively engaged in receiving taxes would be as effective to protect it from actions against its will as would a protest made when coercive measures were being taken to collect the tax. The officers of the state have the same time and legal right to inquire into the validity of the claim when made at the one time as they do when made at the other, and there is no sound reason for

holding a payment of taxes made under the first condition to be voluntary and under the other to be coercive.

The judgment appealed from is reversed, and the cause is remanded, with instructions to proceed to a trial on the merits.

HADLEY, MOUNT, and DUNBAR, JJ., concur. ANDERS, J., concurs in the result.

(34 Wash. 141)

SHERLOCK et ux. v. VAN ASSELT et ux.  
(Supreme Court of Washington. Feb. 24, 1904.)

SPECIFIC PERFORMANCE—EVIDENCE—SUFFICIENCY—STATUTE OF FRAUDS.

1. Evidence held sufficient to sustain a finding that the son of the defendants was not authorized to sell for them the tract of land in controversy.

2. Evidence held to show, in a suit for the specific performance of a contract for the sale of land, that the plaintiff never went into possession, so as to take the contract out of the statute of frauds.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by W. J. Sherlock and wife against Henry Van Asselt and wife. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Allen, Allen & Stratton, for appellants. McClure & McClure, for respondents.

PER CURIAM. Plaintiffs, Walter J. Sherlock and Bridget Sherlock, his wife, commenced this action in the superior court of King county against defendants, Henry Van Asselt and Jane Van Asselt, husband and wife, to compel the specific performance of a contract for the sale of a five-acre tract of land situate in that county. The trial court made the following findings of fact:

"(1) That on or about June 25, 1900, the defendants agreed to sell to the plaintiff W. J. Sherlock ten (10) acres of land situated in King county, Washington, being a part of the Henry Van Asselt donation claim, which ten (10) acres is particularly described as follows, to wit: Beginning at a point being the intersection of the southeast corner of a tract or parcel of land known as that of, and being occupied by, the Denny Clay Company, and the west boundary line of the county road; thence westerly 1,416 feet to the east bank of the Duwamish river; thence southerly along said river bank 308 feet; thence easterly 1,416 feet to the county road; thence northerly 308 feet along the west line of said road to the place of beginning or commencement; comprising or containing ten (10) acres. And that on said June 25, 1900, defendants signed and acknowledged a deed conveying said ten (10) acres to plaintiff W. J. Sherlock, and gave said deed to J. H. Van Asselt for delivery to said Sherlock upon payment of the purchase price, or the sum of thirty-five hundred dollars (\$3,500).

"(2) That thereafter the said J. H. Van

Asselt executed and delivered to the said W. J. Sherlock a certain agreement in writing, in words and figures as follows, to wit: '\$1,500.00. Seattle, Washington, June 30th, 1900. Received from Walter J. Sherlock the sum of Fifteen hundred (\$1,500) Dollars, being a part of the purchase price of the ten (10) acres lying to the south of the Denny Clay Tract in the Van Asselt Donation Claim, King County, Washington, The balance of Two thousand (\$2,000) Dollars to be paid upon J. H. Van Asselt's furnishing an abstract of title and executing a Deed to the said ten acres. The said abstract and deed to be furnished within ten days at which time the said Van Asselt is to give to the said Sherlock a lease on the five (5) acres lying to the south and adjoining the said ten (10) acres, for the period of one year, said lease to take effect on the 1st day of January, 1901, together with a bond to purchase the said five (5) acres at any time between the 1st day of January 1901 and the 1st day of July 1901, and the said lease and bond to expire on said day, said lease to provide for a monthly rental not to exceed \$20.00 per month. J. H. Van Asselt.'

"(3) That the said ten (10) acres mentioned in the said agreement set forth in the last preceding paragraph is the same ten (10) acres mentioned and described in paragraph 1 hereof.

"(4) That the said J. H. Van Asselt was not on said June 30, 1900, or at any time before or after June 30, 1900, authorized or empowered by the defendants, Henry Van Asselt or Jane Van Asselt, or either of them, to sell to the said W. J. Sherlock or said plaintiffs the five (5) acres lying to the south and adjoining the said ten (10) acres, or any part thereof; nor was the said J. H. Van Asselt on the said 30th day of June, 1900, or at any other time, the agent of defendants, or either of them, for the sale of the said five (5) acres or any part of the lands of the Van Asselt donation claim.

"(5) That on or about the 31st day of October, 1900, the said W. J. Sherlock paid to the said J. H. Van Asselt the sum of one hundred dollars, but that said payment was not made on account of the purchase price of said five (5) acre tract, nor to the said J. H. Van Asselt as agent of the defendants, or either of them, and that said defendants have not, nor has either of them, at any time accepted, received, or had the said sum of one hundred dollars, or any part thereof, and that said J. H. Van Asselt prior to the commencement of this action tendered and offered to pay to the said W. J. Sherlock the said sum of one hundred dollars (\$100), which tender and offer was refused by the said W. J. Sherlock.

"(6) That the said defendants have not, nor has either of them, at any time since the 30th day of June, 1900, ratified or confirmed or approved the said agreement mentioned in paragraph 2 of these findings.

"(7) That the plaintiffs, W. J. Sherlock and Bridget Sherlock, have not, nor has either of them, taken or had possession of, or made any improvements whatever upon, said five (5) acre tract."

On which findings the court stated the following conclusions of law:

"(1) That a decree should be entered herein dismissing said action, and that the defendants, Henry Van Asselt and Jane Van Asselt, should have judgment against plaintiffs for their costs and disbursements herein.

"(2) That the said J. H. Van Asselt should repay to the said W. J. Sherlock the said sum of one hundred dollars (\$100)."

Judgment was entered in favor of defendants in accordance with such conclusions of law, from which judgment plaintiffs prosecute their appeal to this court. After the appeal was taken, Henry Van Asselt died, and his executrix, Jane Van Asselt, in her representative capacity, was substituted as a respondent herein in his stead by order of this court.

The main question presented in the record for our consideration on this appeal is one of fact: Was J. H. Van Asselt on the 30th day of June, 1900, or at any other time, authorized by respondents to execute to appellant Walter J. Sherlock the agreement designated in the above finding of fact No. 2, for the sale of the 5-acre tract in question? The testimony adduced at the trial shows that J. H. Van Asselt, who signed the agreement, was a son of respondents; that the respondents were an aged couple; and that Henry Van Asselt, one of the respondents, was paralyzed. He did not testify in the case, and seems to have figured very little in the transaction; doing nothing further than to execute the deed to the 10 acres of land contiguous to this 5-acre tract, which is described in above finding No. 1. Appellant Walter J. Sherlock testified that shortly prior to June 30, 1900, he went to the residence of respondents to ascertain who was the proper agent or party to sell the land designated in the findings as the entire 15 acres. Witness said: "I spoke to them about buying the place, and Mrs. Van Asselt asked me if I was buying it for somebody. I told her, then, 'No,' that I was buying it for myself. She told me, whatever deal I made with Bud [the son], it was satisfactory to her. I asked her then if I would pay him the money. She said, 'Yes,' she wanted to save all the commission; she didn't want to put it in any real estate man's hands to sell." Witness also said that Henry Van Asselt, the other respondent, was sitting in the same room at the time. Mrs. Van Asselt, on the witness stand, denied this conversation, and particularly that her son had any authority from either of these respondents to sell any part of this land. Mr. Sherlock, in explaining why the deed mentioned in the findings was made out for only 10 acres. Instead of 15 acres, testified: "We had agreed upon the

price. I told him [J. H. Van Asselt, the son] I hadn't money enough to buy and pay for the fifteen acres there and then, and he asked me how much money—if I would pay for ten acres. I told him, 'Yes,' and we agreed upon the price and terms—all of us—before ever I paid any money at all." He further testified that the \$100 was subsequently paid to the son in pursuance of the alleged contract for the sale of this 5-acre tract, and that appellants had duly tendered \$1,400, the balance of the alleged purchase price, which was refused by respondents. On behalf of respondents, the evidence tended to show that the purchase of the 10-acre tract was a complete and distinct transaction by itself. Jane Van Asselt and her son both testified that the latter had no authority from respondents to make this contract for the sale of this 5-acre tract, or accept any money in pursuance of such agreement; that the respondents refused absolutely to accept the \$100 paid by appellant Sherlock. The son swore that he offered to return this \$100 to appellant Walter J. Sherlock prior to this action, but that Sherlock would not accept of it; that, when he signed the above contract and receipt, it was subject to his mother's approval, and that Mr. Sherlock was so advised at that time; that he (J. H. Van Asselt) was anxious that his mother should sell this land, but that she did not approve of his acts in that behalf. Mrs. Van Asselt, by her evidence, is very positive to the effect that her son had no authority to make the alleged contract, that she reserved the right to fix the price of the land belonging to respondents, and that she did not want to sell this tract at all. The evidence decidedly preponderates in favor of respondents on the point that appellants never entered into or had possession of this 5-acre tract, or made any improvements thereon, under their alleged contract. The principal testimony on appellants' behalf as to the making of the contract was given by Walter J. Sherlock. His evidence is squarely in conflict with the evidence of respondent Jane Van Asselt and that of J. H. Van Asselt as to the making of the agreement, as well as the alleged ratification of the acts of J. H. Van Asselt, who assumed to act in behalf of respondents. This court has said, in numerous decisions, that it will not disturb the findings of the trial court on questions of fact, where the testimony is conflicting, unless the weight of evidence is against the findings of the trial court. See *Washington Dredging & Improvement Co. v. Partridge*, 19 Wash. 62, 52 Pac. 523; *Boardman v. Hager*, 24 Wash. 487, 64 Pac. 724; *Cullen v. Whitham* (Wash.) 74 Pac. 581. Furthermore, this alleged contract was not executed with the legal formalities required by the statute of frauds. It was not acknowledged as provided in *Ballinger's Ann. Codes & St. § 4518*. The appellants never entered into possession of this tract of land under their agreement in order to take

the transaction in controversy out of the operation of the above statute. This matter of possession was a material issue in the present controversy, tendered by appellants, on which they assumed the burden of proof at the trial, and, we think, failed to establish their allegations in that regard.

The judgment is affirmed.

(34 Wash. 185)

STATE ex rel. JENSEN et ux. v.

BELL, Judge, et al.

(Supreme Court of Washington. Feb. 29, 1904.)

INJUNCTION—CLERK'S MINUTES—FORMAL ORDER.

1. A formal order of injunction signed by the judge supersedes the clerk's minutes of the court's proceedings in which the decision was stated, so that the court has no authority to punish the person enjoined for a violation of the injunction, as stated in the minutes, where the acts do not violate the formal order.

Original application by the state of Washington, on the relation of William Jensen and wife, against W. R. Bell, superior judge for King county, and another, for a writ of prohibition. Writ granted.

Ballinger, Ronald & Battle and Vance & Mitchell, for relators. G. M. Emory and Harold Preston, for respondents.

HADLEY, J. This is an original application in this court for a writ of prohibition directed to the superior court of King county and to the Honorable W. R. Bell, one of the judges thereof, and also to the Seattle Brewing & Malting Company, a corporation. An alternative writ was issued, and return thereto was made. The case presented here is as follows: On the 8th day of January, 1904, a cause was pending in the superior court, wherein the Seattle Brewing & Malting Company, one of the respondents here, was plaintiff, and the relators here were defendants. An application was made in that action by said plaintiff for the appointment of a receiver of a certain leasehold interest in controversy, and also for a temporary injunction against the said defendants. On the said 8th day of January the respondent Bell, as said judge, having heard the aforesaid application, orally announced his decision thereon. In the minutes of the court's proceedings made by the clerk on that day the following appears: "Seattle Brewing & Malting Company vs. Wm. Jensen et ux. No. 41,455. Pliffs' mo. for appointment of receiver granted. Court enjoins the defts from selling any domestic beer except Rainier beer.—Supersedes bond & bond on injunction fixed at \$5,000 each. Ex. allowed." Thereafter, on the 12th day of January, the said judge signed a formal order in the premises, and the same was spread upon the records of the court. Among other things contained in the order, the following appears touching the purchase and sale of beer other than Rainier beer: "And it is hereby further

ordered that the above defendants, William Jensen and Hulda Jensen, together with the attorneys, agents, servants, and employes of each of said defendants, and all persons claiming under, by, or through them, subsequent to the making of this order by the court on January 8, 1904, be, and they hereby are, restrained and enjoined from purchasing from any person whomsoever any beer, except beer imported from outside the limits of the United States of America, to be sold or offered for sale by said defendants, or either of them, in or about the carrying on of the saloon and restaurant business formerly and now operated in the premises referred to hereinabove; and it is further ordered that said defendants, William Jensen and Hulda Jensen, together with their attorneys, agents, servants, and employes, and all persons claiming under or through them, be, and they hereby are, directed and commanded, with reference to purchases subsequent to January 8, 1904, by this order, to purchase from said Seattle Brewing & Malting Company all beer, except imported beer, as above defined, to be sold or offered for sale by said defendants Jensen, or either of them, in carrying on said saloon and restaurant business in said premises." It will be observed that in the clerk's minute entry the statement is made that the defendants are enjoined from selling any domestic beer except Rainier beer, but in the formal order afterwards signed by the court the injunction pertains only to purchases subsequent to January 8, 1904, and no prohibition is declared against selling such other domestic beer as may have been purchased by the defendants prior to said date. Acting under the terms of the formal order of the court, the relators here were about to sell such domestic beer as they had on hand, and which had previously been purchased from others than the respondent Seattle Brewing & Malting Company. At this juncture the respondent Bell, as judge aforesaid, threatened to punish these relators as for contempt if they should proceed to make such sales; he claiming that the minute entry of the clerk correctly records the court's actual decision and order in the premises. The relators then applied to this court for a writ of prohibition to prevent such course on the part of said respondent, and also to prevent interference by the co-respondent with the making of sales by relators as aforesaid.

The question presented is whether the brief minute entry of the clerk shall be held to be of higher character as evidence of the court's actual order in the premises than the written order which was later signed by the judge. We think it should not be so held. A formal written order is signed by a judge, presumably, after deliberation and mature reflection upon the matters involved. Such an entry, we think, should be accorded greater weight, and should be received as more solemn evidence of the court's real intention,

than a mere minute entry, which may be hastily made, and the true import of which may be overlooked by the judge. In this instance it appears to the respondent judge that the clerk's minute entry more correctly records his decision than his own signed order, but another time the situation may be reversed. He may then find that the clerk's minutes are inaccurate, and that his own deliberately signed order correctly states his decision. If we should be thus driven from one to the other for evidence as to the actual order of the court, it is evident that frequent confusion might arise. It is therefore manifest that there should be some standard in the record to which reference may be made as the conclusive evidence of what has been actually decided. We believe, when a written judgment or order has been signed by the court, it should be regarded as such standard. We think it a safe rule to hold that, when the court signs a written order, it shall be considered the evidence of its real and final act touching the subject immediately under consideration. Applying that rule here, the court's written order did not enjoin the relators from selling beer that was purchased by them prior to January 8, 1904, and which then remained unsold. The respondents should therefore not interfere with relators in making such sales, in view of the fact that the court's deliberately signed and recorded order in the premises does not so prevent them.

Respondents cite *Coyle v. Seattle Electric Company*, 31 Wash. 181, 71 Pac. 733, as supporting the contention that the journal entry should be held to be controlling. In that case the court avowedly sought by a later entry to correct what was supposed to be mere error of law inhering in a former one. It was held that errors of law cannot be reviewed in that manner, but must be corrected on appeal, and that the original journal entry therefore became the judgment of the court. No question arose in that case as to what the court actually intended. It was clear that the court simply intended to reverse its view of the law as embodied in the former entry. In the case at bar, however, the court undertakes to say by its written judgment what was actually decided, and it becomes a question whether that statement shall prevail over the clerk's minutes. Respondents argue that the court may, by a *nunc pro tunc* order, correct the judgment entry, and thus make it speak the truth, when by inadvertence or mistake it fails to state the actual judgment of the court. It is true, it has been often held that the inherent power resides in the court to make such corrections in a proper case. 15 Enc. of Pl. & Pr. p. 221 et seq., and cases cited upon that subject. We do not understand that relators' counsel seriously dispute this principle. Such a record is, however, not before us now. Upon the contrary, the record shows that the Seattle Brewing & Malting Company

applied to respondent Bell, as judge, to correct the judgment entry of January 12, 1904, on the ground that it did not speak the truth as to the court's actual decision. Said respondent, however, declined to make any correction, upon the theory, it seems, that the clerk's minute entry was the evidence of the actual decision and order of the court. As the record comes before us, therefore, said respondent admittedly threatens to punish relators as for contempt if they shall sell certain beer, the sale of which is in no way enjoined by the terms of the written and signed judgment of the court. For reasons already stated, the terms of that judgment must be held to import verity as to the court's decision as long as it remains unmodified and uncorrected.

It is ordered that the writ shall issue.

FULLERTON, C. J., and MOUNT, ANDERS, and DUNBAR, JJ., concur.

(34 Wash. 152)

O'CONNOR v. LIDTHIZER et al.

(Supreme Court of Washington. Feb. 26, 1904.)

APPEAL—NOTICE TO SURETIES—CONTRACTS—AVOIDANCE—FRAUD—CONDITIONS PRECEDENT—ORAL EVIDENCE.

1. 2 Ballinger's Ann. Codes & St. § 5186, providing for the giving by plaintiff, in an action in the superior court, of a bond for costs, or any other statute, not authorizing entry of judgment as matter of course against the sureties in the action in which the bond is filed, plaintiff, on appeal from a judgment against him alone therein, need not give notice of appeal to the sureties.

2. In an action on an instrument purporting to be a contract, defendant may allege and prove by oral evidence that it was obtained by fraud: this not varying its terms, but showing it never became a contract.

3. Fraudulent statements, inducing a contract for sale of land, that a certain person was arranging to engage in a certain business, and that plaintiff was then duly authorized by him to act in his behalf, relate to existing facts, and not to acts to be performed in the future.

4. An answer to a complaint in an action for specific performance of a contract made in H., alleging that it was obtained by the fraudulent statement of plaintiff that T. was arranging to embark in the banking business at H., and that plaintiff was authorized by T. to act in his behalf, and showing that T. was president of a bank in S., though not expressly alleging that he was not in H. that day, sufficiently shows, as against demurrer, that reasonable means for ascertaining the truth were not immediately at hand, so as to preclude defendant of the right to rely on plaintiff's statement.

5. In bar of an action for specific performance, defendant may orally prove that certain conditions precedent, which were never performed, were to be performed before the writing should become an operative contract.

Appeal from Superior Court, Lincoln County; William E. Richardson, Judge.

Action by John O'Connor against F. M. Lighthizer and others. Judgment for defendants. Plaintiff appeals. Affirmed.

H. N. Martin and Happy & Hindman, for appellant. Myers & Warren, for respondents.

HADLEY, J. The appellant (plaintiff below) filed a bond in the superior court to secure costs. Respondents now move to dismiss this appeal on the ground that the sureties upon the cost bond were not served with notice of the appeal, and have not joined therein. In support of the motion, we are referred to *Cline v. Mitchell*, 1 Wash. St. 24, 23 Pac. 1013; *Carstens v. Gustin*, 18 Wash. 90, 50 Pac. 933; *State ex rel. Billings v. Port Townsend*, 27 Wash. 728, 67 Pac. 1135; *Pierce v. Commercial Investment Co.* (Wash.) 72 Pac. 473; and *Brockway v. Abbott* (Wash.) 74 Pac. 1069. We have arranged the cases above in the chronological order of the respective decisions, and the last three cases cited involve sureties upon cost bonds. In each of those cases the motion to dismiss the appeal was granted upon the theory that the principle followed in *Cline v. Mitchell* and *Carstens v. Gustin*, supra, applied to the later cases. No discussion appears in the later cases, but the former ones are merely cited as decisive of the question of dismissal. In the case at bar, and in others submitted at the recent term of this court, the contention was earnestly made that the later decisions above named were erroneous, and not controllable by the former ones mentioned. We therefore decided to re-examine the question. In *Cline v. Mitchell* a bond had been given on appeal from justice court to the district court. The district court entered judgment against the sureties upon the appeal bond. This court held that they were properly parties to the judgment in the district court, and should have been served with notice of appeal. The district court was, however, expressly authorized by statute to enter the judgment against them under section 1867 of the Code of 1881, which is as follows: "In all cases of appeal to the district court, if on the trial anew in such court, the judgment be against the appellant, in whole or in part, such judgment shall be rendered against him and his sureties in the bond for the appeal." The action in *Carstens v. Gustin* was one of claim and delivery. Personal property had been levied upon, and the claimant filed an affidavit of ownership and gave bond under the terms of sections 5262-5266. 2 Ballinger's Ann. Codes & St. Judgment was entered in that proceeding against the sureties upon the bond, and it was held here that the sureties were parties to the judgment, and should have had notice of the appeal. The lower court was, however, expressly empowered to enter the judgment under the terms of section 5266, supra, as follows: "\* \* \* but if he shall not maintain his title, judgment shall be rendered against him and his sureties for the value of the property. \* \* \*" Thus, in each of the cases of *Cline v. Mitchell* and *Carstens v. Gustin*, there was direct statutory authority for entering judgment against the sureties in the special proceedings there involved. The only statutory provisions relating to the bond for costs in the superior

court of which we have any knowledge are found in section 5186, 2 Ballinger's Ann. Codes & St. That statute makes no provision for the entry of judgment as of course against the sureties in the same action in which the bond is filed. Without such express statutory authority as entering into and becoming a part of the contract in the bond, whereby the sureties consent to such judgment, we believe judgment cannot be entered against them, and they are not, therefore, parties appearing in the action upon whom notice of appeal is required within the meaning of section 6504, Id. Not being persons against whom judgment may be entered as of course by statutory authority, they are entitled to their day in court. An attempt to enter an of-course judgment against the sureties is without notice and void, but one may appeal from even a void judgment for the purpose of having it judicially determined as void. When, therefore, the court has actually entered judgment against the sureties upon a cost bond, even though void, we believe the better rule to be that they shall be served with notice of appeal, in order that all who may appeal shall be joined. In *State ex rel. Billings v. Port Townsend* and *Pierce v. Commercial Investment Co.*, supra, judgment was actually rendered against the sureties, but such was not the case in *Brockway v. Abbott*, supra. We think, for the reasons stated, that all the cases cited were properly decided, except *Brockway v. Abbott*, and that case is now overruled. In the case at bar there was no judgment against the sureties. It was therefore not necessary to serve them with notice of appeal, and the motion to dismiss is denied.

Appellant brought this action to enforce specific performance. On the 27th day of December, 1902, the respondent Lighthizer was the owner of certain real estate in the town of Harrington, in Lincoln county. On that day he signed and delivered to appellant an instrument in writing, of which the following is a copy:

"In consideration of twenty-five dollars cash to me in hand paid and of the agreement to pay fourteen hundred and seventy-five dollars, on receipt of a deed and abstract showing good and sufficient title, I hereby agree to sell and convey to Mr. John O'Connor, the second room and building in the Empire Block in Harrington, Wash., at an agreed price of \$1500.00 fifteen hundred dollars, being the second room from the alley, and adjoining the Post Office in said block, this bargain and sale being subject to a certain mortgage of \$4500.00 held by Baker & Baker of Walla Walla Wash. mortgagees, and the fifteen hundred dollars is to be paid to Messrs. Baker & Baker, mortgagees and to apply on the said mortgage of \$4500. And the said mortgagees are to release the said sold property to the said John O'Connor, being a strip of ground sixteen feet wide and 100 ft. deep.

"Witness my hand and seal this 27th day of Dec. 1902. F. M. Lighthizer.

"Signed in the presence of J. L. Waldron, J. Ban Natter."

The complaint alleges the payment of the \$25 cash, the readiness and willingness of appellant to pay the remainder of the \$1,500, and the refusal of Lighthizer to convey the land. Other respondents were also made defendants, on the theory that they are subsequent and fraudulent grantees of Lighthizer, and conspirators with him for the purpose of avoiding the conveyance claimed by appellant. The answer of Lighthizer denies the material allegations of the complaint, and affirmatively alleges: That appellant obtained said writing from him through fraud. That, on the day first mentioned, appellant came to the office of Lighthizer, and represented that he desired to buy a building in which to start a bank and loan company. That he inquired the price of the property described in the writing set out above. That Lighthizer informed him he would sell the property for \$3,000. That appellant then stated that he and one Mr. Twohy, president of the Old National Bank of Spokane, were jointly interested in the banking business, and in the establishment of a number of banks in Lincoln county, the chief of which was to be established at Harrington; that Mr. Twohy desired to procure a bank building in Harrington for as little cash outlay as possible, and would pay the balance of the purchase price in stock in the bank thereafter to be established; that, if Lighthizer would consent to sign a written contract for the consideration of \$1,500, the remaining \$1,500 would be paid in stock from the bank. That, as a further inducement to Lighthizer to sign the agreement, appellant represented that he had organized a loan company, and would establish its headquarters in the town of Harrington, and would make Lighthizer its president, at an annual salary of \$2,000, which loan company was to be established in a room belonging to Lighthizer, and adjacent to said bank. That all of said statements and representations were believed by Lighthizer, and implicitly relied upon by him, while in truth they were false, and known by appellant to be false. That thereafter Lighthizer ascertained that appellant had no business relations or connections whatsoever with said Twohy; that appellant did not intend to establish any bank or loan company in Harrington, and such has not been established. That Lighthizer thereafter returned to appellant the \$25 paid at the time the writing was signed, and afterwards, for a valuable consideration, and in good faith, sold said property to respondent A. C. Billings. A further affirmative answer of respondent Lighthizer is to the effect that said writing was signed and delivered to appellant upon the conditions, and not otherwise, that the contract

should have no force or effect unless appellant should proceed immediately after its execution to organize a bank and loan company in the town of Harrington, should make Lighthizer president of such loan company at a salary of \$2,000, and should also deliver to Lighthizer stock in the proposed bank to the extent and value of \$1,500. Appellant demurred generally to each of Lighthizer's affirmative defenses which have been substantially stated above. The demurrer was overruled as to each defense. Issue was joined by reply, and other defendants answered, denying the allegations of the complaint as to the conspiracy. The cause was tried by the court without a jury, and decree entered denying any relief to appellant, and adjudging costs against him. From that decree he has appealed.

It is first assigned that the court erred in overruling the demurrer to Lighthizer's first affirmative defense. It is urged that the defense presents a case of an attempt to contradict and vary the terms of a written instrument, and that it is apparent from the face of the pleading that proof thereof must be made by parol testimony. Whatever may be said of the averments of the pleading as to a contract different from that stated in the writing, it nevertheless does state that the contract was induced by fraud. If so, it was void from the beginning, it never became a contract, and parol proof is permissible to establish the fraud. "In other words, while parol evidence is inadmissible to vary or contradict the terms of a written instrument, such evidence is admissible to show that a writing in the form of a contract never became operative as a contract. This principle is generally approved by the authorities." *Reiner v. Crawford*, 23 Wash. 609, 671, 63 Pac. 516, 517, 83 Am. St. Rep. 848. Many authorities are cited in support of the above. In that case it was held that oral evidence was admissible to show that a writing in the form of a contract was subject to a condition precedent to the attaching of any obligation thereunder; that, if the condition precedent failed, there was in fact no contract; and that such oral testimony did not vary the terms of any contract. The rule is equally as applicable here, where the effect of the pleading is to aver that no contract ever existed, because of fraud. Oral proof of fraud does not vary the terms of a valid written instrument, when the instrument involved was induced by fraud, and therefore never became a valid or operative one.

Appellant further urges that the pleading is bad, as presenting a case for relief on the ground of fraud, in that its allegations relate to acts to be performed in the future, and not to present or past facts. It is true, it does contain allegations as to future acts, and, if it were confined entirely to these, the point urged would become serious. But it also contains averments as to existing facts

which are very material. It alleges that appellant stated that Mr. Twohy desired to enter upon the banking and loaning enterprise in Harrington, and that appellant represented him for the purpose of effecting the necessary purchase, and was therefore associated with Mr. Twohy in the contemplated business. These statements as to Twohy, under the averments in the pleading, became inducements to make the writing in question. They related to existing facts, viz., that Twohy was then arranging to embark upon the business at Harrington, and that appellant was at that time duly authorized by Twohy to act in his behalf. Appellant, however, further urges in this connection that Lighthizer should not have relied upon appellant's statement, but should have investigated the truth for himself before acting. Several decisions of this court are cited to the effect that one will not be granted relief from alleged fraud when it appears that the means for easily ascertaining the truth are at hand, and that the complaining party fails to avail himself thereof. But such conditions, we think, are not presented by this pleading. The pleading shows that Mr. Twohy was the president of a bank in Spokane, and, while it is not expressly alleged that he was not in Harrington on that day, where Lighthizer could have communicated with him, yet, in view of the allegations as to appellant's claim that he was in Harrington to represent Twohy, we think it sufficiently appears upon the face of the pleading, and as against demurrer, that the reasonable means for ascertaining the truth were not immediately at hand. We think, therefore, that the demurrer to the first affirmative defense was properly overruled.

It is next assigned that the court erred in overruling the demurrer to Lighthizer's second affirmative defense. That defense, it will be remembered, states that certain conditions precedent were to be performed before the writing in question should become an operative contract, and that such precedent conditions were not performed. This defense comes squarely within the rule of *Reiner v. Crawford*, supra, and which has already been discussed. Under that rule, parol evidence is permissible here to show the conditions precedent, and if, by reason of the failure of the conditions, the writing never became an operative contract, then the oral testimony does not contradict or vary the terms of a written contract.

It is next assigned that the court erred as to its judgment upon the facts. No specific findings of fact or conclusions of law were entered, other than as contained in the decree itself. The decree simply denies appellant any relief, and judgment for costs is awarded against him. We have examined the evidence, and we believe that it is sufficient to support the decree of the court. We think it unnecessary to discuss the evidence here. It is sufficient to say that, while there

is some conflict, we believe the evidence upon the subject of fraudulent representations and of conditions precedent, within the rules hereinbefore discussed, upon demurrer, warranted the court's judgment.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT and ANDERS, JJ., concur.

(33 Wash. 1)

WOODWARD et al. v. TAYLOR et al.  
(Supreme Court of Washington. Feb. 29, 1904.)  
TAXATION—STATUTES—REPEAL—SAVING  
CLAUSE.

1. Under Laws 1891, p. 280, repealing the taxation act of March 28, 1890, but declaring that the repeal should not be construed to affect any proceeding pending at the time the repealing act took effect, but that all proceedings for the assessment or collection of any tax might be completed under provisions of the repealed act, etc., the provisions of the act of 1891 (Laws 1891, p. 280, c. 140) did not affect the validity or method of an assessment made in 1891 under the act of 1890 and before the passage of the act of 1891.

On rehearing.

For former opinion, see 73 Pac. 785.

PER CURIAM. On petition for rehearing, our attention is called to the fact that nothing was said in the opinion about the act of 1891 (Laws 1891, p. 280, c. 140), and it is now insisted that the act of 1890 (Laws 1890, p. 530, c. 18) never became operative, for the following reasons: Because it became a law on March 28, 1890, without the approval of the Governor; it contained no emergency clause, and therefore did not become effective until June 28, 1890; by its terms the assessment books were to be delivered to the assessor on the last Saturday in March, and that officer was to begin his duties in April, which was two months prior to the time the act became effective; on March 9, 1891, another revenue act was passed, which became effective at once. It is insisted that the act of 1891 repealed and superseded the act of 1890, that the latter act never became operative, that the assessment for the year 1891 was therefore made under the act of 1891, and that, under section 45 (page 297) thereof, the system of numerical assessment or assessments in rem did not apply for that year. This theory of the case was not presented to the court below, and was not mentioned in the arguments or briefs on the appeal, but the case was presented both in the lower court and in this court upon the theory that the assessment was made under the act of 1890, as in fact it was, and the act of 1891 was for that reason not mentioned.

If the act of 1890 was superseded by the act of 1891, as stated, there would be much force in appellant's position, but in the repealing clause of the act of 1891 it was expressly provided: "That the repeal of said act (1889-90) shall not be construed to im-

pair any existing right, or affect any proceeding pending at the time this act shall take effect; but all proceedings for the assessment of any tax or collection of any tax, or special assessment remaining incomplete, may be completed under the provisions of the above entitled act hereby repealed." Laws 1891, p. 325, § 119. Proceedings for the assessment in King county were begun in 1891, under the act of 1890, before the passage of the act of 1891. These proceedings were completed under the saving provision above set out. It follows, therefore, that the provisions of the act of 1891 did not affect the validity or method of the assessment under the act of 1890.

Other questions presented in the petition for rehearing do not require further discussion. We are satisfied with the conclusion reached in the original opinion. The petition for rehearing is therefore denied.

(142 Cal. 27)

GILFILLAN v. SHATTUCK et al. (S. F. 2,677.)\*

(Supreme Court of California. Jan. 27, 1904.)

PRIVATE WAYS — HIGHWAYS — DEDICATION — USER — EVIDENCE — ABUTTING OWNER — RIGHTS — FENCES — DESTRUCTION — INJUNCTION — JUDGMENTS.

1. Where a passageway between two subdivisions of a city lot constituted a mere cul-de-sac, and no one had used it except by license of the owners of such subdivisions, and the only persons who did use it were tradesmen and visitors to persons living on such property, and fences were almost continually kept on and across the northern part of the strip, which for long periods were constructed so as to completely inclose part of it, which was used as a playground and garden, which condition continued for about 50 years, after which a controversy arose as to maintenance of the fences, such facts justified a finding that the passageway was not a public highway.

2. Where a judgment roll was admissible as against one of several defendants, an objection thereto by all of the defendants was properly overruled.

3. Where, in an action to restrain defendants from destroying a certain fence across an alleged private way, one of the defendants had previously sued plaintiff to restrain the maintenance of the fence, in which action judgment had been rendered in favor of plaintiff, holding that the place in question was not a public street, such judgment was admissible in a subsequent action against persons who were not parties thereto to prove that plaintiff had never consented to the use of the strip as a public highway.

4. Where plaintiff had valuable easements in a private way, and some of the defendants contended that the way was a public highway, and compelled plaintiff to litigate such question, she was entitled to an injunction restraining the destruction of a fence maintained by her thereon, without regard to whether she owned the fee in the land to the center of the strip.

5. Where the owner of a lot subdivided it, and left a strip of land between the subdivisions, which was a mere cul-de-sac, the fact that in his conveyances thereof were references in the description to such strip of land did not constitute a conclusive dedication of such strip to the public as a highway.

\*Rehearing denied February 25, 1904.



Department 2. Appeal from Superior Court of City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Sophia J. Gilfillan against Phoebe J. Shattuck and others. From a judgment in favor of plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

Franklin K. Lane, City Atty., W. S. Brobeck, and George E. Lawrence, for appellants. Alexander G. Eells, for respondent.

McFARLAND, J. This is an action to restrain the defendants from destroying a certain fence of plaintiff, and to have it adjudged that a certain strip of land is a private way, and not a public highway. Judgment went for plaintiff in the court below, and defendants appeal from the judgment, and from an order denying their motion for a new trial. The defendant mainly interested in the litigation is Mrs. Phoebe J. Shattuck, who is the owner of a certain lot of land. Her husband, D. D. Shattuck, was made a defendant, and joined with her in her answer and defense. The only other defendant named in the complaint is Martin F. Fragley, as superintendent of streets of the city and county of San Francisco, and afterwards his successor, the board of public works of said city and county, was substituted for him as defendant.

Fifty-vara lot No. 124, or at least what was such lot, is situated on the northeast corner of California and Powell streets, in the city of San Francisco. This vara lot was owned in 1849 by one William Miles. He divided it into two equal parts by an open strip of land  $25\frac{1}{2}$  feet wide, commencing at California street and running northerly to the rear of the lot— $137\frac{1}{2}$  feet—where it stopped. It did not connect with any street or way other than California street, and was a cul-de-sac. It was called "Miles Court" or "Miles Street." The question in the case is whether this short, one-ended strip is a public highway, or a mere private way. The court below found it was and is not a highway, and it is contended that this finding should be here overturned. We think that the finding is right, and that there is no ground for disturbing it.

In 1849 Miles divided each of the two halves of the vara lot into six equal, smaller allotments or lots, making twelve in all, which were numbered consecutively from 1 to 12. During the years from 1849 to 1851 he conveyed all of these smaller lots to various persons, and all of the conveyances, except three, contained a diagram or plan showing the vara lot as subdivided, and also this memorandum: "The owners of the allotments on above plan of Lot No. 124 may close the alley on said above plan and divide the land it contains equally among all of the said allotments, that is, into twelve equal shares, by general agreement in writing, at any time, said agreement to be re-

corded." Plaintiff is and for many years has been the owner of lots 11 and 12, which adjoin each other, and are on the east side of the passageway; lot 12 extending to the north line of the vara lot. She holds through mesne conveyance from Mary Ann Tay, to whom Miles conveyed the two lots in 1851. The deed from Miles to Tay was one of the three conveyances which did not contain the memorandum above referred to, but it contained this language, "Together with all and singular the tenements, improvements and appurtenances thereunto belonging or in any wise appertaining," and referred to said diagram. The deeds under which respondent claims title describe her lots as bounded by the easterly side of Miles street. Immediately north of vara lot 124 is another vara lot, 123, which fronts on Powell street, and is not in any way connected with California street; and the appellant Phoebe Shattuck owns that part of said vara lot 123 which is next to and adjoining vara lot 124 on the north, and includes the land lying north of the said passageway.

The court found all the averments of the complaint to be true, except one which is immaterial, and that all the averments of the answers which are material here are untrue. It is alleged in the complaint and found by the court, among other things, "that said Miles court is not a public street, but is a private way laid out by a former owner of said fifty-vara lot No. 124, through which it passes as aforesaid, as a private way for the sole use of the smaller lots into which said fifty-vara lot No. 124 was subdivided by said former owner; that the same was never in any manner dedicated to the public, nor for the use of the public; that the same has, continuously since it was so laid out, remained in the sole charge of, and under the sole control and care of, the owners of said subdivisions of said fifty-vara lot No. 124; that no person or persons has or have ever used the same, except by the license and permission and for the convenience of said owners of said subdivisions"; and "that for many years prior to the 10th day of June, 1896, the plaintiff maintained a fence across the said northerly end of said Miles court, along the said line between said fifty-vara lots Nos. 123 and 124." It is further averred and found that a few weeks prior to said June 10, 1896, the defendant Phoebe tore down said fence, and that plaintiff immediately began to restore it, and had nearly completed the same, when said Phoebe commenced an action against the present plaintiff to enjoin the latter from constructing or maintaining said fence, and to obtain a judgment declaring Miles court to be a public street, etc. The action was subsequently tried, and judgment therein was rendered against said Phoebe, plaintiff therein, adjudging that Miles court was a private way, and not a public way. That was the case of Shattuck v. Gilfillan hereinafter referred to.

Thereafter, upon certain promises made by said Phoebe, the present plaintiff, Mrs. Gillfillan, removed the fence; but afterwards said Phoebe repudiated her promises, and, upon application to the board of supervisors of the city and county, and without the knowledge of plaintiff, procured said board to pass, and on May 26, 1890, the board did pass, an ordinance declaring said strip of land to be a public street, to be known as "Miles Street." After learning of this ordinance, plaintiff immediately reconstructed her fence; being the fence involved in this action.

The important finding is that Miles court is a private way, and not a public highway; and we do not see how it can be successfully attacked, either for want of evidence, or because it is "against law." A cul-de-sac, such as the one here in question, is not a thoroughfare, which is "a passage through"; "a passage from one street or opening to another" (Webster's Dictionary; *Woodyer v. Had-den*, 5 Taunt. 125, and *Bateman v. Bluck*, 14 Eng. Law & Equity Rep. 69). Whether such a cul-de-sac can be a public highway has been a mooted question. See the two English cases above cited, and the notes to *Sheafe v. People*, at page 51 of 29 Am. Rep. There are not many decisions on the subject. However, it may, perhaps, be correctly said that it is not a legal impossibility for a cul-de-sac, though not a thoroughfare, to be a public highway; but in such case a verdict or finding that such a choked-up and abortive passageway is a public highway should be supported by very clear and satisfactory evidence, and, certainly, a verdict that it is not a public highway should not be disturbed on appeal unless the evidence is almost overwhelmingly the other way. And the question is mainly one for the jury; as was said in *Bateman v. Bluck*, supra: "It is for the jury to consider whether, on the whole of the facts proved, they will presume a dedication to the public;" and that "it is always a strong observation to a jury that the way leads nowhere." In the case at bar there was testimony that from at least as early as 1854 "no one has used that street except by the license and permission of the owners of subdivisions in that fifty-vara lot, and the only persons who used it were tradesmen making deliveries and visitors to persons living on that fifty-vara"; that fences were almost continuously kept on and across the northern part of said strip; that these fences were for long periods constructed so as to completely inclose parts of it which were used as a yard, playground, and garden; and that this condition continued until 1890. What occurred afterwards is above related. We think, therefore, that the evidence fully sustains the findings.

It is contended that there should be a re-

versal because the court erroneously admitted the judgment roll in the case of *Shattuck v. Gillfillan*, above noticed, but we do not think so. The objection was made by all the defendants jointly, and the judgment was certainly admissible as against the defendant Mrs. Shattuck, and it is not to be supposed that the court considered it as a direct adjudication of the main issue as against *Fragley*, who was not a party to that suit. But we think that it was proper evidence against all the defendants to the point that plaintiff had never consented to the use of the said strip of land as a public highway.

Some other points were made by appellant, which will be briefly noticed: Under the complaint and findings plaintiff was entitled to the injunction prayed for. Whether or not she owned the fee to the center of the passageway is immaterial. She had valuable easements in the strip, leaving out of view her contingent right, with the consent of the other owners, to have absolute ownership of her proportionate part of it. If the facts found were true, the ordinance of the board of supervisors declaring the strip in question to be a public highway, without condemnation proceedings or compensation, was of no legal consequence. Whether or not it was proven that Mrs. Shattuck had expressly threatened to destroy the fence is immaterial. She contested the main issue in the case, averred that the strip in question was a public highway, and denied that it was a private way, and compelled the litigation and adjudication of the question. *Fragley* admitted that he intended to tear down the fence, and, if he had done so, the object of the other defendants would have been accomplished. The fact that in the conveyance made by Miles there were references, for description, to the strip of land here involved, was not by any means a conclusive act of dedication of it as a public highway. The memorandum in the deeds showed quite the contrary, and the fact that it does not happen to be in the deed to Mrs. Tay makes no difference as to his intention to dedicate a public highway. It would, in fact, be absurd to suppose that he intended that all of his grantors, except three, might close up the alley and divide it between them, but that it should still be a public highway as to the three—a physical impossibility. There are no other points which we deem it necessary to especially notice. The short strip in question, considered as a private way for the convenience of the few owners along it, naturally subverts its purpose. An attempt to consider it as a public highway can end only in declaring it a miscarriage.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(142 Cal. 59)

**BELL v. SOLOMONS. (S. F. 2,737.)**

(Supreme Court of California. Jan. 29, 1904.)

**RESULTING TRUSTS — ACTION TO ENFORCE — LIENS—RIGHT TO RELIEF—TENDER—COSTS—JUDGMENTS—PARTIES—CONCLUSIVENESS.**

1. Defendant purchased land at sheriff's sale in his own name, with money furnished to him for that purpose by P., except the sum of \$50, which defendant paid from his own funds. At the time of the purchase, P. was acting as plaintiff's financial agent; and a portion of the money furnished to defendant, though without his knowledge, belonged to plaintiff. It was agreed between defendant and P. that the property should be held in trust, and, if redeemed, the redemption money should be applied toward the payment of certain notes held by defendant against plaintiff and P., and, if there was no redemption, that defendant should dispose of the property, and apply the proceeds toward the payment of such notes. *Held*, in an action by plaintiff to enforce a resulting trust in the land, to which P. was not a party, since plaintiff was entitled to redeem the land on payment of defendant's lien, the court should have directed a conveyance on such condition, instead of dismissing the bill.

2. The fact that defendant did not know of plaintiff's interest in the money furnished by P. was not material.

3. Where plaintiff brought suit to enforce a resulting trust in land, and the proof showed her entitled to a conveyance only on payment of defendant's lien, which she had not tendered or offered to pay, she was not entitled to such relief, except on payment of costs.

4. Where funds furnished to defendant with which to purchase land at a sheriff's sale belonged partly to plaintiff and partly to P., and P. was not a party to an action by plaintiff against defendant to recover the land, the findings in such action were not binding on P. in any subsequent litigation affecting her interests in the property, or in the money so advanced.

Val. Dyke, J., dissenting.

In Banc. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Teresa Bell against Lucius L. Solomons. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, she appeals. Modified.

T. Z. Blakeman, for appellant. Edmund Tauszky and Wallace A. Wise, for respondent.

SHAW, J. This is an appeal by the plaintiff from a judgment, and from an order denying her motion for a new trial. We have examined the record with reference to the points urged in support of the appeal from the order denying her motion for a new trial, and have concluded that the evidence, though not satisfactory, is sufficient to support the findings, and that no error is presented thereby which is material to the relief to which we think the plaintiff is entitled, and therefore the points urged upon that appeal need not be further considered.

The complaint alleges, in substance, that one Mary E. Pleasant, as the agent of the plaintiff, intrusted the defendant with a large sum of money belonging to the plaintiff; that

with this money the defendant purchased a certain tract of land, described in the complaint, at sheriff's sale, in his own name, and took a certificate, and subsequently a sheriff's deed, therefor, conveying title to him; that he paid no money at the sheriff's sale, other than money so intrusted to him by the plaintiff, except the sum of \$50, which he advanced out of his own funds as part of the costs of the sale; that the defendant still holds the property in his own name, but in fact as trustee for the plaintiff; and that prior to the beginning of the action she tendered him the \$50 paid by him out of his own funds at the sheriff's sale, and demanded a conveyance of the property by him to her. The prayer is for a decree compelling the defendant to convey the property to the plaintiff upon the payment of the \$50 in question, and for such other and further relief as she may be entitled to in the premises. The answer denied many of the allegations of the complaint, and set up affirmatively that the defendant held the land as security for certain debts existing in his favor against the said M. E. Pleasant and the plaintiff, respectively. The court found that the defendant purchased the land with money furnished to him for that purpose by Mary E. Pleasant, except the sum of \$50, which he paid out of his own funds; that Mary E. Pleasant at the times in question was, to a considerable degree, managing and conducting the affairs of the plaintiff, and handling money belonging to her; that the sum so furnished amounted to \$11,000, of which \$5,100 belonged to the plaintiff, and \$5,900 to Mary E. Pleasant; that defendant did not know that any of the money belonged to plaintiff; that it was agreed between defendant and Mary E. Pleasant, at the time he purchased the property at the sheriff's sale, that he would hold the same in trust, and that, if a redemption was made, the redemption money should be applied toward the payment of certain notes held by him against the plaintiff and Mary E. Pleasant, respectively; if there was no redemption, then he should procure a deed for the property in his own name, and dispose of the same, and apply the proceeds toward the payment of the notes. Other facts and details were put in issue, and found by the court, but they are not material to the point to be decided. Upon the facts admitted and found, a decree was made, declaring the plaintiff not entitled to any relief against the defendant, but that the judgment should be without prejudice to any subsequent action by her to establish her rights in the premises after payment to the defendant of the several amounts to him due on the notes, and \$50 advanced by him out of his own funds.

We think the court should not thus summarily have dismissed the plaintiff from its forum without any relief. The defendant does not claim to hold the absolute title to

the property. All that he claims, and all that the court finds, in substance, is that he holds the land in trust to secure the payment of a promissory note executed to him by the plaintiff on March 26, 1896, for \$6,200, with interest at 7 per cent. per annum from maturity, and also as security for the payment of a balance of \$1,000 owing on a note executed by Mary E. Pleasant to defendant, made January 15, 1895, with 7 per cent. interest from that date, and for the further payment of \$50 advanced by him at the sheriff's sale, with power to sell the property for the payment of said sums. The defendant is not interested in any controversy which may arise between the plaintiff and Mary E. Pleasant with respect to the ownership of the money which he received for the purpose of purchasing the property, nor in their respective rights in the land as against each other in case of redemption by either. Nor does it concern him whether the one or the other effects the redemption. He is entitled to hold the property until all the money secured thereby is paid. Both the plaintiff and Mary E. Pleasant, under the facts found, have an equitable interest in the land, and would be entitled to redeem; but neither of them could do so without the defendant's consent, except upon payment of the full amount due from both. Plaintiff is, therefore, upon the facts as claimed by defendant, entitled to tender to him the full amount due, and receive from him a conveyance of the property. He did not see fit to ask in his answer to have Mary E. Pleasant made a party to the action, and it is not in accordance with our ideas of justice that the plaintiff should be denied any relief because of this failure on the part of the defendant. If Mary E. Pleasant does not choose to assert her rights to the property against the plaintiff, if any she have, that is her affair, and one with which the defendant had no concern. It appears from the record in this case that the property in question has been the subject of long and vexatious litigation. It is to the interest of the parties that the litigation should be ended. It is true that plaintiff asked for a greater measure of relief than she is entitled to, but the relief due her is of the same nature as that which she asked. Her interest in the land is, according to the facts found, a partial interest, instead of the entire interest, as alleged, and the sum due the defendant is much larger than the \$50 alleged. But nevertheless she has an interest which entitles her to redeem on payment of the amounts found due, and the defendant holds the legal title in trust, as alleged, although partly for her and partly for another. The relief is of the same character, and the rights of the parties are of the same nature, as alleged, though different in detail; and the court has power, under section 580, Code Civ. Proc., to award plaintiff such relief as the facts warrant.

The fact that defendant did not know of

plaintiff's interest in the money furnished him by Mary E. Pleasant is not material.

Inasmuch as the plaintiff never tendered or offered to pay the sums found due, or made any attempt to do so, or to ascertain the same, before suit, she should not be allowed the relief here indicated, except upon payment of the costs.

It should be added that the findings of the court in this action, that the money with which the defendant purchased the property in question was partly the money of Mary E. Pleasant, and partly the money of the plaintiff, and upon other matters in issue, will not be binding upon the plaintiff in any litigation between her and Mary E. Pleasant concerning their interests in the property, or in the money advanced for the purchase thereof.

The evidence in the case seems to cover all of the disputes between the parties before the court, and there is no necessity for a new trial. The judgment, however, should be modified in accordance with the views herein expressed.

It is therefore ordered that the cause be remanded, with directions to the court below to enter judgment declaring that the defendant holds the property as security for the sums set forth in the findings and conclusions of law, specifying particularly the amounts, with power to sell the same to pay the said sums of money, and that upon payment of the said sums, with interest due at the time of payment by the plaintiff to him, he shall execute a deed conveying to her the property, and that the defendant recover of plaintiff his costs, including his costs upon this appeal.

We concur: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

ANGELLOTTI, J. I concur in the judgment. To my mind, it is entirely immaterial whether all or any portion of plaintiff's money was used by Mrs. Pleasant in the payment of her indebtedness to the estate of Bell, by reason of which the foreclosure decree held by the estate as security for such indebtedness was transferred to Mrs. Gordon for Mrs. Pleasant in the year 1893, with the full knowledge of plaintiff. Findings of the court, fully sustained by the evidence, justify the conclusion that Mrs. Pleasant had the authority to authorize the taking by defendant at the sheriff's sale of the legal title as security for the payment of the notes of Mrs. Bell and herself, both of which were given for a valuable consideration. The court expressly found that it is not true "that any of said acts or proceedings were without the knowledge or consent of plaintiff," and the evidence shows very clearly that plaintiff had clothed Mrs. Pleasant with ostensible authority, at least, to do anything and everything she saw fit to do with relation to her money. The defendant apparently acted in

the highest good faith throughout. Plaintiff did not by this action seek a decree authorizing redemption. She claimed that defendant was a trustee, by reason of the source of the consideration. She failed utterly to establish to the satisfaction of the trial court the cause of action alleged. I am of the opinion that the judgment, under all the circumstances, was correct, and should be affirmed. The defendant has, however, never claimed to hold the property, except as security for the payment of the amounts due him from plaintiff and Mrs. Pleasant; and as this, with his costs, is secured to him by the modification of the judgment proposed, I concur in the judgment.

VAN DYKE, J. I dissent. I cannot agree with the majority opinion in this case. The findings are not supported by the evidence, and for that reason a new trial should be had, instead of merely remanding the cause, with directions to the court below to enter judgment upon the findings as therein stated. The defendant was employed by the plaintiff in October, 1892, as her attorney and counsel, to advise her and act for her in relation to all her interests in the estate of her deceased husband, Thomas Bell. The court finds that defendant had no knowledge as to the amount of money which the plaintiff had placed in the hands of Mary E. Pleasant, her colored servant, prior to the commencement of this action, and had no knowledge that any of plaintiff's money had been deposited in the account and to the credit of said Mary E. Pleasant with the Donohoe-Kelly Banking Company, or that said Mary E. Pleasant had in her possession money of the plaintiff for any purpose whatever, and that defendant did not know that any sum of money in the possession of Mary E. Pleasant was the property of the plaintiff, or that its possession had been intrusted to said Mary E. Pleasant by the plaintiff. The court also finds that said Mary E. Pleasant did not, on the 23d day of February, 1893, or at any other time, place in the hands of the defendant the sum of \$11,000 of plaintiff's money, or any of plaintiff's money above the sum of \$5,100, and that defendant did not receive said sum of \$11,000, knowing it, or any part of it, to be the money of the plaintiff, and did not pay any money for or on account of the purchase of said judgment and decree of foreclosure, or otherwise, knowing it to be plaintiff's money. These findings of the court in reference to the ownership of the money received by the defendant for and on account of the purchase of said judgment and decree of foreclosure, and the want of knowledge of said defendant as to said ownership, are not supported by the evidence. The Mary E. Pleasant spoken of was a colored woman who had resided with the plaintiff and her husband, Thomas Bell, for many years prior to the latter's death, and continued to reside with the plaintiff after Bell's death until

January, 1899. She was familiarly called in the Bell family "Mammy," and was regarded with indulgence by the family, and she talked of the family affairs of her mistress as "hers" and "ours"; and the defendant says, "I was employed by Mrs. Pleasant as the attorney of Mrs. Bell," and he states that, in the first interview that he had with the plaintiff, "Mrs. Bell said that Mrs. Pleasant had complete charge of her affairs; that she was boss; that she herself understood nothing about business, never had transacted business in her life, and never knew anything of her affairs; that Mrs. Pleasant had always had charge of them as far back as she could recollect; that she was the only mother that she had ever known, and that she had always been a mother to her, and that she was the same as her child, and that everything was entirely in her hands; that whatever she had was Mrs. Pleasant's, and that whatever Mrs. Pleasant had was hers, and that there never had been any distinction, and that there was no use of trying to talk business with her; that she would not know anything about it; didn't want to know anything about it; that Mr. Bell had always kept her like a child, and so had Mammy—she always called her 'Mammy,' except sometimes 'Mary Ellen'—and she did this in response to a statement that I had made." It appears from the evidence that all the moneys of plaintiff were intrusted to this colored woman as her servant, and were administered by her without any kind of supervision. Her position and powers seem to be of unusual and extreme trust and confidence, as stated by the plaintiff herself to the defendant. He says: "She said I never need consult her, under any circumstances, in regard to her business, but to consult nobody but Mrs. Pleasant. \* \* \* From that time on I never did." Accordingly all the moneys received by the plaintiff from the estate of her husband, and on policies on his life, amounting during a period of three months following November 8, 1892, to the sum of \$37,779.75, were paid to Mary Pleasant, and the greater part of them were deposited by said Mary Pleasant to her own account in the Donohoe-Kelly Bank, from which they were drawn on her check from time to time as required for the use of the plaintiff, or other purposes. Her deposits during this period, together with the balance of a small sum, were, as shown by her bank account, as follows:

1891. Feb. 28th (balance).....	\$ 38 00
1892. Nov. 28th .....	8,767 25
1892. Nov. 29th .....	5,000 00
1892. Dec. 9th .....	632 15
1893. Jan. 5th .....	800 00
1893. Jan. 6th .....	10,012 50
1893. Jan. 14th .....	6,000 00
1893. Jan. 23d .....	1,000 00
1893. Feb. 23d .....	5,900 00

Of these amounts, it is admitted that the items of November 28 and 29, 1892, and of January 6 and 14, 1893, were moneys of the

plaintiff; the last of said items (\$6,000) being for family allowance for the three months ending January 16, 1893. These include all the larger items, excepting the last one, in the account. Some of the other smaller items are unexplained. The \$1,000 item of January 23, 1893, is perhaps a portion of the family allowance of \$2,000, for the month ending February 16th, evidenced by receipt as follows:

"San Francisco, January 23, 1893. Received from Lucius L. Solomons Two Thousand & <sup>00</sup>/<sub>100</sub> Dollars in gold coin in payment of Mrs. Bell's allowance for month ending February 16, 1893. M. E. Pleasant."

In regard to the last item of \$5,900, it appears from the evidence that the defendant, February 18, 1893, received from the executors for the plaintiff the sum of \$6,000, being her allowance for three months in advance, which he paid to Mary Pleasant, and took from her receipts as follows:

"San Francisco, February 21, 1893. Received from Lucius L. Solomons One Thousand & <sup>00</sup>/<sub>100</sub> Dollars in gold coin, leaving \$5,000 still in his possession to be deposited in my bank. M. E. Pleasant."

"San Francisco, February 23, 1893. Received from Lucius L. Solomons Five Thousand & <sup>00</sup>/<sub>100</sub> Dollars, by check No. 690a, being balance of family allowance up to May 16, 1893. M. E. Pleasant."

At that date the balance to her credit is found to be \$13,522.21. Against this, on the next day, she gave to the defendant her check on the Donohoe-Kelly Bank for \$11,000, out of the proceeds of which the consideration for the assignment was paid. The amount so withdrawn, together with the sum of \$2,515.50 paid on account of the plaintiff for assessments on mining stock owned by her, entirely exhausted the balance in the bank to the credit of Mary Pleasant, except the amount of \$6.71. With regard to the alleged loan, there is no specific finding, but merely the general finding already referred to—that, of the money represented by the check, \$5,900 was the money of Mary Pleasant—but there is no evidence to justify the finding of the ownership on her part of said money. The court, in fact, found that the Clark-Twitchell mortgage was held by the executors of Bell as security for the sum of \$10,466. For this sum, demand was made by the executors January, 1893, and, the money not being paid, execution was issued on the judgment, and the property was noticed for sale February 24, 1893. Under these circumstances, it was proposed by Mary Pleasant to purchase the mortgaged property at the sale, but she told defendant there was not enough money in bank to make the purchase. It was proposed to the plaintiff to obtain from the executors an advance of plaintiff's allowance for three months, and plaintiff consented. She had come with Mary Pleasant to the defendant's office to sign the vouchers, and defendant says: "I don't re-

member all the conversation, but Mrs. Pleasant announced that she and Mrs. Bell had come down in answer to my summons, so that Mrs. Bell could sign the vouchers for the money—\$6,000—we were going to get in advance, and that Mrs. Bell was going to let her have the necessary amount to make up the full sum necessary to pay the executors for this assignment. \* \* \* I cannot remember the language that was used. Mrs. Pleasant said that she had spoken to Mrs. Bell in accordance with a previous conversation she had with me; that Mrs. Bell was willing to draw her family allowance in advance, and to let Mrs. Pleasant have the \$3,500, which, I believe, was the amount that she was short, in order to pay for the assignment of the judgment." From this, in connection with what was elsewhere said by the defendant, the meaning seems to be that the money was advanced to Mary Pleasant to supply the deficiency in her bank account. The remaining \$2,500 of the amount was to be used, as the witness explains, in payment of plaintiff's indebtedness for assessments on her mining stock. The defendant himself did not understand that the money was to be advanced as a loan. "I did not so conclude at the time. \* \* \* I suppose that is the legal effect of it. \* \* \* I conclude now it was a loan or gift. \* \* \* I did not pay any attention to the question of advance, or anything of that sort, because I had been told by Mrs. Bell that what was hers was Mrs. Pleasant's, and vice versa." Hence, what was said by Mary Pleasant, assuming that it was thoroughly understood and assented to by plaintiff, is quite consistent with the theory that the purchase was to be made on account of the plaintiff. This is not only the presumption naturally arising from the relations of the parties and the circumstances of the case, but such presumption is raised by law. In fact, any other construction of the conduct of the parties would not be consistent with the good faith required of one in Mary Pleasant's position, or with the presumptions raised by law with reference thereto. Code Civ. Proc. § 1963, subds. 4, 19, 20, 28; Civ. Code, §§ 2219, 2224, 2231, 2235. The evidence shows, and the court so found, that "at the time of the death of Thomas Bell said Mary E. Pleasant had on deposit to her credit in the said Donohoe-Kelly Bank a balance of \$33.08, only," and there is no evidence showing that afterwards she received, or had in her possession, or deposited in her bank, any money belonging to herself. It is clear, therefore, that the sum of \$5,900, as well as the rest of the money used in the purchase of the judgment, was the money of the plaintiff, and the property purchased also became hers. "When a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Civ. Code, § 853. And

the defendant, from his relations with the parties and the transactions, must have known this. "Means of knowledge, with the duty of using them, are deemed equivalent to knowledge itself." Pomeroy Eq. Jur. "If the party obtains knowledge or information of facts which are sufficient to put a prudent man upon inquiry, and which are of such a nature that the inquiry, if prosecuted with reasonable diligence, would certainly lead to the discovery of a conflicting claim, then the inference that he acquired the information constituting actual notice is necessary and absolute." Pomeroy, Eq. Jur. vol. 2, § 597; Lady Washington Con. Co. v. S. Wood, 113 Cal. 482, 45 Pac. 809; Duff v. Duff, 71 Cal. 513, 12 Pac. 570.

There is no apparent reason why this colored servant, without means, should seek to acquire the lot in question as her own property, and that either Bell, in his lifetime, or his widow, the plaintiff, should have loaned her the money for such purpose. But there is every reason why the Bells should desire the lot in question, as it adjoins the Bell homestead property, and all these circumstances must have been known to the defendant—in fact, he admitted he knew that property very well. Hence the unreasonableness, not to say absurdity, of the contention that the transaction was a bona fide purchase by Mary E. Pleasant—the colored servant of the Bell family—of the lot in question. She was in court as a witness on the part of the plaintiff. Still, the defendant did not call her to substantiate his theory that the purchase was for and on her account, as her own property.

From the foregoing, it is evident that the findings as to the ownership of the funds that were used in the purchase of the lot in the suit, and also as to the title to said lot, and as to the want of knowledge of the defendant as to the right and ownership of the plaintiff in the premises, are not supported by the evidence. But if, as found by the court, Mary E. Pleasant was a part owner with the plaintiff in the property in litigation, she should have been made a party to the action; but the defendant, although contending, with the finding of the court, that such is the case, raised no objection on that score, either by demurrer or answer, and therefore, as to him, such an objection was waived. Code Civ. Proc. § 434. "But when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplementary pleadings or a cross-complaint to be filed and summons thereon to be issued and served." Code Civ. Proc. § 380.

The defendant, it is to be noted, does not, in his affirmative defense, nor in his testimony, claim the absolute ownership of the land in controversy. But his claim is that he holds the land in pursuance of an agree-

ment with Mary E. Pleasant, whereby he is to dispose of it, and apply the proceeds to the payment of the balance due on the two notes for \$6,200 and \$3,000, respectively. But it was not shown on this trial that Mary E. Pleasant had authority, as agent of plaintiff or otherwise, to hypothecate the land as security for the notes in question, or either of them. If, however, on another trial, it should turn out that she did have such authority, and the notes were given under circumstances which would make the consideration questionable under the law relating to persons occupying confidential relations, it would, in such event, be necessary to ascertain the value of the services which enter into the consideration, and thus arrive at the amount justly due to defendant in the premises. The plaintiff, however, should not, in any event, be relegated to another suit to determine her right to the land as against the defendant or other parties, but, if necessary, such other parties should be brought in.

On Rehearing.

(Feb. 27, 1904.)

PER CURIAM. The petition for rehearing is denied. It is not intended by the opinion herein to decide that the plaintiff, if she redeems the property, is not entitled to claim a credit for any rents which the defendant Solomons may have received during the time he has been in possession thereof, as an offset to the amount due upon the redemption.

(142 Cal. 134)

HALE BROS. v. MILLIKEN et al.  
(S. F. 2,835.)

(Supreme Court of California. Feb. 5, 1904.)

ATTACHMENT—WRIT—COMPLAINT—CONFORMITY—AMENDMENT—CAUSE OF ACTION—DAMAGES—ASCERTAINMENT—MOTION TO DISCHARGE ATTACHMENT.

1. Under Code Civ. Proc. §§ 537, 538, providing that the plaintiff may have the property of the defendant attached in an action on a contract, express or implied, against a defendant not residing in this state, and in such case the affidavit need only state that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims), and that the defendant is a nonresident of the state, and that the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant, the complaint need only state a cause of action, or state such facts that it may be amended so as to state a cause of action. Therefore plaintiff in attachment, who had averred that he was damaged by defendant's failure to furnish iron as agreed for the construction of a building, thereby delaying its completion, and that the use, etc., of the building was worth a certain sum to plaintiff, might, pending a motion to discharge the attachment, amend by stating the use, etc., to be "reasonably" worth said sum, as the amendment did not change the cause of action.

2. Under Code Civ. Proc. § 540, requiring the writ of attachment to state the amount necessary to satisfy plaintiff's demand, "in conformity with the complaint," the writ may state an amount less than stated in the complaint.

3. Plaintiff in attachment alleged that defendant agreed to furnish iron at a stated time for the construction of a building by plaintiff on land leased by it, and that by defendant's failure to comply with the agreement the completion of the building was delayed three months, and plaintiff damaged in a certain sum for ground rent, and that the use, benefit, and occupation of said building were reasonably worth \$3,000 for each month. *Held*, that such damages arose out of the contract, and were sufficiently ascertainable to form the basis of attachment.

4. A general allegation in the complaint in an action in which attachment issued that plaintiff had performed on his part the contract, the breach of which by defendant formed the cause of action, did not show or imply that plaintiff intended to discharge the contract, or defendant's liability under it.

5. A motion to discharge an attachment cannot be given the effect of a demurrer to the complaint, so as to demand consideration of it as on demurrer.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Hale Bros. against Edward F. Milliken and another. From an order denying a motion to discharge a writ of attachment, defendants appeal. Affirmed.

P. F. Dunne, for appellants. Campbell, Metson & Campbell and J. H. Budd, for respondent.

CHIPMAN, C. Motion to discharge the writ of attachment issued in the cause. It appears from the complaint that plaintiff leased a piece of land in San Francisco, with a view to erecting a building thereon in which to conduct its business. In January, 1900, plaintiff began negotiations with defendants for the necessary structural steel required for the building, and defendants submitted two lists of prices—one for delivery in February, 1900, and the other for May delivery; the former calling for a higher price than the latter. That plaintiff informed defendant at this time that it had leased the lands on which the building was to be erected, and would have to pay the rental of \$1,400 per month from and after July 1st, and that it was necessary for plaintiff to complete and occupy the building by that time, but that it could not be then completed and occupied unless the steel should be all delivered during the month of February. That accordingly defendants agreed to make delivery in that month, and plaintiff, in consideration of the earlier delivery, agreed to pay the higher price, amounting to a difference of something over \$4,000. That plaintiff performed all the conditions of the contract on its part, but defendants did not deliver the steel until in April, by reason of which failure the construction of said building was delayed three months. The alleged damages grew out of this delay, and are made up of the following items: (1) Ground rent of \$1,400 per month for three

months. (2) Interest on money expended by plaintiff in the building, outside of the steel-work, during the period of the delay, amounting to \$396.32. (3) The value to plaintiff of the use of the building for three months, alleged to be \$3,000 per month, or \$9,000. (4) The amount expended by plaintiff in preparing the steel for use after its receipt, \$377.65; the alleged agreement being that it should be delivered in complete condition for being placed in the building. The total amount claimed in the complaint is \$13,973.97, for which judgment is prayed. The affidavit for attachment sets forth "that the defendants in said action are indebted to plaintiff in the sum of twelve thousand three hundred and seventy-eight and <sup>29</sup>/<sub>100</sub> dollars (\$12,378.29), over and above all legal set-offs and counter-claims, upon an express contract, to wit, an agreement to deliver, for a consideration, during the month of February, 1900, all steel-work to be used in the construction of a certain building to be erected by plaintiff in the city and county of San Francisco, state of California; that defendants both reside in the state of New York, and neither of them resides in the state of California; that this attachment is not sought, and this action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of defendants." The amount of indebtedness stated in the affidavit and in the writ is the same, and is \$1,595.68 less than the amount claimed in the complaint, and it is to satisfy this lesser amount stated in the affidavit that the writ directs the sheriff to attach the property of defendants. In the complaint it was stated "that the use, benefit, and occupation of said building is worth to plaintiff the sum of three thousand (\$3,000) dollars for each and every month." While the motion was pending, and before the decision thereon, plaintiff moved, and was permitted, without objection so far as appears, to strike out the above-quoted allegation, and insert in lieu thereof the words "that the use, benefit, and occupation of said building are reasonably worth the sum of three thousand (\$3,000) dollars for each and every month."

Section 537, Code Civ. Proc., provides that the plaintiff may have the property of the defendant attached " \* \* \* (2) in an action upon a contract, express or implied against a defendant not residing in this state"; and in such case the affidavit need only state " \* \* \* (2) that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter-claims) and that the defendant is a non-resident of the state; and (3) that the attachment is not sought, and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant." *Id.* § 538. As to the meaning of the words "for the direct payment of money," found in subdivision 1 of sections 537 and 538, we need not concern ourselves, for they relate only to defendants who are residents

¶ 5. See Attachment, vol. 5, Cent. Dig. § 853.



of the state. Upon a motion to dissolve an attachment against the property of nonresidents, it is only necessary that the complaint should show that the action is upon a contract, express or implied, and that the affidavit should state the facts pointed out in the above paragraphs of section 538. If the complaint sets forth a cause of action upon a contract, express or implied, it cannot be attacked for ambiguity or uncertainty, and not even whether it states a cause of action, if it appear therefrom that it can be so amended as to state a cause of action upon contract; in other words, the motion cannot be turned into a demurrer to the complaint. *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741. If we may inquire whether the complaint is capable of amendment in accordance with rules governing amendments, it would seem to follow that such amendment may be made pending the hearing on a motion to dissolve the attachment. So held, we think, in *Hathaway v. Davis*, 33 Cal. 161, and *Hammond v. Starr*, 79 Cal. 556, 21 Pac. 971, and results from what is said in *Kohler v. Agassiz*, supra. We may therefore consider the complaint as amended, for it in no sense changed the nature of the cause of action. There has been some discussion by the court whether it is necessary to allege in the affidavit that the contract sued upon is "express or implied," or whether it is not sufficient to allege that the indebtedness is "upon a contract"; this latter being the material thing to be alleged. *Simpson v. McCarty*, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37; *Flagg v. Dare*, 107 Cal. 482, 40 Pac. 804, citing *Bank of California v. Boyd*, 86 Cal. 388, 25 Pac. 20. The affidavit here alleges that the indebtedness "is upon an express contract," which, in any view of the statute, would seem to be sufficient.

It is objected by appellant that the writ is defective because the amount necessary to satisfy plaintiff's demand is not "stated in conformity with the complaint," as required by section 540, Code Civ. Proc. But it has been held that the writ may state an amount less than the demand in the complaint. *De Leonis v. Etchepare*, 120 Cal. 407, 52 Pac. 718; *Tibbet v. Tom Sue*, 122 Cal. 206, 54 Pac. 741.

The point most urged is whether such damages as are claimed here for breach of contract can be made the basis of an attachment. Appellant relies on *Dunn v. Mackey*, 80 Cal. 104, 22 Pac. 64, as holding the rule to be "that an attachment will not issue in an action for damages, unless the damages are certain and liquidated, or unless the contract itself furnished some standard by which the damages may be made certain." It is claimed that the two main items of damages are the ground rent of \$4,200, and "the use, benefit, and occupation" of the building, alleged to be of the value of \$3,000 per month, or \$9,000 for the three months, and that, unless this last item be included, the writ would

call for an amount very much in excess of the amount on which plaintiff was entitled to an attachment, and hence the writ must be dissolved. *Tibbet v. Tom Sue*, supra; *De Leonis v. Etchepare*, supra, and cases cited. Appellant argues the question from the standpoint of the unamended complaint, which alleged that the use of the building "was worth to plaintiff the sum of," etc. From that point of view, appellant's contention has force that is wanting when we consider the complaint as amended. The amendment made it no longer a question as to what profits plaintiff might have made while conducting its business in the new building for these three months, but the simpler question, what is the reasonable value of the use of the building for that period? As to the meaning of the terms "unliquidated damages," appellant cites *Wade on Attachments*, § 23. The author shows that there is no necessary objection that the damages are unliquidated; that the meaning intended to be conveyed by these terms is merely that the amount plaintiff is entitled to recover shall be ascertained or ascertainable by reference to the contract, and proof of what was done under it; that the standard by which defendant's liability is to be measured shall be furnished by the contract, and not left open to mere speculation or vague conjecture. So, where the action was for breach of contract to convey freight, and the damages claimed, in addition to the time, trouble, and delay, were principally for loss of probable profit on the cargo, this was held too indefinite and uncertain to enable the plaintiff to swear with any certainty to the amount due (*Warwick v. Chase*, 23 Md. 154); but where the implied contract was to tow certain logs safely, and a negligent breach, by which the logs were lost, though there was no agreement as to what should be the liquidated damages, the amount was readily ascertainable, and attachment would be maintained. *New Haven S. M. Co. v. Fowler*, 28 Conn. 103. Similarly, where the contract related to a farm worked "on shares" for one-half the crop, and the landlord took it all, held, attachment would lie in aid of the tenant. *Holloway v. Brinkley*, 42 Ga. 226. The author states: "What is required is that the damages may be readily ascertained, and the basis of computation employed by plaintiff should appear to be reasonable and definite." Citing *Wilson v. Louis Cook Mfg. Co.*, 88 N. C. 5; *Selheimer v. Elder*, 98 Pa. 154. The author cites *Lenox v. Howland*, 3 Caines, 323, *Lawton v. Kiel*, 51 Barb. 30, and *Lawton v. Rell*, 34 How. Prac. 465, to the effect that, where the action arose ex contractu, attachment would lie, whether the damages were liquidated or unliquidated. It is not necessary to go so far in sustaining the writ in the present case. The damages claimed arose out of the alleged contract. The value of the use and occupation of the building is as readily ascertainable as the ground rent would be,

had plaintiffs agreed to pay the reasonable rental value therefor, or as easily as the value of goods sold, where no price was fixed as to value. See *Wilson v. Wilson*, 8 Gill, 192, 50 Am. Dec. 685, cited by appellant.

The further point is made that it appears from the complaint that plaintiff has performed all its agreements, and this operates a satisfaction and discharge of the contract; that, the contract being discharged, there is no longer anything for the attachment to rest upon, and plaintiff cannot now recover for the delay in the delivery. *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515, *Gilson v. Brigham*, 43 Vt. 410, 5 Am. Rep. 289, *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702, and some other cases to the same effect, are cited in support of this contention. These are all cases affirming the doctrine that where the vendee has intentionally accepted personal property manufactured under an executory contract of sale, after full and fair opportunity of inspection, in the absence of fraud, he is estopped thereafter from claiming damages for any visible defects and imperfections, whether discovered or not, unless there is some warranty of quality on the part of the vendor manifestly intended to survive acceptance. No question arises here as to the unfitness or inferior quality of the steel when delivered, unless it may be as to the small item for damage for labor in preparing the steel for use. Whether the rule stated in the cases cited would apply where the goods delivered are in kind and quality according to contract, and the damages arise only from delay in delivery, under the circumstances of this case, as disclosed by the complaint, may be doubted, but it is not necessary to decide the question. There is nothing in the general allegation that plaintiff has performed on his part, etc., which necessarily shows, or from which it may be implied, that plaintiff intended to discharge the contract, or defendant's liability under it; nor, indeed, can we assume that defendants will, when they answer, make any such defense. As already stated, the writ cannot be turned into a demurrer to the complaint. *Kohler v. Agassiz*, supra.

The order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: *McFARLAND, J.*; *LORIGAN, J.*; *HENSHAW, J.*

(142 Cal. 265)

**MERKLEY v. TRAINOR.** (Sac. 1,184.)  
(Supreme Court of California. Feb. 18, 1904.)  
**ELECTIONS—CONTEST—STAMPING BALLOTS—DISTINGUISHING MARKS—STATEMENT OF CONTEST—ELECTION RETURNS AS EVIDENCE.**

1. Under Pol. Code, § 1197, providing, to vote for a person, "Stamp a cross in the square at

the right of the name," and section 1215, providing that no voter shall place any mark on his ballot by which it may be afterwards identified as the one voted by him, a cross stamped on a ballot in the square opposite the words, "No Nomination," appearing under the designation of certain offices on the ticket, makes it invalid, as bearing a distinguishing mark.

2. The invalidity of a ballot, stamped by the voter with a cross at a place not authorized by the statute, as bearing a distinguishing mark, is without regard to the number of other ballots so stamped.

3. Though contestant in his statement of contest attacks the returns from all the precincts, and as to certain precincts attempts to prove the integrity of the ballots therefrom, yet at any time before actual admission of the ballots he may abandon the contest as to those precincts, accept as true the denial of the answer that there is no error in the returns thereof, and introduce the official returns therefrom, which are *prima facie* correct.

4. Allegations of a statement of contest, consisting of separate allegations of misconduct in counting votes as to each of the 76 precincts, being relevant and material, it is not error to refuse to strike them out, though the subject-matter might be more concisely stated.

In Banc. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Election contest by A. A. Merkley against Charles E. Trainor. Judgment for contestant. Contestee appeals. Affirmed.

Hiram W. Johnson, A. M. Seymore, and D. L. Donnelly, for appellant. A. L. Shinn, Philip S. Driver, B. F. Driver, and F. A. Griffin, for respondent.

ANGELLOTTI, J. This is an election contest involving the right of contestee to the office of tax collector of the county of Sacramento, to which he was declared by the supervisors to have been elected at the general election held on November 4, 1902. The trial court found that at such election the contestant received 3,924 legal votes for said office, and that the contestee received only 3,726 legal votes, and judgment was entered annulling and canceling the certificate of election issued to contestee, and declaring that contestant was at the said election duly elected to said office. The contestee appeals from said judgment.

1. Upon the count the trial court refused to count for contestee a large number of ballots cast for him, upon each of which a cross had been stamped by the voter in the square opposite the words, "No Nomination," which words appeared under the designation of the office of county clerk and that of county surveyor on the Democratic ticket, there having been no candidate for either of those offices on that ticket. It is the settled law of this state that a ballot which has been so marked by the voter is illegal and void, and must be rejected, and this regardless of the number of such ballots that may be found in the ballot box of any precinct. See *Mad-dux v. Walthall* (Cal.) 74 Pac. 1026, and cases there cited. The trial court, therefore, did not err in refusing to count these ballots for contestee. No other objection is made on

¶ 1. See *Elections*, vol. 18, Cent. Dig. § 167.

this appeal as to the rulings of the court in the matter of the counting of ballots.

2. As to 6 of the 76 precincts of the county the official returns of the votes cast were admitted in evidence over the objection of contestee, and, the ballots therefrom not being counted by the court, such returns constituted the only evidence as to the vote cast for the parties in such precincts. The contestant had in his statement of grounds of contest alleged that in each of the precincts of the county the board of election thereof had counted for contestee ballots which should not have been so counted, and had failed to count for contestant ballots which should have been counted for him. This allegation was denied by contestee. Upon the trial, the ballots from the remaining precincts having been, at the instance of the contestant, counted by the court, the contestant, having made preliminary proof as to their integrity, offered in evidence the ballots from each of the six precincts; whereupon contestee objected to their introduction, and contestant withdrew the offer, stating that he did so in view of contestee's objection. Subsequently contestee announced that he withdrew the objection to the ballots. Contestant, however, offered the official returns from those precincts, and, the objection of contestee that the same did not constitute the best evidence having been overruled, the returns were received in evidence. Contestant having rested, contestee moved for a nonsuit, one of the grounds of such motion being that the contestant had failed to complete the count of all the ballots cast at the election, and that there was therefore nothing to disclose which candidate received the higher number of votes for the office. The rulings of the court admitting the returns and denying the motion for a nonsuit are assigned as error. We can see nothing whatever in the point thus made. It is, of course, true that the ballots themselves are the best evidence of their contents, and must prevail over the returns, where there is a conflict. The returns are, however, *prima facie* correct, and constitute the only proof of the result until they are impeached by evidence showing that they are incorrect. Either party may so impeach them, if the issues made by the pleadings are such as to warrant the proof, by the ballots showing a different result; but we know of no principle requiring either party to attack the official returns of any precinct in a case where he is satisfied to accept such returns as correct. Unless attacked and overcome by other evidence, such official returns stand and constitute legal evidence showing the true vote of the precinct. It can make no difference that the contestant in his statement attacked the returns from these precincts, or that on the trial he, to an extent apparently unsatisfactory to the contestee, as shown by his objection, proved the integrity of the ballots from the six precincts. He was

at liberty at any time prior to the actual admission of the ballots in evidence to accept as true the denial in the answer of the contestee to the effect that there was no error in the returns from those precincts, abandon his contest as to those precincts, and accept as correct the official returns therefrom.

3. The only remaining point made is as to the refusal of the court to strike out certain portions of contestant's statement of contest. The portions involved in the motion consist of a separate allegation of malconduct on the part of the board of election in the counting of votes as to each of the 76 precincts of the county. No notice was given of the motion. The allegations were relevant and material, and, while the subject-matter thereof might have been more conclusively stated, the refusal of the court to strike the same out could not constitute error warranting a reversal.

The judgment is affirmed.

We concur: McFARLAND, J.; SHAW, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

(142 Cal. 88)

KINCAID v. REID. (L. A. 1,382.)

(Supreme Court of California. Feb. 2, 1904.)

ELECTION—BALLOT—DISTINGUISHING MARK—ILLEGALITY.

1. In an election of a member of a board of supervisors, ballots with a cross stamped opposite the words "No Nomination" are illegal, and should be rejected; the cross being a distinguishing mark, though 101 ballots so stamped were cast in 13 precincts.

Department 1. Appeal from Superior Court, San Bernardino County; J. S. Noyes, Judge.

Election contest by William J. Kincaid against Edward W. Reid. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Henry W. Nisbet and Charles L. Allison, for appellant. H. M. Willis and E. R. Annable, for respondent.

VAN DYKE, J. Appellant and respondent were candidates, respectively, for the office of member of the board of supervisors of the Second Supervisorial District of San Bernardino county, at the election held November, 1902. The board of supervisors of said county met and canvassed the returns of said election in said county at the time and as required by law. It appeared from said returns comprising said supervisorial district that the appellant had received 650 votes for said office, while the respondent had received 700 votes therefor, and a certificate of election was thereupon issued by said board to the respondent. The supervisorial district comprised 13 voting precincts, and, in counting the votes thereof, the elec-

¶ 1. See Elections, vol. 18, Cent. Dig. § 167.

tion officers of each of said precincts rejected and refused to count certain ballots for the sole and only reason that the voting cross was stamped opposite the words "No Nomination." Such ballots so rejected aggregated a total of 101 votes, but, had such ballots been counted, they would have shown that the appellant had received a total of 751 votes for said office, and a higher number of votes than were received by the respondent or any other person for said office. It is conceded by the appellant, in the brief of his counsel, that the only question involved on this appeal is whether or not said rejected ballots were illegal ballots. "If they were, the judgment should stand; if not, then appellant's statement of contest states facts sufficient to entitle him to the relief therein prayed for, and the judgment should be reversed." It is contended by the appellant that, where two or more ballots are stamped as stated, it does not amount to a distinguishing mark, so as to identify the person who may have so voted. But this question may be considered as settled by the decisions of this court against the contention of the appellant. In the late case of *Maddux v. Walthall* (filed December last) 74 Pac. 1026, in the opinion of the court in banc it is said: "That such a mark is prohibited, and renders the ballot illegal and void, has been repeatedly decided." Citing *Farnham v. Boland*, 134 Cal. 151, 66 Pac. 200, 366; *Salcido v. Roberts*, 136 Cal. 670, 69 Pac. 431; *Patterson v. Hanley*, 136 Cal. 265, 68 Pac. 821; and *People ex rel. Bledsoe v. Campbell*, 138 Cal. 11, 70 Pac. 918.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(142 Cal. 90)

PEOPLE v. WALKER. (Cr. 956.)\*

(Supreme Court of California. Feb. 2, 1904.)

CRIMINAL LAW—EMBEZZLEMENT—INFORMATION—EVIDENCE—NEW TRIAL—APPEAL FROM JUDGMENT—QUESTIONS REVIEWABLE.

1. Under Pen. Code, § 1182, providing that in criminal cases a motion for a new trial must be made "before judgment," where such a motion was made and denied when the defendant was brought before the court, and judgment was then pronounced without arraignment, he is not authorized to make another motion for a new trial upon the vacation of the judgment and his subsequent arraignment.

2. On appeal from a judgment in a criminal case, a defendant, without having made a motion for a new trial, may, if he has a bill of exceptions as provided in Pen. Code, § 1171, rely on any of the grounds of exception mentioned in section 1170, including decisions in admitting or rejecting testimony.

3. On a prosecution for embezzlement of a specific sum belonging to a society, evidence of indebtedness of the defendant in a large sum on account with the society was inadmissible.

4. In an information for embezzlement, an averment that the money "had come into" the

hands of the defendant was sufficient on that subject.

Shaw, Henshaw, and Van Dyke, JJ., dissenting.

In Banc. Appeal from Superior Court, City and County of San Francisco; Wm. T. Wallace, Judge.

George Walker was convicted of embezzlement, and appeals. Reversed.

For former opinion, see 64 Pac. 133.

George D. Collins, for appellant. U. S. Webb, Atty. Gen., and Lewis F. Byington, Dist. Atty. (Osgood Putnam, of counsel), for the People.

McFARLAND, J. The defendant was charged with the crime of embezzlement by an information filed in the superior court on November 24, 1897, and on January 11, 1898, he was convicted of said crime. On February 6, 1898, he was brought into court for judgment, and, before judgment, duly made a motion for a new trial upon all the statutory grounds; and, after hearing the argument, the motion for a new trial was by the court on the said day denied. Thereafter, on said day, the court pronounced judgment, and sentenced him to imprisonment in the State Prison at Folsom for four years. No appeal was ever taken by defendant from the order denying the new trial, and no appeal was taken, or attempted to be taken, from the judgment for more than a year after it was pronounced. The judge before whom the case was tried, and who denied the motion for a new trial, afterwards went out of office, and the subsequent proceedings hereinafter mentioned were before his successor. On June 9, 1899, after the time for appeal from the judgment had expired, defendant made several motions in the superior court, and, among others, to be discharged from imprisonment on the ground that the information was insufficient because it did not state facts constituting a public offense, etc.; also to vacate the judgment because defendant had not been properly arraigned for judgment, and "to correct the judgment and minute entry, to wit, to make the said judgment and minute entry show the defendant was not arraigned for judgment, instead of showing, as it did, that he was so arraigned." On June 9, 1899, the superior court denied all said motions, and from the orders denying them defendant appealed to this court. Upon that appeal this court held that the orders, or at least some of them, were appealable as orders made after final judgment. It further held that the orders denying the motions to correct the minutes and vacate the judgment were erroneous, and reversed the same and remanded the cause, with directions to the superior court to arraign the defendant for judgment. *People v. Walker*, 132 Cal. 137, 64 Pac. 133. After the remittitur had gone down "the defendant was on the 3d day of April, 1901, arraigned for judgment accord-

\*Rehearing denied March 3, 1904.

ing to law." Thereupon defendant made a motion for a new trial upon nearly all the statutory grounds. The court refused to entertain said motion on the ground that the court was without power to entertain the second motion for a new trial, as a motion for new trial had already been made and denied, as hereinbefore stated, and afterwards, on August 26, 1901, pronounced judgment sentencing defendant to imprisonment in the State Prison at San Quentin for a term of one year. From this judgment the present appeal is taken by defendant; and, treating the refusal of the court to entertain his motion for a new trial as an order denying it, he also appeals, in form, from what he designates as "the order of said superior court denying and refusing said defendant's motion for a new trial."

The court was right in refusing to entertain the second motion for a new trial. The former motion had been properly made, and at the right time, to wit, "before judgment," as provided in section 1182 of the Penal Code. The motion had been duly heard and denied, and no appeal had been taken from the order denying it, and the right to move for a new trial had thus been exercised and exhausted. Of course, this is entirely different from the case where a motion for a new trial has been by the trial court granted, or on appeal an order denying the motion has been reversed and a new trial ordered, and a new trial has taken place. In that instance, after the granting of a new trial, the case stands as though no trial had ever been had, and upon the conclusion of the second trial a motion for a new trial would be as regularly in order as at the conclusion of the first trial. But with reference to, and in connection with, and for the purpose of reviewing any particular trial of a case, there can be only one motion for a new trial. For the purpose of a convenient form of judgment herein, we will treat the order of the court refusing to entertain said motion as an order denying the same; and the order appealed from is affirmed.

But in *People v. Keyser*, 53 Cal. 183, approved in *Walker v. Superior Court*, 135 Cal. 369, 67 Pac. 336, it was held that, on an appeal from the judgment, a defendant, without having made a motion for a new trial, may rely on any of the grounds of exception mentioned in section 1170 of the Penal Code, although in such case he must have a bill of exceptions, as provided in section 1171. Said section 1170 provides for exceptions to decisions of the court, among other things, "in admitting or rejecting testimony, or in deciding any question of law not a matter of discretion." And the bill of exceptions in this case shows a ruling in admitting testimony which we think was clearly erroneous and prejudicial. Appellant was charged with the specific offense of embezzling a particular sum of money, to wit, \$80.35, which was the amount of a certain check. This

money was charged to have been the property of a certain corporation, called the American Tract Society, of which appellant was averred to have been the agent and servant. At the trial the prosecution introduced as a witness one John Crawford, an expert accountant, and, over the objection of appellant, he was allowed to testify that he had examined the books of said corporation, and that these books showed that there was a general balance due from appellant to the corporation of about \$4,000, or, as counsel calls it, a "shortage." The admission of this testimony was erroneous. It has been held that in prosecutions for certain offenses—as, for instance, embezzlement and forgery—evidence may be introduced of other specific offenses of the same kind as the one charged, committed by the defendant at or about the time of the alleged commission of the offense for which he is being tried, as evidence to show guilty knowledge or intent. This rule, however, is an exception to the general principle that, on a trial for one offense, evidence that the defendant committed another offense is not admissible; and the application of the exception should be closely kept within proper bounds. In the case at bar the said testimony objected to was not of any other embezzlement; it was simply of a general indebtedness; and it appears affirmatively that the \$80.35 charged to have been embezzled was not included in the general balance which the book showed. The testimony was therefore clearly not within the exception above stated. And it certainly does not appear that the testimony was not prejudicial to appellant. On the other hand, it can hardly be imagined that it did not have such prejudicial effect upon the minds of the jury. For this reason, the judgment must be reversed.

Appellant contends that the information is fatally defective, but, assuming that this point can be raised on this appeal, the contention is not maintainable. The information sufficiently shows that the American Tract Society was an existing corporation, and the averment that the money charged to have been embezzled "had come into" the possession, control, etc., of appellant, was sufficient on that subject. *People v. Ward*, 134 Cal. 303, 66 Pac. 372. There are some other objections to the information, which, in our opinion, are not well grounded, and do not call for special notice.

The judgment appealed from is reversed, and the cause remanded for a new trial.

BEATTY, C. J. I concur in the judgment.

ANGELLOTTI, J. I concur in the reversal of the judgment upon the ground that the evidence as to the general shortage was improperly admitted, and also concur in what is said in the opinion of Mr. Justice McFARLAND in regard thereto. I am not, however, satisfied, owing to the peculiar lan-

guage of our statute (section 1201, Pen. Code), that the defendant did not have the right, when arraigned for judgment under the mandate of this court (*People v. Walker*, 132 Cal. 137, 143, 64 Pac. 133), to show, "for cause against the judgment, \* \* \* that he has good cause to offer \* \* \* for a new trial," notwithstanding the fact that he had, prior to the giving of the judgment that was subsequently vacated, made a motion for a new trial. The reversal of the judgment on the other ground renders this question immaterial, and I therefore refrain from expressing any opinion thereon.

LORIGAN, J. (concurring). I am not prepared to say that the defendant was not entitled to move for a new trial. I am satisfied, however, that it was prejudicial error to admit the testimony concerning the general balance shown by the books of the corporation to be due from the appellant. On that point, and on all others, save the matter of the right of defendant to move for a new trial, I fully agree with the reasoning and conclusion reached by Justice McFARLAND, and concur in the judgment of reversal.

SHAW, J. I dissent. The evidence of the shortage was material and competent evidence for the prosecution, irrespective of the question whether or not it was admissible to show other embezzlements. It will not be disputed that evidence which has a legal tendency to prove the crime charged is not rendered inadmissible by reason of the fact that it may also have a legal tendency to prove some other offense. *People v. Sanders*, 114 Cal. 230, 46 Pac. 153; *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269. The defendant was charged with the embezzlement of the sum of \$80.35. It was shown by the testimony of Elizabeth Stevens that he had received the money in question, and had appropriated it to his own use. It was necessary to show that this appropriation was with a fraudulent intent to deprive the owner thereof. It was also necessary to show that he had no right to appropriate it. Nothing is presumed in favor of the prosecution. Every reasonable doubt of the defendant's innocence must be excluded by the evidence, or his guilt is not established. It appeared that there was a general account between the defendant and the tract society. If upon this account money was at the time due to the defendant, he would have had the right to apply it in payment, pro tanto, upon the amount due, and thereupon to appropriate it to his own use. And if he failed to make the entry, the law would make the application for him, and set off one debt against the other. If, on the other hand, the balance of the account was against him, he would have no such right. The evidence was admissible to show, and it did show, the general fact, and nothing more,

that the balance was against him in the sum of \$4,000, and that consequently he had no right to appropriate the money to his own use. It may be that the prosecution could have rested this point upon the legal principle that an agent cannot lawfully appropriate to his own use the money of his principal. But where, as in this case, it appears that there is a running account between them, on which the defendant may have advanced more than was due from him, and thereby have acquired the right to reimburse himself from moneys subsequently received, it is clearly proper for the prosecution to rebut the inference of such a possibility by showing that the state of the account was such that there was no money due from the principal. It was also proper to show the state of the account at the time of the appropriation, and the amount of the balance against the defendant, in order to prove his motive and fraudulent intent in appropriating the money. If one receives money belonging to another, to whom he is already indebted in the sum of \$4,000, and thereupon appropriates such money to his own use, the inference that he intended to deprive the owner thereof is certainly much stronger than it would be if he did not owe the other person anything, or only a small sum. If there was an account between them on which the balance was very small, he might with some plausibility urge the claim that he was uncertain about the matter, and believed that there was a balance in his favor, and in that belief innocently used the money for his own benefit. But such a claim would receive but little credit if the account showed a large sum against him. The evidence therefore had a legal tendency to prove the intent, and to rebut any inference of an innocent intent, and was admissible for that purpose. "As a general rule, great latitude is allowed in the range of evidence when the question of fraud is involved." "It is hardly ever possible to prove fraud, except by a comprehensive and comparative view of the actions of the party to whom the fraud is imputed, and his relative position a reasonable time before, at, and a reasonable time after the time at which the act of fraud is alleged to have been committed." *Reeves v. State*, 95 Ala. 31, 11 South. 158; *Snodgrass v. Branch Bank*, 25 Ala. 175, 60 Am. Dec. 505. I do not understand that the majority of the court disagree with the above views.

I agree with the conclusion that there can be but one motion for a new trial between verdict and judgment. The application must be made before judgment. Pen. Code, § 1182. It may be made at any time after verdict and before judgment. When the defendant is finally arraigned for judgment, if he has already made his motion for new trial, and the same has been denied, he then has not the right to again present the questions decided upon the motion as reasons why judgment should not be pronounced. They

no longer constitute "legal cause," within the meaning of that phrase as used in Pen. Code, § 1200, and no longer constitute cause for new trial under subdivision 2 of section 1201, Pen. Code.

I am of the opinion that the judgment should be affirmed.

We concur. HENSHAW, J.; VAN DYKE, J.

(142 Cal. 77)

McMENOMY v. RUCH. (S. F. 2,982.)

(Supreme Court of California. Jan. 30, 1904.)

ELECTIONS—CONTEST—BALLOTS—ALTERATION  
—IDENTIFYING MARKS—SPOILIATION  
—BURDEN OF PROOF.

1. Where, in an election contest, before the ballots were opened, preliminary proof was made that they were in the same condition as when inclosed in the sealed packages by the election officers at the close of the count at the respective polling places, and the contestee at no time during the trial made any objection to the integrity of the ballots, he could not object for the first time on appeal that there was no sufficient proof that the objectionable identifying marks on certain of the ballots were placed there by the voters before they were handed to the election officers to be deposited in the box.

2. Under Pen. Code, § 41, making the act of changing a ballot at an election a felony, where, in an election contest, there was nothing in the condition of the sealed packages, or on the face of the ballots, to excite suspicion that they had been tampered with, the burden of proving an alteration or spoliation of the ballots was on the person who asserted it.

3. Where certain voters placed a cross in the square at the right of the words "No Nomination," on their ballots, which mark constituted an identifying mark, invalidating the ballot, the fact that a number of ballots were so marked, and by reason thereof such mark did not identify any one ballot as that cast by a particular voter, did not validate the ballots.

In Banc. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by J. H. McMenemy against A. S. Ruch. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. A. Dow, for appellant. A. L. Frick, M. C. Chapman, F. C. Clift, and Reed & Nusbaumer, for respondent.

SHAW, J. This is an election contest, brought under the provisions of the Code of Civil Procedure. Judgment was given in favor of the contestant, and from that judgment the contestee appeals. It was stipulated upon the trial that, if 60 of the ballots cast at the election in favor of the contestee had been counted for him by the court, the judgment should have been in his favor. The objection to these ballots was that each contained an identifying mark, consisting of a cross, placed by the voter in the square at the right of the words "No Nomination," on the face of the ballot.

One contention of the appellant is that there was no sufficient proof that the objectionable marks upon the ballots were placed there by the voters before they were handed

to the election officers to be deposited in the ballot box, and that, for aught that appears from the evidence, the marks may have been placed upon the ballots by some other person after they left the hands of the voters. It appears that preliminary proof was made to the effect that the ballots were in the same condition at the time they were offered in evidence as they were in at the time the ballots were inclosed in the sealed packages by the election officers at the close of the count on election day at the respective polling places. Thereupon, on motion of the contestant, the several packages were opened, and the votes for the contestant and contestee, respectively, as shown on the ballots, were counted. The contestee at no time during the trial made any objection concerning the integrity of the ballots, nor raised the point that he now seeks to make in this court. By thus failing to object to the ballots, he waived the objection now made to the sufficiency of the preliminary proof. The specification in the bill of exceptions that the evidence was insufficient to justify the finding that the crosses in question were placed on the ballots by the voter is not sustained by the record. The integrity of the ballots having been shown satisfactorily, the packages opened, and the ballots counted, they were in themselves presumptive evidence that all crosses stamped thereon were made by the voters. It is not claimed that there was anything in the condition of the sealed packages, or on the face of the ballots, that would cause a suspicion that they had been tampered with. It has been held that, as the election officers act under the sanction of an official oath, and as the act of changing a ballot is a felony (Pen. Code, § 41), the burden of proving any such spoliation of the ballots is on him who asserts it, and that, in the absence of evidence, it will be presumed that the officers obeyed the law, and preserved the ballots unaltered. *Budd v. Holden*, 28 Cal. 133.

The only other contention of the appellant is that the marks above mentioned upon the ballots, consisting of a cross opposite the words "No Nomination," are not sufficient to make the ballots invalid, because, he says, the number of them prevented the identification of any one ballot as the one cast by any particular voter, and therefore identification is impossible. This precise question was considered by this court in the case of *Madux v. Walthall* (decided Dec. 23, 1903) 74 Pac. 1026, holding that, notwithstanding the number of such ballots in any particular precinct, they still must be considered illegal ballots, under the provisions of the election law in force at the time this election was held. Upon the authority of that case, and for the reasons above given, the judgment of the court below is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; MCFARLAND, J.; LORIGAN, J.; HENSHAW, J.

¶ 2. See *Elections*, vol. 18, Cent. Dig. § 236.

(142 Cal. 116)

In re HEATON'S ESTATE. (S. F. 3,505.)

PALM v. HEATON.

(Supreme Court of California. Feb. 4, 1904.)

ADMINISTRATION OF DECEDENT'S ESTATE—GRANT OF GENERAL LETTERS—APPEAL—JURISDICTION OVER SPECIAL ADMINISTRATION—EFFECT.

1. Code Civ. Proc. § 1411, authorizes the appointment of a special administrator when there is delay in granting letters testamentary or of administration, from any cause, or when such letters are granted irregularly, etc. *Held*, that an appeal from the granting of such letters did not affect the court's jurisdiction over a special administration of the estate previously instituted, so as to invalidate an order made therein.

Department 2. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Proceedings for the administration of the estate of W. D. Heaton, deceased. From an order directing Charles W. Palm, as special administrator, to turn over and deliver assets to Jennie M. Heaton, Palm appeals. Affirmed.

See 73 Pac. 185.

Edwin A. Meserve and Henry C. McPike, for appellant. Frederick E. Whitney and Reed & Nusbaumer, for respondent.

LORIGAN, J. Special letters of administration in the above estate were granted to C. W. Palm, appellant, on August 30, 1900. A contest for general letters of administration being subsequently had between himself and respondent, Jennie M. Heaton, the court made an order therefor in favor of the latter, to whom they were issued May 3, 1902. From this order, said C. W. Palm appealed. 73 Pac. 186. In September, 1902, said Palm filed an account as special administrator. This account was not accompanied by any resignation as special administrator, or request that he be discharged as such. Thereafter, and on November 3, 1902, such account coming on regularly for settlement, an order was made settling the same, and directing that said Palm "turn over and deliver forthwith to Jennie M. Heaton, the special administratrix of said estate," all the property in his possession belonging to said estate. Said C. W. Palm likewise appealed from this order, and it is the merit of such appeal that we now have before us; and the only point is whether, by the appeal taken from the order granting general letters of administration to respondent, the court was deprived of jurisdiction to make the order complained of in the special administration of the estate. The appellant insists that it was: that the appeal from the order granting such general letters of administration deprived the court of jurisdiction to make any order in the estate either as to the general or special administration thereon. We cannot agree with this view. The appeal from the order granting general letters of administration to respondent had only the effect of staying all fur-

ther proceedings upon such order. The proceedings in the general administration of an estate and the proceedings in the separate administration thereof are separate and distinct proceedings. The object of a special administrator is to preserve the estate until general letters testamentary or of administration are granted, and the executor or administrator empowered to take charge of it. If there is any delay in obtaining such letters in the first instance, or if the authority of the executor or administrator is suspended by an appeal from the order granting general letters to either of them, it is the duty of the court to take charge of the estate by special administration. Code Civ. Proc. § 1411; Estate of Woods, 94 Cal. 567, 29 Pac. 1108. The policy and purpose of the law is to give the court complete and continuous jurisdiction over such estate by special administration as long as there is no person entitled to take charge of it under a grant of general letters, whether the delay is occasioned through litigation over the right to such letters, or from any other cause. Nor is the jurisdiction over such special administration at all affected by the fact that the appeal is taken from an order granting general letters. The effect of such an appeal is only to stay proceedings upon the order appealed from, and in the matter in which the order was made—the petition for general letters. The appeal cannot affect the special administration, or control the power of the court, under that administration, to make any order it deems necessary or proper. Such orders have no relation or connection with the proceedings in which the order appealed from is made. They are made in a separate, distinct proceeding, and are independent orders. That such an appeal does not affect the jurisdiction of the court over a special administration is apparent from the fact that the taking of the appeal itself, and the consequent delay which will naturally ensue therefrom in the ultimate determination of who is entitled to general letters, directly authorizes the court to appoint a special administrator to control the estate during such appeal. Code Civ. Proc. § 1411; Estate of Woods, supra. It would present a curious legal condition if the appeal could deprive the court of further jurisdiction where the special administration was pending when the appeal was taken, and confer jurisdiction to inaugurate such administration after it was taken. No possible reason could exist for the distinction. The evident purpose of the law is that such appeal shall have no effect whatever upon the proceedings in the special administration. The order in the present case was not made in the matter of the general administration, but was an order exclusively in the special administration, over which the court continued to have jurisdiction, notwithstanding the appeal from the proceeding for general administration.

No attack is made upon this order direct-



ing the appellant to turn over the property to respondent as special administrator, other than that, by reason of the appeal from the grant of general letters, the jurisdiction of the court in the special administration was suspended; and, as we are satisfied that the appeal had no such effect, the particular order appealed from herein is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(142 Cal. 71)

PEOPLE ex rel. MARTIN v. WORSWICK.  
(S. F. 3,472.)

(Supreme Court of California. Jan. 30, 1904.)

MUNICIPAL CORPORATIONS—OFFICERS—PROCEEDINGS TO OUST—COMPLAINT—SUFFICIENCY.

1. In a proceeding in the nature of quo warranto by the people, on relation of defendant's immediate predecessor in the office of mayor, to oust defendant and install relator therein, on the ground of his right to hold office until the legal election and qualification of his successor, the complaint averred that, at the election in question, 4,694 ballots were cast, and that, as to 2,857 of the persons who cast the ballots, the only register of voters used at the polls by and for the 2,857 voters was a copy of a register made in the county clerk's office prior to the 1st day of January of the year of the election. *Held*, that in the absence of averment of fraud, or that any legal voter was denied the right to vote, or that the 2,857 persons were not on a legal register, or that the rejection of these ballots would have changed the result, the complaint is demurrable, even though a voter not on the new register was disqualified.

In Banc. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by the people, on relation of Charles J. Martin, against George D. Worswick. From a judgment for defendant, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and E. E. Cothran, for appellant. John E. Richards (F. B. Brown, of counsel), for respondent.

McFARLAND, J. The defendant was elected to the office of mayor of the city of San Jose at a general city election held on the third Monday in May (May 19), 1902, and afterwards qualified and took possession of said office. The present proceeding is in the nature of quo warranto brought in the name of the people of the state, on relation of Charles J. Martin, to have it adjudicated that said election was illegal, null, and void; that said Worswick be ousted from his office; and that the relator, Martin, who was the immediate predecessor of defendant in the office, is entitled to said office upon the ground of his right to hold the same until the legal election and qualification of a successor. A demurrer to the complaint was

sustained in the court below, and, plaintiff declining to amend, judgment went for defendant. From this judgment, plaintiff appeals.

There are two counts in the complaint, but the second incorporates nearly all the material averments of fact contained in the first, and there is no substantial difference between the two counts. It is averred that at the said election of May 19, 1902, 4,694 ballots were cast, and that, as to 2,857 of the persons who cast said ballots, "the only great register or register of voters used by and for said 2,857 persons casting said ballots as aforesaid was made, arranged, and in the office of the county clerk of said Santa Clara county prior to the 1st day of January, 1902," and that the names of said 2,857 voters "were upon the great register of the said county of Santa Clara before the 1st day of January, 1902, and the said great register containing the said 2,857 names was by the county clerk of the said county of Santa Clara made and arranged for each election precinct of said city of San Jose during the year 1900, and before the 1st day of January, 1902." These are the main material averments of the complaint; and appellant contends that the charter of the city of San Jose provides that city elections shall be conducted under the general election laws of the state, and that under those laws, as they existed at the time of said city election, no one could legally vote at such election who had not been registered 40 days before such election on the new register which the clerk commenced to prepare on January 1, 1902. No fraud is alleged, and it is not averred that any legal voter was denied the right to vote, or that the 2,857 persons were not, independent of the question of registration, qualified voters, or were not on a legal register, or that the rejection of these ballots would have changed the result. Therefore, even if the correctness of appellant's theory that no one was a legal voter at such election who was not on the new register be conceded, still, the complaint is fatally defective, because it is not averred therein that the 2,857 voters were not on such new register. The averment is only that copies of the old register were used at the polls, instead of copies of the new register. But if the said persons were otherwise qualified voters, and had caused their names to be properly registered, they did not lose their votes because the officers of the election neglected to perform the ministerial and directory duty of having the proper register before them for examination. If there were any provisions in the registry laws which clearly contemplated the disfranchisement of a qualified voter for such neglect by the election board, it would be unconstitutional.

Under the foregoing facts, it is perhaps unnecessary to look further into the case; but, as counsel have elaborately discussed other questions, it is, no doubt, expected that

we shall notice them, and we will do so briefly:

We think that the register in existence in 1901 was the proper one to be used at the said city election, and that therefore the demurrer would have been properly sustained, even if the averments of the complaint had been sufficient to raise the questions discussed in the points and arguments of appellant. The municipality of the city of San Jose is organized under what is known as a "freeholders' charter." The charter was adopted in 1897, and the two provisions of it material here are section 1 of chapter 1 of article 2, and section 19 of article 13. Said section 1 is as follows: "The provisions of all general laws governing elections for state and county officers not inconsistent with the provisions of this charter are hereby adopted as the law governing city elections, and the mayor and common council, and the city clerk respectively, shall exercise the powers and perform the duties conferred or imposed by law on boards of supervisors and county clerks concerning elections." Said section 19 is as follows: "It shall be the duty of the board of supervisors of the county of Santa Clara, when great registers are being printed, to provide for the printing of a sufficient number of such registers, in addition to the number required otherwise by law, to be printed for the general and special municipal elections to be held or likely to be held in the city of San Jose, and it shall be the duty of the county clerk of said county to furnish such registers in sufficient number when so required by the mayor and common council of said city. The said county clerk, when so required, for the purpose of a general or special municipal election, shall furnish to said mayor and common council a supplemental list of all voters who have registered since the time of the last printed great register." Said section 1 was afterwards amended, but only as to special elections, all of the language used in the section as above quoted being retained; and, as the election here in question was a general city election, the amendment is of no consequence. At the time of the adoption of the charter the general laws governing the election of city and county officers provided for a great register in each county, and that the whole of said register should be printed, and, further, that there should be a new great register only when ordered by the board of supervisors. In 1899 there were amendments to the general laws governing the election of state and county officers, and by these amendments it was provided, among other things, that in every even-numbered year there should be a new register "of the names of the qualified electors of each of the counties of the state," and of consolidated cities and counties, and that only part of the same should be printed. It was also provided that the county clerk should commence the new register on the 1st day of January of each of such even

numbered years, and that it should "be in progress at all times except during the forty days immediately preceding any election, when it shall cease." It was also provided that the clerk must enter in the register "the names of the qualified electors of the county," that the name of no naturalized citizen shall be entered unless it appear that "he would be an elector of the county at the next succeeding election," and that the clerk must purge the register in the first week in September. Pol. Code, § 1094 et seq. It is apparent from these and other provisions of the Code that the register which is to be commenced on January 1st, and is not to be completed until September, is intended solely for the general election for state and county officers, which occurs in November. Indeed, the general laws of the state touching the registration of voters prior to state and county elections have no bearing on an election of city officers in a municipality governed by a freeholders' charter, except so far as they are adopted by the charter itself. It is conceded that the election here in question was a "municipal affair," and, of course, the city could have adopted any system of registry, or could have declined to have any at all. The reference in section 19 of the charter is clearly to the last completed register. The word "printed" was evidently used because at that time, and for many years previous thereto, the register was printed in accordance with the provisions of the law then existing, but the thing meant was clearly the register which at that time it was the custom to print. The register itself is the same as it was before the amendments of 1899. The difference is in the extent to which it must be printed, the law not providing only for the printing of indexes and copies of original affidavits of registration. But the thing designated by said section 19 is the last completed register, which is the same now as when the charter was adopted. We see no significance in the statement of counsel that on the 1st day of January the old register becomes *functus officio*. Of course, it cannot be used for the next state and county election, but it is still in existence, and is the register which, by the provisions of the charter, is to be used at the general city election. It is competent, and not uncommon, for a law—whether a statute, charter, or ordinance—to incorporate, as part of it, some provision of another law; and, while this form of legislating may sometimes lead to confusion, it is perfectly legitimate where the meaning is kept clear, and the operative words are sufficient to effect the intended purpose, and such, we think, is the case here with respect to the adoption of the charter of the last completed register.

It is also averred that 124 ballots were cast by voters whose names were registered after the commencement of the 40 days next preceding the city election; but there is very slight allusion to this averment in the briefs

of counsel, and it is sufficient to say on the point that there is no showing that these ballots, even if improperly received, could have changed the result.

It may be observed that the contentions of appellant rest entirely upon grounds that may be properly designated as purely technical. Registration is not a constitutional qualification of voters. It is simply a reasonable method of identifying qualified voters, and in this view only is a registration law itself constitutional. There is no pretense that any qualified voters were prevented from voting, or that the circumstances were such that there might have been an unascertainable number of such voters so prevented, or that any one voted who was not a constitutionally qualified elector, or that the will of a majority of the qualified voters was not expressed in the result of the election. Indeed, from all that appears in the case, the majority for the respondent may have been so overwhelming that it would have been folly to attempt to contest the election. Under the circumstances, the construction of the law contended for by appellant would seriously impair the practical working of the city government. Moreover, if applied to the city councilmen, who hold for a fixed term, and not until their successors are elected and qualified, it would entirely destroy the existence of the governing body of the municipality, and leave the city without any legislative department. No construction working such result should obtain, unless clearly imperative.

The judgment appealed from is affirmed.

We concur: SHAW, J., ANGELLOTTI, J., VAN DYKE, J., HENSHAW, J.

LORIGAN, J., deeming himself disqualified, did not participate in the decision.

(142 Cal. 124)

Ex parte RILEY. (Cr. 1,142.)

(Supreme Court of California. Feb. 4, 1904.)

CRIMINAL LAW—JUDGMENT—DISCHARGE—HABEAS CORPUS.

1. A judgment sentencing defendant to pay a fine of \$30, or to serve 15 days in the county jail, is discharged by payment of so much of the fine as is not satisfied by imprisonment at the rate of \$2 a day.

In Banc. George Riley was convicted of violating a county ordinance, and petitions for a writ of habeas corpus. Writ denied.

Renison & Felins, for petitioner.

PER CURIAM. Petition for a writ of habeas corpus. Petitioner was convicted of violating a county ordinance, and sentenced to pay a fine of \$30, or to serve 15 days in the county jail. He contends that the judgment is void because it does not admit of satisfaction by payment of so much of the

fine as is not satisfied by imprisonment at the rate of \$2 a day. It does not, in terms, provide that it may be so satisfied, but we think that is its effect. Whenever it is made to appear that petitioner has paid so much of his fine as remains unsatisfied by imprisonment at \$2 a day, he will be entitled to his discharge.

Petition denied.

(142 Cal. 79)

THOMAS v. NORTHWESTERN MUT. LIFE INS. CO. (S. F. 2,600.)

(Supreme Court of California. Feb. 1, 1904.)

INSURANCE—PREMIUMS—NONPAYMENT—CONDITION SUBSEQUENT—ACTIONS—IMPEACHING EVIDENCE—INSTRUCTIONS—PREJUDICIAL ERROR—APPEAL FROM JUDGMENT—DELAY—REVIEW OF EVIDENCE.

1. Where an appeal from a judgment is not taken within 60 days, the sufficiency of the evidence to justify the verdict cannot be reviewed.

2. Where an insurance policy recited the payment of the first semiannual premium, and provided for its continuance on the payment of semiannual premiums thereafter, the payment of such premiums was a condition subsequent, so that the burden was on defendant, in an action on the policy, to prove a forfeiture of the policy for nonpayment thereof.

3. Where, in an action on a policy, defendant's agent had testified that the policy lapsed for nonpayment of premium on July 25, 1898, and that he would not have accepted the premium after that date without a payment of interest on the premium and a certificate of health, and that the last conversation he had with insured with reference to the policy was probably two or three months after the policy lapsed, and that he had no conversation with him after December 10, 1898, etc., evidence that such witness, after insured's death, on February 7, 1899, stated to another that witness asked insured time after time to pay his premium, and that witness kept the policy up, hoping he would do it, but he did not, and that he spoke to him about paying the premium only a few days before his death, was admissible for the purpose of impeachment.

4. By the terms of a life insurance policy, and under the law, semiannual premiums were payable July 25th and January 25th of each year. Insured died on February 7, 1899, with two premiums in arrear; and, though there was some evidence of a waiver of the premium due July 25, 1898, there was no evidence of a waiver of the premium due January 25, 1899. Held, that an erroneous instruction that the policy took effect from the date of its delivery, so that, under the evidence, the semiannual premiums were payable on the 17th of August and February of each year, under which only the first premium would be in arrear at the time of insured's death, was prejudicial.

In Banc. Appeal from Superior Court, Santa Clara County; John Hunt, Judge.

Action by Emily C. Thomas against the Northwestern Mutual Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. On rehearing in banc. Reversed.

Geo. A. Rankin, for appellant. J. F. Riley and Crittenden Thornton, for respondent.

¶ 2. See Insurance, vol. 28, Cent. Dig. §§ 1654, 1657.

HENSHAW, J. A rehearing in this case was ordered. In the department opinion it was said:

"The defendant, said insurance company, issued a policy of insurance upon the life of Edward E. Thomas, for the benefit of his wife, Emily C. Thomas, the plaintiff herein. Said policy was dated at Milwaukee, Wisconsin, January 25, 1898. The premium thereon was \$90.00, payable semiannually, on the 25th days of January and July each year. The policy acknowledged the receipt of the first payment as of the date of the policy, and contained a promise to pay the beneficiary, in case 'of the death of said insured during the continuance of this policy,' the sum of \$10,000, in semiannual payments of \$500; or, upon request, it would commute the amount to be paid at the sum of \$7,067. The complaint alleged 'that during the continuance of said policy, to wit, on February 7, 1899, said insured died.' The answer set out the material parts of the policy, and denied that said insured died during its continuance, and alleged 'that neither the said insured, nor any person on his behalf, paid said second semiannual premium,' and that no premium, except the first, was ever paid. The jury returned a verdict for the plaintiff, upon which judgment was entered. Defendant's motion for a new trial was denied, but no appeal was taken from the order denying it. This appeal is taken from the judgment, but was not taken within sixty days, and therefore the sufficiency of the evidence to justify the verdict cannot be considered.

"Upon the trial the plaintiff put in evidence the policy of insurance, and proved the death of the insured, and that plaintiff is the beneficiary named therein, and rested. The defendant thereupon moved for a nonsuit, upon the ground that there was no evidence of the payment of any premium, except the first, which was shown by the policy itself. The question thus presented is, upon which party did the burden of proof rest—whether upon the plaintiff to prove the payment of the subsequent premiums, or upon the defendant to prove facts showing that the policy had lapsed and become void?

"That Thomas, the insured, took out a policy in the defendant corporation, dated January 25, 1898; that the policy recited the payment of the first semiannual premium on that day; and that it was in fact paid—is conceded. It follows that from the date of the policy until July 25, 1898, at the least, there was a valid and unquestioned insurance upon the life of Edward E. Thomas. Appellant contends, however, that two other semiannual premiums became due before the death of Thomas; that the life of the policy depended upon their payment; that the payment of the semiannual premiums were conditions precedent throwing the burden of proving subsequent payments upon the plaintiff. But in this counsel is in error. The policy being a valid and enforceable con-

tract when issued, the future payments were conditions subsequent, of which the insurance company might or might not avail itself to defeat a recovery. In *Thompson v. Insurance Co.*, 104 U. S. 252 [26 L. Ed. 765], it was held that the payment of the annual premium upon a policy of life insurance is a condition subsequent, the nonperformance of which may, or may not, according to circumstances, work a forfeiture of the policy. In *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 30 [23 L. Ed. 789], it is said: 'We agree with the court below that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year, as in fire policies. But the position is untenable.' In a very recent work (*Kerr on Insurance*, p. 779) it is said: 'It is incumbent upon an insurer who alleges a nonpayment of a premium upon a contract admitted to have been once in force to show the default whereby the obligation is claimed to have terminated. But if the fact of the making of a valid and binding contract be in issue, the burden of proving that fact, including the payment of the premium, or an agreement for credit, rests upon the insured.' See, also, *Tobin v. Western Mutual Aid Society*, 72 Iowa, 261, 33 N. W. 663; *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144 [93 Am. Dec. 73]. In *Kumle v. Grand Lodge A. O. U. W.*, 110 Cal. 204, 209 [42 Pac. 634], it was expressly held that 'the burden of establishing the failure to pay assessments is upon the defendant.' Citing *Tobin v. Western Mutual Aid Society*, supra; *Spencer v. Citizens' Mutual, etc., Ins. Co.*, 142 N. Y. 505 [37 N. E. 617]; *Black on Benefit & Insurance Societies*, § 454, and cases there cited. *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276 [4 Am. Rep. 675], cited by appellant, is broadly distinguished from the present. There Howell insured his life, for the benefit of his wife, 'for one year, in the sum of \$5,000.' The policy contained the following clause: 'And it is hereby agreed that this policy may be continued in force from time to time until the decease of the said George R. Howell, provided that the said assured shall duly pay to the said company annually on or before the 15th day of July in each and every year the sum of \$138.' In that case the insurance was for one year, with the privilege of renewal from year to year. There was no contract of insurance beyond the expiration of the year, and hence there could be neither forfeiture nor waiver.

"We think the court did not err in admitting the testimony of plaintiff's witnesses Mangrum and Hill. Smith, the general agent of

the defendant, and a witness in its behalf, had testified, in substance, that the policy lapsed on July 25, 1898; that it died on that day; that he would not have accepted the premium after that day unless Thomas produced a certificate of health, and paid interest on the premium; that he always urged him to be reinstated; that it would have been nonsense to ask him to pay without medical examination; that the last conversation he had with Thomas on this subject before his death was probably about two or three months after the policy lapsed; that he had no conversation with Thomas regarding his policy and its reinstatement after December 10, 1898. Thomas was found asphyxiated in his room on the morning of February 7, 1899, and the coroner took charge of the body, at which time Mr. Smith, Mr. Mangrum and Dr. Hill (the coroner) were present. Mr. Mangrum and Dr. Hill were each called by plaintiff in rebuttal, and were asked whether, upon the occasion above stated, Mr. Smith said, referring to E. E. Thomas, the insured: 'Poor fellow! I asked him, time after time, to pay his premium; and he would promise, and then not do it. I kept it going, or kept it up, hoping he would do it. Poor fellow! he did not. I spoke to him about paying his premium every time I saw him. I spoke to him about it the last time I saw him, only a few days ago.' Appellant's objection was overruled, and an exception taken, and is now urged as a ground of reversal. Both witnesses answered in the affirmative. The evident purpose of the plaintiff was to impeach defendant's witness Smith. The ground for the impeaching evidence was properly and fully laid. Appellant's only argument upon the question is a quotation from the case of *Crawford v. Transatlantic Fire Ins. Co.*, 125 Cal. 609, 612 [58 Pac. 177]. In that case 'the main question was whether all the acts of said agents, taken together, amounted to an execution of the policy, so that it became obligatory upon the defendant.' This was sought to be shown by the declarations of one of the agents after the delivery of the policy, and when he was not acting for the defendant in any business connected therewith. Such declarations were rightly held to be hearsay. They were offered to prove a fact, and not for the purpose of impeachment."

The conclusions thus reached are here reaffirmed.

The court adopted the theory, and instructed the jury, that the policy did not go into effect until the date of its delivery. This was, of course, erroneous. *Methvin v. Fidelity Mutual Life Ins. Co.*, 129 Cal. 251, 61 Pac. 1112. Not only were the instructions given erroneous in point of law, but they were injurious to the substantial rights of the appellant. By the terms of the policy, and under the law, the premiums were payable upon July 25th and January 25th of each year. The policy was delivered at such

a time as to make, under the instructions of the court, the semiannual premiums payable upon the 17th of August and the 17th of February of each year. Thomas died upon February 7, 1899. There were thus, under the law, properly construing the policy, two premiums due from him to the company—the one, of July 25, 1898; the other, of January 25, 1899. Under the instructions of the court, however, there was only one semiannual premium which had fallen due before Thomas' death—that accruing upon August 17, 1898—because he died before February 17, 1899, the date when, under the court's instructions, the second premium would have fallen due. There was no conversation shown between the deceased, Thomas, and the general agent, Smith, after January 25, 1899, upon which the claim could be sustained that the company had waived the payment of the premium falling due upon that date. The only conversations from which the jury could justly draw their finding of a waiver all took place before that date, and were addressed, therefore, only to a waiver of the premium which fell due upon July 25, 1898. If two premiums were due, as in law they were, then the evidence fails to show a waiver of the second. Upon the other hand, since, under the instruction of the court, but one premium had fallen due at the time of the death of the insured, the jury were relieved from the necessity of finding a waiver as to the second premium, and their attention was directed and limited solely to that question as applied to the premium falling due under the instructions upon August 17th.

In this discussion we have not been considering the sufficiency of the evidence to justify the verdict, for, as has been said, the appeal was not taken in time for that purpose. But the evidence in the record is properly before us for consideration in determining whether errors of law, duly excepted to, were committed by the court, and whether or not such errors, if committed, were prejudicial and injurious. As has been said, it appears not only that error was committed, but that such error was clearly prejudicial to the appellant.

For the foregoing reasons, the judgment appealed from is reversed, and the cause remanded.

We concur: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

McFARLAND, J. (concurring). I concur in the judgment of reversal, upon the ground last stated in the foregoing opinion; that is, because the instructions therein referred to were erroneous. But I am not prepared to say that in an action upon an ordinary life insurance policy, such as that here sued on, the plaintiff need not prove the payment of the premiums provided for in the contract, but can throw upon the insurance company the burden of the negative proof of nonpay-

ment. This would be in direct conflict with the general principle that a party suing on a contract must show his compliance with it, which was expressly declared applicable to an insurance policy in *Bergson v. The Builders' Ins. Co.*, 38 Cal. 541, 546. I do not think that *Kumle v. Grand Lodge A. O. U. W.*, 110 Cal. 204, 42 Pac. 634, which is mainly relied on, was intended to establish, or does declare, that a different rule applies to the contracts contained in ordinary insurance policies. It merely holds that when, in that case, the plaintiff had proved that at a certain time he had the status of "good standing" in a beneficial association, such status was presumed to continue to exist unless there was evidence to the contrary. And most of the other cases cited were cases arising out of benevolent or mutual benefit societies. But in the case at bar no such question of "status" or "good standing" arises.

BEATTY, C. J. (concurring). I concur in the judgment, but, as to the proposition that the burden rests upon the insurer to prove that accruing premiums have not been paid, I think an examination of the decided cases will show that it rests upon very slender authority, as it certainly is in conflict with a leading principle of the law of evidence. The two cases cited from the United States Supreme Court Reports (*Thompson v. Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765, and *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789) involved different questions. In the first case, the court, conceding that the payment of accruing premiums was a condition that might be waived, merely decided, on demurrer, that plaintiff's replication did not show a waiver. In the second, all that was decided was that the existence of a state of war between the respective countries of insured and insurer does not prevent a forfeiture for nonpayment of premiums, but does entitle the insured to recover the equitable value of his policy at the date when payment of accruing premiums is by the war rendered impossible. Of the cases cited in support of the statement quoted from *Kerr on Insurance*, *Tobin v. Western Mut. Aid Society*, 72 Iowa, 261, 33 N. W. 663, rests on the mere authority of *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144, 93 Am. Dec. 73; and that, without any discussion, simply cites *Gray v. Gardner*, 17 Mass. 188; *Kingsley v. New England Mut. Fire Ins. Co.*, 8 Cush. 393; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 426, 59 Am. Dec. 192; and *Orrell v. Hampden Fire Ins. Co.*, 13 Gray, 431. Turning to these cases, we find in the first that where a party gave his promissory note, conditioned to be void if a certain quantity of oil was brought into port between certain dates, the burden was held to be upon him to prove in defense of an action on the note that the oil had been brought in. In 8 Cush. it was held that, where a policy of fire insurance exempted the insurer from liability

ty for fire caused by cotton waste, the insurer sustained the burden of proving that the fire was caused by cotton waste. In 13 Gray, 431, the defense in a fire insurance case was alienation of the property by the insured. Held, that the insurer must prove it. No one would doubt the correctness of these decisions, which in every instance placed the burden of proof where it belongs; i. e., with the party affirming the fact. The decision in 12 Cush. does come a little nearer the point. That was a fire insurance case, in which the defense was misrepresentation of a material fact in the application for insurance—the fact represented being that there was a force pump of a certain character on the premises; and the decision, that the insurer must prove, that the representation was false. Other cases cited by *Kerr* are suits against mutual benefit societies, like our own case of *Kumle v. Grand Lodge*, 110 Cal. 204, 42 Pac. 634. The contract in these cases is to pay the benefit on condition that the member is in good standing at the time of his death. The good standing evidenced by his certificate of membership can only be forfeited by failure or refusal, after notice, to pay an assessment duly levied, and the proof of these facts is rightly imposed upon the party affirming them. I have seen no sufficient reason anywhere advanced for holding in this case, more than in other cases, that the party affirming a fact upon which his right depends is exempted from proving it when put in issue.

(143 Cal. 112)

LACKMANN, Sheriff, v. KEARNEY et al.  
(S. F. 2,823).\*

(Supreme Court of California. Feb. 4, 1904.)

ESTOPPEL—INCONSISTENT CLAIMS—FINDINGS—  
CONCLUSIONS OF LAW—ABSENCE  
OF SPECIFIC FINDING.

1. In a sheriff's interpleader action, a finding, corresponding with an allegation in the answer of one defendant, that the money claimed was collected from debtors of the execution defendant for his use, and a finding that the other defendant was estopped from pleading a previous assignment by the execution defendant to it, were mere conclusions of law, and did not negative the facts of the assignment alleged in such other defendant's answer, and proven without contradiction by the evidence.

2. Where a material allegation of the answer was proven without contradiction, defendant was entitled to a definite and direct finding with reference thereto.

3. In a sheriff's interpleader action, a finding that plaintiff in the execution was estopped from setting up a previous assignment to him was not a necessary inference from a further finding that the execution was levied by the sheriff under instructions from the execution plaintiff, where the execution defendant was not misled thereby, but successfully resisted the execution proceedings, and it was not shown that the execution plaintiff's action was the result of intentional deceit or negligence.

4. A party is not precluded from a claim because inconsistent with some claim previously asserted by him, but not successfully maintained.

\*Rehearing denied March 5, 1904.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Interpleader action by John Lackmann, Sheriff of the city and county of San Francisco, against Thomas H. Kearney and the Tayler & Spotswood Company. From a judgment for defendant Kearney, and from an order denying a new trial, defendant Tayler & Spotswood Company appeals. Reversed.

Hilton & McKinley, for appellant. Ben B. Haskell and Wm. J. Herrin, for appellee.

SMITH, C. The plaintiff is the sheriff of the city and county of San Francisco; and this suit was brought, under section 386 of the Code of Civil Procedure, to compel the defendants to interplead as to their several claims to moneys collected by him under execution on a judgment of date November 12, 1900, in favor of the last-named defendant against one Atwater. The execution was levied under instructions of plaintiff therein, the Tayler & Spotswood Company, upon certain accounts due to Atwater from various persons, and the sum of \$162.95 was collected. Afterwards, on December 26, 1900, while the money was still in the hands of plaintiff herein, the judgment was vacated by the court, and the execution quashed; and now demands are made upon the plaintiff for the money by both defendants. These facts are alleged in the complaint and expressly admitted in the answers, with regard to which it was stipulated, upon the entry of an order for interpleader, that they should be considered as complaints of interpleader, each as against the other, and that all the allegations of each should be deemed denied. The defendant Kearney claims the money as assignee of one Haskell, to whom, December 27, 1900, the claim of Atwater thereto was assigned; and it is alleged in his answer that the money was collected from debtors of Atwater, and for his use. The Tayler & Spotswood Company claims under a previous assignment to it by Atwater of the accounts in question, of date May 20, 1900. The findings of the court, so far as material, are: That all the allegations of the complaint and of the answer of the defendant Kearney are true, and "that the defendant Tayler & Spotswood Company is estopped from claiming that the money in controversy in this action belongs to it by virtue of any assignment of a date prior to the time of its collection by plaintiff, to wit, November 12, 1900." Judgment was accordingly entered in favor of defendant Kearney for the money in question and for costs. The appeal is by the Tayler & Spotswood Company from the judgment, and from an order denying their motion for a new trial.

One of the grounds of error urged by the appellant is that there is no finding as to the alleged assignment of the accounts in question by Atwater to the appellant of date

May 20, 1900, and, if the alleged fact is to be regarded as material, the ground is obviously well taken. Nor can the contention of the respondent be admitted that the allegation in question was in effect negated by the facts set up in the respondent's answer, and found by the court to be true—that is to say, that the money was collected from debtors of Atwater for his use—or by the finding that the appellant is estopped from pleading the assignment. These, in view of the pleadings and the evidence, must be regarded as findings merely of conclusions of law deduced by the court from the facts before it, and cannot be understood as negating the facts of the assignment alleged in the appellant's answer, and proven without contradiction by the evidence. Assuming the materiality of the fact alleged, the appellant was entitled to a definite and direct finding with reference thereto. We have to inquire, therefore, simply as to the materiality of the allegation. If this be determined in the affirmative, the judgment should be reversed.

The position of the respondent on this point is that the finding of estoppel is but a necessary inference from the fact—alleged in the complaint and in respondent's answer, and found to be true by the court—that, under the instructions of the appellant, the execution was levied by the plaintiff on the accounts in question as the property of Atwater. But the conclusion, we think, is illegitimate. Atwater was not in any way misled to his prejudice by the action of the appellant, but, on the contrary, resisted the proceedings, and succeeded in having the execution and judgment set aside. Nor does it appear that the conduct of the appellant was the result of intentional deceit or gross negligence. Code Civ. Proc. § 1962, subd. 3; *Boggs v. Merced Mining Co.*, 14 Cal. 367; *Barnhart v. Fulkerth*, 93 Cal. 497, 29 Pac. 50; *McCormick v. Ins. Co.*, 86 Cal. 260, 24 Pac. 1003; *Montgomery v. Keppel*, 75 Cal. 128, 19 Pac. 178, 7 Am. St. Rep. 125. Nor do we think a party is precluded from asserting a claim because inconsistent with some claim previously asserted by him, but not successfully maintained. 2 Am. & Eng. Enc. of Law, 446, 447; *McQueen's Appeal*, 104 Pa. 595, 49 Am. Rep. 592; *Wheelock v. Lee*, 74 N. Y. 498, 499.

It may be added, had the facts been found according to the evidence, as they should have been (Civ. Code, § 470), it would have appeared that the assignment to the appellant was for collection, and for application on the debts of the appellant and two other creditors; thus leaving an interest in Atwater which was subject to execution. If, in view of the rights of the other creditors secured, this mode of collection was improper, it may have been the result of an innocent mistake; and, at all events, the rights of the other creditors to participate in the fund would not have been affected. The appellant must therefore be regarded as representing

not only his own rights, but those of the other creditors interested.

We advise that the judgment and order appealed from be reversed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

(142 Cal. 119)

HOECK v. GREIF. - (S. F. 3,571.)\*

(Supreme Court of California. Feb. 4, 1904.)

HUSBAND AND WIFE—COMMUNITY PROPERTY — PRESUMPTION — AGREEMENTS BETWEEN SPOUSES—VALIDITY — ESTOPPEL — STIPULATION IN MORTGAGE.

1. Under Civ. Code, § 164, which, prior to the amendment of 1889, provided that property other than that of certain classes, acquired after marriage, is community property, where property was conveyed to a married woman prior to 1889 it is presumed that she took it as community property, but the presumption is not conclusive.

2. A husband who signs a mortgage in which it is stipulated that, in case of foreclosure, the surplus of the purchase money should be paid to his wife or her heirs or assigns, is estopped, both as against the mortgagee and as against his wife, from asserting that the mortgaged property was community property.

3. Where there are no creditors to be affected by an agreement made between husband and wife as to their property, they may, under the express provisions of Civ. Code, § 153, enter into any agreement or transaction with each other respecting their property which either might make if unmarried.

4. Evidence held sufficient to justify finding that property conveyed to a wife after her marriage was taken by her as separate property.

Commissioners' Decision. Department 2. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Jacob Hoeck against Bruno Greif. From a judgment for defendant, plaintiff appeals. Affirmed.

Aylett R. Cotton, for appellant. Alfred Fuhrman, for respondent.

HAYNES, C. Appellant, Jacob Hoeck, filed a petition in the superior court of Alameda county, under the provisions of section 1723 of the Code of Civil Procedure, praying that it be decreed that he is the owner in fee of a certain lot of land therein described, situated in the city of Alameda. His petition was denied, and he appeals from the judgment and from an order denying a new trial.

The facts alleged in his petition are, in substance, that Auguste Koppe and August Ferdinand Koppe were married in New York in March, 1865; that the lot in question was conveyed to said Auguste April 7, 1880; that she died May 26, 1885, her said husband surviving her; that at the time of its purchase

to the time of her death the legal title to said lot stood in her name, but that it was the community property of her and her said husband; that upon her death the property and title passed to her said husband in fee, and that by mesne conveyances from him the title in fee simple is now vested in petitioner, Jacob Hoeck, and prayed that it be so decreed. One Bruno Greif, the son of said Auguste Koppe, deceased, by a former husband, appeared, and, answering said petition, alleged his said relationship to said Auguste Koppe; that he was her only heir at law; denied that said land ever was community property of said Auguste and Ferdinand Koppe, and alleged that it was the sole, separate, and exclusive property of the said Auguste, and ever since her death has been and now is the property of her estate; that she died intestate at the city and county of San Francisco, and that a petition for letters of administration upon her estate is now on file in the superior court of said city and county. Upon the hearing the court found that said property never was the community property of said Auguste and Ferdinand Koppe, but was the separate property of said Auguste until her death, and that Bruno Greif is a son of said Auguste Koppe, deceased. As a conclusion of law the court found that Jacob Hoeck is entitled to no relief, and that Bruno Greif have judgment for his costs.

The record contains a bill of exceptions stating the evidence, and the only question is whether said real estate was community property or the separate property of the wife, to whom the conveyance was made. The conveyance to the wife, Auguste Koppe, was made on April 7, 1880, by Wenck and wife, as parties of the first part, "and Auguste Koppe, of the same place, party of the second part." The consideration named is \$800, paid "by said party of the second part." Upon proof that the grantee was, at the time of the conveyance, a married woman, the presumption arises that she took it as community property, the conveyance having been made prior to the amendment of section 164 of the Civil Code, made in 1889. But that presumption is not conclusive. As said by this court in Jackson and Thomas v. Torrence, 83 Cal. 529, 23 Pac. 697: "This is a mere rule of evidence, fixing the onus probandi in cases where the ownership is in litigation, and is entirely consistent with the doctrine that every purchaser has notice, her deed being of record, of the extent of her claim to the property, whatever it may turn out to be. \* \* \* And so, also, it will be her separate property if paid for by her husband with community funds, and by his direction, and for the purpose of a gift conveyed to her." There is no direct evidence as to the source from which the purchase money of said lot came, whether from the community funds or from the separate funds of one of the spouses. Nor do we think it

\*Rehearing denied March 5, 1904.



material to determine from which source Mrs. Koppe acquired it, since she might have obtained title as her separate property from either source, the question being simply whether there is evidence sufficient to overcome the presumption, arising from its acquisition after marriage, that it was community property.

As was said by Mr. Justice Rhodes in *Peck v. Brummagin*, 31 Cal. 441, 447, 89 Am. Dec. 195: "No good reason is perceived why the husband, while free from debts and liabilities, may not make a gift to his wife of either real or personal property which at the time was the common property of the husband and wife. The statute confers upon him the like absolute disposition of the community property as of his own separate estate," except that he cannot make a voluntary disposition of it with a view of defrauding or defeating the claims of the wife. Mr. Justice Field, in *Barker v. Coneman*, 13 Cal. 10, said: "The law allows, and even regards with favor, provision made by the husband, when in solvent circumstances, for wife and family, against the possible misfortune of a future day, by setting aside a portion of his property for their benefit;" and every consideration that can be urged in support of the provisions for the wife when made out of the husband's estate concur in sustaining the settlement when made from the common property. *Peck v. Brummagin*, supra. Both husband and wife were dead before this proceeding was commenced. The date of their removal from New York to San Francisco does not appear. The wife followed dressmaking in New York after her marriage, but for what length of time, and with what result, does not appear; nor is there any evidence that the husband was employed in New York, but there was some evidence that she gave him \$500 to go to Germany and "stay there," and that he returned. The lot here in question was conveyed to the wife April 7, 1880. There is no intimation in the deed that she was a married woman. It recited a consideration of \$800 paid by her. About two months after the conveyance both husband and wife joined in the execution of a note and mortgage upon said lot to secure the payment of their promissory note for \$500 to one Clark, and said mortgage contained the following clause: "That in case of foreclosure of the same rendering the overplus of the purchase money (if any there shall be) unto the said Auguste Koppe, one of the parties of this first part, her heirs, executors, administrators, or assigns." Richard Collins, called on behalf of Bruno Greif, testified that he knew Mr. and Mrs. Koppe in their lifetime; that Koppe was employed with him at the Golden Gate Woolen Mills in San Francisco in 1885; that in March, 1885, Koppe told him that he owned a piece of property on Filbert street, San Francisco, and that his wife owned the property located

in Alameda; that Mrs. Koppe was sick at that time, and Koppe said, "I am afraid that she wants to give that Alameda property to her son, Bruno Greif, but I want the benefit of it as long as I live;" that Bruno Greif did not help to keep it up, but that the property belonged to his wife; that shortly afterwards Koppe told the witness that Mrs. Koppe had made a will, wherein she left the Alameda property to him (Koppe) for life, but after his (Koppe's) death it should go to her son, Bruno, as her next heir; that shortly before the death of Mrs. Koppe he called at their residence on Nineteenth and Florida streets in San Francisco, and that Mrs. Koppe then said to witness in the presence of her husband, "I own the property in Alameda, and he [meaning her husband] owns the property on Filbert street," and that to this statement Koppe did not reply. Other witnesses were called, some of whom testified that Mrs. Koppe frequently spoke of the property in the presence of her husband as "hers," "her property," and the like, while others said she spoke of it as "home," "our home."

Appellant's claim of title is based upon a conveyance made by Mr. Koppe on March 22, 1901, to his sister, Louise Brzeski, of Berlin, Germany, in consideration of love and affection, and a conveyance by her to appellant, Hoeck, after Koppe's death (which occurred November 3, 1901), in consideration of \$10. Appellant's contention is that said lot was community property, and that the title passed by the deed of Mr. Koppe to his sister, under whom Hoeck claims. Koppe had no children, and Mrs. Koppe's only child is the respondent, Bruno Greif. Appellant's title rests wholly upon the presumption that Mrs. Koppe acquired the title as community property; but Mr. Koppe was estopped, not only as against the mortgagee, but also as against his wife, by his stipulation that in case of sale any surplus should be paid to Mrs. Koppe. Besides, the parties seemed to have agreed between themselves as to a division of the property as shown by the statements of each in the presence of the other. There were no creditors to be affected by any agreement made between them as to their several interests in the property acquired by either. Section 158 of the Civil Code provides: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried."

We think the evidence sufficient to justify the findings, and that the judgment and order appealed from should be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

(142 Cal. 125)

In re GORDON.

FARNHAM v. GORDON. (S. F. 3,577.)

(Supreme Court of California. Feb. 5, 1904.)

ADMINISTRATORS—COMPETENCY—RESIDENCE—EVIDENCE—PRESUMPTIONS—PLEADINGS—FINDINGS OUTSIDE ISSUES—BILL OF EXCEPTIONS—SETTLEMENT.

1. Evidence on petition to revoke letters of administration granted to the public administrator and for issuance of letters to petitioner, *held* insufficient to sustain a finding that petitioner was not a bona fide resident of the state.

2. Code Civ. Proc. § 1383, provides that, when letters of administration have been granted to another than one of certain classes of relatives of intestate, any one of them who is competent may obtain revocation of the letters and be entitled to the administration by presenting a petition praying therefor. Section 1385 provides that at the time appointed the court shall hear the allegations and proofs of the parties, and if the right of the applicant is established, and he is competent, letters must be granted to him, and those granted to the other revoked. Section 1369 provides that no person is competent to be an administrator who is (1) under the age of maturity, (2) not a bona fide resident of the state, (3) convicted of an infamous crime, (4) adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity. *Held* that, as to the elements of competency recited in subdivisions 3 and 4 of section 1369, there is a presumption in favor of petitioner, and the petition need make no allegation in respect thereto; so that, the existence of any such elements of competency not being put in issue by the answer setting up the disqualification, findings of lack of such elements of competency are outside the issue, and of no effect.

3. Under Code Civ. Proc. § 649, permitting the bill of exceptions to be settled when the decision is made, appellant, having then presented it, may use it, though the court does not actually settle it till a later date.

Department 2. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

In the matter of the estate of Eliza E. Gordon, deceased. The petition of Elisha F. Gordon to be appointed administrator in place of John Farnham, public administrator, was denied, and he appeals. *Reversed*.

W. C. Van Fleet, Philip I. Manson, and Edward F. Treadwell, for appellant. Carlton W. Greene, for respondent.

LORIGAN, J. On October 25, 1900, Eliza E. Gordon died intestate in the city and county of San Francisco, leaving an estate therein, and thereafter letters of administration thereon were duly granted to the respondent as public administrator. On December 2, 1902, the appellant, Elisha F. Gordon, filed a petition for revocation of the letters granted to respondent and for the issuance of letters of himself. His petition set forth that he was a brother of the deceased, a resident of the state of California, over the age of 21 years, and contained the usual statements of the death of deceased intestate leaving no husband, children, mother or father, the general character of the estate, the names of the

heirs at law, including himself, and the appointment of respondent. In response to a citation duly issued and served, the respondent filed an answer denying generally all the allegations of the petition save his own appointment, and, the matter coming on for hearing, the court, on January 26, 1903, made and filed findings in which it found all the allegations of the petition to be true, except that as to residence it expressly found "that said Elisha F. Gordon is not a bona fide resident of the state of California," and made an additional finding "that said Elisha F. Gordon is improvident, and lacking in capacity and understanding to such an extent that he is not competent to execute the office or trust as administrator of said estate." Thereupon an order was made denying the petition for revocation of the letters of respondent, as also the petition for the issuance of letters to appellant.

This appeal is taken from such orders on a bill of exceptions, and as the grounds for a reversal it is insisted, first, that there is no evidence to support these findings, but, on the contrary, the evidence shows that the appellant was competent in all respects to act as administrator; and, secondly, as to the finding that the appellant is improvident, and lacking in capacity and understanding to such an extent as not to be competent to execute the office of administrator, that there is no issue raised by the pleadings as to the competency of the petitioner in these particulars, and that the finding thereon is therefore outside of the issues.

As to the sufficiency of the evidence, we will address ourselves first to the finding that the appellant is not a bona fide resident of the state of California. Only two witnesses were sworn in the case—the appellant and his nephew. The testimony of the nephew was of no particular moment, and that of the appellant was directed solely to proof of his age, relationship to the deceased, and his residence. Upon these matters aside from residence the court found in his favor. Stating appellant's testimony generally as to residence, it appears therefrom: That he is 74 years of age, and had formerly lived in Massachusetts, from which state, having sold his property there, he came to California, and has resided here continuously for some six years past. That he came to this state with the intention of making it his permanent home and residence, and had done so. That upon his arrival here he lived in San Francisco about a year and a half, and afterwards went to Napa county, where (having been a soldier) he entered the Soldiers' Home at Yountville, and remained three months. That, having purchased a ranch in Napa county, he left the home, and remained on the ranch for a year and a half, when he sold it. He then returned to San Francisco, where he remained until he left to enter the Soldiers' Home at Santa Monica, where he has remained ever since. His departure to

enter said home was some six months prior to the time when his application for letters came on to be heard. That he went to the home to save expenses. The appellant further testified that he was a married man, that he had four children residing in Massachusetts, and that he had never registered as a voter in California. This is substantially all the evidence on the subject, and we think it unquestionably proved that appellant was a bona fide resident of the state. We are unable to perceive upon what theory it could be doubted. His intention to make this state his residence was formed, and his acts and conduct illustrative of its bona fides occurred, years before the death of his sister, so that it cannot be said he was fictitiously asserting his residence for purposes of administration. It was established long before any necessity for administration arose. Residence is to be determined from the intention of the party, and that intention is to be gathered mainly from his acts. All the acts of appellant were in harmony with the existence of such intention, and we are not pointed to any act, during the interval of years that appellant has been in the state, which is not consistent with his expressed intention. The only suggestions made in support of the finding are that the evidence shows that appellant is a married man, having four children in Massachusetts, his former family home, and hence it must be presumed that his home is where his wife and children are; that he has never registered as a voter in this state, and has, at different periods, been an inmate at the Soldiers' Home. The appellant had a right, as a soldier, to enter the home. The exercise of that right did not in the slightest degree militate against his claim that he was a bona fide resident of the state. His presence there was as much in accord with his claim of residence as if he had lived elsewhere in the state. He was none the less a resident by reason of being at the home. He could have acquired a residence solely by being an inmate there. *People v. Holden*, 28 Cal. 137; *Stewart v. Kyser*, 105 Cal. 463, 39 Pac. 19. Neither was it necessary, as an evidence of that intention, that he should have registered as a voter. That was a right which he might or might not exercise, as he saw fit. As to the matter of his family ties in Massachusetts, there is no direct evidence in the case that appellant has a wife living. In response to counsel's inquiry whether he was a married man he answered in the affirmative. Counsel for respondent argues from this that he had a wife living, and that it must be presumed that he intended to return to Massachusetts. There is, however, no direct proof upon the subject. The witness may have understood the inquiry to be whether he had been married, as counsel for appellant in his brief contends that he did understand it. Neither side in the examination seems to have pressed the matter any further than this general inquiry, or to have attached any im-

portance to ascertaining the actual fact. Under these circumstances, and against the positive evidence, all showing residence in good faith, we do not think this dubious inference is of any moment. Neither is there any evidence that there was any home in Massachusetts, occupied by the family, before appellant came to California; nor that his children occupied it with him; nor is there any testimony concerning the children, save that he has four. There is no presumption that these children are minors. In fact, it is a reasonable inference that children of a man of appellant's age are old enough to take care of themselves, and do not need the paternal presence to watch over them.

As to the contention that the evidence was insufficient to show that appellant was improvident, and lacking in capacity and understanding to such an extent as to render him incompetent to act as administrator, we do not purpose discussing it, because we are of the opinion that the other point made by appellant that no issue was raised under the pleadings as to the competency of the petitioner in these particulars, and that the finding of the court in that regard was outside the issues, is well taken. Section 1383 of the Code of Civil Procedure, under which this proceeding was instituted, reads: "When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother or sister of the intestate, any one of them who is competent, or any other competent person at the request of any one of them may obtain the revocation of the letters and be entitled to the administration by presenting to the court a petition praying for the revocation, and that letters of administration may be issued to him." Section 1385 of the same Code provides that: "At the time appointed \* \* \* the court must proceed to hear the allegations and proofs of the parties, and, if the right of the applicant is established and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked." By section 1369 thereof it is declared that: "No person is competent or entitled to serve as administrator or administratrix who is: (1) Under the age of maturity. (2) Not a bona fide resident of the state. (3) Convicted of an infamous crime. (4) Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity." It is insisted by counsel for respondent that under these sections it is necessary, in a petition for revocation of letters, that the petitioner duly allege not only that he is a bona fide resident of the state, and of the age of majority, but that he must also further specifically allege the nonexistence of all of the other matters which, under section 1369 of the statute, would otherwise disqualify him—to allege that he has not been convicted of an infamous crime, and is not a drunkard, improvident,

or wanting in understanding or integrity; that, if he is not required to make these specific allegations, he is, at least, required to make a general allegation of competency; and, in any event, that the burden of proving competency to the extent of showing the nonexistence of all these disqualifying conditions is cast upon the petitioner. We are of a contrary opinion. While it is true that a person is not entitled to letters of administration who comes within any of these disqualifications, yet we are satisfied that it is only necessary for a petitioner to allege in his petition the existence of those matters concerning which no presumption of law is indulged in his favor. Where such presumption exists, it is neither necessary to allege matters in aid of such presumption nor does the law cast upon the petitioner the burden of proving them. The only matters set out in the section as to incompetency, concerning which the law does not raise the presumption in favor of their nonexistence, is as to residence and age. There is no presumption that a person is a resident of the state, or of any particular age. As to these matters it is therefore necessary for the petitioner to allege and prove them. The presumptions, however, are in his favor against the existence of any of the other disqualifications. It would hardly serve any useful purpose to endeavor to sustain by authority the proposition that no presumption is indulged in that a person has been convicted of an infamous crime. All men are presumed innocent. Nor that a person is a drunkard, or improvident, or that he lacks understanding or integrity. Every person is presumed to be sane, and in the full possession of ordinary mental faculties. Likewise it is presumed that he possesses a fair character for truth, honesty, and integrity. The word "integrity," as used in section 1369, "means soundness of moral principle and character, as shown by a person's dealing with others, in the making and performance of contracts, in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for probity, honesty, and uprightness in business relations with others." In *re Bauquier*, 88 Cal. 307, 26 Pac. 178, 532. And by subdivision 4 of section 1963, Code Civ. Proc., it is presumed "that a person takes ordinary care of his own concerns." In all these matters the presumptions are with the petitioner, and it would be idle to require him to allege what the law does not require him to prove. In the case at bar, as in like cases generally, all that the petitioner was required to show, in order to establish his right to letters, was that he was an heir at law. On showing that he was a resident, and of the age of majority, in addition to his right, his competency was established. This was proof of all matters concerning which the law raises no presumption. As to the existence of any other matters which might disqualify him, the law raised a presumption in his

favor of their nonexistence. If the respondent desired to question his personal competency, it devolved upon him to make an issue as to any particular disqualification by setting up in his answer its existence. He was not entitled to be heard to overcome the presumption against its existence unless he did so. It is of no moment to say that the petitioner should have at least alleged general competency. Such an allegation would not have helped the respondent. The petition did allege generally that he was entitled to letters, which, if it were necessary, might be held to be about as effective as a general allegation of competency, which at best would be but a conclusion of law.

Assuming, however, that the petitioner had alleged general competency, as it is claimed he should have done, in addition to the special allegation of residence and age, this would not have affected the case. Under such general allegation the petitioner would only have been required to prove, as he did, his special allegation as to residence and majority. As to all the other matters specified in section 1369 he could have rested upon the presumption in his favor as to their nonexistence, casting the burden of proof as to such matters where the law contemplated it should be cast—upon the respondent. Neither do we perceive how the public administrator, or in fact any one who is not in a position to contest the absolute right of another to administration, can stand upon a different or better footing than a person contesting an original application for letters of administration. When such an application for general grant of letters is originally made, any person contesting such right on the ground of the incompetency of the applicant must allege his grounds of incompetency (section 1374, Code Civ. Proc.), and necessarily the burden of proof is upon him to establish his allegations in that regard. So, we think, under the general rule of law the duty was cast upon the respondent, if he wished to attack the competency of this petitioner, to allege and prove his incompetency for any of the reasons specified in said section 1369, the nonexistence of which the law presumed in his favor.

It will be observed that as to the disqualifications mentioned in the fourth subdivision of that section the section itself requires that there shall be a direct adjudication by the court as to those matters in the particular proceeding. As this adjudication can only properly be made upon proof of the existence of such disqualifications, and as the person resisting an application for letters upon such grounds has the burden of proving them cast upon him, so also is the necessity of alleging their existence required of him. It will be observed, also, that none of the sections above referred to provide that the petitioner for revocation of letters shall allege or prove his competency. They do not deal with the matter of pleading or proof.

They simply declare a right; that is, that one who otherwise would be entitled to letters may have letters which were previously issued revoked, if he is competent to act as administrator. To what extent a petitioner is required to plead or prove such competency is not mentioned, and we are of the opinion that the proper rule as to those matters is as we have above indicated.

As no issue was tendered in this proceeding as to improvidence, lack of capacity, or understanding of the petitioner, the finding of the court upon these matters was outside the issues, and unwarranted under the findings.

We are mindful of the point made by respondent that this court cannot consider the bill of exceptions accompanying the appeal from the order because it was not presented at a proper time. That order was entered on April 9, 1903. The bill of exceptions was settled and filed April 2, 1903, one week before the entry of the order. Respondent claims that it was settled too early; that under section 650 of the Code of Civil Procedure it could only be settled within 10 days after the entry of the order, not before. It is not necessary to determine whether this early settlement could render the bill ineffectual, because it seems to have been settled under section 649 of the Code of Civil Procedure, which permits the bill of exceptions to be settled at the time the decision is made, and the certificate of the judge recites that this bill was "duly presented within the time allowed by law." Under this certificate it must be assumed that the bill was presented at the time when the decision was made. This is at most all the law requires of counsel, and, if the court actually settled it at a date later than its presentation, this cannot affect the right of appellant to use the bill on an appeal from the order. Neither is there any merit in the point that the appeal was taken too late to permit the use of the bill in reviewing appellant's exception to the sufficiency of the evidence to support the findings. The appeal was taken within 60 days after the entry of the order.

There is nothing further in the case which requires consideration, and for the reasons given the order of the lower court is reversed, and the cause remanded.

We concur: BEATTY, C. J.; HENSHAW, J.

(142 Cal. 102)

WORTHINGTON v. BREED, Auditor, et al.  
(S. F. 2,723.)

(Supreme Court of California. Feb. 3, 1904.)  
MASTER AND SERVANT—HOURS OF LABOR—  
STATUTE—CONSTRUCTION.

1. Under St. 1899, p. 149, c. 114, making it unlawful for any contractor of public work to require workmen to labor more than eight hours in any calendar day, and providing for withholding the amount of penalties stipulated in such contract by the person whose duty it

shall be to pay the moneys due thereunder, no more than the amount of penalties stipulated in the contract may be withheld.

2. The city auditor is not authorized to withhold a warrant for public work performed for a city, pursuant to a contract therewith, under St. 1899, p. 149, c. 114, making it unlawful for any contractor of public work to require workmen to labor more than eight hours in any calendar day, and providing for withholding the amount of penalties stipulated in such contract by the person whose duty it shall be to pay the moneys thereunder.

Commissioners' Decision. Department 2. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by John Worthington against A. H. Breed, auditor of the city of Oakland, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. A. Dow (C. L. Dam, of counsel), for appellants. Fred L. Button, for respondent.

COOPER, C. Plaintiff filed his verified petition for a writ of mandate, alleging that he had performed services in replanking the city wharves of the city of Oakland in pursuance of a contract duly made by the city authorities, by the terms of which he was to receive the sum of \$3,799.99 for the said work. His claim was duly approved, and a resolution adopted by the board of public works of said city allowing the amount against the general fund of the city. Defendant Breed refused to draw a warrant upon the defendant treasurer for the amount. Defendants filed their answer to the petition, the court sustained plaintiff's demurrer to the answer, and judgment was ordered in favor of plaintiff, as prayed. This appeal is from the judgment, and presents the sole question as to the court's ruling on the demurrer.

The answer attempted to allege that the petitioner permitted 11 laborers and mechanics to work upon the said repairs more than eight hours per day for several days, and thus incurred penalties amounting to \$3,520, under an act limiting the hours of daily service of laborers, mechanics, and others upon public works of the state, or any political subdivision thereof, approved March 20, 1899 (St. 1899, p. 149, c. 114). The said act, by its terms, makes it unlawful for any contractor performing public work of any kind "to require or permit them [laborers] to labor more than eight hours in any one calendar day," with certain exceptions. It is provided in section 2 of the act that all contracts of the character named "shall contain a stipulation that no laborer, workman or mechanic in the employ of the contractor or any subcontractor \* \* \* shall be required or permitted to work more than eight hours in any one calendar day \* \* \* and each and every such contract shall stipulate a penalty for each violation of the stipulation directed by the act of ten dollars for each laborer, workman or mechanic, for each and every calendar day in which he shall labor more than eight hours; and the inspector or

other officer or person whose duty it shall be to see that the provisions of any such contract are complied with, shall report to the proper officer of such state or political subdivision thereof, all violations of the stipulation in this act provided for, in each and every such contract, and the amount of the penalties stipulated in any such contract shall be withheld by the officer or person whose duty it shall be to pay the moneys due under such contract." The answer does not show, nor attempt to show, that the contract in this case contained any stipulation whatever as to the time laborers or mechanics should be required to work, nor as to the penalties referred to in the act. It does not show, nor attempt to show, that any inspector or officer reported any violation of the act, or of any stipulation in the contract, or of the amount of any penalties stipulated in any contract. It is evident that the "amount of the penalties stipulated in the contract" is all that can be withheld. The answer must therefore have shown that there were penalties stipulated in the contract, in order to authorize any one to withhold any amount of the contract price. In such case the penalties can only be withheld by the officer or person whose duty it is to pay the money due under the contract. It is no part of the duty of the auditor to pay the moneys due under the contract. Neither has he any authority to refuse to draw his warrant. His duties are ministerial, and he must not anticipate the violation of the law by any one else. It is sufficient for him to do his duty under the statute, and not assume other responsibilities.

In what has been said, we do not intimate any opinion as to the constitutionality of the act, as it is not necessary. It is sufficient to say that, conceding the act to be valid, the defendants have not shown their right to withhold any amount due plaintiff under its provisions.

We advise that the judgment be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: HENSHAW, J.; MCFARLAND, J.; LORIGAN, J.

(142 Cal. 105)

PEOPLE v. NUNLEY. (Cr. 1,032.)

(Supreme Court of California. Feb. 3, 1904.)  
LARCENY OF HORSE—EVIDENCE—PLEADING  
AND PROOF—INSTRUCTIONS.

1. Under Pen. Code, § 956, declaring that, when an offense involving a private injury is described so as to identify the act, an erroneous allegation as to the injured person is immaterial, evidence that one partner had possession, control, and management of a horse belonging to the firm at the time of its alleged larceny will sustain an allegation of ownership in such partner.

2. In an instruction defining reasonable doubt, accused cannot complain of the omission of a

part relating to the burden of proof, where it is elsewhere fully given and repeated, and the essential feature of the definition was not destroyed or materially weakened.

3. Instructions in a criminal case fully covered by instructions given were properly refused.

4. Accused requested an instruction prefaced with the maxim that "it is better that many guilty persons should escape than one innocent person should suffer," and followed by a statement of the danger of "destroying liberty upon evidence that does not produce conviction," and that "where there is a reasonable doubt as to the defendant's guilt the jury have a right to consider that innocent men have been convicted." Held objectionable as argumentative and an invasion of the province of the jury.

5. In a prosecution for stealing a horse, defendant asked an instruction to disregard a robe, neck halter, and strap found in defendant's possession when arrested. Held, that it would have been an invasion of the province of the jury in deciding on the weight of the evidence concerning such articles, which had been admitted as relevant.

6. Where an officer, in testifying to stains on defendant's coat when arrested, said that they were "moss stains" made by green moss such as grows on the bark of trees, an objection that the witness, under Code Civ. Proc. § 1845, could testify "of those facts only which he knows of his own knowledge; that is, which are derived from his own perception," was untenable.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

E. J. Nunley was convicted of larceny of a horse, and he appeals. Affirmed.

A. V. Scanlan and J. F. Ramage, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., C. W. Norton, Dist. Atty., and Geo. F. McNoble, Asst. Dist. Atty., and J. J. Fitzgerald, for the People.

CHIPMAN, C. Defendant was convicted of the crime of grand larceny, the information alleging that he stole a horse, the property of J. Suey Lung.

1. The principal question arising on the appeal is that there is a fatal variance between the proofs and the information as to the ownership of the horse. There is evidence that the horse was one of several belonging to a company of Chinese known as Hop Fong Company; that this company was composed of some 20 men and some women, and was divided into 23 shares, of which J. Suey Lung owned 2, a mercantile company in San Francisco, known as Fook Wah, held 3 or 4 shares, others owned 1 share each, and one or more a half share; the company was a partnership, and leased and cultivated land for a garden; the alleged owner of the stolen horse, J. Suey Lung, was not only one of the partners, but was the "boss man" of the company, or its manager; he made the lease with the owner of the land; employed and discharged the men working there; bought the horses required, and sold horses not needed; bought all the supplies required by the company; sold the products of the gardens; deposited the company money in bank, sometimes in his own name and some-

¶ 1. See Larceny, vol. 32, Cent. Dig. § 122.

times in the company name, and likewise drew it out in his own or the company's name; he bought the stolen horse, as others, in his own name; he kept the horses in the barn of the company, and testified that no one had a right to take the horse in question out of the barn without his consent, and that he could sell the horse, but no one else—none of the other men on the ranch, the partners—could sell the horse, and that he alone could sell the horse. He also testified to the names of some of the partners or shareholders, but did not know the names of all, or who they were, and that he was the only manager. Section 956 of the Penal Code is as follows: "When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." In the case of *People v. Edwards*, 59 Cal. 359, the crime charged was the burglarious entry of "the store of one S. Loupe," and the proof was that the store belonged to S. Loupe, L. Loupe, and A. Haas, partners doing business therein. It was pointed out in the opinion that at common law the ownership of property upon which an offense was committed was an essential averment in an indictment, and must be proved as alleged, and that, if stolen goods were the property of partners or joint owners, the names of all the partners or joint owners had to be stated if known; if not known, then it was necessary to state it to be the property of one, naming him, and of others unknown. Attention is called to a statute passed by Parliament to relieve criminal proceedings from embarrassments arising under this rule, and our statute (section 956, supra) is cited. It was then said: "The defendants having been charged with having entered a store of a certain person with intent to commit larceny, the act or intent were both alleged with sufficient precision and certainty to constitute the offense, and to enable the defendants to understand the accusation made against them. \* \* \* It is true that the additional fact was elicited that other persons were interested with the party named in the information as owner of the store which had been broken into and entered; but if that fact had been recited in the information, it would not have identified the offense with any greater certainty, or enabled the defendants to understand more clearly the offense with which they were charged. It only showed that there was a partially erroneous description or allegation of ownership of the store in which they committed the offense; \* \* \* the variance was immaterial." *People v. Leong Quong et al.*, 60 Cal. 107, was larceny of a horse alleged to belong to one Sang Hop. At the trial the owner testified that Sang Hop was his business name, and his personal name

was Yup Chin. It was said: "The name of the owner of stolen property is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense." As to the purpose of section 956, supra, see *People v. Watson*, 72 Cal. 402, 14 Pac. 97. See, also, *People v. Bitancourt*, 74 Cal. 188, 15 Pac. 744, similar to *People v. Edwards*, supra. Also *People v. Anderson*, 80 Cal. 205, 22 Pac. 139. In *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082, the information charged that the stolen goods were the "personal property of the estate of George H. Tay and Oscar Backus, copartners \* \* \* under the firm name and style of Geo. H. Tay & Co." It appeared that one of the partners was dead, and that his estate was represented by executors, who were the legal owners of the property, and a fatal variance was claimed by reason of these facts. It was held, under section 956, that the description left no doubt as to the identity of the act charged to have been committed, and was sufficient. See this section applied to the fact in *People v. Smith*, 112 Cal. 333, 44 Pac. 663, and *People v. Prather*, 120 Cal. 660, 53 Pac. 259, where the statement above quoted from *People v. Leong Quong*, supra, is repeated approvingly. Where the crime of arson is charged, it has been held not necessary to prove who owned the buildings, if the defendant did not own them. *People v. Davis*, 135 Cal. 162, 67 Pac. 59. It was said in *State v. Nelson*, 11 Nev. 339: "The only thing essential in either case [larceny or robbery] seems to be an averment which shall show conclusively that the property does not belong to defendant. And courts have shown a disposition to allow any sort of interest in or right to the custody of the property to be sufficient proof of ownership." And the court expressed a willingness to go as far as any respectable precedent would warrant, "because the protection of innocence can never by any possibility require any strictness of proof on this point." In the case of *McMullin v. State* (Tex. Cr. App.) 59 S. W. 891, the alleged owner of the stolen sheep was one Prosser, who had exclusive control, care, and management of the ranch and hired hands, and the direction of matters generally upon the ranch whence the sheep were taken, but he was not the owner of the sheep. It was held that "this would constitute Prosser in law the owner in a prosecution for theft." See, also, *Ledbetter v. State*, 35 Tex. Cr. R. 195, 32 S. W. 903. So held, also, in South Dakota as to the foreman of a ranch "having full charge and control of the interests of the owner." *State v. Vincent* (S. D.) 91 N. W. 347. In this case the question was fully considered, and a statute identical with our section 976 was before the court. The Supreme Court of Arkansas held the rule to be that "when

the stolen property belongs to joint owners the ownership must be laid in all of them, unless it was, when stolen, in the control and management of one of them, in which case the ownership may be laid in him." (Syllabus.) *Scott v. State*, 42 Ark. 73. In *State v. Wilson*, 6 Or. 428, the court upheld an instruction couched in much the same terms as the instruction No. 38 given in the present case and to which defendant takes exception. The instruction here given was that if the jury found that the horse belonged to a partnership, and that others were part owners with J. Suey Lung, "and it also appears from the evidence that J. Suey Lung, by the consent and agreement of the other said partners or said part owners, had possession, control, and management of said horse at the time of the alleged larceny, \* \* \* such proof will sustain the allegation of ownership in said J. Suey Lung." Under section 956, Penal Code, and in view of the decisions referred to and the facts disclosed, we think the instruction correct.

2. Defendant asked for an instruction upon the doctrine of reasonable doubt in the language used in *Commonwealth v. Webster*, 5 Cush. 295, by Mr. Justice Shaw. The court gave a portion of the instruction, but omitted that part relating to the burden of proof, because elsewhere fully given and repeated. The essential feature of the definition was given, and it was not destroyed or materially weakened by separating from it and giving elsewhere the rule as to the burden of proof.

3. Defendant asked an instruction prefaced with the maxim that "it is better that many guilty persons should escape than one innocent person should suffer," and followed by a statement of the danger of "destroying liberty upon evidence that does not produce conviction" and that "where there is a reasonable doubt as to the defendant's guilt the jury have a right to consider that innocent men have been convicted." Citing *People v. Travers*, 88 Cal. 237, 26 Pac. 88. The instruction held erroneous in that case stated to the jury that, "while it is true that innocent persons have been convicted in the past, there is no proof in this case of any such fact, and you are not justified in considering such matters in determining the guilt or innocence of the defendant." The court said that this was error, because "the jury had the right to consider that innocent men have been convicted." There is a wide difference between instructing a jury as was done in the *Travers* Case, and in refusing to instruct at all on this point. In the one case the jury are forbidden to consider what it is their clear right to consider, while in the other the jury are left to consider, free from any instruction, what is within the knowledge and experience of most men. Full instructions upon the doctrine of reasonable doubt, the presumption of innocence the rule as to the preponderance of the evidence, and other

principles found in the record, left no necessity for such an instruction as the one referred to. Furthermore, in the *Travers* Case the court held the instruction objectionable as argumentative and an invasion of the province of the jury. The instruction here would be amenable to the same objection.

4. An instruction was asked by defendant, and refused, upon the rule as to the preponderance of the evidence, in the course of which the doctrine of reasonable doubt is repeated. The court elsewhere instructed fully on these points.

5. Defendant asked that the jury be instructed to entirely disregard and not consider the robe, neck halter, and strap found in the possession of defendant at the time of his arrest. There was some evidence concerning these articles, and if it did not appear, as claimed by defendant, that the articles were taken from the vicinity of the alleged crime or used in its commission, the evidence was before the jury, admitted as relevant, and it was for the jury to judge of its weight. Under the circumstances disclosed, the instruction would have been an invasion of the province of the jury. Const. art. 6, § 10.

6. Among the circumstances claimed by the prosecution to point to defendant's guilt were certain green stains upon defendant's coat when arrested. Witness Sheriff Sibley, the arresting officer, testified, against defendant's objection, that these stains were "moss stains" made by green moss such as grows on the bark of trees. It is not necessary to state all the facts which made this particular fact relevant, for the objection is not that the circumstance was immaterial, but that "the witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perception." Code Civ. Proc. § 1845. As we read the evidence, that is precisely what the witness testified to.

7. It is urged that the verdict is contrary to the law and the evidence, for the reason that the horse "was not proved to have been at any time in the possession of the appellant," citing *People v. Hurley*, 60 Cal. 75, 44 Am. Rep. 55. The case in hand was one where defendant's possession of the horse, if he had possession at all, was shown by circumstantial evidence. He was at no time seen in personal possession, but there were circumstances proven which tended to show that during the night of the theft he was leading the horse in a direction away from where it was taken. There was no evidence that any one saw defendant in actual possession. The horse had been turned loose, by the person who took it, before it was found. But there was some evidence, which the jury thought sufficient, directly connecting defendant with the crime. Appellant does not point out wherein there is any failure of evidence except as above quoted.



The only remaining point is an objection to an instruction involving the question of ownership of the horse, already disposed of.

The judgment and order should be affirmed.

We concur: SMITH, C.; HAYNES, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(142 Cal. 97)

In re BELL'S ESTATE. (S. F. 3,564.)\*

(Supreme Court of California. Feb. 3, 1904.)

EXECUTORS AND ADMINISTRATORS — FAMILY ALLOWANCE—ORDERS—EFFECT—TERMINATION—ACCOUNTING.

1. Where a temporary order granting a special administratrix a certain sum for family allowance was made before the return of the inventory, the fact that the order directed payment thereunder "until further order of the court" did not extend its force beyond the return of the inventory.

2. A family allowance was granted from the proceeds of an estate before the return of the inventory. The executors continued to make payments under such order after the return of the inventory, and the court impliedly recognized its continuance by subsequently modifying it, and thereafter granting ex parte orders authorizing the custodian of the funds of the estate to pay certain sums on account thereof, under the mistaken belief, which was shared by creditors of the estate, that it did not become ineffective on the return of such inventory. *Held*, that such facts did not prevent the creditors from contesting such payments on an application for the allowance of the accounts of the administratrix.

3. Where the account of an administratrix was allowed and became final from lapse of time and a failure to appeal, it was improper on a subsequent accounting to admit evidence tending to impeach the account as settled.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Judicial accounting of Teresa Bell as administratrix of the estate of Thomas Bell, deceased. From an order allowing the administratrix certain sums for family allowance, certain creditors of the estate appeal. Reversed.

Drown, Leicester & Drown, Garret W. McEnerney, Wm. B. Bosley, John S. Drum, Maurice V. Samuels, and James M. Allen, for appellants. T. Z. Blakeman and Brewton A. Hayne, for respondents.

HENSHAW, J. This is an appeal by certain creditors of the estate of Thomas Bell, deceased, from the order of court settling the final account of the special administratrix of the estate. The attack upon the account goes to the allowance to the special administratrix of payments amounting to over \$20,000 made to herself as widow of the deceased upon account of family allowance. Upon January 12, 1893, and before the return

of the inventory in the matter of the estate of the deceased, the court made its order directing that the sum of \$2,000 per month should be paid to Teresa Bell, the widow, from the date of the decedent's death "until further order of the court." The inventory was returned upon June 17, 1893. On October 14, 1893, the court made its second order "modifying" the order of 1893, and directing the executors to pay the widow on and after that date, "as family allowance, the sum of \$1,500 per month, instead of the monthly allowance of \$2,000 theretofore ordered to be paid." Later the court made its third order, providing that on and after the 16th day of May, 1898, the sum of \$100 a month should be paid for family allowance. All of the family allowance accruing under the two last orders has admittedly been paid. The sums in controversy are payments made under the first order, sums asserted to have accrued between the date of the return of the inventory and that of the order of 1893.

Upon the authority of *In re Lux's Estate*, 100 Cal. 593, 35 Pac. 341, and *Crew v. Pratt*, 119 Cal. 131, 51 Pac. 44, it is not to be disputed that the temporary order for family allowance made before the return of the inventory ceased to be operative when that return was made. The words "until the further order of this court," found in the order here under consideration, did not and could not have the effect to prolong the life of the order beyond the return of the inventory. *In re Lux's Estate*, 100 Cal. 598, 35 Pac. 342.

It is contended, however, that certain considerations take this case out of the operation of the rule above laid down. Those considerations are: First. That from the time of the return of the inventory until the date of the making of the second order the executors continued to make payments as and on account of family allowance; that those payments were duly entered in their accounts, and settled by the court; that they were based upon the belief of the executors and of the court that the preliminary order for family allowance was still in effect. Second. That in its order for family allowance made in 1893 the court in terms "modified" the order of 1893, and directed the payment of \$1,500 a month, "instead of the monthly allowance of \$2,000 theretofore ordered to be paid," and that this was sufficient recognition of the continued existence of the previous order, and was sufficient authority in and of itself to authorize the payments here contested. And, third, that certain ex parte orders of the court in the nature of drafts upon the California Safe Deposit & Trust Company (the custodian of the funds of the estate), authorizing the depositary to pay certain sums to Teresa Bell, the widow, "for and on account of family allowance," were sufficient to justify and validate the payments here in controversy.

As to the first of these considerations, it need but be said that the payments so made

\*Rehearing denied March 4, 1904.

by the executors, charged in their accounts, and allowed by the court, are not, upon this appeal, open to attack by the creditors; nor, indeed, are they attacked. But the fact that both the executors and the court mistakenly believed that there was an order for family allowance under which these payments were properly made did not and could not operate to revive the order of 1893, which had become a nullity upon the return of the inventory. The creditors are not complaining of the payments made in the past and charged and settled in the executor's account, since the validity of those payments by lapse of time and failure to appeal is no longer open to question, but they may be heard on appeal as to payments subsequently made, and now for the first time presented to the court in probate for its consideration.

The same may be said as to the second proposition—the recognition in the order of 1895 of the continued existence of a family allowance under the order of 1893. The order of 1895 is an order independent of the order of 1893 (*Estate of Bell*, 131 Cal. 1, 63 Pac. 81, 668), and the fact that the court in probate apparently mistook the law, and believed that the order of 1893 continued in force until 1895, could not affect the legal situation.

As to the third proposition, the *ex parte* orders of the court authorizing the payment of certain sums of money to the widow "upon account of family allowance" are based upon the same mistaken belief entertained by the court that an unpaid family allowance had accrued under the order of 1893. These orders, as has been said, were *ex parte* orders; but, if the payments contemplated by them were illegal or improper, such payments were not validated because made under such orders. The probate court has no power to relieve an executor or administrator from liability for the funds of the estate by making *ex parte* orders directing the disposition of such funds. At the proper time, upon the settlement of the account of the executor, the legality of his disposition of every dollar of the moneys he has expended is open to attack by the parties in interest. Such orders would show the good faith of the executor in making the payments, if that were called in question, but the orders could not even be regarded as evidence tending to establish the validity and legality of the payment. It is concluded, therefore, as to each and all of the propositions advanced, that they are not sufficient to justify and uphold the disputed items herein.

The fact that certain creditors of the estate themselves entertain the mistaken belief that the order of 1893 continued in operation cannot operate to estop the contesting creditors who here appeal.

One other matter demands consideration. In the third annual account, as settled, a certain amount was allowed upon account of

family allowance. This allowance, and the whole account, has become final from lapse of time and failure to appeal. Upon the hearing of the present account respondent was permitted to introduce vouchers to show that of the amount so allowed some \$12,000 was expended, not, in fact, for family allowance, but to pay certain claims and assessments against properties of the estate; and the effect contended for by respondent is, upon the theory of the continued validity of the order of 1893, that there is some \$12,000 more due her upon account of unpaid family allowance under that order. The determination heretofore reached and expressed that the order of 1893 ceased to be operative upon the return of the inventory disposes of all questions of unpaid amounts arising under that order, but it is proper to add that, the items having been allowed and settled as and for a family allowance, and the account itself having become at the expiration of the time for appeal a final adjustment and adjudication of the matters between the parties in interest, it was improper to admit any evidence tending to impeach the verity of the account as settled.

The order appealed from is reversed, with directions to the trial court to settle the final account of the special administratrix by disallowing any and all items for payment of family allowance under the order of 1893.

We concur: McFARLAND, J.; LORIGAN, J.

(30 Mont. 60)

### VAN HORN v. HOLT et al.

(Supreme Court of Montana. March 3, 1904.)

ACTION ON BOND—SUFFICIENCY OF COMPLAINT  
—WAIVER OF OBJECTION.

1. Objection to a complaint, raised by demurrer, that it does not state a cause of action, is not waived by pleading over.

2. The complaint on an injunction bond, conditioned for payment of damages suffered by reason of the injunction, if it be decided there was no right thereto, must allege a failure to pay.

Appeal from District Court, Custer County; C. H. Lond, Judge.

Action by C. W. Van Horn against John M. Holt and another. Judgment for plaintiff. Defendants appeal. Reversed.

Geo. W. Myers, for appellants. T. J. Porter, for respondent.

**HOLLOWAY, J.** This is an action on an injunction bond. E. C. Howard commenced an action in the district court against the respondent Van Horn, the only object of which was to secure an injunction restraining Van Horn from the commission of certain acts detailed in the complaint in that action. Howard executed an injunction bond in the sum of \$300, conditioned as required by law, with the appellants here as sureties. An in-

¶ 1. See Pleading, vol. 39, Cent. Dig. § 1404.

junction was issued and served. Van Horn appeared in the action, filed an answer denying the allegations of the complaint, and afterwards moved the court to dissolve the injunction. This motion was sustained, and the injunction dissolved. Thereupon Van Horn commenced this action against the sureties on the injunction bond to recover specific damages alleged to have been sustained by him by reason of the injunction. The complaint alleges the facts set forth above, and, in addition, contains the specific allegation of the items of damages, and prays judgment for \$177.50 and costs. To this complaint the defendants (appellants here) filed a general demurrer, alleging that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was overruled, and defendants answered. The cause was tried to a jury, which returned a verdict in favor of the plaintiff for \$152.50, and from the judgment entered for that amount and costs the defendants appealed.

Appellants contend that the complaint does not state facts sufficient to constitute a cause of action, and does not support the judgment entered. Respondent contends that, even conceding that the demurrer was well taken, it was waived by the defendants' pleading over and by the verdict, and cites *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. 637, which he contends supports this doctrine. But an examination shows that the demurrer therein considered was a certain special demurrer, and of the soundness of that decision we make no comment. It is not anywhere held that the objection to a complaint on the ground that it does not state facts sufficient to constitute a cause of action is waived by pleading over, or that such defect in the complaint is cured by verdict. On the contrary, it has been held uniformly that such objection is not waived, but may be urged in this court for the first time. *Territory v. Virginia Road Co.*, 2 Mont. 96; *Gillette v. Hibbard*, 3 Mont. 412; *Largey v. Sedman*, 3 Mont. 472; *Parker v. Bond*, 5 Mont. 1, 1 Pac. 209; *Foster v. Wilson*, 5 Mont. 53, 2 Pac. 310; *Milligan v. Savery*, 6 Mont. 129, 9 Pac. 894; *Quirk v. Clark*, 7 Mont. 31, 14 Pac. 669; *Whiteside v. Lebcher*, 7 Mont. 473, 17 Pac. 548.

The particular objection urged against the complaint is that there is no allegation that the amount of damages claimed to have been suffered by the plaintiff has not been paid. The condition of the injunction bond is "that in case said injunction shall issue, the said plaintiff will pay to the said parties enjoined such damages not exceeding the sum of \$300 as such parties may sustain by reason of said injunction, if the said district court finally decide that the said plaintiff was not entitled thereto." This action is upon the bond, and plaintiff sets forth at length the damages which he suffered by reason of the injunction, but does not say that such damages have not been paid. The gist of the

action—that which gives rise to the action—is the failure of Howard or his sureties (appellants here) to pay such damages, or, in other words, the gist of the action is the breach of the contract; and, in the absence of an allegation of a failure to pay, there is no allegation of any breach whatever, and consequently nothing which can give rise to an action. This rule seems to be settled beyond controversy. *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379; same case on second appeal, 40 Pac. 801; *Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678; *Michael v. Thomas*, 27 Ind. 501; 4 Ency. P. & P. 937, 942; 5 Cyc. 826. The action is analogous to an action on commercial paper, where nonpayment must be alleged (8 Cyc. 136), or to an action on any other form of written contract where the breach must be averred (9 Cyc. 728). The complaint does not state a cause of action, and will not support the judgment.

We have considered the other errors assigned by appellants, but are of the opinion that there is no merit in any of them.

Respondent, in his brief, contends that the record is insufficient, in that it does not contain certain papers which he contends should be a part of the judgment roll. But there is nothing whatever in this record to indicate that any other papers than those included should be in the judgment roll, while the certificate of the clerk is to the effect that the record does in fact contain a copy of the judgment roll. Attention is also directed to the certificate of the clerk attached to the record; but, while it is inartificially drawn, we are of the opinion that it is sufficient to identify the papers constituting the record.

The judgment is reversed, and the cause remanded. Reversed and remanded.

**BRANTLY, C. J., and MILBURN, J., concur.**

(30 Mont. 48)

**NORD v. BOSTON & M. CONSOLIDATED  
COPPER & SILVER MIN. CO.**

(Supreme Court of Montana. March 3, 1904.)

**MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE—ACTIONS—EVIDENCE—BURDEN OF PROOF—NONSUIT—VARIANCE—APPEAL—QUESTIONS NOT RAISED AT TRIAL.**

1. Court Rule 10, subd. 3 (57 Pac. vii), providing that the specification of errors relied on shall set out separately and particularly each error intended to be urged, does not require appellant to set out the reasons why he claims that the decision objected to is erroneous, and hence a specification that the court erred in sustaining defendant's motion for a nonsuit was sufficient, without a further statement that it was error for the court to hold that the evidence was insufficient to go to the jury as tending to support the allegations of plaintiff's complaint, which should be disregarded as surplusage.

2. Code Civ. Proc. § 1173, requiring that, when the notice of motion for new trial designates as the ground therefor errors of law occurring at the trial and excepted to by the moving party, the statement shall specify the par-

ticular errors on which the party will rely, does not apply to bills of exception, and does not require such bills to contain a specification of errors of law relied on.

3. Where plaintiff saved his exception to a ruling granting defendant's motion for a nonsuit, and settled his bill of exceptions containing the testimony and exception to the ruling of the court, such exception is all that is required to be shown by the bill in order to save plaintiff's right to urge that the court's ruling in granting the nonsuit was erroneous.

4. While, in an action for injuries to a servant, the burden is on the plaintiff to prove that defendant was negligent, and that the injury complained of was the direct or proximate result of the negligence alleged, the burden is on the defendant to show that plaintiff was guilty of such contributory negligence as would prevent his recovery, or that plaintiff assumed the risk of the employment.

5. Though the burden is on the master, in an action for injuries to his servant, to prove contributory negligence or assumption of risk, if the existence of such defense is disclosed by plaintiff's witnesses, defendant is entitled to the same advantage thereof as though proven on his part.

6. A nonsuit should not be granted unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had under any view which could reasonably be drawn from the facts which the evidence tends to establish.

7. In an action for injuries to a servant, alleged to have resulted from the master's failure to provide a safe place for plaintiff to work, evidence reviewed, and *held* not to justify a nonsuit on the ground that it conclusively showed plaintiff to have been guilty of contributory negligence, or that plaintiff assumed the risk.

8. Where, in an action for injuries to a servant by falling into an empty ore bin while he was engaged in uncoupling a car on a track running over several bins, plaintiff testified that he did not know that the bin was empty, defendant was not entitled to a nonsuit on the ground that plaintiff's testimony showed that he knew that the bin into which he fell and another one were empty and dangerous, or was charged with such knowledge from the fact that he passed over them frequently to and from his work.

9. Where, in an action for injuries to a servant, the negligence alleged was defendant's failure to provide and maintain a reasonably safe place for plaintiff to work, and there was sufficient proof of such negligence to go to the jury, a variance relating merely to the details of the occurrence by which the injury was caused did not entitle defendant to a nonsuit.

10. Where, in an action for injuries to a servant, defendant moved for a nonsuit at the close of plaintiff's evidence, on the ground that the evidence conclusively showed that plaintiff was guilty of contributory negligence or that he assumed the risk, it could not be alleged for the first time on appeal that the nonsuit was properly granted by reason of an alleged variance between the pleading and proof.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action by Nels Nord against the Boston & Montana Consolidated Copper & Silver Mining Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

A. C. Gormley and Word & Word, for appellant. Ransom Cooper and Wm. T. Plgott, for respondent.

CLAYBERG, C. C. Appeal from a judgment of nonsuit. The action was for dam-

ages resulting from a personal injury caused by the alleged negligence of defendant in not using ordinary care to provide and maintain a reasonably safe place for plaintiff to work.

It appears from the record that defendant had constructed six ore bins, in a continuous line, for the purpose of receiving ore from loaded freight cars. Only three of these bins were at the time of the accident in actual use, and these were at the westerly end of the line. The next bin to those in actual use was full of ore, which had been placed therein prior to plaintiff's employment. Bins 5 and 6 (those farthest to the east) were empty, and about 22 feet in depth. Lengthwise, over this line of bins, two railway tracks had been constructed and maintained, over which cars containing ore were moved from the east to west, for the purpose of unloading in bins 1, 2, and 3. Two board walks were also constructed parallel to the railway tracks over all the bins—one about 2½ feet wide, between the two railway tracks, and another on the north side of the tracks. These walks seem to have been constructed for the accommodation of the men working there, as a means of passage. It was the duty of the men who unloaded the cars in bins 1, 2, and 3 to bring the loaded cars from the east, where they were stored, to the place of unloading. For this purpose three men were usually employed; one to attend to the brake on the loaded car, one to uncouple the car from the others, and one to start the car with a pinch bar, if necessary. Bins 5 and 6 were not covered between the tracks; bin 4 was full of ore; the nearest light was about 120 feet away from the place where the accident occurred, being suspended over the center of bin 3. Plaintiff was hired to unload ore, and do such other work connected therewith as was required of men in like employment. The injury complained of occurred about 2 o'clock a. m. Plaintiff had worked only 10 shifts prior to that time, and had never before uncoupled cars. One Nelson, the "straw boss" who had charge of the men working on the shift, told plaintiff and one Morris to go with him after a loaded car. When they reached the car, Nelson mounted it on the end nearest to bin No. 3 to attend to the brake. Plaintiff, under Nelson's directions, passed along the car to uncouple it at the other end. He says he placed his left foot on the board walk between the tracks, his right foot on the timber rail or on the rail of the track, and reached over to uncouple the car, and fell in the bin, breaking his back. There was a little light between the tracks, but it was very dark between the cars. At the conclusion of plaintiff's case defendant made a motion for nonsuit, which was sustained, and judgment entered for defendant. From the judgment this appeal is prosecuted.

1. Counsel for respondent first objects to the sufficiency of the third specification of error in appellant's brief, and insists, as the

motion for nonsuit was based upon the proposition that the evidence given on the trial in behalf of plaintiff conclusively showed that plaintiff was guilty of contributory negligence, or had assumed the risk of the employment, as well as upon the proposition that plaintiff's proof did not tend to support the allegations of the complaint, that appellant could not be heard to attack the judgment of nonsuit on the ground that the testimony did not show contributory negligence or assumption of risk. This specification is as follows: "It was error in the court to hold that the evidence was insufficient to go to the jury as tending to support the allegations of plaintiff's complaint. It was accordingly error to sustain the defendant's motion for nonsuit." Respondent's objection is purely technical, and should only be sustained if no other conclusion can be reached. The error complained of is clearly as to the action of the court below in granting a nonsuit. Appellant's reasons why he claims the decision was error are immaterial, and are not required to be set forth by the rules of this court. They are therefore mere surplusage, and should not be considered. The provisions relied on are found in rule 10, subd. 3 (57 Pac. vii), which, among other things, provides that the appellant's brief shall contain "a specification of errors relied upon, which shall be numbered and shall set out separately and particularly each error intended to be urged." There is no requirement that the specification shall set out appellant's reasons why he claims the decision is error. That is purely a matter of argument. It is sufficient under the provisions of this rule, therefore, to simply specify that the court below "committed error in granting the motion for nonsuit." The rules of the court are not established for the purpose of befogging attorneys, and a reasonable interpretation of them, therefore, should obtain. The purpose of this subdivision of rule 10, above cited, is to require attorneys to specify and point out the errors of which they complain, and not to give their reasons why they complain it is error, and, if more than one error is charged, to number them and set them out separately and particularly. Counsel for appellant at the hearing requested permission to amend specification of error No. 3, which was objected to by respondent on the ground that the specification in the brief should correspond with the specification of error in the bill of exceptions, and that the bill of exceptions could not be amended, ergo the brief could not. It seems that attorneys generally have fallen into the error that the statutes require a bill of exceptions to contain a specification of errors at law relied upon by the parties settling the same. We are of the opinion that this is not required. None of the sections of the statutes providing for the settlement of bills of exception require that such bills shall contain specifications of error at law. The

statutes providing what the bill of exceptions shall contain, it is complete when it contains such matter, and therefore there can be no authority for requiring matters to be stated in the bill of exceptions which are not required by the statutes. The error probably arose from the provisions of section 1173 of the Code of Civil Procedure, which requires that in statements, "when the notice designates as the ground of the motion errors in law, occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely." But an examination of this section shows that it only applies to statements, and has no reference to bills of exception. Subdivision 2 of this section refers to bills of exception. Subdivision 3, which contains the foregoing language, refers exclusively to a statement of the case settled on motion for a new trial. The California statutes are the same as ours, and that court has uniformly held the doctrine above announced. *Reay v. Butler*, 69 Cal. 572, 11 Pac. 463; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *Hagman v. Williams*, 88 Cal. 146, 25 Pac. 1111; *Barfield v. South Side Irrigation Co.*, 111 Cal. 118, 43 Pac. 406; *Snell v. Payne*, 115 Cal. 218, 46 Pac. 1069. In this case motion for nonsuit was made and granted. Plaintiff below saved his exceptions, and settled his bill of exceptions containing the testimony and his exceptions to the ruling of the court. This exception is all the statute requires to be shown in the bill of exceptions to save his right to urge the error in this court.

2. Did the court err in granting the nonsuit? We shall preface our consideration of this question with a statement of some legal principles, and then apply such principles to the question in hand.

(1) The question presented on a motion of nonsuit is one of law. *Emerson v. Eldorado Ditch Co.*, 18 Mont. 247, 44 Pac. 969; *Donahue v. Gallavan*, 43 Cal. 573.

(2) The following are generally questions of fact: (a) Whether the defendant was negligent. (b) Whether the injury complained of was the direct or proximate result of the negligence alleged. (c) Whether the plaintiff was guilty of such contributory negligence as will prevent his recovery. (d) Whether the plaintiff assumed the risk of the employment. The burden is always upon plaintiff to show the facts specified in "a" and "b." The burden in this case was upon defendant to show the facts specified in "c" and "d." The decisions of this court have settled the proposition that in a case of this character the burden is upon the defendant to allege and prove contributory negligence. *Cummings v. Helena & Livingston S. & R. Co.*, 26 Mont. 434, 68 Pac. 852. This court, in the case last cited, uses the following language: "In actions for personal injuries the absence of contributory negligence is not required to be pleaded or proved by the plain-

tiff, but its presence is a matter of defense. Such is the law in Montana. *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450; *Mulville v. Pac. Mutual Life Ins. Co.*, 19 Mont. 95, 47 Pac. 650. The contrary rule was announced in *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744, but has been overturned by the cases cited and those referred to by the opinions therein. If, however, the complaint shows the proximate (or a proximate) cause of the injury to have been the act of the plaintiff, the complaint must also state his freedom from negligence in the doing of the act, otherwise the pleading is bad. *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21. And so, if the evidence in behalf of the plaintiff shows the injury to have been directly caused (either in whole or in part) by his act, the burden is immediately upon him to prove that he was exercising ordinary care at the time. *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905." This doctrine has been reannounced and reaffirmed in the case of *Ball v. Gussenhoven* (Mont.) 74 Pac. 871. Of course, the existence of these defenses may be disclosed by plaintiff's witnesses, and, if so disclosed, defendant can have the same advantage of them as if proven on his part.

(3) The rule of this court governing nonsuits is well stated in the case of *Cain v. Gold Mountain Mining Company*, 27 Mont. 529, 71 Pac. 1004, in the following language: "Upon a motion for a nonsuit, everything will be deemed to be proved which the evidence tends to prove. *State ex rel. Pigott v. Benton*, 13 Mont. 306, 34 Pac. 301; *Morse v. Granite County Commissioners*, 19 Mont. 450, 48 Pac. 745. The rule is well established 'that no cause should ever be withdrawn from the jury unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish.' *Great Northern Ry. Co. v. McLaughlin*, 17 C. C. A. 330, 70 Fed. 669." See, also, *Coleman v. Perry* (Mont.) 72 Pac. 42; *Ball v. Gussenhoven* (Mont.) 74 Pac. 871; *Michener v. Fransham*, Id. 448; *Gardner v. Mich. Cent. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; *Patton v. Southern Ry. Co.*, 82 Fed. 979, 27 C. C. A. 287. These questions, being generally questions of fact, only become questions of law where the facts are such that "all reasonable men must draw the same conclusion from them." In *Patton v. Southern Ry. Co.*, supra, the court says: "It is difficult to mark with precision the exact line which separates the functions of the judge from the functions of the jury in actions of negligence; for this being a mixed question of law and fact, and the terms by which it is usually defined having a relative significance, the rule requiring judges to decide questions of law, and juries to decide questions of fact, is perplexed with subtleties when applied to the special cir-

cumstances of each particular case. When the facts are undisputed, and such that all reasonable minds must draw the same conclusion from them, it is clearly the duty of the judge to say, as matter of law, whether or not they make a case of actionable negligence; but such is the infirmity of the human mind, and such its idiosyncrasies, that minds equally honest may sometimes draw different conclusions from the same facts. In all such cases, and wherever the facts are in dispute, it is as clearly the duty of the judge to submit them to the jury; for the law holds that 12 impartial men, applying their separate and varied observations and experiences of everyday life to the decision of questions of fact, are more likely to reach a correct conclusion than a single judge; and this must be so, if the jury system is worthy to be preserved. The courts have long since abrogated the doctrine that a mere scintilla of evidence from which there might be a surmise of negligence is sufficient to carry a case to a jury, and have adopted the more reasonable rule that in all cases there is a preliminary question, which the judge must decide—whether, granting to the testimony all the probative force to which it is entitled, a jury can properly and justifiably infer negligence from the facts proved; for, while negligence is usually an inference from facts, it must be proved, and competent and sufficient evidence is as much required to prove it as to prove any other fact. The simplest definition of 'negligence' is absence of due care under the circumstances. This seems easy of comprehension, but, when one attempts to apply it to a particular case, the inherent vagueness of the terms 'due care' and 'reasonable prudence' becomes apparent; for there is no fixed and immutable standard by which to measure duty in the varying and diverse transactions and happenings of life, and what may be due care in one condition and relation is the want of it in another. A process of ratiocination, therefore, becomes necessary—comparison and deduction. When this comes into play, new difficulties arise from the distinctive individualities, peculiarities, and anfractuosities of the human mind. Of all the reported cases wherein judges have granted nonsuits or directed verdicts in actions of negligence, there are few where other judges, equally conscientious, might not have discovered some fact which would be considered rightly capable of producing a different impression on other minds, and therefore properly cognizable by a jury. One clear thread seems to run through them all, and that is that in all actions founded on negligence, whenever the facts are in dispute or conflicting, or the credibility of witnesses is involved, or the preponderance of testimony, and wherever the facts admitted or not denied are such that fair-minded men might draw different inferences from them, it is a case for a jury; and a case should not

be withdrawn from the jury unless the inferences from the facts are so plain as to be a legal conclusion."

We have carefully examined the testimony disclosed by the record, and cannot say that "the facts are such that all reasonable men must draw the same conclusion from them." Therefore we must conclude that the above stated questions in this case were questions of fact, and that the court erred in granting a nonsuit.

3. Counsel for respondent claim that appellant's own testimony conclusively shows that he either had full knowledge that bins 5 and 6 were open, empty, and dangerous, or was charged with such knowledge from the fact that he passed over them frequently to and from his work. But appellant denies such knowledge; and this fact, taken in connection with other facts and circumstances disclosed in the evidence for plaintiff, is sufficient, we think, to go to the jury upon the question of plaintiff's knowledge or means of knowledge of the dangerous condition of the place of his employment.

4. It is also claimed that there was a variance between the allegations of the complaint and the proof. As before stated, the negligence charged was that defendant did not use ordinary care to provide and maintain a reasonably safe place for plaintiff to work. We think the proof of this negligence was sufficient to go to the jury. The variance claimed does not go to the showing of the negligence alleged, but merely to the details of the occurrence by which the injury was caused, and we cannot say that such variance entitled defendant to a nonsuit; besides, the motion for nonsuit was not based upon variance, and no new grounds can be advanced in this court.

Further reference to the many other propositions urged by respondent seems unnecessary. We advise that the judgment appealed from be reversed, and the case remanded for trial.

POORMAN and CALLOWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed, and the case remanded for trial.

(30 Mont. 61)

McMILLAN et al. v. FRANK.

(Supreme Court of Montana. March 3, 1904.)

CONTRACT—LEASE OF MINE—SUIT BY ADJOINING OWNER—INDEMNITY—PLEADING—AMENDMENT—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. In an action against the lessor of a mining claim on an alleged agreement to indemnify the lessees for their expense in working a mine thereon in case an adjoining owner's claim to it should be compromised, or the mining claim sold, where the answer denied the allegations of the complaint, and alleged that the adjoining owner claimed the mine, and that the lessor had not asserted that it belonged to his claim, and had no information on that point, except from the lessees, it was proper to per-

mit an amendment to the answer, at the close of the evidence offered by the lessees, alleging that any contract relating to the mine was on condition that it had its apex in the lessor's claim, and stating on information and belief that its apex was in the adjoining owner's claim.

2. In an action by the lessees of a mining claim on an alleged agreement to pay them \$8,000 to indemnify them for expenses incurred in case the lessor should compromise an adjoining owner's suit for possession of a mine, or should sell the mining claim, the lessor's testimony that he sold the claim, together with other mining property, for \$2,500, was admissible.

3. Where the lessees of a mining claim showed that a suit against the lessor for possession of a mine in the claim was ordered dismissed as settled, the lessor's testimony that he knew nothing about a compromise of the suit, and did not know it was dismissed as settled, was admissible.

4. In an action against the lessor of a mining claim on an alleged agreement to indemnify the lessees for expense in working a mine thereon in case an adjoining owner's suit for possession of the mine should be compromised, or the claim sold, where the witnesses for the lessees, in the examination in chief, purported to give the entire conversation on which their claim of a contract was based, testimony in rebuttal as to whether the promises to indemnify the lessees were made dependent on finding that the apex of the mine in the lessor's claim was properly excluded.

5. Where a mine worked by lessees of a claim had its apex in an adjoining claim, the lessor was under no obligation to protect them against a suit of the adjoining owner for possession of the mine, and his promise to do so is not binding, unless supported by some other consideration than the covenants of the lease.

6. In an action against the lessor of a mining claim on an alleged agreement to indemnify the lessees for expenses incurred in case an adjoining owner's suit should be compromised, or the mining claim sold, any error in an instruction that the order of dismissal in the adjoining owner's suit was not final was harmless, where it was undisputed that the lessor sold the claim.

7. Where the evidence was conflicting as to whether there was a contract, the jury's finding is conclusive.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; Jno. Lindsay, Judge.

Action by A. A. McMillan and others against H. L. Frank. From a judgment for defendant, plaintiffs appeal. Affirmed.

The facts in this case, in so far as it is necessary to state them, are that in October, 1890, the respondent, Frank, leased to one Cusick, appellants' assignor, an undivided one-half interest in and to the Clark lode claim. The lease contained the usual covenant for quiet possession. In the month of June, 1891, the appellants discovered within the exterior boundaries of the Clark claim a large body of ore, and commenced to extract the same. On June 29th the Anaconda Mining Company, which then owned a claim adjoining the Clark, called the "Mountain," began an injunction suit against appellants and respondent; claiming that the ore body upon which the appellants were working was part of a vein which had its apex in the Mountain claim, and consequently was no part of the Clark. When the writ of injunction was served, the appellants and respondent

ent had a conference, in which the situation was thoroughly discussed. Both believed that the ore body upon which the appellants were working was part of a vein which had its apex within the limits of the Clark claim. Respondent agreed with appellants that he would employ an attorney and defend the suit, and that he would exploit the Clark claim for the purpose of demonstrating that the apex in question was in fact within the boundaries of the Clark. The foregoing facts are undisputed. Appellants also alleged "that thereafter plaintiffs surrendered to defendant the entire possession of said lode claim, and permitted defendant to use their tools and appliances with which they had been operating the said mine to make the said development work as aforesaid, and, in consideration of the matters and things above set out, and a surrender of the said lode claim, and of the use of the tools and appliances for the purpose of doing the said development work, the defendant then and there agreed that he would litigate said suit to a successful termination, and in such event, or in the event of his compromising said suit, or in the event of his selling his said undivided one-half interest in the said Clark lode claim to the said Anaconda Mining Company, he would then pay and reimburse plaintiffs for all the money and labor that they had expended and all costs and expenses that they had incurred in doing development work on the said Clark lode claim as aforesaid." They further alleged that respondent did afterward compromise the suit and sell his interest in the Clark claim to the Anaconda Mining Company, but did not repay or reimburse them for any of the expenditures made, labor done, or materials furnished by them. All these allegations were fully denied by respondent. He denied that the ore body in question was a part of the Clark claim; alleged that the Anaconda Mining Company "claimed to be the owner of said vein by reason of its ownership of certain claims lying north of the said Clark lode claim, and that it also claimed that the said vein or body of ore had its apex in the vein so owned by the said company, or one of them, and that it did not have its apex in the Clark lode claim, and was not part of the latter"; alleged that the Anaconda Mining Company did not lay any claim or set up any title to the one undivided half part of the Clark claim leased by him to Cusick, or to any part of the Clark claim itself; denied that he claimed or asserted to appellants that the said vein or ore body was a part of the Clark claim, or that the apex of said vein or ore body was within the boundaries of the Clark claim; averred that he had no knowledge concerning these matters, and no information except such as was given and furnished to him by the appellants themselves. Under the statute in force at the time, the answer was deemed denied without reply.

At the trial, after appellants had closed

their case in chief, the court, over appellants' objection, permitted respondent to amend his answer by adding thereto certain allegations, in which respondent, without admitting any contract between himself and appellants, averred that any and all stipulations, agreements, or transactions, if any, that may have been had between the parties relating to the matter alleged in the complaint, were "made, done, and had upon the understanding and condition" that the vein in question should be shown to be a part of the Clark claim, and that it had its apex therein, and that it was not intended by the parties, or either of them, that respondent should pay anything to the appellants, or assume any liability towards them, in case the apex of the vein should be found to be in one of the claims of the Anaconda Mining Company, or outside the Clark claim; and averred, upon his information and belief, that the apex was found to be in the Mountain claim, belonging to the Anaconda Mining Company, and that the location of the Mountain claim was prior to that of the Clark.

Appellants did not attempt to show that the apex of the vein or ore body was in the Clark claim. They relied upon the contract alleged in their complaint. McGovern, one of the appellants, in relating a conversation with respondent, said, in part: "He told me he was going to fight that lawsuit right to a finish; was going to develop that lead, and show the Anaconda Company that the apex of that lead was in the Clark ground. Frank made the remark right there, in the presence of three of us, that he would pay us what we were out, in case it came to a settlement or compromise." Speaking of a conversation subsequent to the one just quoted, McGovern said: "He repeated just what he said that afternoon—that, if it ever came to a compromise with the Anaconda Company or anybody else, that we would get every dollar that we were out. I have given Frank's exact words about reimbursing us, as nearly as I can remember. Mr. Frank said he would sink a shaft right on his own ground, and show the Anaconda Company that it was his mine, and on his lead. He asked Mike Devine [one of the appellants] if he would take charge of the development work, and he also asked for the privilege of using the shaft and tools to do this development work with. \* \* \* Mr. McMillan and Mr. Frank and the other gentlemen present, who were not miners, all took our judgment as to what ground this lead belonged to. I told them all that I was satisfied that the lead belonged to the Clark ground, and I had nothing else to point different. I really did believe that statement at the time."

To sustain his answer, respondent introduced evidence tending to show that the apex of the ore body in question was in fact in the Mountain claim, belonging to the Anaconda Mining Company, and in his testimony denied that he had made any kind of a contract with the appellants in which he agreed



to reimburse them for their time or money expended in developing the Clark lode, and discovering the ore body therein. He testified that he had expended about \$3,000 in an endeavor to show that the apex of the ore body was in the Clark lode, but without avail.

The jury found a verdict in favor of respondent. A motion for a new trial was made, which was denied, and appellants then perfected this appeal.

F. T. McBride and E. N. Harwood, for appellants. Stapleton & Stapleton, for respondent.

CALLAWAY, C. (after stating the facts).

1. Appellants insist that the court erred in permitting respondent to amend his answer during the progress of the trial, and say the amendment was inconsistent with the original answer, and that it raised a new issue after appellants had put in their case in chief. We think the amendment simply accentuated the defense alleged in the original answer. Respondent leased the Clark claim with a covenant that the lessee should have the quiet and peaceable possession of the same, with the right to extract the ores and minerals therefrom. If the vein of which the ore body was a portion had its apex in the Mountain claim, and not in the Clark claim, then the ore body was not a part of the Clark, and was not included in appellants' lease. That the Mountain claim has extralateral rights is not controverted by appellants. The controversy between appellants and respondent, as shown by the complaint and answer, both before and after amendment, arose upon the hypothesis that the apex of the vein or ore body was within the Clark claim. We fail to see how the inconsistency alleged to exist in the answer after amendment prejudiced appellants' case in any way. We do not think any new issue was injected by the amendment. The testimony necessary to support the amendment would have been admissible without it.

2. Appellants contend that the court erred in not striking out at their instance a statement made by respondent to the effect that he sold his interest in the Clark lode, together with an eighth interest in the Nettie lode, for \$2,500. We see no error in the court's ruling. The appellants based their action upon an alleged promise made by respondent to pay them over \$8,000 in case he should compromise the suit or sell the Clark claim. He testified that he actually did sell the Clark claim, together with an interest in another, for \$2,500. This was a circumstance for the jury to consider in arriving at its verdict.

3. Appellants showed by a journal entry of the district court dated May 16, 1894, that the suit brought by the Anaconda Mining Company had been ordered dismissed as settled. Respondent testified that he did not

know anything about a compromise of the suit, and did not know it was dismissed as settled. Appellants moved to strike out this testimony as incompetent, on the ground that the action of a person in court through his attorney is his action, and the client is bound by it. The court overruled the objection. Its action in so doing was not wrong. The journal entry in question does not show that respondent or his attorney had anything to do with it. If respondent had not interposed an answer asking for affirmative relief—and there is no showing that any answer was filed—the Anaconda Mining Company had the right to dismiss the action, even against respondent's consent.

4. After respondent had closed his case, appellants called the witness McGovern to the stand, and asked him this question: "State whether or not Mr. Frank made the promises which you have testified to as to reimbursement of lessees for the labor and expenditures they made on the Clark lode, dependent upon the fact of his afterward discovering the apex of the ore body which the lessees discovered upon the Clark claim?" This was objected to as not rebuttal testimony, for the reason that what took place between the appellants and respondent had been fully gone into in the examination in chief of the same witness. The evidence offered was a mere repetition. This witness, as shown by the statement of facts, testified that he had given the exact language of respondent as to the promise of reimbursement. All of appellants' witnesses who testified concerning the conversations with Frank were examined minutely as to such conversations, both upon direct and cross examination, and assumed to give all of the testimony which they remembered, in detail. The offered proof, therefore, was properly excluded.

5. Appellants urge that the court erred in giving instruction No. 9, in which the jury was told that respondent was under no legal obligation to protect appellants against the suit of the Anaconda Mining Company; that a promise on the part of respondent to protect the appellants or to pay them could not be binding unless based upon some consideration other than the covenants contained in the lease. This instruction was given upon the assumption that the apex of the ore body was within the Mountain claim. Had there been any controversy upon that point, it would have been error to so instruct the jury. That the apex was within the Mountain claim is undisputed. Appellants did not deny that such was the fact, either in their case in chief or in rebuttal. Respondent, on the other hand, produced much testimony to prove it. If, as we have suggested above, the ore body was not a part of the Clark claim, but was a part of the Mountain claim, neither respondent nor his lessees were entitled to it, and respondent was under no obligation to defend the suit brought by the Anaconda Mining Company. This matter was

fully covered by Instruction No. 16, which appellants have not attacked in their argument.

6. Appellants urge that it was error for the court to tell the jury, in instruction No. 20, that the minute order dismissing the action brought by the Anaconda Mining Company was not conclusive and did not amount to a final or absolute dismissal of the suit, because it was not followed by any other order or judgment. We regard this instruction as immaterial and harmless. Appellants had shown that the respondent sold the property in question to one Haggin on January 23, 1894, some months prior to the time the minute entry of dismissal was made, and that Haggin thereafter transferred it to the Anaconda Mining Company. Respondent himself testified that he sold it to Haggin. Whether the suit was technically dismissed did not matter. The facts were before the jury. Upon appellants' theory of the case, respondent was liable if he sold the Clark lode to any one.

7. Appellants take exception to a number of other instructions given to the jury, but, after giving due attention to their argument pertinent thereto, we do not find that they have pointed out any error therein.

8. On the question whether there was a contract or agreement between appellants and respondent with respect to the subject-matter of this action there was a substantial conflict of testimony. The jury found for respondent, and, under the settled rule, its finding thereon is conclusive.

For the foregoing reasons, we are of the opinion that the judgment and order should be affirmed.

CLAYBERG, C. C., and POORMAN, C., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(30 Mont. 76)

MORIN v. WELLS et al.

(Supreme Court of Montana. March 7, 1904.)

JUSTICES—APPEAL—BOND—SURETIES—JUSTIFICATION—OBJECTION TO SURETIES—CONSIDERATION—JURISDICTION—PRESUMPTIONS—STATUTES.

1. Code Civ. Proc. § 1760, provides that an appeal from a justice is to be taken by filing a notice of appeal with the justice, and serving a copy on the adverse party. *Held* that, in the absence of any showing to the contrary, it is to be presumed that a notice filed with the justice was properly served.

2. Code Civ. Proc. § 1763, provides that appellee, on an appeal from a justice, may except to the sufficiency of the sureties on the appeal bond, and, unless they or others justify in five days, the appeal must be regarded as if no bond had been given, and that an appeal is not effectual unless there is a proper bond. *Held*, that an exception to the sureties does not divest the court of jurisdiction.

3. The statute is directory and for appellee's benefit, and he may waive his privilege of ex-

cepting to the sureties, and may withdraw it after exception.

4. If appellee insists that the sureties justify, the statute is mandatory on appellant.

5. Where appellee excepted to the sufficiency of the sureties, counsel for the parties had a right to stipulate for an extension of the time within which the sureties might justify beyond the time fixed by the statute.

6. The parties to an appeal from a justice stipulated for an extension of the time within which the sureties might justify beyond that fixed by the statute, and, within the time so stipulated for, defendant signed as a surety. Six months later, the appeal was dismissed. *Held*, that the signature of defendant was not without consideration; it being for the purpose of preventing the appeal from becoming ineffectual and it having, at least, operated to stay proceedings for several months.

7. Defendant's action in becoming a surety, under the circumstances, was not contrary to public policy.

Commissioners' Opinion. Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Action by Oliver Morin against John Wells and others. From a judgment in favor of plaintiff, defendant Frank Moshner appeals. Affirmed.

Rudolph Von Tobel and Walsh & Newman, for appellant. Blackford & Blackford and F. W. Mettler, for respondent.

CALLAWAY, C. This is a suit on an undertaking on appeal. The district court entered judgment against the principal and sureties upon the undertaking. Defendant Moshner moved for a new trial, which was denied. From the judgment, and order denying his motion, he has appealed.

It appears that on September 12, 1900, respondent herein recovered a judgment in justice's court against defendant Ouellette in the sum of \$298.15. Desiring to appeal therefrom, Ouellette on October 8th filed notice and undertaking on appeal. The sureties thereon were defendants Wells and Berger. On the day following, October 9th, respondent excepted to the sufficiency of the sureties; requiring them to justify within five days. This they failed to do. On October 15th counsel for respondent and Ouellette entered into a written stipulation in which it was agreed that Ouellette "have until and including October 22, 1900, in which said sureties were to justify, or said appellant was to furnish a new bond on appeal." On October 22d the appellant herein, at the instance and request of Ouellette, signed the undertaking and justified. No objection is made that appellant's signing and justification were not within the purview of the stipulation. Thereafter, and on April 19, 1901, the appeal was dismissed by the district court, though for what cause the record does not show.

The question for decision is, did the district court rightly hold appellant liable upon the undertaking?

\* 4. See Justices of the Peace, vol. 31, Cent. Dig. § 566.

By section 1760 of the Code of Civil Procedure it is laid down that "any party dissatisfied with a judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the district court of the county, at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party or his attorney." Section 1763, *Id.*, prescribes that an appeal from a justice's court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money, and must be conditioned that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the district court. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and, unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amount stated in their affidavits, the appeal must be regarded as if no such undertaking had been given.

The undertaking in this action substantially complies with the conditions of the statute. The notice of appeal and undertaking were filed with the justice within 30 days after the rendition of the judgment. Presumably, the notice was properly served. The district court therefore had jurisdiction of the appeal. We must not confound the jurisdiction which the court then had with what took place after respondent exercised his right to except to the sufficiency of the sureties. *Carroll v. McGee*, 25 N. C. 16. While respondent could not divest the court of the jurisdiction given it by the appeal, yet he could render the appeal ineffectual in case he saw fit to insist upon his exceptions to the sufficiency of the sureties, provided that his objections be not obviated as prescribed by statute; that is, by a justification on part of the same or other sureties or by the giving of a new bond.

The appeal, then, was perfected, subject only to the action of respondent. The undertaking was filed and approved by the court. The statute requiring a justification is directory, and is for respondent's benefit. *State v. Sixth Judicial District Court*, 22 Mont. 449, 57 Pac. 89, 145, 74 Am. St. Rep. 618.

The respondent may waive his privilege of excepting to the sureties, if he chooses. If he does waive it, no one else can object. So, too, as the statute is for his benefit, he may except to the sufficiency of the sureties, and afterwards withdraw such exceptions; in other words, he may forbear to pursue his advantage.

If the respondent insists that the sureties justify within five days, the statute is mandatory upon the appellant. The sureties must justify, or at least commence to justify, within the period of five days, or others must justify in their stead, or a new bond must be given, upon notice to respondent; otherwise the appeal becomes ineffectual for any purpose.

It will be readily perceived that more than five days might be required to complete the taking of testimony upon a justification. Doubtless such a hearing could be postponed from time to time to suit the convenience of the court, or of the parties upon their stipulation, or because of necessity, as if the justifying surety should be taken ill during the hearing. It is manifest that the statute does not contemplate that the period of five days shall always be deemed a hard and fast limitation. It must be subject to variation, *ex necessitate rei*. Statutes must be liberally construed to maintain the right of appeal. *Payne v. Davis*, 2 Mont. 381. This being true, it follows that counsel for appellant and respondent had the right to enter into the stipulation set forth in the record, and the same is binding upon them.

Appellant contends that there was no consideration for his signing. He signed the undertaking and justified within the time fixed in the stipulation. He did so at Ouellette's request. He knew, or should have known, the purpose for which he signed the undertaking, and the object it was intended to accomplish. *Mueller v. Kelly* (Colo. App.) 47 Pac. 72. It was for the purpose of preventing the appeal from becoming ineffectual—for the purpose of maintaining it. Upon the foregoing facts, we think there was sufficient consideration for the undertaking sued on. It was signed "in consideration of the appeal," and appellant bound himself to pay the amount of the judgment appealed from, and the costs which might be awarded against Ouellette on the appeal, or on a dismissal thereof. It may be that one of the other sureties justified, or that the undertaking was sufficient, in respondent's opinion, after appellant signed. As to that the record is silent. We cannot say that it was not in all respects sufficient after appellant became surety to it; but, whether that be so or not, the record shows that he signed it on the 22d day of October, and that the appeal was not dismissed until the 19th day of April following. The presumption is that appellant received the benefit of having a stay of proceedings between the last-mentioned dates. In *Elliott on Appellate Procedure*, § 357, it is said: "There is a disposition—and it is a commendable one—on the part of the courts to enforce bonds given in legal proceedings wherever it appears that the party whose duty it was to execute a bond has received benefit from the bond, although it may not be well executed, and although there may be some defect of a jurisdictional nature, but

not of such a character as to completely deprive the tribunal of jurisdiction. Weight is attached—justly, as we believe—by the better-considered cases, to the fact that the bond has yielded the principal obligor beneficial consideration." *Braithwaite v. Jordan*, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238, and cases cited; *Stephens v. Miller*, 80 Ky. 47.

The Supreme Court of California takes the view that, even if an appeal be not secured, this does not operate to render void the undertaking given as required by law to make it effectual, and says: "The sureties on such an undertaking agree to be liable if the appeal be dismissed, and, since the respondent must be at some expense to have even a void appeal disposed of, there is a consideration for the undertaking." *In re Kennedy's Estate*, 62 Pac. 64. We need not go to that extent in this case. As above observed, we think the consideration for this undertaking sufficient.

Appellant's becoming surety when he did was not contrary to a mandatory statute, nor was it prohibited by public policy. *Abbott v. Williams* (Colo. Sup.) 25 Pac. 450. On the other hand, it was for a good purpose—to preserve to Ouellette his appeal, and to secure to respondent the payment of his judgment, or any that he might recover in the district court. It follows that appellant must discharge the obligation he has voluntarily imposed upon himself.

For the foregoing reasons, we are of opinion that the judgment and order should be affirmed.

CLAYBERG, C. C., and POORMAN, C., concur.

PEI: CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(30 Mont. 73)

#### KINMAN v. SCHEUER.

(Supreme Court of Montana. March 7, 1904.)

#### APPEAL—JUDGMENT OF DISMISSAL—SPECIAL ORDER AFTER JUDGMENT.

1. Code Civ. Proc. § 1722, as amended by Sess. Laws 1899, p. 146, authorizes an appeal from a final judgment or from any special order made after final judgment. Section 1004 authorizes the dismissal of an action in certain cases, and declares that such dismissal is made by entry in the clerk's register. *Held*, that an entry noting the filing of an agreement to dismiss is not a dismissal from which an appeal can be taken.

2. Under Code Civ. Proc. § 1722, authorizing an appeal from any special order made after final judgment, an order overruling a motion to set aside a pretended judgment of dismissal, which was in fact not a dismissal within section 1004, authorizing dismissal, is not appealable.

3. Under Code Civ. Proc. § 1722, authorizing appeals from final judgments and special orders made after final judgments, an appeal from an order denying a motion to adopt a general verdict and special findings and to set aside the

special verdict in a suit in equity must be dismissed where the record shows no judgment of dismissal or other final judgment.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by Charles E. Kinman, as guardian of Fred V. Scheuer, against Isabella Scheuer. From an alleged judgment of dismissal and certain special orders, plaintiff appeals. Appeals dismissed.

Sanders & Sanders and J. M. Hinkle, for appellant. Stapleton & Stapleton and M. E. Le Blanc, for respondent.

CLAYBERG, C. C. Suit in equity. Three appeals are presented in this record—one from an alleged judgment of dismissal, one from an order refusing to vacate such judgment, and one from an order overruling plaintiff's motion to adopt the general verdict and special findings and set aside the special verdict of the jury. The statutes determine in what instances appeals may be taken to this court. Section 1722, Code Civ. Proc., as amended by Sess. Laws 1899, p. 146, provides: "(1) From a final judgment entered in an action or special proceeding commenced in a district court or brought into a district court from another court. (2) \* \* \* From any special order made after final judgment. \* \* \*" It thus appears that in cases of this class, an appeal can only be taken from a final judgment, or from special orders made after final judgment. On appeal from a final judgment the record must contain a copy of the judgment roll. Section 1736, Code Civ. Proc.; *Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972. The judgment roll must contain the final judgment. Section 1196, Code Civ. Proc. The record on this appeal does not contain any judgment, but, on the contrary, shows affirmatively that no judgment was ever rendered or entered, and that the case is still pending in the court below. The only showing made by the record as to the dismissal of this case is found in an entry of the clerk in the register of actions, viz.: "November 25th, 1901. Agreement between Frederick V. Scheuer and Isabella Scheuer containing agreement to dismiss filed." This filing of itself was not a compliance with the provisions of section 1004, Code Civ. Proc., and was not sufficient to dismiss the action. It could amount to nothing more than the filing of a *præcipe* for dismissal. It would not have the effect of dismissing the suit. The statute provides: "The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register." This contemplates a formal entry of the dismissal by the clerk in his register, and not the mere filing of the stipulation upon which the dismissal is to be entered. Whether the proper entry by the clerk would have the effect of a judgment of dismissal is not before us, and is not considered or passed upon. There being no judgment of dismissal in the record, we conclude that the

appeal from the pretended judgment must be dismissed.

There can be no special order after judgment until a judgment is rendered or entered. There being no judgment in the record, the appeal from the order overruling the motion to set aside the pretended judgment of dismissal must therefore be dismissed.

The appeal from the order overruling plaintiff's motion in regard to the verdict and findings is necessarily an appeal from an order before final judgment, because no other judgment than one of dismissal can be entered in an equity case where there are special findings of a jury, until the action of the court is had upon such findings, as to the basis of a judgment. We have seen that the record contains no judgment of dismissal, and it contains no other final judgment.

The action of the court on motion as to the findings and verdict of a jury can be reviewed, if erroneous, by this court upon appeal from the final judgment. This appeal must therefore also be dismissed.

We recommend that each and all of the appeals in the record be dismissed.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the appeals, and each of them, are dismissed.

(12 Wyo. 362)

LADD v. REDLE et al.

(Supreme Court of Wyoming. March 7, 1904.)

WATERS—DIVERSION ONTO LAND—EXEMPLARY DAMAGES—INJUNCTION—EVIDENCE—SUFFICIENCY.

1. A landowner may fill in and raise the level of his ground, and erect embankments to protect his premises from overflow of water, but he has no right to cast the water on the land of another to his injury.

2. In an action for damages because of the washing away of plaintiff's land by the waters of a stream, owing to defendants' alleged unlawful diversion of other waters into the stream, evidence considered, and *held* not to show that the washing away of plaintiff's land was due to any act of defendants.

3. Where defendants removed a sand bar on plaintiff's land, after notice from plaintiff not to do so, whereby waters were permitted to flow into a stream which crossed plaintiff's land, but it did not appear that plaintiff suffered any actual damages, or that it was done with an intent to injure her, or in disregard of whethed it might injure her, plaintiff was not entitled to exemplary damages.

4. In an action for damages because of the washing away of plaintiff's land by the waters of a stream, owing to defendants' alleged unlawful diversion of other waters into the stream, there was no error in excluding evidence as to the sum required to construct an embankment to protect plaintiff's property; it not appearing that the encroachment was due to any act of defendants.

5. A judgment in favor of defendants will not be reversed where it appears that plaintiff was merely entitled to nominal damages; the statute requiring a new trial to be granted for causes "affecting materially the substantial rights of a party."

6. Plaintiff was not entitled to an injunction restraining defendants from diverting waters into a stream in the absence of a showing of threatened injuries of an irreparable nature.

Error to District Court, Sheridan County; Joseph L. Stotts, Judge.

Suit by Virga N. Ladd against William Redle and another. Judgment for defendants, and plaintiff brings error. Affirmed.

E. E. Enterline, for plaintiff in error. Lonabaugh, Blake & Hamilton, for defendants in error.

CORN, C. J. The plaintiff in the court below (plaintiff in error here) brought suit against the defendants for damages, and also, in a separate action upon the same facts, sought an injunction against the defendants to restrain them from certain acts by which it is alleged the current of Big Goose creek, a stream flowing through the town of Sheridan, is deflected from its natural course and thrown against plaintiff's lots, thereby causing such current to continuously encroach upon and cut away plaintiff's ground. The district court consolidated the two actions, and, upon the trial, gave judgment in favor of the defendants. The plaintiff in error urges two reasons why the judgment should be reversed, viz., that upon the evidence the judgment should have been for the plaintiff, and that the court erred in excluding evidence that an expenditure of \$500 would be required to protect the lots of plaintiff from the encroachment of the stream.

It appears from the evidence that on June 6, 1899, the plaintiff became the owner of certain ground adjoining the lots of defendants on the east; the south line of the property of both parties being the same, and fronting upon Burkett street. The stream known as "Big Goose Creek" enters the properties from the south, and it would seem, though this is not very clear from the evidence, that the main branch is entirely upon plaintiff's ground. In times of high water, at a point some 500 feet south of the two properties, a portion of the water of the stream overflows into another channel to the west. This channel passes over defendants' lots near their east line. Ordinarily there is little, if any, water in this west channel; but in June and July, when the water is high from the melting snows in the mountains, about a fourth to a third of the water of the creek flows into it, and at times overflows a portion of defendants' ground. In June, 1899, defendants filled in the low parts of their lots, and cut off or graded down the southeast corner so that the water flowing through the west branch would flow into the main stream at or near the corner of their lots. They also erected a wall or dike on their own ground, some 5 feet from their southeast corner, to divert the water into the main channel and further protect their lots from overflow. The plaintiff claims that the effect of turning the water of the west branch

into the stream at this point is to deflect the current toward the east, and push it over against the east bank, on her ground, washing away the soil and causing the bank to fall in.

It is a well-settled proposition of law that one may do as he will upon his own ground, provided it is not to the injury of others. And there can be no question that a proprietor may fill in and raise the level of his ground, or erect embankments or dikes upon it, to protect his premises from overflow; but he has no right to cast the water upon the ground of another, to his injury. And if he does so, he is liable in damages. 28 Ency. L. 957; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Radcliff's Ex'rs v. Mayor*, 4 N. Y. 195, 53 Am. Dec. 357; *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279. Under the evidence, we think there can be no question that in ordinary high water, occurring annually at the time of the melting of the snows in the mountains, the west branch was the natural course of a portion of the water of the creek. And, while the evidence tends to show that, independently of any act of the defendants, the passage of vehicles along the street had partially cut away a sand bar, and thus opened a passage for a portion of the water of the west branch into the east branch, or main stream, yet there is no question that the acts of the defendants also diverted a portion of the water into the main stream, and onto the ground of the plaintiff.

The only question before this court in the first action, therefore, is whether the refusal of the district court to give judgment in favor of the plaintiff for damages was reversible error, in view of all the evidence. We think it was not reversible error. The plaintiff acquired the property on June 6, 1899, by conveyance from her mother, Mrs. Held, who had been the owner and in possession for several years before. The acts of defendants, of which complaint is made, occurred in the same month. That the banks were washed away, and that plaintiff's property was damaged, there can be no doubt; but the evidence that it was due in any measure to the flowing in of the water of the west branch, or any act of defendants, is very slight indeed, and we think there is a great preponderance of the evidence that it was not. Mrs. Held thinks that the current prior to June, 1899, was near the center of the bed of the creek, and that the acts of defendants caused it to be deflected against the east bank. But the evidence shows that at this point there is a bend in the creek; that the property of plaintiff is on the outside of the curve, and, the current flowing in a northeasterly direction, its tendency is toward the point where plaintiff's ground is washed away, and in high water is against the bank on that side. And a number of witnesses, who have been long familiar with the stream, and have observed it at both low and high water, testify that the current of the main

channel is so much stronger that that from the west branch is almost immediately absorbed in it, and has no perceptible effect upon it whatever. Moreover, the evidence shows that at least as far back as 1894, and especially in 1896 and 1897, long prior to the acts of the defendants and prior to plaintiff's ownership, the banks were washing away, and the then owners of the property were making attempts to prevent it. There is also evidence tending to show that the cutting away of the bank at the southwest corner of plaintiff's land was caused by a ditch running down on the north side of Burkett street. This ditch, it seems, was under the control of the city, and emptied on the opposite side of the creek from the property of the defendants, and defendants had no control of it whatever. Other witnesses testify that, prior to any of the acts of defendants which are complained of, Henry Held had endeavored to protect the east bank by putting in willows and dirt and logs, and by riprapping, but these embankments were washed out by the next high water. There is also evidence that since the plaintiff acquired the property and came into possession there has been no washing away of the bank, and no damage to her ground, but that the current has been turned away somewhat toward the west, and that the bank has filled up toward the stream.

The plaintiff claims, however, that defendants, in the face of notice not to do so, graded away a sand bar in the stream which was on plaintiff's ground, and that this was such a trespass as entitled her to exemplary damages. The defendant William Redle testifies that the work was done under his general direction, and that he gave no instructions to go upon plaintiff's premises for such a purpose, and had no knowledge that any grading was done upon her ground. But if it be conceded that a preponderance of the evidence tends to the conclusion that defendants removed the sand bar, knowing that it was on plaintiff's ground, and after notice, yet there is evidence, and it does not seem to be seriously controverted, that it was done for the purpose, and had the effect, of widening the stream, and therefore operated for the benefit of the plaintiff as well as the defendants. There is no suggestion that the removal caused actual damages or pecuniary injury to the plaintiff, and there is no attempt to prove actual damages by reason of it. We think, therefore, in the absence of evidence that it was done with the intent to injure plaintiff, or wantonly and in disregard of whether it might work injury to her or not, no case is made for exemplary damages. 12 A. & E. Encyc. (2d Ed.) 21; *Spellman v. R. Co.*, 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858; *Nordhaus v. Peterson*, 54 Iowa. 68, 6 N. W. 77.

With reference to the second assignment, that the court erred in excluding evidence that it would require an expenditure of \$500

to construct an embankment to protect plaintiff's property from the encroachments of the stream, it is sufficient to say that, if the evidence fails to show that such encroachment was due in any measure to the acts of the defendants, then evidence of the expenditure necessary to protect the premises is not material, even if it be deemed the proper measure of damages, in case any had been shown. The statute only requires a new trial to be granted for "causes affecting materially the substantial rights" of a party. Rev. St. 1899, § 5415. We ought not, therefore, to reverse the decision of the district court, even if we should be of the opinion that the plaintiff was entitled, under the evidence, to nominal damages.

The decree of the court below denying an injunction must also be affirmed substantially upon the grounds already stated. While it is true that, in the absence of proof of substantial damages already sustained by plaintiff, she might yet be entitled to an injunction upon proof of irreparable injury threatened by the defendants, yet we think not only is the judgment of the court sustained by sufficient evidence that such injury as plaintiff has sustained was not caused by the acts of the defendants, but that the evidence upon the trial failed to show that at that time the condition of the stream and of the plaintiff's premises was such as to justify any apprehension of irreparable injury in the future from any source.

The judgment will be affirmed. Judgment affirmed.

KNIGHT and POTTER, JJ., concur.

(44 Or. 227)

#### DUBIVER v. CITY & S. RY. CO.

(Supreme Court of Oregon. March 1, 1904.)

#### NEGLIGENCE—CONTRIBUTORY NEGLIGENCE— DEGREE OF CARE REQUIRED—CHILDREN—BURDEN OF PROOF.

1. Contributory negligence is a matter of defense, and the burden of proving it is on defendant.

2. A boy who has not yet arrived at the period of maturity of judgment should not be held to the accountability of an adult in the matter of due care, but only to the accountability of a prudent person of his years.

3. It must be presumed, until otherwise shown, that a minor has exercised the care and circumspection to be expected of one of his years.

4. It cannot be said, as a matter of law, that because a minor is sui juris he should have exercised the same degree of prudence and judgment as an adult.

On petition for rehearing. Denied.

For former opinion, see 74 Pac. 915.

Dolph, Mallory, Simon & Gearin, for petition. Bernstein & Cohen, opposed.

WOLVERTON, J. It was not our purpose by the main opinion handed down here-

in, as it seems to be suggested by the petition for rehearing, to hold to the doctrine "that, where the interests and actions of an infant are involved, a trial judge can in no case declare as a matter of law that there has been contributory negligence." We said, it will be observed, "there are cases, properly decided, too, where the courts have said as a matter of law that the minor, considered as yet immature, was guilty of such contributory carelessness and negligence that he ought not to recover," and in support thereof we cited several authorities. In line with this view are some of the cases cited by counsel in their petition for rehearing. Notably is the case of *Rudd's Adm'r v. R. & D. Railroad Co.*, 80 Va. 546, where a boy of 12, sent by his parents to mind the cows in a field along a railway, went to sleep on the track, and was run over and killed by a freight train, and it was held that, notwithstanding his immature years, he was guilty of such contributory negligence that his administrator could not recover. Another is *Masser v. Railroad Co.*, 68 Iowa, 602, 27 N. W. 776, where a boy between 11 and 12 years was killed while crossing the tracks of a railroad. The court said in that case: "A boy 11 years of age knows, as well as an adult does, what a railroad is, and the use to which it is put, and the consequence to a person who should be struck by a passing train, and knows that he should not stop to play or lounge amid a network of tracks. It is true that a boy of that age cannot be presumed to have the judgment of an adult; but it does not require much judgment to keep from walking in a dangerous place, the dangers of which are fully understood. If the question was as to whether the deceased was guilty of contributory negligence in the mere act of stepping backward upon the defendant's track when the Fort Dodge train passed, the case would be different. The deceased evidently lost his presence of mind somewhat, and he might not have been guilty of negligence in what he did then, even though he did not govern himself with the prudence which might reasonably have been expected of an adult. But his negligence consisted in going, in the outset, and in remaining, where he incurred the danger of losing his presence of mind." Of like import are the cases of *Twist v. Winona & St. Peter R. Co.*, 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626, and *Merryman v. Railroad Co.*, 85 Iowa, 634, 52 N. W. 545, both of which arose from accidents about turntables, and in all these cases the injured parties were trespassers. In the *Twist Case* the court says: "The law very humanely does not require the same degree of care on the part of a child as of a person of mature years, but he is responsible for the exercise of such care and vigilance as may reasonably be expected of one of his age and capacity, and the want of that degree of care is negligence." Yet, in spite of the fact that the

¶ 2. See Negligence, vol. 37, Cent. Dig. § 123.

child injured was less than 10½ years of age, the court held it to have been guilty of contributory negligence as a matter of law. In the case at bar neither the lower court nor this court was asked to say as a matter of law whether the minor was guilty of contributory negligence. There was no motion for a nonsuit or an instructed verdict, nor was all the evidence brought here in the bill of exceptions so that we could determine that question if it had been urged.

We cannot say, of course, whether, had the question been before us, the result would or would not have been different, in view of the authorities cited both here and in the main opinion. The single question presented, however, was whether the court erred in instructing that the jury should take into consideration the age of the minor, and determine whether he used the care and prudence which an ordinarily prudent boy of his age would be expected to exercise. It was urged that the instruction should not have been given because the boy was fully acquainted with the business in which he was engaged, and knew the danger of crossing the tracks of the defendant's railway as well as if he were an adult, took like precautions in crossing in the present instance as an adult would have taken or was required to take, and offered proofs of the exercise of that kind of care. It should be noted that, with the exception of the last one, the reasons advanced as a basis for the objection are deductions drawn from the evidence, which in some manner, at least, is susceptible of a different construction. The question, therefore, resolved itself into this, as stated in the main opinion, whether this boy, of the age of 15 years, had arrived at man's estate in judgment, prudence, and foresight; for, if he had not, the instruction, although given unasked, was not inappropriate. The entire case turned upon whether he was guilty of contributory negligence in driving off the tracks after he had started to cross them, the defendant's theory being that he stopped, or practically so, by turning his horse's head and the fore wheels of the wagon parallel with the track. But as to this there was a dispute in the evidence, so far as disclosed by the record, and the question presented is not whether he was guilty of contributory negligence notwithstanding he was a minor, but whether he was an adult to all intents and purposes notwithstanding he was but 15 years of age, so that it was error to instruct at all that the jury should take his age into consideration. If the case was to go to the jury at all, it was not improper for it to go as it did.

The New York cases cited, namely, *Reynolds v. Railroad Co.*, 58 N. Y. 248, and *Tucker v. Railroad Co.*, 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670, seem to proceed upon a different doctrine as to the burden of proof in negligence cases from that adopted here. The plaintiff there is required to show affirmatively as a part of his case, be-

fore he can recover, that he is not guilty of contributory negligence. Mr. Justice Parker states it clearly in the *Tucker Case*, saying: "The plaintiff, in order to recover for the damages sustained by the killing of his intestate, \* \* \* was burdened with the necessity of proving, first, that the defendant was guilty of negligence; and, second, that he was free from all fault contributing to that result." Not so here. Contributory negligence is a matter of defense, and the burden of maintaining it is cast upon the defendant. *Johnston v. O. S. L. Ry. Co.*, 23 Or. 94, 31 Pac. 283; *Tucker v. Northern Terminal Co.*, 41 Or. 82, 68 Pac. 426. The *Tucker Case* from New York cites the *Nagle Case* (*Nagle v. Allegheny Valley Railroad Co.*, 88 Pa. 35, 32 Am. Rep. 413), and the *sui juris* doctrine is applied. To be understood, this requires development. Mr. Justice Paxson in the *Nagle Case* says: "The law fixes no arbitrary period when the immunity of childhood ceases and the responsibilities of life begin;" and, referring to *Sharswood's Blackstone* (volume 1, p. 435; vol. 4, p. 20), continues: "We learn that 14 is the age of discretion in males, and 12 in females; that at 14 an infant may choose a guardian and contract a lawful marriage. His responsibility to the criminal law is equally well settled. Under 7 years of age an infant cannot be found guilty of felony, for then a felonious discretion is almost an impossibility in nature; but at 8 years old he may be guilty of felony. *Dalt. Just. c. 147*. Between the ages of 7 and 14, though an infant shall be *prima facie* adjudged to be *doli incapax*, yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. After 14 an infant is responsible for his crimes to the same extent as an adult." From this statement of the law the eminent jurist makes the deduction that at the age of 14 an infant is presumed to possess sufficient capacity and understanding to be sensible of danger, and to have the discretion and foresight to avoid it, and "this presumption," he says, "ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of 14 years of age." Mr. Justice Parker thus reasons in the *Tucker Case*: "The Penal Code provides that, when an infant is charged with crime, upon the prosecution rests the burden of showing that the defendant has sufficient intelligence and maturity of judgment to render him capable of harboring a criminal intent until the age of 12 years, at which time the presumption of incapacity ceases. Now, while this statute does not undertake to prescribe, and does not necessarily affect, the rule to be applied in civil actions, it suggests, as asserted in the *Nagle Case*, an age to which the courts can with safety limit the presumption of incapacity on the part of an infant to appreciate the perils incident to crossing railroad tracks.



This presumption may, in a proper case, be so far overborne by evidence as to present a question for the jury, and then the age of the injured party may doubtless be considered by the jury in connection with the facts indicating a lack of comprehension of a dangerous situation. But, in the absence of evidence tending to show that an injured infant 12 years old was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track which an adult would, he must be deemed *sul juris*." If we mistake not the reasoning of that case, it means this: that a child of 12, without evidence to show his incapacity to comprehend danger and to avoid it, will be deemed to be *sul juris*—that is, that he has such capacity—and, being *sul juris*, he is as capable and as well qualified to understand and appreciate the danger and to observe and employ the same degree of caution in crossing a railroad track as an adult. Thus, it casts the burden of proof upon the child to show that he does not possess the same degree of appreciation of danger and the same prudence and foresight, as it respects the crossing of a railroad track, as an adult, and logically carries with it the presumption that in such a case a child of 12 is to all intents and purposes a person of mature judgment, appreciation, and understanding.

The rule seems to be the legitimate result and eventual outgrowth of the rule obtaining in New York, that plaintiff has the burden of showing that he was not guilty of contributory negligence before he can recover. This is apparent from the case of *Stone v. Railroad Co.*, 115 N. Y. 104, 110, 21 N. E. 712, where the court say: "We are inclined to the opinion that in an action for an injury to a child of tender years, based on negligence, who may or may not have been *sul juris* when the injury happened, and the fact is material as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as matter of fact, of exercising judgment and discretion. This rule would seem to be consistent with the principle now well settled in this state, that in an action for a personal injury, based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action."

Now, it may be true that a lad of 12 or 14 has sufficient capacity and understanding to be sensible of danger, and to have the discretion and foresight to avoid it, and yet, as compared with an adult of mature judgment, he may not be governed by the same degree of prudence and foresight as the adult, and therefore he could only be expected to exercise that degree of care and circumspection that a lad of his years is wont to exercise. There is a time when a child is wholly incapacitated to exercise judgment.

Then comes a time when he is to be deemed *sul juris*, as the New York and Pennsylvania courts term it, and is responsible for crime, and may be capacitated to contribute to his own injury, or, in other words, may be deemed guilty of contributory negligence, and yet not have the mature discretion and judgment of an adult. Later comes a time when he is held to all the duties and responsibilities of an adult or person of mature years. While yet he has not arrived at the period when his judgment is mature, and negligence is imputed to him, he ought not to be held to the full accountability of an adult, but only to the accountability of a person of his years of prudence and discretion; and in determining whether he is guilty of negligence as a matter of law this feature must be taken into account: that for a person of his years and discretion he has been guilty of such a departure from that degree of judgment that one of his years is wont to exercise as to make him absolutely responsible for the injury which he has brought upon himself. Under our practice, where the defendant must show as a defense that the plaintiff has been guilty of contributory negligence, it must, contrary to the New York rule, be assumed until otherwise shown that the minor has exercised the care and circumspection to be expected of one of his years of discretion, and we cannot say as a matter of law that because he is *sul juris* he should have exercised the same degree of prudence and judgment as an adult. For these reasons we are impressed that the *sul juris* doctrine, as applied in New York and Pennsylvania, is inapplicable here, and it fortifies our former holding that the instruction complained of was not inappropriate under the evidence as disclosed by the record.

Rehearing denied.

(44 Or. 380)

BOYD v. DUNBAR, Secretary of State.

(Supreme Court of Oregon. March 1, 1904.)

STATE TREASURER—POWERS—DRAWING WARRANTS—NECESSITY OF FUND FOR PAYMENT—COMPENSATION FOR SERVICES IN INDIAN WARS—EXHAUSTION OF APPROPRIATION.

1. By Const. art. 6, § 2, and B. & C. Comp. § 2397, the Secretary of State is made the auditor of public accounts, and required to superintend fiscal concerns of the state, to examine and determine claims where provisions for payment have been made by law, and to indorse upon the same the amount due, and from what fund the same is to be paid, and draw a warrant upon the treasurer therefor. Section 2398 provides, however, that no warrant shall be drawn in payment of any claim unless an appropriation has been first made for the payment thereof; and Const. art. 9, § 4, declares that no money shall be drawn from the treasury but in pursuance of an appropriation made by law. Laws 1903, p. 228, § 1, appropriates \$100,000 to pay the veterans of the Indian wars of 1855-56, and section 3, p. 229, declares that claims for such services shall be presented to the Adjutant General, who shall file with the Secretary of State vouchers showing the amount payable to the claimant, whereupon the

latter officer shall issue his warrant for the amount due. *Held* that, after exhaustion of the \$100,000 appropriated by the act, the Secretary of State is without power to draw a warrant for compensation for services in the Indian wars, and hence cannot be compelled so to do by mandamus.

Appeal from Circuit Court, Multnomah County; A. F. Sears, Jr., Judge.

Mandamus proceeding by J. R. Boyd against F. I. Dunbar, as Secretary of State, to compel defendant to draw a warrant in favor of plaintiff on the State Treasurer. From a judgment granting the writ, defendant appeals. Reversed.

A. M. Crawford, Atty. Gen., for appellant.  
J. C. Moreland, for respondent.

BEAN, J. This is a proceeding by mandamus to compel the defendant, as Secretary of State, to draw a warrant on the State Treasurer in favor of the plaintiff for \$129.50, as compensation for services in the Indian wars of 1855-56. In 1903 the Legislature passed an act "to provide for compensating volunteers for the service of the territory of Oregon, during the Indian wars of 1855-56, for such services, and appropriating money therefor." Laws 1903, p. 228. Section 1 provides "that there be and hereby is appropriated out of the general funds in the treasury of the state of Oregon the sum of \$100,000, or so much thereof as shall be necessary, to pay the veterans of the Indian wars of 1855-56, who served under and by virtue of the directions of the officers of Oregon Territory, for their said service, under the conditions and upon the terms hereinafter provided." Section 2 fixes the amount to be paid the several claimants and section 3, p. 229, reads: "The claim for such services, verified by the claimant, shall be presented to the Adjutant General, who shall, without additional cost to the state, examine and pass upon the same, and may require additional and corroborative evidence in support thereof; and he shall prepare, certify, and file with the Secretary of State proper vouchers showing the amount payable to the claimant under the provisions of this act. Thereupon, the Secretary of State shall issue his warrant for the amount found due to the claimant." Section 4 provides who shall be entitled to the benefits of the act, and section 5 attempts to declare an emergency. Prior to the presentation of the plaintiff's claim, the secretary had, pursuant to the provisions of the act, and upon proper vouchers therefor, drawn warrants in satisfaction of the claims of Indian war veterans regularly presented to the full amount of the appropriation, and at the time of the presentation of the plaintiff's claim the appropriation was, and ever since has been, exhausted. He therefore declined to audit or allow it, but advised plaintiff that it would be referred to the next Legislature for consideration. Under the Constitution and laws, the Secretary of State is the auditor of public

accounts, and charged with the duty of superintending the fiscal concerns of the state. Const. art. 6, § 2; B. & C. Comp. § 2397. But he cannot audit or allow a claim or draw a warrant on the State Treasurer for the payment of money unless authorized to do so by law. His duties and powers in this regard are limited and controlled by the Constitution and statutes, and he cannot go beyond them. He is required, as Mr. Justice Wolverton says, "when a claim is presented, to look to the law, and determine whether the claimant has brought himself within any of its provisions allowing him compensation. In other words, before allowing the claim he must be able to put his finger upon some law which gives the claimant a standing in his tribunal upon which he can demand payment by the state." *Shattuck v. Kincaid*, 31 Or. 379, 393, 49 Pac. 758. In his capacity as auditor, the secretary is required "to examine and determine the claims of all persons against the state, in cases where provisions for the payment thereof shall have been made by law, and to indorse upon the same the amount due and allowed thereon, and from what fund the same is to be paid, and draw a warrant upon the treasury for the same." B. & C. Comp. § 2397, subd. 7. No warrant shall be drawn by him, however. "In payment of any claim against the state unless an appropriation has first been made for the payment thereof; but, where such claim has been incurred in pursuance of authority of law, but no appropriation has been made for its payment, or, if made, has been exhausted, the secretary shall audit such claim, and, if allowed, shall issue to the claimant a certificate as evidence of such allowance." B. & C. Comp. § 2398. The secretary's duties as auditor are therefore confined to examining and determining the claims of persons against the state "in cases where provisions for the payment thereof shall have been made by law"; and he has no authority or power to draw a warrant in favor of any claimant, unless there is at the time an unexhausted appropriation for its payment. Such are the mandatory provisions of the statute; the latter having been enacted for the express purpose of changing the policy previously prevailing, which was approved in *Shattuck v. Kincaid*, supra.

It would seem clear, therefore, that the secretary has no authority, and cannot be compelled, to issue a warrant in favor of the plaintiff, because it is admitted that the appropriation made by the Legislature for the payment of the claims of Indian war veterans had been exhausted before the presentation of the plaintiff's claim. The general language of the act of 1903, that, upon the filing of such a claim in the office of the Secretary of State, he shall issue his warrant for the amount due the claimant, does not repeal or modify the general statute in relation to auditing claims or issuing warrants thereon, nor was it intended to empow-

er the Secretary of State to issue warrants for the particular class of claims mentioned, in excess of the appropriation. If, as is probable, the Legislature was mistaken as to the amount necessary to pay and discharge the claims of the Indian war veterans, the remedy lies with it alone, and neither the secretary nor the courts can correct such mistake. The Constitution provides that no money shall be drawn from the treasury but in pursuance of appropriation made by law. Const. art. 9, § 4. The object of this requirement is to secure to the legislative department the sole and exclusive power of determining how, when, and for what purpose the public fund shall be applied, and its will upon that question is mandatory on all the other departments of the government.

No person has a legal claim which he can enforce against the state except by its consent, and one demanding a warrant from the Secretary of State for the payment of money must be able to point out some law that clearly authorizes the expenditure. Before he can require the secretary to audit or allow a claim in his favor, he must find some law under which it was incurred, and the claim must have been presented within a specified time. Now in this case there is no existing provision of law for the payment by the state of the claims of the Indian war veterans, except the act of 1903. If there ever was a legal obligation on the part of the state to assume and pay the debts of the territory to the volunteers in the Indian wars of 1855-56, the plaintiff's claim has long since been barred by the statute. From 1859 to the present time the statute has provided that all persons having claims against the state shall exhibit them, with evidence in support thereof, to the secretary, to be audited, settled, and allowed, within two years, and not afterwards. B. & C. Comp. § 2399. As plaintiff's claim was not so exhibited, the secretary could not audit or approve it without legislative authority, even if it be a legal obligation of the state. The only law under which he can lawfully act in auditing and allowing claims of the character now under consideration is the act of 1903, which is clearly a special appropriation made by the Legislature for a particular purpose, the amount of which is the measure of the secretary's authority in the premises. Where an appropriation is made for a particular purpose, and is the only authority for incurring the expense, the measure of the appropriation is the limit of the power to obligate the state, and the secretary can neither audit nor draw his warrant for a claim in excess of the amount named. *Henderson v. Hovey* (Kan. Sup.) 27 Pac. 177, 13 L. R. A. 222; *Flynn v. Auditor General*, 99 Mich. 96, 57 N. W. 1092. There is nothing in the act of 1903 to indicate that the Legislature thus intended to authorize the expenditure of any greater sum than the amount appropriated for the purpose stated, and, whatever may

be the moral obligation of the state to Indian war veterans whose claims were not paid from such appropriation, the authority of the secretary is limited to the terms of the act, and he cannot go beyond its provisions, nor can the courts compel or authorize him to do so.

The judgment of the court below is reversed.

(44 Or. 370)

SECURITY SAVINGS & TRUST CO. et al.  
v. GOBLE, N. & P. R. CO. et al.  
(WATTS et al., Interveners).

(Supreme Court of Oregon. March 1, 1904.)

RAILROADS—INSOLVENCY—RECEIVERS—LABOR CLAIMANTS—MORTGAGEES—PRIORITY—PERSONAL PROPERTY—SALE—APPLICATION OF PROCEEDS.

1. B. & C. Comp. § 1083, provides that it shall be the duty of a receiver to pay out of the first receipts and earnings of the corporation, after paying current operating expenses under his administration, the wages of all employes and laborers which accrued within 6 months prior to the appointment of such receiver; that he shall also pay the wages of all employes and laborers employed by him, at least once every 30 days, out of the receipts and earnings, and, if he shall not take in sufficient moneys from the receipts and earnings, then he shall issue certificates to such employes, which he shall pay out of the first moneys coming into his hands from the receipts and earnings of the property under his charge, in the order of their issuance. *Held*, that labor claimants against a corporation were not entitled to priority of payment to mortgagees holding a mortgage on the corporation's property, since such section did not authorize payment of wages from the corpus of the corporation's estate, but only from the receipts and earnings thereof.

2. Where, in a proceeding to foreclose a railroad mortgage, a receiver was appointed, and realized from the sale of personal property covered by the mortgage the sum of \$670, such sum was equally applicable to the payment of the mortgage indebtedness with the proceeds of the sale of the real estate.

On petition for rehearing. Modified.

For former opinion, see 74 Pac. 919.

WOLVERTON, J. By his petition for rehearing, counsel for the interveners insist that the claimants are entitled to priority of payment over the mortgages of plaintiff by virtue of the statute (B. & C. Comp. § 1083). As we read this statute, it was not intended that such claims should be paid out of the corpus of the property in the hands of the receiver, but from the first receipts and earnings of the property coming into his hands after paying current operating expenses accruing under his administration; that is to say, the surplus of earnings coming into the hands of the receiver after his appointment, above current operating expenses, should be applied to the wages of laborers accruing within 6 months prior to the appointment of such receiver. That such is the proper interpretation of the statute is indicated by the latter clause, by which the receiver is required to pay the wages of all employes and laborers employed by him, at least once every

30 days, out of the "receipts and earnings" while the property is under his management, and, should he not take in sufficient moneys from the receipts and earnings, then that he shall issue and deliver to each of such employes and laborers, upon demand, a certificate showing the amount due, etc., and thereafter he shall pay such certificates out of the first moneys coming into his hands from the receipts and earnings of the properties under his charge, in the order of their issuance. It was not the purpose of this statute to take note of the earnings prior to the receivership, or to subject the corpus of the property to the payment of the labor claims; and the rule as enunciated in the main opinion is undisturbed, and not in manner entrenched upon by its operation. Neither is section 5659 of any avail to the claimants, as they have made no attempt to claim a lien in pursuance thereof. A rehearing will therefore be denied.

From a petition filed on the part of the trust company for a modification of the decree, which is not controverted by the claimants, although, as we are informed, their counsel has been furnished with a copy, we find that we misinterpreted the findings of the trial court respecting the status of the personal property from which the \$670 was derived; having the impression that it was not covered by either of the mortgages. Being now advised to the contrary—that it was in fact covered by the chattel mortgage, and that the proceeds thereof were derived through a sale by the receiver under the order of the court—the decree heretofore rendered by this court will be modified so as to apply this fund to the payment of the mortgage indebtedness, the same as the proceeds of the sale of the real property.

(44 Or. 425)

**SCHWARTZ et al. v. GERHARDT et al.**

(Supreme Court of Oregon. March 1, 1904.)

TRUSTS—ADMINISTRATION—FOREIGN JURISDICTION—DECREES—CONSTRUCTION—CONSTRUCTIVE TRUSTS—BURDEN OF PROOF—IDENTITY OF FUNDS—TRANSACTIONS BETWEEN RELATIVES—ACCOUNTING—PARTIES—PLEADINGS—DENIALS.

1. A trustee appointed by a foreign court is amenable only to that court, and the fact that his residence is in another jurisdiction will not confer authority there to control the administration of his trust, or to require accountability for the trust property.

2. The decree of a court in Germany declared that the will of plaintiffs' grandfather was void in so far as it attempted to deprive plaintiffs' father of the administration and enjoyment of three-fourths of plaintiffs' inheritance during their minority, and further declared that the father was entitled to such administration and enjoyment until the plaintiffs should have completed their eighteenth year, and directed the surrender to the father of such three-fourths. No further evidence as to the laws of Germany or the proceedings in the case was introduced. *Held*, that the decree would be construed as having finally disposed of the fund, and that it had ceased to be in the cus-

tody of the German court, and the trust in favor of plaintiffs was therefore subject to the equitable jurisdiction of the courts of Oregon.

3. In a suit to establish a constructive trust, plaintiffs must show by clear and convincing proofs that their money in defendant's hands was used by him to purchase the identical property in controversy.

4. A trust fund does not lose its identity, though it may change in semblance, and, in whatsoever form it may have assumed, the trust still attaches, whether it remains in the hands of the original trustee, or has gone into other hands, especially if the other has taken with knowledge of the trust relation.

5. Where a transaction complained of as creating a constructive trust is between near relatives, it will be viewed with distrust, and, the attendant facts and means of disclosure being peculiarly within the trustees' knowledge, they are called on, when a prima facie case is made against them, to show the entire good faith of the transaction, and, failing in this, the prima facie case will prevail.

6. In a suit by children to establish a constructive trust in property purchased by the children's father with money left to plaintiffs by their maternal grandparents, evidence *held* to make such a prima facie case as to require defendants to show the true state of affairs, and, not having done so, to hold them to full accountability.

7. Where it was shown that property was of considerable value, and was purchased with the trust funds of plaintiffs, defendant must be held to hold the same as trustee, constructively, for plaintiffs, although the amount of the purchase price was not shown.

8. In a suit to establish a constructive trust and for an accounting, it is proper to reserve the matter of the accounting for further hearing and consideration after decreeing the establishment of the trust.

9. A denial that defendant paid the sums alleged in his itemized account, or any part thereof, is sufficient to put the items of such account in issue.

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Jr., Judge.

Action by Louisa Schwartz and another against Martin Gerhardt and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The plaintiffs, Louisa Scharwtz and Anna Gerhardt, are the children of the defendant Martin Gerhardt, and the stepdaughters of Frieda Gerhardt, his wife. They inherited in Germany, from Peter Hahn and Susanna Hahn, their grandparents on their mother's side, \$1,725.12, which, it is alleged, came into the possession of the defendant Martin Gerhardt; it being further alleged that he purchased lots 13, 14, 15, and 16, block 1, Lochinvar's Addition, Multnomah county, Ore., known as the "Piedmont Property," with a portion of such funds, and took the legal title thereto in the name of his wife, with her knowledge of the conditions, and that he converted the remainder to his own use and benefit. A decree is demanded that the real property described be held in trust for plaintiffs, together with an accounting. The plaintiffs having succeeded in the circuit court, the defendants appeal.

C. J. Schnabel and Daniel R. Murphy, for appellants. A. L. Veazie, for respondents.

WOLVERTON, J. (after stating the facts). The defendants, at the threshold of the controversy, challenge the jurisdiction of the court to require an accounting, or to control in any manner Gerhardt's disposition of the funds, which it is insisted that he holds as the father and natural guardian of plaintiffs, and is accountable only to the court in Germany that gave him the property for administration during the minority of the plaintiffs. It is undoubtedly a well-established principle of law that a trustee appointed by a foreign court is amenable only to that court, and the fact that his residence is in another jurisdiction will not confer authority there to control the administration of his trust, or to require accountability for the trust property. The rationale of this doctrine is that, the trust relations having been created by judicial decree of another country, the trustee is accountable only to the court creating the trust. He becomes the instrumentality of the court for the administration of the property intrusted to his care and custody, which is to be considered and treated as in *custodia legis*; and, if other jurisdictions were permitted to interfere with and to direct the execution of the trust, it would lead to great conflict of authority and inextricable confusion, which would hinder rather than aid in the rightful administration thereof. 2 Beach, *Trusts & Trustees*, § 758; *Campbell v. Sheldon*, 13 Pick. 8; *Jenkins v. Lester*, 131 Mass. 355; *Curtis v. Smith*, 6 Blatchf. 537, Fed. Cas. No. 3,505; *Woodruff v. Young*, 43 Mich. 548, 6 N. W. 85; *Vaughan v. Northup*, 15 Pet. 1, 10 L. Ed. 639; *Peale v. Phipps*, 14 How. 368, 14 L. Ed. 459. Gerhardt, however, as we view the situation, is not in a position to invoke the rule. The complaint states that on or about the 13th of January, 1898, a decree was rendered by the Second Civil Department of the Grand Ducal Circuit Court of Mayence, Germany—a court of general jurisdiction, having jurisdiction of said cause and parties—to the effect that the said defendant Martin Gerhardt, as father and natural guardian of the plaintiffs herein, was entitled, under the laws of Germany, during the minority of each of the plaintiffs, to the custody and control of her respective share of the said inheritance, to the extent of three-fourths thereof, and that by such decree the said George Hahn was directed to pay over the said three-fourths share of the said inheritance to the said defendant Martin Gerhardt accordingly. This averment does not appear to have been denied by the answer, but it is alleged that a part of the money left by the grandparents, to wit, \$1,145.49, was by said court of Germany decreed to be paid over to the defendant Martin Gerhardt, to be used and expended by him for said children during the time they were under the age of 21 years. The decree referred to is, in part, as follows:

"(1) The wills of Peter Hahn and Susanna, née Hambach, his wife, of Nierstein, dated

November 7, 1889, July 31, 1891, and February 12, 1894, are hereby declared void in so far as they deprive the plaintiff of the administration and of the [use and enjoyment] usufruct of three-fourths of the inheritance of his children.

"(2) It is further found that the plaintiff is entitled to the administration and [use and enjoyment] usufruct of these three-fourths until the children have completed their eighteenth year, and that it is the duty of George Hahn, the defendant, to surrender the plaintiff three-fourths of his children's property, if in his possession; the right to ascertain the amount in detail being reserved."

This is all the evidence to be found in the record tending to show that Gerhardt is a trustee of plaintiffs and their property. The opinion of the court in Germany indicates that the father is not only entitled, under the laws of that country, to the right of administration of the property of his minor children coming to them by inheritance, but that he has a right to the use and enjoyment, or the usufruct, of such property during the time of their minority; the term "usufruct" signifying "the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing." Bouvier, *Lay Dict.* Some criticism as to the correct translation of the term in German standing for "use and enjoyment," or "usufruct" is made, but, by reading the court's decree, together with its opinion in the decision rendered, we are convinced that the father is entitled to the usufruct; that is, the profits or earnings of his children's estate during their minority, and not to the corpus thereof, or any part of it. While Mr. Gantenbein was on the stand as a witness for plaintiffs, it was developed on cross-examination that he had the Codes of the German Empire of 1898, consisting of 10 or 12 volumes, in his office, in the city of Portland; that he had never looked into them to ascertain whether a bond was required of a guardian where there was a fund to be distributed, but that he had good reason to believe, from a letter written by a judge of the court in Germany, that such a bond was required, and proffered to offer the letter in evidence if defendants desired, but it was not offered. When asked to produce the Codes, the witness demanded proper notice to do so. Here the case rested, without a production of the Codes, or their being introduced in evidence. We have therefore the simple record, showing the inheritance of the plaintiffs in Germany, which a competent court of that country directed to be surrendered to the defendant Martin Gerhardt, their father, he being entitled thereto under the laws of that country for the purpose of administration, with a right to the profits or earnings arising therefrom during their minority; that is, until they arrive at the age of 18 years. The find-

ings and decree of the court contain no order or direction that he give or furnish any bond or other security for the faithful performance of his trust, nor do they require that he account to the court for the funds thus directed to be delivered or surrendered to him; and the Codes and laws of that country regulating the manner or disposition of such property are not before us. Are we to assume, in the light of this evidence, that the property is in custodia legis, or should we take it that the order of the German court introduced made a final disposition thereof, in so far as it was authorized to control and direct its administration, and the trustee's accountability therefor to that tribunal? It was said at the argument that this court would presume that the laws of Germany in respect to the guardianship of the estates of minors would be the same as our own; therefore, that a bond was required of the guardian, and that he was accountable to the court appointing him. We have enough before us, however, to indicate that the laws there in the respect mentioned are not the same as our own, and hence the presumption cannot hold good. The father there is entitled as of right to both the administration and the profits or earnings of the property during the minority of his children. Not so here. The natural guardian has the preference, if he apply for it, to appointment as guardian of the minor's estate, but has no right whatever to the profits arising therefrom, and is held to a strict accountability to the county court or the ward for the entire property intrusted to him, with all accumulations of profits and earnings. The presumption invoked cannot, therefore, avail the defendants; and, under the evidence, we think the better view is that the decree of the German court finally disposed of the fund when it ordered unconditionally, as it did, that the property be surrendered to the father. When he took possession, it ceased to be in custodia legis, and he only became accountable to the plaintiffs for the faithful execution of his trust. The trust was therefore subject to equitable cognizance in this jurisdiction.

This brings us to a consideration of the rightful ownership of the realty in controversy. That depends upon whose money was used in its purchase. Plaintiffs say it was theirs, and, having been so employed, that the defendant Frieda Gerhardt holds the property in trust for them. This is denied by defendants, who allege that the purchase was made wholly and entirely with the means of Frieda Gerhardt, and that she is the real owner. The plaintiffs have the burden of proof, and, inasmuch as they are depending upon a constructive trust, they must show by clear and convincing proofs that their money in the hands of Gerhardt was used by him to purchase the realty, or, in other words, that he has misappropriated or wrongfully employed their means

in making the purchase for his wife's use and benefit. The principle is that the fund in trust does not lose its identity, although it may change in semblance, and, whatsoever form it may have assumed, the trust attaches still, whether it remains in the hands of the original trustee, or has gone into other hands, especially if the latter has taken with notice of the trust relations. When, therefore, it is sought to be shown that trust money or property has been misapplied, and to trace or impress the trust upon property in another and different form, the recognized rules of law require that the identity be established by clear and cogent testimony before the courts will say that it is the property of the cestui que trust, and that it should be accounted for as such. *Sisemore v. Pelton*, 17 Or. 546, 21 Pac. 667; *Barger v. Barger*, 30 Or. 268, 47 Pac. 702, and cases cited. See, also, *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868. It is perhaps putting it strongly to say that the proofs should be convincing beyond a reasonable doubt, as though the guilt of a person accused of a crime was in the balance; but they should be such as to satisfy the mind fully from a consideration of all the evidence of the misapplication and of the identity of the trust property sought to be established in its transformed condition.

There is another rule, however, equally as well settled, and of peculiar application here, which must be observed in the course of the investigation, which is that, where the transaction complained of as creating the condition which it is sought to rectify is between near relatives, it will be viewed with distrust, and, the attendant facts and circumstances and the means of disclosure and explanation being peculiarly within their cognizance and power, they are called upon, when a prima facie case is made against them, to show the entire good faith of the transaction, and if they fail in this the prima facie case will prevail. *Jolly v. Kyle*, 27 Or. 95, 39 Pac. 999; *Mendenhall v. Elwert*, 36 Or. 375, 389, 52 Pac. 22, 59 Pac. 805; *Garnier v. Wheeler*, 40 Or. 198, 66 Pac. 812; *Goodale v. Wheeler*, 41 Or. 190, 68 Pac. 753. With these observations as to the rules of law applicable, we will turn to the evidence.

There was an application made for continuance on behalf of the plaintiffs for the purpose of obtaining evidence in Germany, to show, among other things, the amount that Gerhardt had received of plaintiffs' inheritance; but, in order that the trial might proceed, it was admitted, in effect, that testimony would be produced tending to establish the allegations of the plaintiffs upon the subject. This is wholly undisputed, so that it must be taken as proved, as alleged, that Gerhardt received from Germany \$1,725.12.

The plaintiff Louisa Schwartz was born in Germany, and Anna Gerhardt in America. When they were yet quite young, the defendant Martin Gerhardt returned with them and

his former wife to Germany, where, his wife having soon died, he placed the children in care of his mother, and returned again to America. A few weeks afterward their grandparents on their mother's side, Peter and Susanna Hahn, took them into their custody, and kept them as long as they lived; at their death the children being given in charge of their uncle George Hahn and an aunt. Some six or seven years after coming to America the second time, having married the defendant Frieda in the meantime, Gerhardt again returned to Germany, and was appointed guardian of the persons of the plaintiffs by a decree of the family council, bearing date May 15, 1895. He almost immediately came with the children to America. Peter and Susanna Hahn left an estate to plaintiffs by will, but it was subsequently decreed in a suit instituted by Gerhardt that three-fourths of the property, notwithstanding, descended to plaintiffs by inheritance, and that Gerhardt was entitled, by reason of being their father, to its administration and use and enjoyment, or the issues and profits arising therefrom. The decree is the same as hereinbefore discussed, and bears date January 6, 1898. In August, 1896, the defendant Martin Gerhardt came with his family from St. Paul, Minn., where he was employed as a mechanic in the shops of the Northern Pacific Railroad Company, and settled in Clark county, Wash.; purchasing 10 acres of land, at a consideration of \$100 per acre. A mortgage was executed upon this place, the amount of which does not appear, presumably to secure the payment of a part, at least, of the purchase price. Gerhardt borrowed \$250 to come West on. Mrs. Gerhardt had saved up of her own earnings prior to their marriage \$250, but that appears to have been all spent before leaving St. Paul. The family lived scantily on the farm, as it is called, and the parents could not have made more than a bare living while there. Gerhardt sold the place in August, 1898, to his brother-in-law, Moore, for \$1,200, and soon thereafter went to Germany; and the family moved to Portland, and stopped at the Hotel Rheinpfalz. He returned from Germany shortly before Christmas, and in a few days the family moved into a house on Sacramento street, where they lived for two months, when the property in question was purchased, and the family took up their abode there. Louisa Schwartz testifies that in the winter, after moving on the farm in Clark county, Mrs. Gerhardt received \$500, which she inherited, but that they were very poor, and kept using from it until it was all expended; that the \$250 which Gerhardt borrowed before coming West had all been expended; that they had gotten in debt, and the money last received was all paid out before spring; that, when the family moved to Sacramento street, her father purchased new furniture at an expense of from \$200 to \$250, sufficient to

furnish the house comfortably for people in their station of life; that, soon after her father's return from Germany, he and her stepmother went out every day looking for a home to buy, which resulted in the purchase of the property at Piedmont, and at the same time he bought a cow, a buggy, and some chickens; that when her father left for Germany he told her he was going to San Francisco to seek employment, and that she did not know any different until she overheard her mother and Mr. Moore talking about some money matters, and about him being in Europe trying to get the money; that while he was away her stepmother constantly told her that her father was in San Francisco; that she overheard the stepmother telling her sister that, whenever there was any property purchased again, it would be bought in her name, so that witness and her sister could not touch it; that, when Gerhardt arrived home from Germany, he took witness into a room and asked her if she knew where he had been, and told her he had been to Europe, and that all her relations were dead, and that it was no use for her to write to them, for that reason, and took her to task for having written a letter that he wrongfully accused her of writing, but that he never told her anything about getting the money in Germany; that she had a conversation with her father and stepmother shortly before bringing this suit, in which the witness mentioned the money matter to them—that she would see about the affair as soon as she could—and that Gerhardt made reply that he did not marry her mother for nothing (meaning her own mother), and that the money belonged to him, and not to plaintiffs; that she told him he bought the Piedmont property with their money, and gave it to their stepmother, which he denied, and that she has never seen her father since to speak to him; that witness' stepmother told her immediately after they moved to Piedmont that her father had paid her back the \$750 of hers that he spent, and that she was going to put it in the bank, and would not let him lay another hand on it. John Fuog testifies that, before going to Germany, Gerhardt said to him, "I got some business. I go to the old country;" and when he came home he said, "I have fixed that all right in the old country;" and after that he bought some property, and said to witness, "John, I have bought a nice property. You come and see me when you get time." This is all the evidence of much importance in the record bearing upon the subject. There is much testimony indicating that the plaintiffs were illy treated by the defendants, and it leaves the impression that the parents were unduly severe with them, and that they discriminated against them in favor of the children of the second marriage, while it might have been, on the other hand, that the plaintiffs were at times undutiful. The only value to be attributed to this is

that it sheds light upon the transaction touching the trust as it pertains to plaintiffs' property. Now, it is manifest from this testimony that when Gerhardt came West with his family from Minnesota he had no ready means, as he was obliged to borrow money to make the journey with. He went in debt for the land he purchased in Clark county, Wash., to what extent is not known, but it must have been considerable. In the winter after their arrival, as related by Louisa, they were indebted to such an extent that, when Mrs. Gerhardt received the \$500 from her people, it was soon expended. They lived scantily on the place for two years or more. In August after the decree was rendered in Germany, giving the father possession of plaintiffs' inheritance, the place was sold at a profit of \$200 above the purchase price, there still being a mortgage on it, which was paid off when the purchaser paid for the land. Gerhardt went very soon to Germany, and returned in about two months, or shortly before Christmas. It was but a little later that he purchased furniture to the amount of \$200 or \$250 with which to furnish the house on Sacramento street, and he and his wife began looking for property to buy for a home, resulting in about two months in the purchase of the property in question. At the same time a purchase was made of a cow and buggy and some chickens. Gerhardt attempted to conceal the fact of his going to Germany from the plaintiffs, and his wife led them to believe that he had gone to San Francisco for the purpose of obtaining work. When he returned, he told Louisa where he had been, but he upbraided and punished her for presuming to write to her people in Germany, telling her at the same time it was of no use for her to write any more, as her relatives were all dead; but he never disclosed to her at any time the fact of his obtaining their money in Germany, although she was then in her sixteenth year, and capable of knowing and understanding much about such affairs, and fair dealing would suggest that she should have been fully informed of what he had done relative to their property. When, however, he was reproached about the money matters by Louisa, he replied that the money belonged to him—an idea that seems to have taken firm hold of him, as his actions fully indicate. The stepmother's intentions were discovered by her remark to her sister—in effect, that, when any property was bought again, it should be in her name, so that the older children would not be able to obtain it. There is enough here to lead one irresistibly to the conclusion that the Piedmont property was purchased with the money of plaintiffs that the father obtained in Germany. To say the least, there is such a prima facie case as to require defendants, who have full knowledge of all transactions respecting the property, to show the true state of affairs, and, not having done so, they must be held

to full accountability. Gerhardt could not have had money of his own with which to make these purchases. True, he may have realized something from the farm above the mortgage, but it could not have been a large sum, and the expenses of the family had to be met in the meanwhile, nor could his wife have had any money with which to have made the purchases, for we find that he paid back to her, manifestly out of plaintiffs' funds, the \$250 that they used of her earnings in Minnesota, and the \$500 that she received from her people after coming to Washington, which was expended while on the farm, making \$750, the sum she told Louisa that she had put in the bank, and that her father would never lay hands upon again. These matters are all undenied, and they bear heavily against the father as trustee, who is held to an open, fair, and strict accountability of his trust, and unmistakably implicate the stepmother in his efforts to misappropriate the inheritance of the plaintiffs.

There was an omission in failing to show the amount of the purchase price of the realty, but, it being fully apparent that the property was of considerable value, and that it was purchased with the trust funds of the plaintiffs, the defendant Frieda Gerhardt must be held to hold the same as trustee constructively for them, and the decree of the circuit court requiring the conveyance to plaintiffs was properly rendered.

The circuit court reserved the matter of the accounting for further hearing and consideration. This was regular, under the practice. *Durkheimer v. Heilner*, 24 Or. 270, 33 Pac. 401, 34 Pac. 475.

In the itemized account of expenditures alleged to have been made for the benefit of plaintiffs and their trust property, appear two items—one for \$678, and the other for \$215—which defendants' counsel claim were admitted by the reply by failing to deny them in proper form. The itemized account appears to have been annexed to the answer and marked "Exhibit A," but there is no direct allegation making it a part thereof. Moreover, if it be conceded that it was regularly made a part of such answer, there is a denial in the same connection that defendant Martin Gerhardt paid the sums alleged in their pretended itemized account. Exhibit A, or any part thereof, which is a sufficient denial, under the practice.

The decision of the circuit court will be in all respects affirmed, and it is so ordered.

(45 Or. 67)

McLEOD v. LLOYD.

(Supreme Court of Oregon. March 1, 1904.)  
APPEAL—DECREE—ALIAS MOTION TO RECALL  
MANDATE.

1. Where the Supreme Court has exercised its discretion on a motion to recall a mandate by entering a final decree, after affirmance



of the decree, and overruling petition for rehearing, an alias motion to recall the mandate will not lie.

On alias motion to recall mandate. Motion denied.

For former opinions, see 71 Pac. 795; 74 Pac. 491.

MOORE, C. J. This is an alias motion to recall a mandate. It is stated by appellant's counsel that the land, the title to which is alleged to have been clouded, lies in Douglas, and not in Lane, county, as averred in the complaint, which fact was not discovered until after the decree in this court was rendered; that the defendant, for a valuable consideration, and without knowledge of the plaintiff's claim, purchased the premises in good faith, and caused the deeds to be recorded in Douglas county, before plaintiff's deeds were recorded therein, thereby securing the superior title; that the mandate issued in pursuance of the decree of this court states that plaintiff is the absolute owner of the lands; that the deeds therefor executed to the defendant are void, and should be canceled; and that he is enjoined from asserting any interest in the premises. An application is made for an order recalling the mandate, that another may be issued, directing the trial court to take such further proceedings in this suit as may be necessary, not inconsistent with the opinion, or that the new mandate shall not preclude the defendant from asserting, either in this suit, or in any other action or proceeding, any rights he may have acquired by reason of his having secured the prior record of his deeds in the proper county.

It was held on the former application to recall the mandate that it was discretionary with this court either to enter a final decree, or to remand the suit for further proceedings, and a final decree having been entered on appeal herein, and a petition for a rehearing overruled, the right of the defendant to answer in this suit is thereby concluded. *McLeod v. Lloyd*, 74 Pac. 491. If, since the cause was brought to this court, the defendant's ascertainment of the boundary between Lane and Douglas counties may be regarded as newly discovered evidence, his remedy is not to open the decree that was affirmed in this court, but to vacate it by instituting an original suit for that purpose. *B. & C. Comp. § 391*; *Crews v. Richards*, 14 Or. 442, 13 Pac. 67; *Nessley v. Ladd*, 30 Or. 564, 48 Pac. 420; *Hilts v. Ladd*, 35 Or. 237, 58 Pac. 32. "The law relative to bills of review," says Mr. Justice Gabbert in *Warren v. Adams*, 26 Colo. 404, 60 Pac. 632, "is based upon Lord Bacon's ordinance, which provided: 'No decree shall be reversed, altered or explained, being once under the great seal, but upon bill of review, and no bill of review shall be admitted except it contain \* \* \* some new matter which hath arisen in time after the decree, and not any new proof which

might have been used when the decree was made. Nevertheless, upon new matter that has come to light after decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be granted by the special license of the court, and not otherwise.' On the question of diligence, the rule is that, in order that new matter may be made available as a basis for a bill of review, it must appear that it was not known to the party pleading it, or his counsel, in time to have been brought forward and used in the former trial, and that by the exercise of reasonable diligence it could not have been discovered or produced in that suit." In the notes to the case of *Little Rock, etc., Ry. Co. v. Wells*, 54 Am. St. Rep. 216, it is said: "The enforcement of a judgment may be inequitable, either because it was against equity and good conscience to enforce it from the very beginning, or because, though its enforcement was at one time proper, subsequently occurring circumstances have changed the relations of the parties, and made it inequitable to insist upon its further execution." If, therefore, the decree of this court, though proper when rendered, has become inequitable in consequence of the defendant's subsequent ascertainment of the boundary between these counties, and the prior recording of his deeds in Douglas county, and such discovery could not have been made, by the exercise of reasonable diligence, in time to interpose the fact as a defense in the trial of this suit, the remedy is by an original suit to set aside the final decree of this court, and the mandate heretofore issued will afford no bar to its prosecution, so that no necessity exists for recalling the mandate, and the motion should be overruled, and it is so ordered.

(44 Or. 407)

# RINGUE v. OREGON COAL & NAVIGATION CO.

(Supreme Court of Oregon. March 1, 1904.)

SERVANT'S INJURIES—EXISTENCE OF SERVANT RELATION—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY—INSTRUCTIONS—CURE OF ERRORS—WAIVER OF REGULATIONS—DISCHARGE—QUESTION FOR JURY.

1. In an action for injuries to a servant, where the relationship of master and servant was denied by defendant, the burden was on plaintiff to show such a state of facts as would constitute such relation, within the law of negligence.

2. In an action for injuries to an infant working in a mine with his father, in order to establish the relationship of master and servant between plaintiff and defendant mine operator, it was not necessary for plaintiff to prove a direct contract of employment by some authorized agent of defendant, or that his right to work in the mine was included in the terms of the contract with his father, but evidence that he was going into the mine, at the time of his injury, by the request of his father, and with the express or implied consent of defendant, for the purpose of performing work or labor for defendant, was sufficient to show him not a

trespasser or licensee, but a servant of defendant, within the rule requiring a master to exercise reasonable care to prevent injury to his employes.

3. In an action for injuries to a servant, error in an instruction basing plaintiff's right to recover on the existence of a contract of employment directly between defendant and himself, or indirectly through his father, was not cured by an instruction to the effect that if plaintiff was passing through a gangway by his father's request, with defendant's consent, it would be defendant's duty to exercise due care to avoid unnecessary danger to him, as such instruction must be taken in connection with the other instructions, and be understood as defining plaintiff's rights and defendant's duties in case the jury should find that there was an actual contract of employment.

4. A custom of a mine operator, requiring a father employed by it, and desiring to take his son into the mine to assist him, to apply to the bookkeeper for an order on the blacksmith for tools for the son, was a regulation which the operator could waive.

5. An instruction based on facts not shown by the evidence is erroneous.

6. In an action for injuries to a servant, whether statements of defendant's officers, made when plaintiff's father, requested additional cars for plaintiff to use, to the effect that the father should take plaintiff out of the mine, because there were not enough cars for the miners, amounted to a discharge of plaintiff, or was merely intended as an excuse for not furnishing the cars, was a question of fact for the jury.

Appeal from Circuit Court, Coos County; J. W. Hamilton, Judge.

Action by Louis Ringue, a minor, by his guardian ad litem, Julien Ringue, against the Oregon Coal & Navigation Company. From a judgment for defendant, plaintiff appeals. Reversed.

E. B. Watson and C. Henri Labbe, for appellant. J. W. Bennett and J. S. Coke, for respondent.

BEAN, J. This is an action by Louis Ringue, by his guardian ad litem, against the Oregon Coal & Navigation Company, to recover damages for an injury alleged to have been caused by the negligence of the company. The complaint is, in substance, that on and prior to November 21, 1901, the plaintiff, a minor 14 years of age, and Julien Ringue, his father, were employed in defendant's mine in Coos county as common laborers, engaged in mining coal and loading it in cars, for which the father received \$1 per ton; that on the day named, while the plaintiff was going to the place of his work, a portion of the roof of the gangway along which he was passing fell, owing to the neglect and carelessness of the defendant, and injured him. The answer admits the accident to the plaintiff, but denies his employment by the defendant and the negligence charged. For affirmative defenses it alleged (1) that plaintiff was not in the employ of the defendant at the time of the accident, but was wrongfully in the mine, without the knowledge or consent of the defendant, and contrary to its direction; (2) that the gangway where the accident occurred was con-

structed by competent and skillful men, in a good and workmanlike manner, and was continuously and daily inspected by skillful employes of the defendant, who were unable to ascertain any defect therein; (3) that there were three other and additional gangways which the plaintiff could have used in going to the place or room where his father was at work, but, instead of doing so, he wrongfully stopped, loitered, and played in the gangway where the injury occurred; and (4) that plaintiff's father was a competent and skillful miner, and had for many months prior to the accident passed daily through the gangway, and both he and the plaintiff understood the manner in which it was constructed, and thoroughly knew and appreciated whatever risk or danger there was in using it, and, as a consequence, they ought not to be heard to allege that it was an unsafe place through which to pass, or that defendant should be held responsible for the accident.

The testimony on the trial tended to show that for several years prior to the accident the plaintiff's father had been working for the defendant as a coal miner, receiving as a compensation \$1 a ton for all coal mined and loaded on the cars; that it was a custom or practice for fathers employed by the defendant, who desired to have their minor sons assist them at their work, to obtain from the bookkeeper an order on the blacksmith for a half set of tools, and to request the underground boss to furnish an extra car for the boy; that for some time before the accident the plaintiff, at the request of his father, and with the knowledge and acquiescence of the officers of the company, assisted his father in his work, and the company furnished extra cars for his use, and paid the father for his services; that, as he was going to the place of his work on the morning of the accident, a section of the roof of the gangway through which he was passing fell and injured him. There is no evidence of any direct contract of employment of the plaintiff by the defendant, or that his father obtained an order from the bookkeeper on the blacksmith for tools for him. It was in evidence that about eight or ten days before the accident the plaintiff's father complained to the superintendent, and also to the underground boss, that he and his son were not getting sufficient cars, and was told by them to take the boy out of the mine, because "there were not cars enough for the miners." This was not done, however, and the evidence tended to show that the plaintiff worked as usual from that time until the accident, and the defendant continued to furnish cars for him and his father, and to receive and accept the benefit of his services. The court, in its instructions, stated that one of the material issues in the case was the alleged employment of the plaintiff by the defendant; that upon such issue the burden of proof was with the plaintiff, and he must show an employment before he could recover. Upon this

point it charged the jury that if they found from the evidence "that plaintiff's father was employed by the defendant, and, by the terms of such employment, plaintiff was to assist the father in such work, and plaintiff entered the mine under such employment, and with permission of defendant, it would be the duty of the defendant to exercise reasonable care in maintaining a place for his work," etc.; that, if there was an employment of the plaintiff by the defendant, and "the accident occurred through some defect in the mine, which the defendant should have provided against," etc., it would be necessary for them to ascertain the amount of damages suffered by the plaintiff; that, if the plaintiff was not rightfully in the mine at the time of the accident, he could not recover, because in such case the defendant would not be required to furnish him a safe place "in which to work, or through which to pass to his work. That relationship and duty would only exist in case plaintiff was employed by defendant"; that if the plaintiff was in the gangway of the defendant at the time of the accident, "without first having obtained its consent for that purpose," he was a trespasser, and could not recover; that if the plaintiff's father "applied to the defendant for leave to take his son into the mine," and "permission to do so was refused," the plaintiff had no right to go into the mine, and was a trespasser, to whom the defendant did not owe the duty of seeing that the place where he was injured was reasonably safe.

By these instructions the plaintiff's right to recover was made to depend upon his employment by the defendant, and the jury must necessarily have understood he was not entitled to recover unless there was an actual contract of employment, even though he may have been working at the mine at the request of his father, with the defendant's permission and consent, and for its benefit. The complaint proceeds on the theory that at the time of the accident the relation of master and servant existed between the plaintiff and the defendant. This was denied, and was therefore a material issue in the case. The plaintiff must recover, if at all, upon the cause of action as alleged; and the burden of proof was upon him to show such a state of facts as, under the law of negligence, would constitute the relation of master and servant. We do not understand, however, that it was necessary for him to prove a direct contract by some authorized agent of the defendant, employing him, or that his right to work was included in the terms of the contract with his father. If, as the evidence tended to show, he was going into the mine at the time of the accident by the request of his father, with the permission or consent of the defendant, express or implied, for the purpose of performing work or labor for it, he was not a trespasser or a licensee, but was rightfully in the mine, and the relation of master and servant existed between

him and the defendant, within the meaning of the rule requiring a master to exercise reasonable care to prevent injury to his employes. In *Tennessee Coal, etc., Co. v. Hayes*, 97 Ala. 201, 12 South. 98, the plaintiff's father was employed to load defendant's cars at a specified price per car. His minor son, while assisting him in his work by the direction and under the supervision of an agent of the defendant, was injured; and it was held that the son was a servant of the defendant, although his name was not on its pay roll, and his father received the compensation for his services; the court saying: "The defendant had the benefit of plaintiff's labor thus induced and assented to by its authorized agent, and performed with his knowledge and under his supervision, if the facts be in line with this tendency of the evidence, which was a question for the jury. That this evidence, if believed, established the relationship of master and servant, within the meaning of the act referred to, between the defendant and the plaintiff, is, we think, clear. That plaintiff's name was not on defendant's pay roll, and that he personally received nothing from defendant for his labor, has no bearing on the question. He was a minor, and his father was entitled to his time and to the rewards of his labor. The payment of compensation for his services to his father was as if it had been paid directly to him, so far as the fact of payment bears upon the question of the relationship between him and the defendant corporation. Here, then, on this aspect of the evidence, we have an employment by the defendant in accordance with defendant's directions, and payment for that work, in legal effect, to the person employed, and who performed the labor. We do not conceive that any doubt can exist of the jury's right to find that plaintiff was defendant's servant, and by such finding support the averments of the complaint in this regard." In *Rummell v. Dilworth*, 111 Pa. 343, 2 Atl. 355, 363, the plaintiff was injured in a spikemill. He was employed by a roller boss, and paid by him, and the court said: "Whether he was directly in the defendants' employ, or indirectly as the assistant of Richards, he may be treated as their employe. He was engaged in the work of the defendants, upon their machinery, and the defendants were themselves operating the mill. The right of the roller boss to employ assistants is clearly shown, and, as it does not appear that he was an independent contractor, it is unimportant that the amount of his compensation was measured by the number of tons manufactured. The plaintiff was not a trespasser. He was in the rightful discharge of the duties of a valid employment. The relation of master and servant is fairly inferable from the proofs, and the defendants are therefore bound to the performance of all the duties, and are entitled to the protection which that relation affords." To the same effect, see *Indiana Iron Co. v. Cray*, 19

Ind. App. 565, 48 N. E. 808; Neimeyer v. Weyerhaeuser, 95 Iowa, 497, 64 N. W. 416; Wallace v. Southern Cotton Oil Co., 91 Tex. 18, 40 S. W. 399; Southern Cotton Oil Co. v. Wallace, 23 Tex. Civ. App. 12, 54 S. W. 638.

Under the law, therefore, even though there was no direct contract of employment, the plaintiff was entitled to the protection of a servant, if, with the knowledge and consent of the defendant, he was in the mine for the purpose of rendering services for its benefit, and the case should have been submitted to the jury upon that theory. The instructions as given, however, were to the effect that plaintiff could not recover unless he was actually employed by the defendant, or was authorized, under the terms of his father's employment, to work for it. It is stated in one of the instructions that the duty of the defendant to exercise reasonable care, and to furnish the plaintiff a reasonably safe place in which to work, would "only exist in case plaintiff was employed by the defendant," and in another that if, by the terms of the contract under which the father worked, plaintiff was to assist him, and entered the mine under such arrangement, with the permission of the defendant, it would be its duty to exercise reasonable care to provide him a reasonably safe place in which to work. His right to recover was thus made to depend upon the existence of a contract of employment, either directly with himself or through his father, while, as we have seen, he was entitled, under the law, to the protection of a servant if he was in the mine, with defendant's consent, for the purpose of performing labor or services for its benefit; and hence there was error in the instructions.

Nor was the error cured by an instruction given at the request of the plaintiff to the effect that if, at the time of the accident, plaintiff was passing through the gangway by his father's request, going to the place where his father was at work to assist him, with the permission or consent of the company, it would be the duty of the defendant to exercise due care and diligence and to take suitable precautions to avoid any unnecessary danger to him by reason of a defect in the roof of the gangway. This instruction, standing alone, may state the law correctly as applicable to the facts; but it must be taken in connection with the other instructions, and thus understood as meaning to define the rights of the plaintiff and the duties of the defendant in case the jury should find that there was an actual contract of employment. It was suggested at the argument that the relation of master and servant did not exist between the plaintiff and the defendant, because there was no evidence showing that plaintiff's father applied to the bookkeeper of the defendant for an order for tools for his son before taking him into the mine, but this does not necessarily affect the relationship of the parties. The custom requiring a father employed by the defendant, who de-

sired to take his son into the mine to assist him, to apply to the bookkeeper for an order on the blacksmith for tools for the son, was a mere regulation of the company, which could be waived by it, and the evidence tends to show such to have been the case. The instruction that if plaintiff's father applied to the defendant for leave to take the boy into the mine to assist him in his work, and was refused, the plaintiff could not recover, is, as we understand the record, outside the testimony. There is no evidence that the father ever applied to any officer of the company for that purpose, but, on the contrary, the superintendent, who alone had authority to hire employes, testified that the plaintiff's father never made any such application. In taking the boy into the mine, the evidence tended to show that he was merely following a practice or custom which prevailed, and to which the defendant gave its sanction and consent. The instruction was, no doubt, intended to refer to the alleged conversation between the father and defendant's superintendent and underground boss a few days before the accident about the shortage of cars. The father was not at that time applying for leave to take the boy into the mine. He had already been working, as the evidence tended to show, with the knowledge and under the direction of the defendant, for some time, and the father was merely complaining because he did not receive sufficient cars for himself and son. Whether the statements of the officers of the company at the time amounted to a discharge of the boy, or a refusal to allow him to work longer in the mine, or were merely intended as an excuse for not furnishing cars, was a question of fact for the jury.

The defendant insists that, notwithstanding any errors which may appear in the record, the judgment should be affirmed, because the accident to the plaintiff was not due to the negligence or carelessness of the defendant, and that plaintiff was himself guilty of contributory negligence. The first point is disposed of by the fact that the bill of exceptions does not purport to contain all the evidence, and the second was a question for the jury.

The judgment is reversed, and a new trial ordered.

(44 Or. 439)

#### CITY OF PORTLAND v. YICK.\*

(Supreme Court of Oregon. March 1, 1904.)

ORDINANCES—IMPEACHMENT—JOURNALS OF COMMON COUNCIL—JUDICIAL NOTICE—LOTTERIES.

1. Not only a municipal court, but the circuit court on a trial de novo on appeal from it, will take such judicial notice of ordinances of the city, and of such journals and records of the common council as affect their validity, meaning, and construction, as state courts take of public statutes of the state and the journals of the Legislature.

2. To impeach an ordinance by the records of the common council, it must appear affirm-

\*Rehearing denied April 23, 1904.

actively, not by mere silence from the journal of its proceedings, which the charter requires it to keep, that the charter provisions relative to the adoption of the ordinance were not complied with.

3. A city council, under its power to prevent and suppress gaming and gambling houses, may pass an ordinance prohibiting the setting up or keeping of a house for the purpose of selling lottery tickets.

4. An ordinance prohibiting an act and prescribing a penalty for violation of it is not objectionable because not declaring the act to be a crime, or unlawful.

5. The signing or attesting of an ordinance by the city auditor is not essential to its validity, in the absence of a charter requirement.

Appeal from Circuit Court, Multnomah County; M. C. George, Judge.

Wing H. Yick was convicted of violating an ordinance of the city of Portland, and appeals. Affirmed.

C. M. Idleman and A. C. Palmer, for appellant. J. J. Fitzgerald and J. P. Kavanaugh, for respondent.

WOLVERTON, J. The defendant was convicted in the municipal court of the city of Portland of the violation of Ordinance No. 11,336, and appealed to the circuit court, wherein he was again convicted, and now appeals to this court.

He is charged with the violation of section 2 of the ordinance, which provides that "no person or persons shall within the corporate limits of the city of Portland set up or keep, either as owner, proprietor, keeper, manager, or employé, with or without hire, lessee or otherwise, any house, shop or place for the purpose of selling any lottery ticket, certificate, paper or instrument, purporting or representing, or understood to be or to represent, any ticket, chance, share or interest in or depending upon the event of any lottery." Section 6 provides for the punishment of any violation of the ordinance by fine or imprisonment, or both. When the city offered evidence at the trial in the circuit court it was met with the objection by the defendant that the ordinance had not been adopted in the manner provided by charter and the rules governing the common council, and was therefore void and inoperative. None of the records of the common council relative to the adoption of the ordinance were introduced in evidence, but the court was asked to take judicial knowledge thereof, and thereby determine the validity of its adoption. Under section 27 of the city charter of 1898 (Sess. Laws 1898, p. 108), the common council was authorized to adopt rules for the government of its members and its proceedings. It was required, however, to keep a journal of its proceedings, and upon the call of any two of its members to cause the yeas and nays to be taken and entered in the journal upon any question before it. In pursuance of this charter regulation, the following among other rules were adopted, viz.: "Rule 26: No standing rule as provided by this ordinance shall be rescinded or suspended, except by

vote of two-thirds of all the members present, and the yeas and nays shall be recorded on any motion to suspend a rule. Rule 27. Every ordinance shall receive three readings previous to its being passed, but shall not be read more than twice at any one meeting. \* \* \* The journal shows that the ordinance was read the first time and second time by title, and, on motion of Councilman Harris, duly seconded and carried, rule 27 was suspended, the ordinance read a third time by title, placed upon its final passage, and passed by 11 yeas, giving the names of the councilmen voting yea. On the back of the ordinance, which contains the attestation at the bottom: "Passed the Council, March 21, 1900. A. N. Gambell, Auditor. Approved, March 22, 1900. W. A. Storey, Mayor"—there are attached two slips, each containing the names of the councilmen, with the words, "Yeas," "Nays," at the top in separate columns. One of them bears at the top the notation in pencil, "Suspension Rule 27," and opposite each name in the column headed "Yeas" a perpendicular pencil mark. The other bears at the top the word "Passage," with a like mark opposite each name in the column headed "Yeas," thus indicating that rule 27 was suspended by a unanimous vote, and the ordinance passed by a like vote, the latter showing the vote to be the same as recorded in the journal.

Preliminarily, it is urged that the courts will not take judicial knowledge of the acts of the common council leading to the adoption of an ordinance, but only of the text or provisions of the ordinance. It will be noted that the charter regulations relating to the keeping of a journal by the common council are almost identical with the requirements of the state Constitution for the government of each house of the legislative assembly. This court said in *State of Oregon v. Rogers*, 22 Or. 348, 364, 30 Pac. 74, Mr. Justice Bean announcing the opinion: "In *Currie v. Southern Pac. Co.*, 21 Or. 566, 28 Pac. 884, we held that the court will take judicial knowledge of the journals of the Legislature for the purpose of impeaching the validity of the enrolled act on file with the Secretary of State; and when from such journals it affirmatively appears that the bill as filed in the Secretary of State's office, did not in fact pass the Legislature, the courts will refuse to recognize it as a valid law; but every reasonable presumption is to be made in favor of the legislative proceedings; and when the Constitution does not require certain proceedings to be entered in the journal, the absence of such a record will not invalidate a law. It will not be presumed, from the mere silence of the journal, that either house has exceeded its authority or disregarded constitutional requirements in the passage of legislative acts." The bill which was the subject of controversy in that case passed the House and was amended in the Senate. When returned to the House that body con-

curred in the amendments. This was shown by the journal, but it did not show that the bill as amended was read section by section on the final passage, nor that the vote was taken by yeas and nays, as required by article 4, § 19, of the Constitution. Conceding that the yeas and nays should have been thus taken in that instance, the court further say: "We must assume, in the absence of a showing to the contrary, that the constitutional requirements were observed, and hold that the act under consideration was constitutionally passed." In the *Currie Case*, alluded to in the opinion of the court in *State v. Rogers*, supra, the bill went to the Senate after passing the House, and the journal shows that it was put upon its final passage, when it received 13 yeas and 11 nays. There were five absent and one senator was excused; "so," continues the record, "the bill failed to pass." There was an affirmative showing that the bill failed to pass, and the court took judicial cognizance of the record in the journal, and declared the act inoperative.

The same principle was announced in *McKinnon v. Cotner*, 30 Or. 588, 591, 49 Pac. 956. The bill in that instance passed the House, went to the Senate, and was amended by the addition of section 8, being an emergency clause, and passed, when it was returned to the House and the amendment concurred in. This is all shown by the journals of the two houses, but no other reference is made therein to the bill, except to show that it was duly signed by the presiding officers. The enrolled act so signed was approved by the Governor, filed in the office of the Secretary of State, and published among the general laws, but it did not contain section 8, and the act was held valid because it nowhere appeared in the journals that the act did not pass in the form actually signed by the presiding officers and as found on file in the office of the Secretary of State. In all these cases, if we are rightly informed, the court took judicial knowledge of the state of the record as shown by the journals in the two houses, without the necessity of their introduction in evidence. Indeed, the general rule seems to be that courts will take judicial notice of the contents of the journals and other records of legislative bodies, required to be kept by the fundamental law, which may in any manner affect the validity or the meaning and proper construction of an act. But further than this they will not go, and they will not take judicial cognizance of any fact that is without legal potency to affect the validity of the act or to explain its meaning or construction. 17 Am. & Eng. Encyc. Law (2d Ed.) 928, 929; *Division of Howard County*, 15 Kan. 194; *The People v. Mahaney*, 13 Mich. 481; *Green v. Weller*, 32 Miss. 630; *Somers v. State*, 3 S. D. 321, 58 N. W. 804; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *McDonald and Another v. State*, 80 Wis. 407, 50 N. W. 185. Under the doctrine of this court it will not look behind the enrolled bill

having the signatures of the presiding officers of the two houses and filed in the office of the Secretary of State, except to determine whether it appears affirmatively from the records of those bodies that the mandatory provisions of the Constitution have not been observed in the enactment; and, unless it does so appear, the law will not be declared invalid. Mere silence of the journals as to such a requirement will not suffice to overthrow it, unless it might be in a case where the Constitution requires an entry in the journal, as the presumption will then obtain that the Legislature proceeded regularly and properly. Such being the ascertained rule and doctrine, the further solution of the present problem is not difficult.

The municipal courts will take judicial notice of the ordinances of the municipality and of such journals and records of the law-making body as affect their validity, meaning, and construction in like manner and for like purposes as the courts of the state take judicial cognizance of the public statutes of the state, and, in the event of an appeal to the circuit court, although by the rules of law the case is to be tried *de novo*, the circuit court will take like judicial notice of such ordinances as the municipal courts. We are not saying that it will not do so upon any other principle, but it will upon this, which suffices for the determination of the present controversy. *City of Solomon v. Hughes*, 24 Kan. 211; *Downing v. City of Miltonvale*, 36 Kan. 740, 14 Pac. 281; *State of Iowa, for the Use of the City of Dubuque, v. Leiber*, 11 Iowa, 407; *The Town of Laporte City v. Goodfellow*, 47 Iowa, 572; *Town of Moundsville v. Velton*, 35 W. Va. 217, 13 S. E. 373. The charter as to the common council stands in the same relation that the Constitution does to the two houses of the legislative assembly, and, if the ordinance in question is to be impeached or overthrown, it must appear affirmatively from the journal of the common council that the mandatory provisions of the fundamental law relative to the passage of the ordinance have not been observed. The courts will not look into minor records that the council may require to be kept to determine whether the rules which it has adopted for the orderly dispatch of the business before it have been complied with, and whenever it is not affirmatively shown by the journal (mere silence of the record not amounting to such a showing) that the charter provisions relative to the adoption of the ordinance have not been complied with, the ordinance in controversy must be deemed to have been regularly adopted. Now, the ordinance under consideration appears affirmatively from the journal to have received a majority vote of all the members of the common council. This was sufficient to indicate its adoption. *Sess. Laws 1898*, p. 109, § 30. The record as to the suspension of the rules is not required by the charter to be kept in the journal, and, if it were at

all material to the present controversy, the record of the yeas and nays on the suspension of the rules kept by the common council upon slips attached to the ordinance is amply sufficient to show a compliance with the rules. It was the method employed by the common council for keeping the record, and, being by it deemed sufficient for the purpose, the courts will not intervene to hold it void.

It is next contended that the common council was not empowered to adopt the ordinance. The delegated power is "to prevent and suppress gaming and gambling houses, or places where any game in which chance predominates is played for anything of value." This is unquestionably broad enough to authorize the common council to prevent the setting up or keeping of any house or place for the purpose of selling lottery tickets or certificates depending upon the event of a lottery, which is essentially the purpose of section 2 of the ordinance in question. The setting up or keeping of such a house is in itself an overt act, and constitutes the offense, the object of the charter being to prevent and suppress gambling houses. Lottery, it has been held, is a gaming device (*Ex parte Kameta*, 36 Or. 251, 60 Pac. 394, 78 Am. St. Rep. 775), and the keeping of a house for the purpose of selling lottery tickets is as much within the spirit and intentment of the charter as if it was kept for any other kind of gambling.

Another objection urged to the ordinance is that the acts prohibited thereby are not declared to be crimes or misdemeanors, or even to be unlawful. A penalty, however, is prescribed for their violation, and this is all that is necessary to notify persons of the unlawful character of the offense.

The next and last objection preferred is that the auditor did not attest the ordinance as "Auditor of the City of Portland," as he is styled in the charter (*Sess. Laws 1898*, p. 119, § 46). Manifestly, the answer to this is that neither the signing nor the attestation of the ordinance by the auditor is essential to its validity under the charter. It might be, and no doubt is, convenient, and perhaps essential, to identify the ordinance in its transmission to the mayor and return to the council body that he attest it, or place upon it his file mark; but we are not aware that any such a formality is required in order to complete its perfect enactment, so as to give it the force of law.

These considerations affirm the judgment of the trial court, and such will be the order of this court.

(44 Or. 491)

LESLEY et al. v. KLAMATH COUNTY et al.

(Supreme Court of Oregon. March 1, 1904.)

PUBLIC ROADS — PETITION — ADDRESS — SUFFICIENCY — VIEWERS — LOCATION OF ROAD — PROXIMITY TO RESIDENCE — PRESUMPTION.

1. Where a petition for a road was entitled, "In the County Court of the State of Oregon,

County of K.," the fact that it was addressed to the county judge and commissioners by their names and titles of office did not affect the jurisdiction of the court.

2. Under B. & C. Comp. §§ 4966, 4967, providing that when it shall appear to the county court that the residence of any person is not reached by a public road viewers shall be appointed to locate a county road 30 feet wide or a gateway not less than 10 feet wide, according to the application, it is not optional with the viewers to locate either a road or gateway, but they must conform to the petition in that respect.

3. Under these sections it is not necessary that the road begin precisely at the residence of the petitioner, but it is sufficient if it gives convenient entrance to his premises in proximity to his residence so that the public may have access.

4. Under conflicting evidence as to the distance of the road from petitioner's residence, the plat of the viewers showing it to be an eighth of a mile or more, while the petition represents it to be near, it will be presumed on appeal, in support of the decision of the trial court establishing the road that it was located as required by law.

5. Where the petition for establishment of a public road under B. & C. Comp. §§ 4966, 4967, showed that a roadway was kept open from a corner of petitioner's premises to a county road, but it was not alleged that this was a road of public easement, or a public road of any kind, or that it was closed by authority of court, the petition could not be regarded as one for the vacation of a former road.

Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Petition by Caleb T. Oliver to the county judge and county commissioners of Klamath county for a road of public easement. From an order of the county court establishing the road, George L. Lesley and another brought a writ of review. From a judgment of the circuit court dismissing the writ, they appeal. Affirmed.

F. H. Mills, for appellants. J. C. Rutenic, for respondents.

WOLVERTON, J. This is an appeal from the judgment of the circuit court dismissing a writ of review from the county court of Klamath county from a proceeding entitled "In the Matter of the Petition of Caleb T. Oliver, for a Road of Public Easement." Some questions are made as to the regularity of the appeal and of the service of the writ of review from the county court so as to give the circuit court jurisdiction in the premises, but these may be passed over, and the case disposed of on its merits, as in either view the result would be the same.

The first objection insisted upon by the appellants is that the county court was only authorized and empowered to entertain the proceeding upon a petition addressed to the county court of Klamath county, whereas the one in question was addressed to Hon. L. F. Willits, county judge, Fred Melhase and H. T. Anderson, county commissioners. By a stipulation of the parties, which accompanies the record, it appears that the petition was entitled "In the County Court

¶ 3. See Private Roads, vol. 40, Cent. Dig. § 2.

of the State of Oregon, County of Klamath." Being so entitled, it is immaterial whether it was addressed to the county court or to the individual members thereof, or in either capacity, as at most it could constitute an irregularity only, not affecting the jurisdiction of the court to entertain the proceeding.

The petitioner prayed that viewers be appointed to view out and locate a county road 30 feet in width from the residence of the petitioner to the county road theretofore established along the west line of sections 12 and 13, township 41 south, range 10 east, so as to do the least damage to the land through which the road is located, and to assess damages, etc. The order of the court appointing the viewers followed the prayer of the petition, directing them to view out and locate a county road 30 feet in width. The second objection is directed to this order, because it did not leave it discretionary with the viewers to locate either a county road or a gateway. The question presented depends upon the provisions of sections 4966 and 4967, B. & C. Comp. Properly construed, the petitioner is authorized to petition for either a road or a gateway, and it is not optional with the viewers to establish which they may choose, but they must view out the easement prayed for, and as directed by the county court, so as to do the least damage to the land through which it may pass.

The order appointing viewers directed them to meet at the residence of Caleb T. Oliver, or the northwest corner of the east half of the west half of section 13, township 41 south, range 10 east, and view out and locate a county road 30 feet in width from the residence of said Caleb T. Oliver to the county road specified in the petition. The viewers report that they located the road, beginning at the said northwest corner of the east half of the west half of section 13, and running thence west 10 chains on Lesley's land; thence north 1.25 chains; thence west 10 chains on land occupied by Bert Davis to an intersection with the county road. A plat accompanies the report, which indicates that the beginning point of the road is not at the residence of Caleb T. Oliver, but is distant therefrom an eighth of a mile, if not further. Upon this state of the record it is contended that the county court was unauthorized to approve the report and direct the establishment and opening of the road as laid, because, it is argued, the road does not extend from the residence of the petitioner to some public road. It was the intentment of the statute (section 4966, supra) to provide a road of public easement to and from the residence of the petitioner. This is for the benefit of the public as well as for the petitioner, and any road that does not afford this privilege is without the purview of the law. It is not believed, however, to be necessary to a practical and full exercise of the privilege that the road should begin at the very dooryard of the residence

of the petitioner. It is sufficient for the purpose that it gives convenient entrance to the premises of the petitioner in proximity to the residence, so that access to and from the same by the public is assured. This is apparent when the succeeding section is read in connection with this one. There is some controversy as to the distance of the residence from the point of beginning, the plat of the viewers showing it to be an eighth of a mile or more, but no measurement appears to have been made by the surveyor. Upon the other hand, the petition represents that it is near the point of beginning. The county court was in a position to determine as to this matter, it being one of fact, and, having directed an establishment of the road, we must presume that the conditions of the law have been fulfilled in that particular.

It is next and lastly contended that the petition was, in effect, for the vacation of the former road, as well as for the establishment of this one. The petition simply shows that a roadway was kept open, leading from the northwest corner of petitioner's premises to the county road, but it is nowhere alleged that this was a road of public easement, or a public road of any nature, or that it was closed by authority of the county court; so that the inference is that it was but a private way, which had been otherwise closed to the petitioner and the public. The point is without force.

These considerations lead to an affirmance of the judgment of the court below, and it is so ordered.

(44 Or. 323)

SMITH v. WILCOX et al.

SAME v. TURPLE et al.

(Supreme Court of Oregon. March 1, 1904.)

MECHANICS' LIENS—SUBCONTRACTOR—RIGHT TO LIEN—JOINT CONTRACT—DIFFERENT BUILDINGS—SEPARATE ACCOUNTS—CONTRACTOR'S PAYMENTS—APPLICATION.

1. Where a subcontractor for the erection of two houses fully performed his contract, he was entitled to a lien for the amount due thereunder as against the owners to the extent of the agreed consideration between the owner and the original contractor, without regard to the fact that the subcontractors under him did work and furnished material for both houses under joint contract indiscriminately, without keeping a separate account with each.

2. Where a contractor for the erection of two houses made no application of payments made to materialmen, employés, and subcontractors of a subcontractor, such subcontractor was entitled to make such application of payments to the contract for each house as he saw fit.

On petition for rehearing. Denied.

For former opinion, see 74 Pac. 708.

WOLVERTON, J. In their petition for rehearing counsel urge that there remains a question that has not received the consideration of the court, which is, can the subcontractor, contracting separately with the original contractor for the construction of each of the two buildings, arbitrarily apportion



the cost of materials and labor furnished at his instance upon the buildings indiscriminately, and claim a lien therefor? This mistakes the real question, which is, can the subcontractor under such conditions claim a lien for material and labor furnished under his contract—that is, having performed his contract with the original contractor, can he claim a lien for the amount remaining due him by the terms of that contract? In this form the question is answered by the main opinion. Being within the scope and authority of the original contract, the consideration agreed upon between the original contractor and the subcontractor must be deemed to have been reasonable, and the subcontractor has his lien to the extent of such agreed consideration. How Smith, the subcontractor, performed his work of construction; whether by subcontracts with other mechanics or workmen, or by the purchase of material and the employment of labor by him direct, and their use in the buildings, or whether his subcontracts with others comprised the two buildings jointly, or the materials and labor were employed indiscriminately thereon, without keeping a separate account therefore with each building, could make no difference with the owner, so that his contract with the original contractor has been performed, and it is not costing him more than he agreed to pay for the work of construction. The subcontractors under Smith, if they made joint contracts for doing certain portions of the work as it respects both houses, and the materialmen and persons furnishing labor, if they furnished material and performed labor indiscriminately upon the two houses without keeping a separate account with each, might, and undoubtedly would, have trouble, under the decision in *Beach v. Stamper* (Or.) 74 Pac. 203, in claiming a lien; but Smith is not environed or entangled with their difficulties. He had only to look to the performance of his subcontracts with Dammeler Company to entitle him to his liens, and, if his subcontractors, materialmen, and employes were paid indiscriminately by the original contractor or his agents, he had a right, as we have seen, to make the applications of payments as it pertains to his two contracts with Dammeler Company as he saw fit, the company not having itself made such applications.

This disposes of the question now insisted upon, and the rehearing will be denied.

(44 Or. 496)

#### FARROW et al. v. NEVIN.

(Supreme Court of Oregon. March 1, 1904.)

ADMINISTRATORS — CLAIMS — ALLOWANCE — PRESENTATION — LIMITATIONS — COURTS — JURISDICTION — ORDERS — WRIT OF REVIEW — PETITION — SCOPE — DEFECTS.

1. B. & C. Comp. § 596, provides that a writ of review shall be allowed on the petition of plaintiff (who is defined by section 592 to be the party prosecuting the proceeding), describing the decision or determination sought to be

reviewed with convenient certainty, and setting forth the errors alleged to have been committed therein. *Held*, that a petition for a writ of review was not fatally defective because it was not entitled in a particular court as a complaint in an ordinary action.

2. Failure of a petition for a writ to review an order allowing the claim of an administrator to set out the date of the order sought to be reviewed was immaterial, where it appeared that the petition was filed and the writ issued within six months from the date of the filing of the administrator's final account, since it was therefore necessarily filed within the time provided by law after the order approving such account.

3. Where a petition for a writ to review an order allowing an administrator's claim alleged that the county court exceeded its jurisdiction in allowing the claim of the administrator for money alleged to have been loaned by him to deceased, because the claim was barred by limitations, the petition sufficiently specified the error complained of.

4. The office of a petition for a writ of review is to bring to the notice of the circuit court or judge thereof the decision or determination sought to be reviewed, and the grounds on which the party prosecuting the proceeding seeks relief therefrom, and when sufficient for this purpose, and the writ has been issued and the proceedings sought to be reviewed have been certified to the circuit court, such court may rightfully examine them to ascertain whether the jurisdiction of the inferior court or officer had been exceeded or erroneously exercised, regardless of technical defects in the petition for the writ.

5. Where it was claimed that the county court exceeded its jurisdiction in allowing the claim of an administrator for money alleged to have been loaned by him to decedent, because the court was prohibited by statute from doing so, the court's order allowing the claim was reviewable by writ of review.

6. Under the express provisions of B. & C. Comp. § 1167, the county court had no power or authority to allow the claim of an administrator against the estate, where the claim was not presented to the county judge for allowance before it was barred by limitations.

7. On a writ to review an order of the county court allowing an administrator's claim against the estate, it was error for the circuit court, in reversing the order, to adjudge that the administrator should be charged with interest on a balance in his hands from a certain date; such question being within the jurisdiction of the county court, and its determination thereon not being reviewable on writ of review.

Appeal from Circuit Court, Columbia County; Thomas A. McBride, Judge.

Writ of review by Kinder C. Farrow and others against Allen Nevin, as administrator of the estate of John Farrow, deceased. From a judgment in favor of plaintiffs, defendant appeals. Modified.

J. W. Day, for appellant. S. H. Gruber, for respondents.

BEAN, J. On July 20, 1891, the defendant, A. Nevin, was appointed administrator of the estate of John Farrow, deceased, by the county court of Columbia county, and immediately qualified and entered upon the discharge of his duties. In November, 1901, more than 10 years later, he filed his final account, in which he credited himself with \$280 for money alleged to have been loaned by him to the deceased. Objections were made to the allowance of this item, because, among other

things, the claim was barred by the statute of limitations; but the objections were overruled, and the item allowed by the county court. On a writ of review to the circuit court the decree of the county court was reversed, and the item disallowed, and the administrator charged with interest on the balance in his hands on March 6, 1893. From this judgment the present appeal is taken.

It is contended that the petition for the writ of review is fatally defective, in that it is not entitled in any court; does not set out the names of any parties, either as plaintiffs or defendants; does not allege that the petitioners or any of them have any right to the writ or interest in the matter sought to be reviewed; does not show that it was filed within six months after the date of the order of final settlement in the county court; does not specify any errors of the county court; and does not make either the county judge or court a party to the proceeding. But we do not think any of these objections sufficient to reverse the cause. It is true the petition is not entitled in any court, and does not contain the names of formal plaintiffs or defendants. It is denominated a "petition for writ of review of proceedings of the county court," and is addressed "to the Hon. Thomas A. McBride, judge of the circuit court of the state of Oregon for Columbia county." It contains the names of the parties prosecuting the proceeding and that of the adverse party. It was filed with the clerk of the circuit court, and, based thereon, an order of the judge of that court was made directing a writ to issue as prayed for, which was done accordingly. The statute (B. & C. Comp. § 596) provides that the writ shall be allowed upon the petition of the plaintiff, who is defined to be the party prosecuting the proceeding (B. & C. Comp. § 592), describing the decision or determination sought to be reviewed with convenient certainty, and setting forth the errors alleged to have been committed therein. The statute must, of course, be substantially complied with before the writ can rightfully issue. *Southern Oregon Co. v. Coos County*, 30 Or. 250, 47 Pac. 852; *Southern Oregon Co. v. Gage*, 31 Or. 593, 47 Pac. 1101. But a mere failure to entitle the petition as a complaint in an ordinary action or suit is not so far fatal to the proceedings as to invalidate an order for the writ when the petition contains all the essential requisites of the statute. The names of certain parties, including J. N. Percy, as administrator of the estate of William Farrow, deceased, are stated in the petition as the parties prosecuting the proceeding, and it is alleged that Farrow was the father and sole heir of the defendant's intestate, and prior to his death had given Percy a power of attorney to collect the amount due him; that in due time after the filing of the final account of the defendant, and before the hearing, Mr. Gruber, as attorney for the heirs, filed objections to the allowance of cer-

tain items therein, including the one now in controversy. There is no direct averment that any of the parties named in the petition except William Farrow were or are the heirs of the defendant's intestate, but it is inferentially so stated, and the record as certified up in obedience to the writ of review shows that such parties appeared in the court below and objected to the allowance of the final account. The date of the order of the county court sought to be reviewed is not set out in the petition, but it does appear therefrom that the petition was filed and the writ issued within six months from the date of the filing of the final account, and therefore necessarily within the time provided by law after the order approving such account. The error specified was sufficient. It is that the county court exceeded its jurisdiction in allowing the claim of the defendant administrator for money alleged to have been loaned by him to the deceased, because the claim was barred by the statute of limitations. The office of a petition for a writ of review is not that of a complaint in an ordinary action or suit, but merely to bring to the notice of the circuit court or judge thereof the decision or determination sought to be reviewed, and the grounds upon which the party prosecuting the proceeding seeks relief therefrom. When it is sufficient for this purpose, and the writ has been issued, and the proceedings sought to be reviewed have been certified to the circuit court, the latter may rightfully examine them to ascertain whether the inferior court, officer, or tribunal has exceeded its jurisdiction or exercised its functions erroneously to the injury of the petitioner, regardless of the mere technical defects in the petition for the writ. Neither the county court nor judge thereof is a necessary or proper party to a proceeding to review the action of the county court in the matter of the final settlement of the estate of a decedent. They are not in any sense parties to the litigation, or interested in the result.

It is also insisted that the remedy of the petitioners was by an appeal from the decree of the county court, and not by writ of review. A writ of review, under our statute, cannot be used as a substitute for an appeal, nor can a mere error of an inferior court, officer, or tribunal, either of fact or of law, in the exercise of a rightful jurisdiction, be reviewed or considered in such a proceeding. The writ will lie only when the inferior court or tribunal has exceeded its jurisdiction or exercised its functions illegally or contrary to the course of procedure applicable to the matter before it. *Garnsey v. County Court*, 33 Or. 201, 54 Pac. 539, 1089; *McAnish v. Grant* (Or.) 74 Pac. 396. In the case at bar, however, the question presented is not that of an erroneous exercise of a rightful jurisdiction, but that the county court exceeded its jurisdiction in allowing the claim of the administrator for money alleged to have been loaned by him to the decedent, because it

was prohibited from doing so by law. Section 1167, B. & C. Comp., provides that if an executor or administrator is a creditor of the estate, and his claim is not presented to the county judge for allowance "before it is barred by the statute of limitations, such claim can not be allowed, retained, or recovered." Under this section the county court is without power or authority to allow the claim of an administrator or executor unless it has been presented to the county judge for allowance before it is barred by the statute of limitations. The claim of the administrator in this case was not so presented, and the court, therefore, exceeded its jurisdiction in allowing him credit therefor on final settlement.

The circuit court, however, was in error in adjudging and decreeing that the administrator should be charged with interest on the balance in his hands from March 6, 1893. That was a question which rightfully belonged to and was within the jurisdiction of the county court, and its determination, even if erroneous, cannot be disturbed by the circuit court on a writ of review.

The judgment appealed from will therefore be modified by remitting the interest, and in all else affirmed.

(44 Or. 193)

**MOPHEE et al. v. KELSEY.**

(Supreme Court of Oregon. March 1, 1904.)

**WATERS—DIVERSION—IRRIGATION—CONTRACTS  
—ISSUES—PLEADING—CONSTRUCTION.**

1. Where, in an action to determine plaintiffs' rights in certain waters in a slough, plaintiffs alleged a claim to such waters by a prior appropriation, and also set up an agreement with defendant, under which, for a consideration, plaintiffs extended their ditch across and beyond the slough, and by mutual consent and agreement and at defendant's request plaintiffs have since the date of such agreement used such ditch in common from the place where it crossed the slough, to carry and convey the waters thereof down to the point where the ditch emptied into a stream, plaintiffs were not limited by the complaint to rights acquired by prior appropriation, but were also entitled to claim under the contract.

2. Plaintiffs, prior to the extension of an irrigation ditch by which water was diverted from a river across a slough, entered into an agreement with defendant by which the waters of the slough were drained into the ditch, defendant prior to the agreement not having used or diverted such waters. In a suit to restrain defendant's subsequent diversion of the waters of the slough, plaintiffs, after reciting the making of the contract, alleged that plaintiffs and their predecessors and said defendant, by means of the ditch, appropriated for irrigation and beneficial purposes 1,600 inches of water, miners' measure, under 6-inch pressure, and then alleged how much each of the respective parties appropriated. After the agreement further appropriation of the water was made by the persons interested in the ditch for the irrigation of second and third crops of alfalfa. *Held*, that plaintiffs were not limited by the complaint to claim the water of the river by virtue of the contract, but were entitled to also claim the same by prior appropriation.

3. Where a diversion of the water of a slough was the result of defendant's express agree-

ment with plaintiffs, defendant was not thereafter entitled to claim that such diversion was an invasion of his riparian rights.

On petition for rehearing. Denied.

For former opinion, see 74 Pac. 401.

**WOLVERTON, J.** A petition and supplementary petition for rehearing have been filed herein. To these an answer has been interposed, and a reply made to the answer. By these documents, which are voluminous and searching, the case has been ably and exhaustively presented by both sides upon the questions as to which a rehearing is sought. The main contention centers about the pleadings, and is whether the court, in its opinion, has transcended their scope, and decided the cause upon issues not contained therein.

First, as it respects Hutchinson Slough, it is insisted that plaintiffs' entire claim to the waters thereof was by right of a prior appropriation, and that no claim was made thereto in the complaint by virtue of the contract of 1888. It is true that plaintiffs set up that they were entitled to the waters of Hutchinson Slough by right of prior appropriation. But this is not all. In the same cause of suit—for the complaint purports to contain but one—they set up the agreement of 1888, and allege that with the consent and agreement of the defendant, Kelsey, they extended the ditch across Hutchinson Slough, and continued on and intersected the Warm Spring Branch. And, again, "that by mutual consent and agreement, and at the request and with the consent of the said defendant Kelsey, the plaintiffs have since the year 1888 used the said Dalton, Smith, and Kelsey ditch in common from the place where the same crosses the said Hutchinson Slough to carry and convey the waters of said slough on down to the said point where the same is emptied into said Warm Spring Branch." Without further detail, we are firmly impressed that the findings of the court are within the scope of the complaint, in view of the manner in which it is drafted and these allegations.

It is next insisted that under the complaint the plaintiffs claim the water from North Powder river entirely by virtue of the contract with defendant of 1888, and not by prior appropriation. But, as we read the complaint, the very gist of it respecting these waters is that plaintiffs acquired such as they claim by prior appropriation. After reciting that plaintiffs and their predecessors entered into the contract of 1888, they allege that "said plaintiffs and their predecessors and said defendant by means of said ditch took out and appropriated for irrigation and beneficial purposes 1,600 inches of water, miners' measure, under six-inch pressure," and then it is shown how much each of the respective parties appropriated. Now, as we said in the main opinion, there was a new appropriation made, not in the minds of the contracting parties when the agreement was entered

into. The diversion from North Powder river, however, was made through the ditch in which all these parties had a joint interest, acquired by reason of the agreement. Under these conditions, the several parties made their respective appropriations for the irrigation of the second and third crops of alfalfa. The agreement made it possible for such appropriations to follow, and we think the complaint covers the issue. True, the answer sets up a very different agreement from the one alleged in the complaint, but the evidence does not support the defendant's contention in that regard.

The further idea is advanced that defendant's riparian rights are being invaded. But this cannot avail him when the diversion is the result of an express agreement upon his part.

The petition for rehearing will be denied.

(45 Or. 89)

#### DOWELL v. BOLT et al.

(Supreme Court of Oregon. March 1, 1904.)

APPEAL—APPELLATE COURT—JURISDICTION—NOTICE OF APPEAL—UNDERTAKING—FAILURE TO SERVE—MISTAKE—RELIEF—DISMISSAL.

1. B. & C. Comp. § 549, declares that, within 10 days after the giving or service of notice of appeal, the appellant shall cause to be served on the adverse party or his attorney an undertaking, and within such 10 days shall file the original thereof, with proof of service, with the clerk; that the adverse party shall have 5 days within which to except to the sureties, and, after the expiration thereof, or from the justification of the sureties, if excepted to, the appeal shall be deemed perfected. *Held*, that the appellate court acquired jurisdiction of the appeal from the time the notice of appeal was given or served within the time required, though the undertaking was not given or served.

2. Under B. & C. Comp. § 549, providing that where an appellant omits, through mistake, to do any act necessary to perfect the appeal or stay proceedings after the giving of the notice of appeal, the appellate court may permit the performance of such act on such terms as may be just, it is immaterial whether the omission was due to a mistake of law or of fact.

3. B. & C. Comp. § 549, provides that when a party in good faith gives due notice of an appeal, and thereafter omits, through mistake, to do any act necessary to perfect the appeal or to stay proceedings, including the filing of an undertaking as provided in such section, the appellate court may permit the performance of such act on such terms as may be just. *Held*, that where appellant gave due notice of appeal, and averred in an affidavit that his failure to give the required bond was occasioned by mistake, which he attempted to correct as soon as discovered, and it appeared, from the fact that appellant had caused a bill of exceptions to be filed in the appellate court, and had also prepared and filed a brief, that the appeal was taken in good faith, a motion to dismiss the appeal for failure to serve the undertaking will be denied.

Appeal from Circuit Court, Josephine County; H. K. Hanna, Judge.

Action by W. I. Dowell against John Bolt. From an order denying a motion of H. C. Austin, a subsequent judgment creditor of defendant Bolt, to set aside a judgment in

favor of plaintiff, defendant Austin appeals. On motion to dismiss. Denied.

W. C. Hale, for the motion.

MOORE, C. J. This is a motion to dismiss an appeal. The defendant John Bolt, with the assent of the plaintiff, W. I. Dowell, executed to him a confession of judgment for the sum of \$260 and costs, which, in vacation, was entered in the journal of the circuit court for Josephine county, and, an execution having been issued thereon, certain placer mining claims in that county belonging to Bolt were sold to Dowell. H. C. Austin thereafter commenced an action against Bolt in that court, and, having secured a judgment therein for the sum of \$164.93, attorney's fees, costs, and disbursements, and an order for the sale of these mining claims which had been attached in that action, moved to set aside the confession of judgment, on the ground that it did not state facts out of which the indebtedness arose. This motion was denied, and the sale made to Dowell of the mining claims confirmed, which judgment Austin sought to review by serving and filing a notice of appeal October 27, 1903, and 10 days thereafter filing an undertaking on appeal, which was not served on Dowell or his attorney, who move to dismiss the appeal for that reason. Notice of such motion having been served, Austin's attorney filed an affidavit to the effect that the failure to serve the undertaking was due to inadvertence and oversight, and the omission to comply with the statutory requirement was not called to his attention until after plaintiff's brief had been filed in this court; and, based on such written declaration under oath, he moved for leave to serve a copy of the undertaking, and to attach it to the transcript as a part thereof, and an amendment to the bill of exceptions.

It is contended by plaintiff's counsel that the service of an undertaking is a condition precedent to the exercise of the right of appeal, and, being jurisdictional, the motion to dismiss the appeal should be allowed. The statute prescribing the mode of taking and perfecting an appeal, so far as deemed material, is as follows: "(2) Within ten days from the giving of notice or service of notice of the appeal, the appellant shall cause to be served on the adverse party or his attorney an undertaking as hereinafter provided, and within said ten days shall file the original of said undertaking, with proof of service indorsed thereon, with said clerk. Within five days after service of said undertaking, the adverse party or his attorney shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto. \* \* \* 4. From the expiration of the time allowed to except to the sureties in the undertaking, or from the justification thereof if excepted to, the appeal shall be deemed perfected. When a party in good faith gives due notice as hereinabove

provided of an appeal from a judgment, order, or decree, and thereafter omits, through mistake, to do any other act (including the filing of an undertaking as provided in this section) necessary to perfect the appeal or to stay proceedings, the court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just." B. & C. Comp. § 549.

It is the giving of a notice in open court at the time the judgment, decree, or order is made, and the entering thereof in the journal by order of the court or judge, or the serving and filing of a notice of appeal within the time and according to the manner prescribed, that confers jurisdiction on the appellate court, and constitutes the taking of an appeal, the strict performance of which cannot be waived by the parties, nor excused by the court. *Oliver v. Harvey*, 5 Or. 360; *Taylor v. Lapham*, 41 Or. 479, 69 Pac. 439. The giving of an undertaking, however, is one of the steps required to perfect an appeal; and, under the liberal provisions of the statute quoted, the appellate court may permit the performance of such act when it appears that the notice of appeal has been given in good faith, and that the failure to comply with the requirements of the statute is occasioned by mistake. The affidavit of defendant's counsel does not state what constituted the inadvertence and oversight causing the omission to serve the undertaking, and it may have been either a mistake of law or of fact. As we view the statute, however, the character of the mistake is immaterial, so long as it in fact existed, and this is to be determined by the good or bad faith with which the notice of appeal is given or served. In *re Skinner's Will*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951. In the case at bar the appellant caused a bill of exceptions to be filed in this court and also prepared and filed a brief, thereby evidencing the good faith of the giving of due notice of appeal; and believing, as we do, from the affidavit of defendant's counsel, that the mistake existed, and that the appellant attempted to correct it as soon as discovered (*Newberg Orchard Association v. Osborn*, 39 Or. 370, 65 Pac. 81), the motion to dismiss the appeal should be denied and the defendant's motions allowed, and it is so ordered.

(44 Or. 402)

McMAHAN v. WHELAN et al.

(Supreme Court of Oregon. March 1, 1904.)

VERBAL LEASE—SPECIFIC PERFORMANCE—INJUNCTION—JUSTICE COURT—EQUITABLE JURISDICTION—FORCIBLE ENTRY AND DETAINER—RES JUDICATA.

1. Neither a judgment in justice court in plaintiff's favor in forcible entry and detainer, nor a judgment likewise in his favor on appeal to the circuit court, estops defendant from resorting to equity to preserve his right to possession by an independent suit for specific performance of a verbal lease, and injunction against the judgment, since, the justice court being without equitable jurisdiction, he could not have

availed himself of his remedy as a defense in that court, and neither could he have done so in the circuit court, as it would have raised a new issue not presented in justice court.

Appeal from Circuit Court, Marion County; R. P. Boise, Judge.

Action by L. H. McMahan against Walter Whelan and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This is a suit to require the specific performance of a verbal contract of leasing, and to enjoin the enforcement of a judgment given and rendered by the circuit court upon an appeal from a judgment obtained in the justice's court in an action for forcible entry and detainer. The complaint alleges that, about September, 1901, plaintiff and defendant entered into a verbal contract for a lease to the plaintiff of lot 2, in block 4, Jones's Addition to Salem, for three years, at an annual rental of \$75, to be paid in installments, \$50 at the time of leasing, \$25 eight months after October 8, 1901, and \$25 every four months thereafter during the term of the lease; that plaintiff entered into possession in pursuance of the contract, and has paid all installments of rent up to and including the 8th day of October, 1903; that he tendered the installment of \$25 payable on that date before it was due, the acceptance of which was refused, and now brings the same into court; that defendant agreed to execute a written lease in accordance with the terms verbally agreed upon, but has failed and neglected so to do; that after taking possession plaintiff cut and fitted new and expensive carpets to certain rooms in the dwelling, calimined other rooms, constructed plank walks upon the premises, cleaned out the well, repaired and renovated the reservoir, etc., and leased a barn upon adjoining property, in reliance upon the verbal contract for a lease; that on October 17, 1903, defendant instituted an action of forcible entry and detainer against the plaintiff before N. J. Judah, recorder of the city of Salem and ex officio justice of the peace, for cause whereof it was alleged that, on or about October 1, 1901, defendant herein delivered to the plaintiff possession of said premises, with the intention of leasing the same to the plaintiff, but that thereafter they were unable to agree upon the terms of the lease, and plaintiff continued in possession, at the will and sufferance of the defendant, holding the premises at the rental of \$25 for each four months' term, payable in advance, and that he has failed to pay the rent according to the terms of his leasing; that plaintiff recovered judgment therein for a dismissal of the action, which was reversed on appeal to the circuit court, and a judgment rendered in favor of the defendant, who is about to enforce the same through the instrumentality of a writ of restitution. The defendant has taken issue with the plaintiff upon every allegation of the complaint, except as to the rendition of the judgment in the justice's court and its reversal in the cir-

cuit, and sets up the latter judgment as an estoppel in bar to the present suit. A decree having been rendered in favor of the plaintiff, the defendant appeals.

John A. Jeffrey, for appellants. S. T. Richardson and C. L. McNary, for respondent.

WOLVERTON, J. (after stating the facts). By stipulation of the parties it is to be deemed that plaintiff has introduced evidence tending to support every allegation of the complaint. This leaves for our determination simply a question of law, which is whether the judgment against plaintiff herein in the circuit court, in the action for forcible entry and detainer, is a bar to the prosecution of the present suit. The plaintiff relies upon the case of *Wallace v. Scoggins*, 17 Or. 476, 21 Pac. 558, as decisive of this in his favor. There is this difference between the two cases. There the action of forcible entry and detainer had not gone to judgment, the justice being enjoined from proceeding further in the case, while here judgment has been rendered against the plaintiff herein. This is the only difference. Does it control the case differently, so as to deprive plaintiff of his remedy in equity? The defendant's theory is that plaintiff was a tenant at will or sufferance, from four months to four months, the rental being payable in advance, and that, having alleged appropriate facts in the justice's court showing this relation between the parties, and plaintiff having allowed them to go uncontroverted, the latter is estopped by the judgment, as having determined the fact in issue against him. Upon the other hand, plaintiff insists that his defense to that action was purely equitable, one that he could not have availed himself of in a justice's court, and that the judgment therein does not operate to deprive him of his equitable remedy to enforce the specific performance of the verbal lease entered into between him and the defendant. This court has decided in *Hill v. Cooper*, 6 Or. 181, which has been subsequently followed in *Spaur v. McBee*, 19 Or. 76, 23 Pac. 818, and *South Portland Land Co. v. Munger*, 36 Or. 457, 54 Pac. 815, 60 Pac. 5, that under the statute, which allows the interposition of equitable defenses by cross-bill in actions at law, a party may insist upon a legal defense in an action without being thereby precluded from afterward asserting his equitable title by an original suit. The law action there was in ejectment, and the defendant, who appeared and answered, failed because he was claiming under an imperfect deed; but he afterward began an independent suit, basing his right of recovery upon the imperfect deed as a contract to convey, praying specific performance, and it was held that the judgment in the law action was not a bar thereto, the court saying: "It is true, when the appellant asserted a fee-simple title in his answer in the ejectment, he claimed a title which, if he possessed, included all inferior titles, and he had no

need to assert this equity claimed in the suit. But the determination in that action was that he had not a fee-simple title; that such title was in respondent Cooper. This determination in that action showed that appellant was mistaken in supposing he possessed a fee-simple title in that action. He could not assert his equity under the pleadings on which it was tried, and consequently his equity asserted in this suit was not adjudicated in that action." The rule obtains in California under a statute similar to ours, relating to the interposition of equitable defenses in actions at law. In *Hough v. Waters*, 30 Cal. 309, it was held that a judgment recovered in ejectment, where the equitable defense was pleaded and withdrawn, was not a bar to a recovery in equity upon a contract for specific performance. See, also, *Lorraine v. Long*, 6 Cal. 452; *Hills v. Sherwood*, 48 Cal. 386. Now, if a party is not estopped to pursue his equitable remedy by an independent suit when he has had an opportunity to set it up as a defense in a law action previously instituted against him, and did not, by a much stronger reason he should not be estopped when he has not had the opportunity and could not under the statute and rules of law have set it up in the law action if he had desired so to do. A justice's court has no equitable jurisdiction, and it would have been idle pretense for the plaintiff to have attempted to set up his equitable defense to the action of forcible entry and detainer in that court. Where the equitable defense could not be pleaded in the law action, the defendant will not be concluded by the judgment therein (*Radcliffe & Lamb v. Varner & Ellington*, 56 Ga. 222; *Waters v. Perkins*, 65 Ga. 32), and he may invoke his remedy by independent suit in equity, and may thereby interfere with and, if necessary, enjoin the operation or enforcement of the judgment at law (*Marine Insurance Co. v. Hodgson*, 7 Cranch, 332, 3 L. Ed. 362; *Crim v. Handley*, 94 U. S. 652, 24 L. Ed. 216; *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013; *Knox County v. Harshman*, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. Ed. 586). Plaintiff could no more set up his equitable defense in the circuit court after the forcible entry and detainer cause had gone there on appeal than he could in the justice's court, as it would have raised a new issue not presented in the latter court. *Monroe v. N. P. Coal Mining Co.*, 5 Or. 509; *Dixon v. Johnson* (Or.) 74 Pac. 394. We conclude, therefore, that the adjudication in the justice's and circuit courts in the forcible entry and detainer cause does not estop the plaintiff to prosecute his equitable remedy to enforce the specific performance of his verbal contract for a lease, having entered into possession and made expenditures in reliance thereon, and fully performed upon his part all the conditions thereof to the time of the institution of this suit.

The decree herein of the circuit court will be affirmed.

(44 Or. 386)

## BEERS et al. v. SHARPE.

(Supreme Court of Oregon. March 1, 1904.)

IRRIGATION AGREEMENT—SUFFICIENCY OF EVIDENCE—CO-TENANT—AUTHORITY TO CONVEY WATER RIGHT—ADVERSE USER—NOTICE—EXTENT OF APPROPRIATION—NECESSITY OF APPROPRIATION.

1. Evidence in an action to enjoin interference with a right to use water from a slough for irrigating purposes examined, and held to show that plaintiff's predecessor in title had made an agreement with defendant's predecessors in title to aid in the construction and maintenance of a dam, in consideration of which he was to have a portion of the water.

2. A co-tenant, in the absence of special authority, cannot transfer any greater interest in an appropriation of water for irrigating purposes appurtenant to the estate than is commensurate with his own interest.

3. A lower proprietor agreed with a co-tenant of an upper estate that in consideration of helping to build and maintain a dam he was to have a certain water right for irrigating purposes. He filed a notice in the county, of his claim, but it did not describe the quantity of water he intended to appropriate. He testified that the notice was given to preserve his rights against a third person. After the notice was filed, another of the co-tenants diverted water from the stream. Held, that the notice was not notice to such co-tenant and his successors in title of an adverse claim by the lower proprietor.

4. The use by a lower proprietor of water after it has passed the upper proprietor's boundary is not adverse to the upper proprietor, so as to lay the basis for a claim by adverse user.

5. Evidence in a suit to enjoin interference with a water right for irrigating purposes examined, and held to show that plaintiff had not increased his appropriation within a reasonable time, so as to be entitled afterwards to a larger amount of water.

6. Where, by an agreement to aid in the construction and maintenance of a dam, a lower proprietor becomes a co-tenant with the proprietors of an upper estate in the water diverted for irrigating purposes, his failure to use his entire share within a reasonable time, and the delay of another co-tenant in appropriating his share, will not prejudice their rights there-to.

Appeal from Circuit Court, Malheur County; Morton D. Clifford, Judge.

Action by W. P. Beers and another against I. W. Sharpe. Judgment for defendant, and plaintiffs appeal. Affirmed.

This is a suit to enjoin interference with the flow of water in a slough in excess of a given quantity. The averments of the complaint, so far as deemed material, are, in substance, that plaintiffs own in severalty 1,760 acres of arid land in Harney county, through which Jordan creek flows and a slough connected therewith extends; that in 1874 they entered into an agreement with defendant's predecessors, stipulating to aid in enlarging a dam in the creek and to keep it in repair for the exclusive right to use all the water diverted into the slough in excess of 150 inches theretofore appropriated; that they performed their part of the agreement, and, under a claim of right, have for 27 years adversely used all the water in the slough in excess of 150 inches in irrigating

1,000 acres of their land now in cultivation, requiring 2,000 inches for that purpose; and that in May, 1901, the defendant unlawfully built a dam in the slough, obstructing the flow of water to their premises, and threatens, and unless restrained will continue, to maintain it. The answer denied the material allegations of the complaint, and for a separate defense averred that in 1870 the defendant's predecessors in interest settled on, cleared, and cultivated 600 acres of arid land above plaintiffs', and with the predecessors in interest of one George Clinton, who owns 1,200 acres lying between the premises of plaintiffs and defendant, built a dam in the creek, diverting into the slough 2,000 inches of water, which they (Clinton and the defendant) have ever since used in irrigating their lands, the surplus flowing to plaintiffs' premises; that such appropriation was prior in time and superior in right to all others; and that in May, 1901, plaintiffs unlawfully removed defendant's dam, and prevented him from irrigating a part of his crops. The reply denied the allegations of new matter in the answer, and averred that defendant ought not to be permitted to disavow plaintiffs' right, for that he secured a title to his land with knowledge of their claim to the exclusive use of the water in the slough by reason of their work upon the dam and expense incurred in the cultivation of land while relying upon the faith of the agreement entered into with his predecessors. The cause was referred, and, from the testimony taken, the court found that the defendant and Clinton owned the exclusive right to use all the water in the slough, and that plaintiffs had no interest therein, except to the use of the surplus when permitted to flow to their premises, and, a decree having been rendered dismissing the suit, they appeal.

Will R. King, for appellants. L. R. Webster and John L. Rand, for respondent.

MOORE, C. J. (after stating the facts). It is contended by plaintiffs' counsel that the testimony shows that their clients and the defendant are tenants in common of the dam in Jordan creek, the headgate, and the water right to the dam first built in the slough, below which they possess the exclusive right and are the prior appropriators of all the water turned into the slough in excess of 150 inches, and that the court erred in dismissing the suit and in not granting the relief prayed for in the complaint.

The transcript shows that in the fall of 1868 Sherman J. Castle, Fred Isabel, and C. D. Bacheier settled on unsurveyed public land, which they called "Goose Ranch," bordering for about two miles on the right bank of Jordan creek, a natural stream that rises in Idaho, flows westward in a well-defined channel, and empties into the Owyhee river in Oregon. Bacheier claimed an undivided

¶ 2. See Tenancy in Common, vol. 45, Cent. Dig. §§ 130, 132.



one-half interest in the land, and Isabel and Castle each an undivided one-fourth, but Isabel having transferred his interest to Castle, and Bachelor an undivided one-fourth to G. H. Tracy, they, in 1873, built a dam in the creek, which, raising the water more than 7 feet, caused about 2,000 inches thereof to flow into a slough, or old north channel, in which they placed a dam about 400 yards from its head and dug a ditch on the south side, diverting water, which they used in irrigating grain grown near the creek on their ranch. In 1869 O. W. Inskeep settled on similar land at the mouth of Cow creek, a northern tributary of Jordan creek, calling the premises "Ruby Ranch," about four miles below the dam in the latter stream, and on June 13, 1874, transferred his possessory right to the plaintiff, W. P. Beers, who, after the land was surveyed in 1875, filed a homestead on 160 acres in the center of section 16, township 30 south, of range 44 east of the Willamette meridian. The plaintiffs also secured from various sources the title to the remainder of section 16, and all of sections 15 and 22, in that township and range, except 160 acres in the latter section on the south side of the creek, which they own in severalty. Castle and one E. H. Clinton, having succeeded to the rights of the other claimants, became equal owners of Goose Ranch, and, in partitioning the land after it was surveyed, filed homesteads thereon, the former taking the west half of the southwest quarter, the southeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section 24, and the latter the north half of the northeast quarter and the north half of the northwest quarter of section 26, in that township and range, through which Jordan creek flows, and, having made proof of their continued residence on and cultivation of these lands, patents therefor were issued to each respectively. Castle also filed on and secured a receiver's receipt, under the desert act, for the north half, the north half of the southeast quarter, and the northeast quarter of the southwest quarter of section 24 in that township and range, and, having died, his widow, as his heir, on March 7, 1896, executed to the defendant a deed to all of section 24, except 40 acres in the southeast corner. The defendant repaired a dam built in the slough near the northwest corner of his land, and diverted water, which he used in irrigating crops, when the plaintiff, W. P. Beers, in May, 1901, removed the obstruction, which being rebuilt, this suit was instituted.

Beers, as a witness in his own behalf, testified that in the fall of 1874 he entered into a contract with Bachelor, who was the manager of Goose Ranch, whereby it was stipulated that in consideration of his helping to keep the dam in Jordan creek in repair he was to have the use of all the water flowing in the slough in excess of the quantity re-

quired to fill an irrigating ditch on that ranch, which did not exceed 200 inches, and that Castle knew of this agreement; that every year thereafter he paid one-third of the cost of the labor and material required to maintain the dam and the headgate built in the slough, and had claimed and used 1,000 inches of water in irrigating land, his right thereto never having been controverted until May, 1901, when the defendant placed a dam in the slough, thereby impeding the flow of water therein.

C. D. Bachelor, who, with his associates, built the dam in Jordan creek, as plaintiffs' witness testified that they turned water into the slough and used it in irrigating grain, cultivating in 1874 more than 100 acres; that until 1878, when he left Goose Ranch, no water was ever used except on the grain land; that he entered into an agreement with Beers whereby he was to have the water that went over the dam near the head of the slough during the time he helped to maintain the dam in the creek; that the witness and his associates never claimed the use of any water, except such as was conducted in their ditch, and had no use for the overflow; that Castle never objected to his agreement with Beers; and that Tracy assigned his interest in Goose Ranch to the witness, who, after the land was surveyed, transferred to S. Skinner and E. H. Clinton an undivided half of the water right and all his interest in the premises, describing the land which Clinton filed on as a homestead.

Henry Scoubes, as plaintiffs' witness, testified that he was working on Ruby Ranch when it was purchased by Beers, by whom he was employed until October, 1876; that he heard Bachelor tell Beers that if he would help repair the dam in Jordan creek he should have a share of the water, saying they would form a partnership and divide it between them. The testimony discloses that a dam and head gate were built in the slough near its upper end, to regulate the flow of water therein, and that Beers paid a part of the expense incurred in its construction, and also helped to maintain the dam in the creek, repairs to which were frequently rendered necessary by freshets.

G. H. Tracy, as defendant's witness, testified that he was one of the claimants of Goose Ranch, and resided thereon from 1872 to the spring of 1875, when he transferred his interest to Bachelor; that no arrangements were ever made, to his knowledge, with Beers, whereby he was to have the use of any water; that in his absence his interests in the ranch were represented by Bachelor, who had no authority to sell the place or to dispose of any interest therein; that Castle represented his own half; and that Inskeep never had any interest in the dam. The witness states, however, that no claim was made to any water except such as was conducted in their ditch.

O. W. Inskeep's deposition is to the effect



that he never considered he had any interest in the dam in Jordan creek, though he worked thereon several days under an agreement that, in consideration of such labor, he was to have the surplus water, but the dam leaked to such an extent that no water ever reached Ruby Ranch through the slough when needed, and he never used any in irrigating crops grown on the premises.

The foregoing is a brief synopsis of the testimony tending to establish the plaintiffs' right, from which we think it conclusively appears that Bachelor contracted with Beers to allow him the use of surplus water in the slough in consideration of his aid in maintaining the dam in Jordan creek, and that he performed his part of the agreement. Bachelor, in speaking of the manner of diverting the water into the slough and the difficulty experienced in doing so, said: "It was a long time before we got the dam to stand." The defendant, estimating the expense of turning the water into the old channel, testified as follows: "I suppose a person could put in the dam, the work, the rock, maybe for \$600 or \$700; and it might cost more to go right at it to work." The cost of constructing and maintaining the dam and head gate, the volume of water that could be diverted into the slough, the plaintiffs' need thereof for irrigation, the labor performed and the money expended by them in keeping up the repairs, and the fact that a similar agreement was entered into with Inskeep, are circumstances which seem to confirm the conclusion that Beers entered into an agreement with Bachelor in respect to the use of surplus water in the slough. Beers does not base his original right to the use of the water from the slough on any agreement entered into with Castle, but on Bachelor's implied authority to grant such privilege on his behalf. In 1874, when Beers entered into the contract relied on, Castle possessed an undivided one-half and Tracy and Bachelor each an undivided one-fourth interest in Goose Ranch, the water appropriated thereon, and the right in the slough appurtenant thereto, and though they had only a possessory right to the property they were tenants in common thereof. *Freeman, Co-Tenancy* (2d Ed.) § 88; *Kinney, Irrigation*, § 301; *Long, Irrigation*, § 75. Bachelor could not, therefore, without special authority from his co-tenants, which has not been established, transfer any greater interest than he possessed, or more than an undivided one-fourth. *Person v. Wilson*, 25 Minn. 189; *Thompson v. Bowman*, 6 Wall. 316, 18 L. Ed. 736.

Assuming, without deciding, that the parol agreement conveyed an estate in the old channel and transferred a right to use water flowing therein, constituting Beers a tenant in common, was his use of the water from the slough for 27 years adverse to the defendant, so that he now possesses a greater right than he originally secured? The continued use of the water by plaintiffs is pre-

sumed to be in maintenance of the right of the defendant, for whom they held it as tenants in common. *Moss v. Rose*, 27 Or. 595, 41 Pac. 606, 50 Am. St. Rep. 743. Beers filed in Baker county, which then included Ruby Ranch, the following notice: "Jordan Creek, Jordan Valley, Baker County, Oregon, December 10th, 1877. To all whom it may concern: This is to certify that I, W. P. Beers, claim (as successor by purchase of Oliver W. Inskeep) a water right for irrigating and other purposes. Said water is taken out of Jordan Creek at a dam on said creek, about five miles more or less above the mouth of Cow Creek, and conveyed through ditches and a slough a distance of about four miles on the north side of said creek, to section 18, township 30, south of range 44, east of the Willamette meridian, all in the aforesaid county and state. The aforesaid dam and ditches were constructed by Oliver W. Inskeep and others and the water has been used by said Inskeep and myself for six or eight years, for irrigating purposes. [Signed] W. P. Beers." It will be observed that this announcement does not pretend to describe the quantity of water intended to be appropriated, and for that reason it could not of itself impart notice to the defendant of Beers' intention to claim the use of all the water in the slough. This deduction is strengthened by Beers' testimony to the effect that the notice was given to preserve his rights from invasion by one Leslie, who then contemplated the appropriation of some of the water, and it is quite evident that it was not intended to limit or restrict the defendant's use of water from the slough, which conclusion seems to be confirmed by the fact that, after the notice was filed, Castle, without objection from plaintiffs, built a dam in the slough and diverted water therefrom, which he used in irrigating a crop of barley and potatoes.

Before possession lawfully taken by a co-tenant can become adverse to the parties jointly interested in the property, so as to set in motion the statute of limitations, there must be an actual ouster and notice or knowledge of the hostile intention, in pursuance of which the exclusive possession has been held. *Northrop v. Marquam*, 16 Or. 173, 18 Pac. 449; *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95; *Wheeler v. Taylor*, 32 Or. 421, 52 Pac. 183, 67 Am. St. Rep. 540. The water flows in the slough through defendant's premises, and thence across Clinton's land to that of the plaintiffs, whose use thereof for irrigation, after it has passed the defendant's western boundary, is not such an overt act as to constitute an ouster, or sufficient to impart notice of a hostile intention to assert a right by prescription, because the defendant sustained no injury in such use. *Wimer v. Simmons*, 27 Or. 1, 39 Pac. 6, 50 Am. St. Rep. 685; *North Powder Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223; *Bowman v. Bowman*, 85

Or. 279, 57 Pac. 546. If plaintiffs' diversion had been above the defendant's, their exclusive use of the water might have presented a very different question, but, being below, we do not think the evidence of their use sufficient to set the statute of limitations in motion. An examination of the testimony convinces us that Inskeep never initiated such a right to the use of water as would permit it to pass as an appurtenant under his deed to Beers.

The rule is settled in this state that to constitute a valid appropriation of water there must be (1) an intent to apply it to some beneficial use, existing at the time or contemplated in the future; (2) a diversion thereof from a natural stream; and (3) an application of it within a reasonable time to some useful industry. *Simmons v. Winters*, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727; *Hindman v. Rizer*, 21 Or. 112, 27 Pac. 13; *Low v. Rizer*, 25 Or. 551, 37 Pac. 82; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777. If the method thus adopted be applicable to the case at bar, it is doubtful if Castle, the defendant's predecessor in interest, contemplated, at the time the water was diverted into the slough, using it for the irrigation of any land other than that lying along the creek, and thereafter included in his homestead; but if, at the time of the original diversion, he intended to use the water on the land embraced in his desert entry, it is quite probable that the appropriation was not made thereon within a reasonable time. It will be remembered that in 1873 water was diverted from the slough by means of a dam and ditch, and used in irrigating grain grown on land now included in the homesteads of Castle and Clinton, and that Bachele and Tracy respectively testified that no claim was ever made to the use of any water except such as was conducted in their ditch. These witnesses were undoubtedly able to testify in relation to their contemplated use of the water at the time they made the prior appropriation; but they do not attempt to express Castle's intention in respect thereto, nor do we think their testimony shows them qualified to speak for him on that subject. The transcript shows that Castle made final proof in support of his desert entry and secured a receiver's receipt for the premises, December 24, 1887. Mrs. M. C. Barton, the former wife of Castle, as defendant's witness, testified that the water used to reclaim the desert land was taken from the original ditch, and that none was secured from the slough below the dam near its head until 1888 or 1889, when Castle built a dam therein at the northwest corner of the desert land, and used the water only one season to irrigate about 18 acres of barley, and that this dam was washed out in 1894. The defendant, as a witness in his own behalf, testified that in 1899 he rebuilt this dam, and used water from the slough with which he irrigated about 30 acres of the des-

ert land until May, 1901, when Beers removed the obstruction. This is about the extent of the use of water from the slough on that land, and if it be assumed that in 1873, when Castle helped to turn the water into the slough, he contemplated using it to irrigate that tract, it must be conceded that his appropriation was not very speedily made.

If the rule that water diverted from a natural stream must be applied to some beneficial use within a reasonable time, in order to preserve the right of appropriation, is applicable to the plaintiffs, it is evident that they are entitled to no more than is necessary to irrigate 35 acres, for the testimony conclusively shows that from 1874 to 1892 the area of their cultivated land that was irrigated with water taken from the slough was not increased. Beers testified that in 1874 Inskeep was irrigating about 35 acres with water taken from that source. M. J. Anawalt said that his father leased the premises in 1876, and raised about 35 acres of grain. F. C. Fletcher said that he lived at Ruby Ranch from 1875 to 1884, during which time Beers irrigated about 40 acres of grain. Marcos Rientria, who worked there about five years, said that in 1892 Beers irrigated about 30 or 40 acres. These witnesses appeared for plaintiffs, and their testimony is uncontradicted. Joseph Newell, as defendant's witness, testified that he worked for Beers from 1885 to 1892; that in 1885 the water from the slough was not used by Beers, but permitted to flow into the creek; and that prior to 1892, when the witness left Ruby Ranch, Beers irrigated about 35 or 40 acres with water from the old channel. The testimony of this witness is contradicted by Beers, who said that Newell did not commence to work for him until 1886, and the witnesses W. H. Hicks, M. J. Anawalt, and Clinton Beers each testified that Newell was not employed by Beers until 1887, but no one contradicted his statement in relation to the area of plaintiffs' cultivated land that was irrigated with water taken from the slough. The testimony shows, however, that in 1888 Beers built a dam in Jordan creek near the southwest corner of section 23, and dug a ditch in a northwesterly direction, about 4 feet wide at the bottom, and carrying a depth of about 7 or 8 inches of running water all the time, which is used in irrigating section 22; that he also constructed another dam below this, and dug a ditch therefrom on the south side of the creek, and diverted water which he used in irrigating about 150 acres of land; that he has another ditch taken out of Cow creek that supplies about 100 inches of water, which is used in irrigating his orchard and garden; and that for several years prior to the institution of this suit he has been using the water from the slough to irrigate a part of section 15, and that he now irrigates from the various sources about 1,000 acres of land.

In *Hall v. Blackman* (Idaho) 88 Pac. 19, *Fielding Ethel and David B. Ethel*, in 1871,

formed a partnership, as Ethel Bros., to acquire and cultivate land, and purchased 480 acres, the north 320 of which was taken in the name of Fielding and the remainder in that of his brother. In 1872 they cultivated about 200 acres of the north part, and, for the purpose of irrigating the entire 480 acres, diverted 500 inches of water from a natural stream, which by means of adequate ditches was conducted to and used upon the cultivated land, the excess flowing in a depression across the land conveyed to David. In 1886, the copartnership was dissolved, and the premises were divided in pursuance of an agreement that each should have and own one-half of the water so diverted, and that an old road running east and west through the land should form the boundary, Fielding executing to his brother a deed for all his part of the 320 acres lying south of the highway; but the sealed instrument did not refer to the water right, except so far as it might be implied in the word "appurtenances." After this partition David put much of the land which he owned into cultivation, using in its irrigation one-half of the water so diverted until 1890, when he died, and W. H. Blackman became the owner of the south tract. In 1893 Fielding conveyed the north part to W. E. Wilson, who thereafter, and until the institution of that suit, divided the 500 inches of water equally with Blackman, but, maintaining that, as only 3 inches of water had been actually used in irrigating the land when it was conveyed to David, that was the quantity appurtenant thereto and the measure of Blackman's right, sought to prevent the latter from using any more than that so originally appropriated, and, having secured a decree to that effect, Blackman appealed. Mr. Justice Sullivan, speaking for the court, in modifying the decree and referring to the legal principle insisted upon by Wilson, said: "We are unable to agree with that contention under all of the facts of this case. Ethel Bros. jointly appropriated 500 inches of water for the irrigation of said 480 tract of land, and the question here involved is the same as if said land and appropriation of water was owned and made by one person. The evidence shows that said amount of water was diverted by means of said ditches each succeeding irrigating season, and taken upon said land, and applied to the irrigation of about 200 acres thereof, up to 1886, when more of said tract was put into cultivation by David B. Ethel after the partnership division, and although they had but about 200 acres of said land in cultivation from 1872 to 1886 they preserved their right to the use of sufficient water to irrigate all of said tract that is susceptible of irrigation, and for that reason the rights of each, as shown by the evidence, must date from March 1, 1872, so far as water for the irrigation of the said 480 acres of land is concerned. This would not affect the date of Wilson's right to the use of water for the irrigation of land that

formerly belonged to the partnership, which land he purchased from Fielding Ethel, but it requires a change in the date of the right of Blackman to the use of water in the land which he purchased from David B. Ethel, and which had belonged to said copartnership. The use of such water by Fielding and David B. Ethel was in common during the existence of their copartnership, although used upon the land entered by Fielding Ethel (as to the cultivated land), and the continuous use by each of those parties and their successors in interest of one-half of the water until shortly before this action was brought clearly establishes the right of plaintiff Wilson and appellant Blackman as of the same date to the amount of water required for the proper irrigation of the land which formerly belonged to said crop copartnership. The water appropriated by Ethel Bros., as copartners or tenants in common, for the reclamation and irrigation of said 480 acres of land, attached to and became appurtenant to all of said land, or the right to the use thereof became so appurtenant. The right to the use of water sufficient to irrigate the whole of said tract of land was preserved by the construction of ditches of sufficient size and capacity to carry onto said land a sufficient quantity for that purpose, and by thus diverting and taking that amount of water thereon. The evidence clearly shows that that was done, and that said amount of water was so conducted each successive irrigating season whenever said stream carried that quantity of water."

We think, upon principle, whatever rights plaintiffs have to use water from the slough depend upon their contract entered into with Bachelier, and not upon their appropriation of water to a beneficial use within a reasonable time. To render definite the reason upon which this conclusion is based, it is deemed necessary to describe with some degree of particularity the valley formed by the creek and slough and the parts thereof owned by the parties hereto and others. From the testimony and the maps offered in evidence it appears that Jordan creek flows through a canyon for about 4 miles, at the lower end of which Castle, Tracy, and Bachelier built their dam in what, after the survey, proved to be the northwest quarter of the southwest quarter of section 19, in township 30 south, of range 45 east; from thence the stream flows southwest in the adjoining township through sections 24 and 25; thence west through section 26; thence northwest through sections 27 and 22 to the southwest corner of section 15; thence west through section 16 to a point near the southwest corner, where it forms a junction with Cow creek, and flows thence southwesterly through a canyon for about 12 miles. Just above the dam referred to exists a slough or an old channel about 35 feet in width and 4 in depth, that runs northwest through section 19 in the township first mentioned, and

through sections 24, 23, 14, and to the center of 15, and thence southwest through sections 15 and 16 in township 30 south, of range 44 east, connecting with Jordan creek near its confluence with Cow creek. The land bordering on Jordan creek originally produced native grass caused by the spring overflows of that stream, but above the line of freshets it was covered with sagebrush, which having been grubbed out in places where water could be used for irrigation, the premises thus cleared have produced excellent crops. Sections 15 and 23, in township 30 south, of range 44 east, were granted by Congress to aid in the construction of a wagon road, and the California & Oregon Land Company, on July 14, 1900, conveyed the former section to Beers and the latter to G. W. Clinton. For several years prior to the commencement of this suit, Beers, E. H. Clinton, and Castle claimed all the land lying between Jordan creek and the slough, except the odd-numbered sections, and jointly possessed the right to use the water from the slough for irrigation, G. W. Clinton having succeeded to the rights of E. H. Clinton in the premises. The plaintiffs' right in this respect was not secured as in *Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642, by appropriating the surplus water from the channel of a natural stream to a beneficial use after the needs of the prior appropriators were supplied, but it was obtained after having been diverted into a slough by agreement upon consideration of their aiding in enlarging and maintaining the dam in Jordan creek. This contract made plaintiffs parties to the diversion and tenants in common with the other joint owners of the right to the use of water in the slough, and, the plaintiffs having performed their part of the agreement, their right, as against such joint owners, necessarily continued unimpaired without any appropriation of the water whatever by them, and it would appear that they are entitled to their share thereof, irrespective of whether or not they within a reasonable time increased the area of their cultivated land that was irrigated from the slough. *Hall v. Blackman*, 68 Pac. 19. For the same reason Castle, having aided in diverting water into the slough, was the owner of an undivided one-half thereof, and, as against the plaintiffs and all others in privity of contract with him, had an unlimited time in which to apply his share to a beneficial use, and hence the right of the defendant, as the successor in interest of Castle, has not been lost by the delay in appropriating his share of the water.

It is alleged in the answer that the defendant is the sole and exclusive owner of an undivided one-half interest in the dam, slough, ditches, and water right, consisting of 2,000 inches of water from Jordan creek to be used for irrigation, it being intimated that Clinton was the owner of the other moiety. The testimony shows that the defendant has at all times intended to permit one-half of the

water in the slough to flow to Clinton's premises, and if the plaintiffs are entitled to a part thereof, which is not determined herein, they have not been deprived of their rights by the defendant, who, as the successor of Castle, is entitled to the quantity so claimed by him, and hence the decree is affirmed.

(27 Utah, 193)

# **MATHEWS v. DALY WEST MIN. CO.**

(Supreme Court of Utah. Feb. 5, 1904.)

**ACTION FOR INJURY TO EMPLOYÉ—EVIDENCE—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—INSTRUCTIONS—REVIEW ON APPEAL.**

1. Plaintiff, who was employed in defendant's mill as repairman, was informed by its superintendent that he was going to shut the mill down for half an hour for repairs, as was the custom when repairs were being made, and requested plaintiff to perform that duty. Plaintiff began work, and leaned over a belt to tighten a cap, when the superintendent gave the order to start the mill, without the customary warning, and plaintiff was injured. *Held* gross negligence on the part of the superintendent, immediately causing the injury.

2. Evidence in an action by an employé for a personal injury considered, and *held* insufficient to show contributory negligence or assumption of risk, as a matter of law, so as to warrant a nonsuit or direction of a verdict for defendant.

3. An employé, while leaning over a belt in a mill which had been shut down for repairs, was suddenly placed in great peril by an order to start the mill without giving the customary warning, and he thereupon gave a wrong order to "back up," thus increasing the danger. *Held*, that this was not contributory negligence, under the circumstances.

4. An instruction was properly refused where there was no evidence tending to prove the supposed state of facts on which it was predicated.

5. Where an instruction includes different and independent subjects, a general exception thereto cannot be considered on appeal unless the instruction as a whole is incorrect.

6. A repairman in a mill had a right to implicitly rely on the statement of the foreman that he was going to shut down for repairs, and in an action for an injury to him claimed to be due to negligently starting it up without warning, it was not reversible error to permit him to testify that he did so rely.

7. In an action for injury to a repairman in a mill, claimed to have been caused by negligently starting the same without warning after it was shut down for repairs by the superintendent, and while plaintiff was at work, it was not error to reject an expert opinion of a witness as to whether, in his experience as a machinist, a man could, in the nature of things, state that he was going to shut the mill down for repairs for a given length of time.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Thomas Mathews against the Daly West Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Dickson, Ellis & Ellis and Snyder & Wight, for appellant. S. R. Thurman and Hurd & Wedgwood, for respondent.

¶ 2. *Hone v. Mammoth Mining Co.*, 27 Utah, —, 75 Pac. 381.

¶ 3. See *Master and Servant*, vol. 34, Cent. Dig. § 791.

BASKIN, C. J. This is an action to recover for personal injuries alleged to have been caused by the negligence of the defendant. The answer denies the negligence alleged in the complaint, and alleges contributory negligence upon the part of the plaintiff. A verdict and judgment were rendered in favor of the plaintiff.

The defendant made a motion for a nonsuit, and, when the testimony was closed, requested the court to instruct the jury that, as a matter of law, the plaintiff was not entitled to recover. The denial of both the motion and request is assigned as error. The ground of the motion and request is that the evidence fails to show any negligence on the part of the defendant, and shows contributory negligence on the part of the plaintiff.

The plaintiff, at the time of the injury, on the 3d day of October, 1901, was 32 years old, and was, and had for 1 year previously been, in the employ of the defendant as repairman in and about defendant's mill. F. W. Sherman was, and had been since July, 1899, the superintendent. The plaintiff testified, in substance, that, on the day he was injured, Mr. Sherman said to him that he was going to shut the mill down for half an hour for repairs, and told him to look over the mill as quickly as he could; that shortly afterwards the mill was shut down, and the plaintiff began to look it over, and having, while doing so, discovered a cap which was nearly off, he procured a candle and a wrench, and, while lying across a belt, and engaged in tightening the cap, the mill started, and he was caught between the belt and its pulley, and was injured; that he had been so engaged about six minutes before the mill was started; that there was no good way to tighten the cap, except to lie across the belt, but by getting down underneath the mill, and lying on his back, with somebody to hold a candle, he could, even when the mill was in operation, have tightened the cap without being exposed to danger, but to do the work in that manner was unhandy, and he did not think he could have easily twisted the cap down while the mill was running. Lawrence Abeglen, an employé, whose standing duty was to assist plaintiff to make repairs, testified: That there was "room enough for him to get under by tight squeezing. If the gearing was out of order, he could fix it under there. Couldn't tighten screws or bolts there very handy. Could have done it with my assistance. I was sent there for that purpose. Didn't ask me." That it was "a common thing for him to get on the belt when the mill was stopped. No danger then. It was done in a conspicuous way, so everybody around the mill could see him when it was stopped." This witness further testified, in substance, that he was present, and heard Sherman, the superintendent, say that he was going to shut down the mill for half an hour, and at the same time he told the plaintiff "to look over the mill, and directed me to help him." The

evidence shows, without conflict, that the place underneath the mill, mentioned by the plaintiff in his testimony, was safe, and that the place where the plaintiff received his injuries was also safe when the mill was not in motion. It likewise appears from the evidence that it was the custom to shut the mill down every day for repairs, and that repairs were not made while the mill was running, and that it was also customary for the superintendent, or his substitute, to give warning when the mill was about to be started, loud enough to be heard throughout the mill, and that, on the occasion of plaintiff's injury, no warning was so given. Sherman, the superintendent, who was present on the occasion of plaintiff's injury, and ordered the mill started up, testified: "We always give a signal in starting up; that is, often do. I am not always down. If I am down on the floor just level with the engine-room floor, and give the signal to start up to the engineer, I always give the signal, 'Look out.' \* \* \* The purpose in giving the signal is to have all the employés in their proper positions, to turn on their valves, turn on water, begin feeding ore, and so on. Such a signal was not given to warn men to get out of dangerous places."

Appellant's counsel contend that, as the plaintiff knew that there was a place underneath the mill where he could tighten the loose cap with safety, he was guilty of contributory negligence, and assumed the risk, by attempting to do so at the place where he was injured; and in support of this contention they rely upon the well-settled rule of law that when the servant knows, or by the exercise of ordinary care can ascertain, that there are both safe and dangerous ways by which he can perform his duties, if he voluntarily chooses to pursue one of the ways that is dangerous, he assumes the natural and ordinary risk incident to the way he has chosen, and is barred from recovering for any injury which he may have received in the discharge of his duties, both on the ground of contributory negligence and assumed risk, notwithstanding the master's negligence may have also contributed to the injury. It is also well settled that the negligence of the master is not among the risks so assumed by the servant. Therefore when the servant, in the discharge of his duties, is in a position which is, under the conditions which then exist, naturally safe, but is suddenly made dangerous by the negligence of the master, and injury to the servant is immediately caused thereby, the master is liable. It was shown by the preponderance of evidence in the case at bar that the superintendent informed the plaintiff that he was going to shut the mill down for half an hour for repairs, and desired the plaintiff, who was the repairman, to perform that duty. The mill soon thereafter was shut down. The evidence also shows, without conflict, that while repairs were being made it was

the custom to shut down the mill, and, when shut down, before again starting it, to give warning; that on the occasion of the plaintiff's injury the superintendent was present, and gave the order to start the mill without giving the customary warning. It is clear from the evidence that the plaintiff's position on the belt, until the mill was started, was not a dangerous one, and that when the mill was not running, he could tighten the cap there with perfect safety, and accomplish his task there more conveniently and with greater dispatch than underneath the mill. Under the circumstances disclosed by the evidence, it was gross negligence on the part of the superintendent to start the mill without giving the customary warning. This negligent act of the superintendent suddenly rendered the place occupied by the plaintiff (which before was safe) dangerous, and immediately caused plaintiff's injury.

Appellant's counsel contend that the decisions of this court in the cases of *Fritz v. Electric Light Co.*, 18 Utah, 493, 56 Pac. 90, and *Cook v. Mining Co.*, 12 Utah, 51, 41 Pac. 557, sustain their contention. In one of these cases the danger to which the servant was exposed was naturally incident to the uses of electrical appliances, and in the other case was inherent in the plank over which the servant was passing when injured. In neither of these cases was it shown, as in the case at bar, that the position of the servant, which before the accident was safe, was at the time of injury suddenly made dangerous by the negligent act of the master. It is clear that these cases are not in point.

We cannot say that the evidence in this case shows, as a matter of law, either contributory negligence or assumed risk on the part of the plaintiff. This being so, both the motion for a nonsuit and the request to direct a verdict for the defendant was properly denied. See *Hone v. Mammoth Mining Co.*, 27 Utah, —, 75 Pac. 381, decided by us at the present term.

It further appears that at the time the plaintiff was injured the mill was started in a way that caused the machinery to move backward, instead of forward, and the plaintiff, by reason of that fact, was drawn in between the belt and the pulley around which the belt passed, and that, while the plaintiff was being so drawn in, he cried out, "Back up." The cause of plaintiff's peril was the backward movement of the pulley. Its forward movement would have carried him away from danger. The appellant claims that, as the respondent's contention is that he was injured by the mill being started in the wrong way, the order, "Back up," which he himself gave, was a wrong one, and contributory negligence on his part. The plaintiff was, by the negligent act of the defendant in starting the mill without giving the customary warning, placed in a position of extreme peril, and it is evident from the cry which he uttered that he was terror-stricken

by the dangerous emergency suddenly caused by starting the mill. Under such circumstances, the master is liable, even when the servant, as in the case at bar, to escape the impending danger, has done something which increases his peril, or something which, if he had not done, he would not have been injured, because "persons in great peril are not to be required to exercise all of that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances." *Beach on Contributory Negligence*, § 14. The wrong order given by the plaintiff was not, under the circumstances disclosed, contributory negligence.

Appellant also took exception to the refusal to give the following instruction requested by its counsel, viz.: "You are further instructed that if the plaintiff, from his position as repairman, or from any other source, knew or ought to have known that, during the time that the mill closed down on the occasion in question, it was the intention of Sherman to set up the rolls, or that they were likely to do that, and if you further believe from the evidence that the plaintiff knew that, in order to set up the rolls, they would have to give the engine a partial turn one way or the other, then it was negligence on his part to get in a position where he would be likely to get caught if any partial turn were made; and if, with knowledge of all these facts, if you believe them to be facts, he went into an unnecessary position of danger, and such position of danger was the proximate cause of his injury, if any he received, he cannot recover in this action." There was no direct evidence, nor any evidence, from which it could be reasonably inferred that the plaintiff knew or ought to have known that Sherman, the foreman, intended to set up the rolls, or that he was likely to do so, or, in doing so, on that occasion, it was necessary to give the engine a partial turn. As there was no evidence tending to prove the supposed state of facts upon which the instruction asked for was predicated, it was without foundation, and the request to give it was properly refused.

The appellant assigns as error the giving of the sixth, seventh, tenth, and eleventh instructions. The exceptions respectively taken to these instructions at the trial are as follows: "The defendant excepts to the sixth instruction because it limits the liability of plaintiff for the risk assumed to narrower limits than justified by the pleadings and evidence in this case, and does not submit to the jury the entire law upon that branch. The defendant excepts to the seventh instruction because it limits the question of negligence of a fellow servant within narrower limits than justified by the law, and because it authorizes the jury to find in favor of the plaintiff, even though the negligence of a fellow servant was the proximate cause of the injury. The defendant excepts to the tenth

instruction because it enlarges the measure of defendant's liability, and restricts the measure of the plaintiff's liability for contributory negligence, and presents matters for the consideration of the jury, in respect to rules and regulations, which are not put in issue by the pleadings in this case, and is therefore immaterial and erroneous. The defendant excepts to the eleventh instruction for the reason that it defines inaccurately the law of fellow servants and vice principals, and presents to the jury an immaterial issue in this case, and because it is contradictory to the seventh instruction." Exceptions of the same character as the foregoing were taken at the trial of the case of *People v. Thiede*, 11 Utah, 241, 39 Pac. 837, which was affirmed on appeal to the Supreme Court of the United States (*Thiede v. People*, 159 U. S. 521, 16 Sup. Ct. 62, 40 L. Ed. 237), and in the opinion of that court the exceptions appear in full, and are as follows: "Defendant excepts to the giving of the instructions to the jury on the definition of the word 'malice,' and application to this case, as being misleading, confusing, and not correctly stating the law as applicable to this case, and tending to influence the jury to find a verdict not justified by the evidence in this case. The defendant excepts to the giving of the instruction of the court to the jury on the question of murder in the second degree, as not being justified by the evidence, and tending to mislead and confuse the jury, and cause them to render a verdict not sustained by the evidence in this case. The defendant excepts to the instruction of the court to the jury in defining 'deliberation,' and that the same does not properly and legally define the meaning of the words used in the indictment in this case. The defendant excepts to the instruction of the court to the jury in the definition and meaning of 'premeditation,' as misleading and not correct, as charged in the indictment in this case." The territorial court held that these instructions were "too general to raise any question for the consideration of the court," and, in support thereof, Mr. Justice Kling, in the opinion rendered, quoted the following from the opinion in the case of *Hickory v. U. S.*, 151 U. S. 316, 14 Sup. Ct. 334, 38 L. Ed. 170: "The rule in relation to exceptions to instructions is that the matter excepted to shall be so brought to the attention of the court before the retirement of the jury as to enable the judge to correct the error, if there be any, in his instructions to them, and this is also requisite in order that the appellate tribunal may pass upon the precise question raised without being compelled to search the record to ascertain it." In the case of *Whipple v. Preece et al.*, 24 Utah, 364, 373, 67 Pac. 1072, Mr. Justice Bartch, in the opinion, said: "The exceptions are too general, simply referring to whole paragraphs of the charge. To be of avail in an appellate court, they must specify the particular objectionable matter,

so as to give the trial judge an opportunity to make a correction, notwithstanding that it is provided in section 3151, Rev. St. 1898, that 'no reason need be given for such exceptions.' That section does not authorize the making of wholesale exceptions, without reference to the specific matter which is claimed to be objectionable. The reason of the rule which requires the specific objectionable matter to be pointed out in the presence of the jury is obvious. If the objection to such matter be well taken, the court may then make the correction called for, and thus not only save the expense of another trial, but also the time of the court. The rule has been firmly established in this state." Each of the instructions in question included a number of separate and independent matters, most, if not all, of which were, beyond question, relevant and correctly stated. The exception to each instruction as numbered is therefore simply a general exception to it as a whole, and not to the particular matter objected to upon the appeal. It is a settled rule of this court that an exception to the whole of a particular instruction which includes different and independent subjects is a general exception, and will not be considered by the appellate court unless the instruction as a whole is incorrect. It is clear that the exceptions in this case were not properly taken at the trial, and cannot, therefore, be considered.

The plaintiff was allowed, over the objection of the defendant, to testify that he implicitly relied upon the statement of the foreman that he was going to shut down the mill for repairs. The plaintiff had a right to rely on that statement. Therefore it was not reversible error to permit him to testify that he did so. Nor did the court err in rejecting the expert opinion of the witness Murdock as to whether, in his experience as a machinist, a man could, in the nature of things, state that he was going to shut the mill down for repairs for a given length of time.

The judgment is affirmed, with costs.

BARTCH and McCARTY, JJ., concur.

(27 Utah, 231)

BUSBY v. CENTURY GOLD MIN. CO.

(Supreme Court of Utah. Feb. 9, 1904.)

CONTRACTS—LOANS—CONSTRUCTION—REPAYMENT—CONTINGENCIES—TIME—PLEADING—ADMISSIONS.

1. Where plaintiff and certain other stockholders in a mining corporation loaned it money with which to carry on its business, which it could not otherwise have procured, and the corporation gave receipts reciting that it had received so much money, "mutual loan 1½ per cent, to be repaid from the first profits of the mine," the 1½ per cent. referring to the proportion of the lender's stock in the company, such receipt evidenced an absolute obligation to re-

¶ 1. *Johnston v. Schenck*, 15 Utah, 490, 50 Pac. 921; *McIntyre v. Mining Co.*, 20 Utah, 323, 60 Pac. 552.

pay the amount so loaned, which was not dependent on the contingency that the corporation should make profits from its mine.

2. Where, in an action on a loan which was payable within a reasonable time, defendant by its answer admitted that the loan was due, it could not thereafter contend that a reasonable time for payment had not expired.

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Action by Thomas Busby against the Century Gold Mining Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff brought this action to recover from defendant the sum of \$603.75. The complaint, in substance, alleges: (1) The corporate existence of defendant; (2) that between the 10th day of October, 1897, and the 17th day of October, 1898, plaintiff loaned to defendant, at its special instance and request, and for its use and benefit, certain sums of money amounting to \$603.75, which said defendant promised and agreed to repay plaintiff out of the first profits of its mines and property; (3) that more than a reasonable time has elapsed since the receipt by defendant of said sums of money; (4) that on the 15th day of November, 1901, plaintiff demanded payment of said sum from defendant, and that payment was refused; and (5) that there is now due and owing from said defendant to said plaintiff the sum of \$603.75, together with interest.

Defendant's answer admits its corporate existence; "(2) admits that between the 16th day of October, 1897, and the 17th day of October, 1898, at divers and sundry times said plaintiff loaned to this defendant certain sums of money, amounting in all to the sum set forth in plaintiff's complaint, and that at the time of each and every of the loans so made as aforesaid this defendant entered into a contract and agreement to repay the same; (3) denies each and every allegation of the third paragraph of said complaint; (4) admits the allegations of the fourth and fifth paragraphs of said complaint."

The record shows that there were six loans made, and for each loan plaintiff received from defendant a written acknowledgment, of which the following are fair samples:

"Nov. 8th, 1897. Received from T. B. Busby Seventy-five Dollars, mutual loan 1-½ per cent, to be repaid from the first profits of the mine. Century Mining & Mill Co. By J. T. White."

"Dec. 13th, 1897. Received from Mrs. Thomas B. Busby one hundred and eight dollars, mutual assessment of 1-½ per cent, to be returned from the first profits of the company. Century Gold Mine & Mill Co. Per Jno. T. White."

"Oct. 17th, 1898. Received of Thos. B. Busby and wife two hundred and twenty and no/100 dollars, 1 per cent loan, balance, to be repaid in order from the first profits of the

company. \$220.00. Century Gold Mining Co. Per J. T. White."

Three years elapsed, and the loans were not paid. The plaintiff then demanded payment, and, upon the defendant company refusing to comply therewith, commenced this action.

The cause was tried by the court sitting without a jury. The plaintiff, in support of his complaint, introduced in evidence the receipts mentioned, which he testified were receipts for money loaned him; that they were given him by the manager and president of the company; that certain of the receipts were for money paid by his wife while he was away from home; that he had demanded payment, and same had been refused. On cross-examination plaintiff stated that at the time of the loans he was a stockholder of the company; that the receipts were for a mutual loan of a certain per cent. of the stock owned by plaintiff; that, so far as the money was loaned by the stockholders, it was based upon the par value of the stock which they owned in the company; that, when the loans were made, the company was in need of money, and had no other means of deriving it; and that the purpose of the loan was to give the corporation funds to carry on the work. "Q. That word 'mutual loan' referred to the fact that all the stockholders were in like manner making loans based upon the amount of their stock? A. No; it did not. Some of them didn't loan any at all; wouldn't loan any." No evidence was offered by defendants. The court found the issues in favor of plaintiff, and rendered judgment in his favor for the sum of \$603.75, and interest thereon from the 17th day of October, 1898, at the rate of 8 per cent. per annum. Defendant appealed.

Price & McCrea, for appellant. McGurrlin & Gustin, for respondent.

MCCARTY, J. (after stating the facts). The first contention of appellant is that by the terms of the written acknowledgment referred to in the statement of facts, considered in connection with the circumstances and conditions, as shown by the evidence, under which the loans were made, payment was to be postponed until such time as the profits of appellant company would be sufficient to liquidate the indebtedness evidenced by the receipts or acknowledgments mentioned. Counsel for appellant say in their brief "that respondent expressly waived claim of payment except upon the happening of a contingency and the existence of a fund"; in other words, that respondent made the loans with the express understanding that in case no profits should be derived from the business which appellant was engaged in, and for which the indebtedness was incurred, the money never would be repaid.

In the case of Johnston v. Schenck 15 Utah, 490, 491, 493, 50 Pac. 921, the contract



sued on in that case provided in part as follows: "If within one year from and after June 15, 1891, we, or either of us sell, convey or transfer any interest whatever in or to said, or either of said, lode mining claims \* \* \* or put the same into any incorporation now or hereafter organized, then we agree to repay on demand to said James Johnston, the aforesaid sum of two thousand dollars advanced to us by him as aforesaid; otherwise such sum of two thousand dollars shall not be repaid by us to him." Notwithstanding that in that case there is a positive declaration in the foregoing instrument that the indebtedness should not be repaid unless the property mentioned should be disposed of within a certain period of time, this court held that "the paper in question bound the defendants to repay the plaintiff the \$2,000 which he loaned them at the expiration of one year from its date, unless they should sell or transfer their mining claims, or some part of them, sooner, and in that event to pay on demand; that it gave them one year to repay, or until they should sell their mining claims, within that time." It was held in that case that contracts and agreements such as we now have under consideration are to be construed in the light of the circumstances and conditions under which they are made, keeping in view the situation, interest, and motive of the parties as far as they can be determined by the contract and other evidence, and then give to the language used a reasonable construction.

In the case before us it appears that appellant corporation was in need of money to carry on its business, and the loans in question were made "to help it out," and at a time when some of its other stockholders refused to make appellant company any loans whatever. Under these circumstances the only reasonable construction that can be given to the written acknowledgments under consideration is that the clause "to be repaid from the first profits of the company" was inserted for the benefit of the respondent, making his debt first in order of payment out of the profits of the company, should any be realized, and not for the purpose of enabling the appellant, after reaping the benefits derived from the loans, to avoid repaying the money in case it should derive no profits from the business in which it was engaged. When the money was loaned, the debt was created and became absolute, and the provisos in the written instrument that the money should be repaid out of the first profits of the company merely fixes the happenings of such an event as a convenient time for making the payment, and in case no profit should be realized the law implies a promise to pay within a reasonable time. The construction thus given the written instruments under consideration is not only in accord with our ideas of justice and fair dealing, but is in harmony with the great weight of judicial authority on this subject. *De Wolfe v. French*, 51 Me. 420; *Noland v.*

*Bull (Or.)* 33 Pac. 983; *McCarty v. Howell*, 24 Ill. 342; *Page v. Cook*, 164 Mass. 116, 41 N. E. 115, 28 L. R. A. 759, 49 Am. St. Rep. 449; *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687; *Sears v. Wright*, 24 Me. 278; *Johnston v. Schenck*, supra; *McIntyre v. Mining Co.*, 20 Utah, 323, 60 Pac. 552; *Button v. Higgins (Colo. App.)* 38 Pac. 390.

Appellant's next contention is that the court erred in finding that three years and two months, the period of time which had elapsed between the date of making the last loan and the commencement of the action, was a reasonable time for defendant to pay the debt. By an examination of the pleadings as set out in the foregoing statement of facts it will be seen that appellant in its answer admitted the allegations of the second, fourth, and fifth paragraphs of the complaint. In the fifth paragraph it is alleged that the debt was owing, due, and unpaid. By admitting that the debt was due, appellant in effect admitted that a reasonable time had elapsed for the payment thereof. In fact, the answer admits all of the material allegations of the complaint relied on for a recovery.

Respondent would have been entitled to a judgment on the pleadings, had he made a motion to that effect in the court below.

The judgment is affirmed, with costs.

BASKIN, C. J., and BARTCH, J., concur.

(27 Utah, 222)

# HEAVEY v. COMMERCIAL-NAT. BANK OF OGDEN CITY.

(Supreme Court of Utah. Feb. 8, 1904.)

BILLS OF EXCHANGE—FORGERY—EVIDENCE—  
NEGLIGENCE OF DRAWER—BONA FIDE  
HOLDER—LIABILITY—EVIDENCE.

1. A bank mistakenly informed a person that a sum of money had been deposited to his credit, whereupon he wrote the bank, requesting a draft for the amount of the deposit, and on receipt of the draft he indorsed it, procuring the money. *Held* that his indorsement did not amount to a forgery.

2. Where a drawer of a check, draft, or bill of exchange has been induced through fraud to deliver it to an impostor, believing him to be the person named in the check, draft, or bill of exchange, and the impostor negotiates the instrument and receives payment thereon from an innocent third party, as between the bona fide holder and drawer, the latter must stand the loss.

3. A bank, having received a deposit to the credit of a certain person, mistakenly wrote another person that a deposit had been made to his credit, and he immediately showed the letter to plaintiff, who had known him for over two years, and wrote requesting a draft for the amount of deposit, which was sent, and he indorsed it to plaintiff, who paid him the amount thereof. *Held* that, as between plaintiff and the bank, the latter was liable for the loss, even if the indorsement was a forgery.

Appeal from District Court, Weber County; H. H. Rolapp, Judge.

Action by Hugh Heavey against the Commercial National Bank of Ogden City. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

The transactions and circumstances out of which this action arose are as follows:

On November 10, 1902, one P. M. Cushnahan deposited with defendant bank the sum of \$375 for the credit of one James Molloy. The same day the clerk of defendant bank wrote such information upon a postal card addressed to James Molloy, Corrinne, inclosing such postal card in an envelope, which he by mistake addressed to James Malloy, Denver, Colo. This card was received by one James Malloy, of Denver, who on November 17th wrote defendant bank as follows:

"Denver, Colo., Nov. 17, 1902.

"T. D. Ryan, Cashier, Ogden, Utah—Dear Sir: Your P. C. of the 10th, received. Please send me New York draft for the \$375.00, less your charges. James Malloy.

"2219 Larimer Street, Denver, Colo."

Before sending the letter, Malloy showed it to plaintiff herein. Upon receipt of this letter, and believing it came from its depositor, in compliance therewith, defendant bank made out the following draft:

"Commercial National Bank.

"Ogden, Utah, Nov. 20, 1902.

"No. 14,601.

"Pay to the order of James Malloy, three hundred and seventy four and sixty one-hundredths (\$374.60) dollars.

"R. T. Hume, Cashier.

"To Kountze Bros., Bankers, New York."

This draft was inclosed with the following letter, which was forwarded to the address indicated in Malloy's letter of November 17th, which was plaintiff's place of business:

"Ogden, Utah, Nov. 20, 1902.

"Mr. James Malloy, Denver, Colo. 2219 Larimer St.—Dear Sir: Complying with yours of the 17th, we inclose New York draft for \$374.60.

"Yours truly, T. D. Ryan, Cashier."

When the draft arrived in Denver, the letter in which it was inclosed was received by plaintiff, and by him handed to James Malloy, whom he had known for a couple of years. The letter was opened and the draft produced in plaintiff's presence, and thereupon James Malloy requested plaintiff to go with him to the bank and get the money, which plaintiff did. He identified him there as James Malloy, but was requested by the bank to place his (plaintiff's) name upon the back of the draft. This being done, the money was handed to plaintiff, and by him then and there delivered to Malloy. On November 20th James Molloy (the real party for whom the money was deposited) came into the bank, and it was then discovered that a mistake had been made, and the bank imposed upon by the Malloy letter of November 17th. The payment of the draft was immediately stopped in New York, and an effort made to stop payment in Denver. When, in due course of business, the draft reached New York, payment was refused, and the draft was protested, and returned to the Denver bank, which bank thereupon char-

ged the amount of the draft against plaintiff's account. James Malloy, of Denver, disappeared immediately after the draft was cashed by the Denver bank. It appears that the defendant bank was well acquainted with the signature of James Molloy, of Corrinne, both from seeing it upon his checks drawn against his deposits in the bank, and also as indorsed upon the back of dividend checks; he being a stockholder of the defendant bank. The account of James Molloy in the bank was carried in the name of James Malloy, but his signature and indorsements were always "James Molloy." The cause was tried by the court sitting without a jury. The court, after hearing the evidence, found the issues in favor of plaintiff, and rendered judgment in his behalf for the amount of the draft and interest thereon. Defendant bank appeals.

Heywood & McCormick, for appellant.  
Henderson & Macmillan, for respondent.

MCCARTY, J., after stating the facts, delivered the opinion of the court.

Appellant contends that James Malloy, having procured the draft by artifice and fraud, acquired no right or title to the same, and that his indorsement, which appellant insists was a forgery, could not and did not invest respondent with any legal right to recover on the instrument which Malloy himself did not possess, however innocent and free from blame the respondent may have been in the part he took in the transaction which eventually put him in possession of the draft. The rule contended for by appellant has been held to apply to cases in which the draft or bill has been lost or stolen, and then negotiated upon a forged indorsement, but the facts in this case do not bring it within that rule. The draft in question was issued by appellant on Malloy's order, in his favor, and he is the man to whom it was sent. True, appellant at the time believed him to be the James Molloy, of Corrinne, in whose favor the deposit was made against which the draft was supposed to have been drawn. The fact, however, remains that James Malloy, of Denver, is the man to whom the draft was sent. The record shows that when he negotiated the instrument he made no attempt to impersonate some other person, and he indorsed it by writing his own name on the back thereof, without any intention that his signature should be taken for that of any other person. Under these circumstances, whatever crime Malloy may have committed by procuring and negotiating the draft in the manner he did, it is evident that his indorsement of it did not constitute forgery. 2 Bish. Crim. Law, 583. Even if Malloy's indorsement of the draft were construed to be a forgery, it could not, in the face of the admitted facts in this case, and the great weight of judicial authority, affect the result. While there are a few cases which hold to the contrary, yet the majority of the decisions which we think contain the better reasoning hold that, where

a drawer of a check, draft, or bill of exchange has been induced through fraud to deliver it to an impostor, believing him to be the person named in the check, draft, or bill of exchange, and the impostor negotiates the instrument, and receives payment thereon from an innocent third party, as between the bona fide holder and drawer the latter must stand the loss. *Land, Title & Trust Co. v. No. Wes. Nat. Bank (Pa.)* 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717; *United States v. Nat. Ex. Bank (C. C.)* 45 Fed. 163; *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; *Crippen v. American Nat. Bank*, 51 Mo. App. 508; *Burrows v. Wes. Union Tel. Co. (Minn.)* 90 N. W. 1111, 58 L. R. A. 433, 91 Am. St. Rep. 380; *Emporia Nat. Bank v. Shotwell (Kan.)* 11 Pac. 141, 57 Am. Rep. 171.

In this case it appears that appellant was well acquainted with the signature of James Malloy, of Corrinne, who was both a depositor and a stockholder of defendant bank, and that his signature is easily distinguished from that of James Malloy, of Denver, Colo., to whom the draft was sent. Not only is there a marked dissimilarity between the signatures of the two men as shown by the record, but their names are spelled differently. Therefore it is manifest that, if appellant had exercised ordinary care and prudence at the time it received the order from James Malloy, of Denver, for the draft, it would not have been possible for him to have perpetrated the fraud and procured the draft. Not only did appellant fail to exercise ordinary business care on this occasion, but accompanied the draft with a letter which was sufficient to enable Malloy to dispel every doubt that the ordinary business man might entertain as to the regularity of the transaction that put him in possession of the instrument. The rule is tersely, and, we think, correctly, stated in the case of *Crippen v. American Nat. Bank*, 51 Mo. App. 508, as follows: "That when both parties to a transaction are innocent, and the loss must fall upon one, it should be upon the one who in law most facilitated the fraud." Appellant, having issued and placed into the hands of an impostor its draft, a negotiable instrument that is accepted and exchanged with almost the same degree of confidence in commercial centers as are national bank notes, ought not to be permitted to repudiate it, and compel respondent, who honestly and in good faith became an indorser, to stand the loss, which the record shows was made possible by appellant failing to observe the usual and customary business rules followed by banking houses and other commercial institutions in issuing this class of paper. As was said by the court in the case of *Levy v. Bank of America*, 13 Am. Rep. 124: "The plaintiffs cannot successfully complain that the bank failed to protect them from the devices of a person who had with so little effort deceived and defrauded them. \* \* \* It seems to us that they are endeavoring to make the bank

repair a loss which they brought on themselves by their own carelessness." In this case it is not shown, nor is it claimed, that there was any fact or circumstance connected with the transaction by which respondent became the owner of the draft in question that would have justified the slightest suspicion on his part that Malloy obtained it by fraud; but, on the other hand, he knew that Malloy had sent an order for the draft, which, when issued, was forwarded to respondent's place of business, the letter opened in his presence, and the draft produced and shown to him by a man whom he had known for two years. Under these circumstances respondent did no more in identifying Malloy and indorsing the draft than any business man of ordinary prudence would have been justified in doing under the same or similar circumstances.

We are of the opinion, and so hold, that appellant, by its own carelessness having furnished Malloy the means by which he perpetrated the fraud, ought to stand the loss occasioned thereby.

The judgment is affirmed, with costs.

BASKIN, C. J., and BARTCH, J., concur.

(27 Utah, 241)

## TWIGGS v. STATE BOARD OF LAND COM'RS.

(Supreme Court of Utah. Feb. 9, 1904.)

PUBLIC LANDS—SCHOOL LANDS—PREFERENCE PURCHASE—RIGHTS OF OCCUPANT—PURCHASER FROM OCCUPANT—STATUTES—CONSTRUCTION—REPEALS—RETROACTIVE EFFECT.

1. All statutes relating to the same subject-matter, which are not necessarily inconsistent with each other, are to be construed together as constituting one act, and, when it can be done with any reasonable construction, made to harmonize.

2. Rev. St. 1898, § 2337, provided that settlers who had resided upon lands granted to the state for school purposes, prior to the extension of United States surveys over such lands, might be permitted to purchase them at a price not less than 25 per cent. of their appraised value. In 1899 the entire law of which this section was a part, except section 2337, was repealed by Sess. Laws 1899, p. 95, c. 64, § 48, which provided that such section should remain in force until all applications filed by virtue of the same should be fully disposed of. Subsequently, and at the same session, chapter 88 (page 165) was enacted, providing that settlers who had resided on lands granted to the state for school purposes prior to certain dates might be permitted to purchase the lands at not less than 25 per cent. of the appraised value, provided that the purchase price should not be less than \$1.25 per acre. *Held*, that chapter 88 did not repeal section 2337, nor operate retroactively to the prejudice of parties who had filed on school lands in pursuance of such section, as they were expressly provided for by chapter 64.

3. Under Rev. St. 1898, § 2337, providing that settlers who had resided on, occupied, or cultivated land granted to the state for school purposes should have a preference right to purchase the same, it is not necessary that a person shall actually reside upon the land in order to be an "occupant" thereof.

4. One who has purchased a possessory right

¶ 1. See Statutes, vol. 44, Cent. Dig. §§ 302, 303.

from an original settler is entitled to the same privileges and benefits under Rev. St. 1898, § 2337, giving settlers on school lands, or those purchasing from them, a preference right to their purchase on specified terms, as his grantor would have had had he continued in possession of the land, and not parted with his interest therein.

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Action by Agnes J. Twiggs for writ of mandate against the State Board of Land Commissioners. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff brought this action to obtain a writ of mandate against the State Board of Land Commissioners to compel said board to award to plaintiff the preference right to purchase a certain piece of land situated in Salt Lake county, and consisting of 17.4 rods; also to award to and credit plaintiff with the value of certain improvements on the land. The case was tried and decided by the trial court upon documentary evidence and the following stipulation or agreed statement of facts: "It is hereby agreed by the parties hereto that this cause may be heard, considered, and determined by the court upon the following statement of facts, together with such other evidence as may be admitted by the court. It is admitted: (1) That the premises described in plaintiff's petition herein filed are a part of the school lands allotted to the state of Utah lying and being in section sixteen (16), township one (1) south, range one (1) east, Salt Lake Meridian. (2) That there are no adverse claimants to said premises other than plaintiff, and the same has not been sold, and is still the property of the state of Utah. (3) That plaintiff, within the time and in the manner prescribed by law, duly made and filed her application with the defendant for the preference right to purchase said premises at the appraised value thereof, and at 25 per cent. thereof. (4) That said application of plaintiff to purchase said premises was denied by defendant, and plaintiff was duly advised of the same on, or soon after, the 21st day of June, 1898. (5) That said improvements were appraised in the sum of eighty-one dollars and ten cents (\$81.10) by the defendant board, as appears from the books and records of the defendant board of commissioners, and the same have not been awarded or credited to plaintiff. (6) That said premises and improvements have been duly appraised, and said appraisement has been duly approved by the defendant. (7) That plaintiff's grantors have occupied said land continuously from the month of August, A. D. 1867, to or about September 26, A. D. 1895, at which time it was duly assigned to the petitioner herein." The court made and filed its findings of fact in accordance with the foregoing stipulation, and as a conclusion of law found: (1) That the plaintiff has the preference right, and is entitled to purchase from the state the land described in her petition at 25 per cent. of the appraised value thereof; (2) that plaintiff is the owner of

and entitled to the value of the improvements upon said land, and to have the same credited to her upon the books of the defendant board. Judgment was entered in favor of plaintiff directing that defendant board recognize plaintiff's preference right to purchase the land described, and to take such measures as may be necessary and proper in accordance with law to permit the plaintiff to pay for and obtain the title to said land, and to credit plaintiff with the appraised value of her improvements on the books of the board. From the foregoing judgment defendant, the State Board of Land Commissioners, appealed.

M. A. Breeden, Atty. Gen., and W. R. White, Dep. Atty. Gen., for appellant. N. V. Jones, for respondent.

McCARTY, J., after making the foregoing statement of facts, delivered the opinion of the court.

Respondent (plaintiff below) bases her claim to a preference right to purchase the land in question upon section 19, c. 80, p. 242, Sess. Laws 1896, which, so far as material in this case, provides: "That when settlers have resided upon, occupied or cultivated any lands granted to the state for school purposes, prior to the extension of the surveys of the United States over said lands, or who hold the same or the possession thereof, by purchase from the original settlers or their assigns, said original settlers having resided upon or occupied or cultivated such lands prior to the extension of the surveys of the United States over said lands, they may be permitted to purchase such lands at a price not less than 25 per cent. of its appraised value." This same law was re-enacted in 1897 (section 17, p. 65, Sess. Laws 1897), with the further provision that all such claims must be made prior to July 24, 1897. The above provisions were incorporated into the Revised Statutes of 1898 (section 2337). In 1899 the entire law, excepting section 2337, was repealed by section 48, c. 64, p. 95, Sess. Laws 1899. Section 48 is as follows: "Title 62, Revised Statutes, is hereby repealed, excepting section 2337 thereof, which section shall remain in force until all applications filed by virtue of the same, are fully disposed of. This repeal shall not affect any rights accrued under the said title." Subsequently, and at the same session, the Legislature, by chapter 88, p. 165, declared, so far as material here, that: "Where settlers have resided upon, occupied or cultivated any lands granted to the state for school purposes prior to March 1st, 1869, or who on January 1st, 1894, held the same or the possession thereof by purchase from such settlers or occupants, or their assigns, they may be permitted to purchase such lands at not less than twenty-five per cent. of their appraised value, provided that the purchase price shall not be less than \$1.25 per acre." Appellant's theory, as we understand it, but which is not clearly defined, respecting the construction that should be given the fore-

going provisions of the statutes, is that chapter 88, p. 165, Sess. Laws 1899, by implication absolutely repeals section 2337, Rev. St., and therefore, as respondent did not come into possession of and occupy the land in question until after January 1, 1894, whatever rights she may have acquired by virtue of section 2337 to purchase it are forfeited to the state.

It is a familiar rule of statutory construction that all statutes relating to the same subject-matter which are not necessarily inconsistent with each other are to be construed together as though they constituted one act, and, when it can be done with any reasonable construction, made to harmonize. Sutherland on Statutory Construction, 283. "Especially is it the rule that different legislative enactments passed upon the same day, or at the same session, and relating to the same subject, are to be read as parts of the same act." Black, Inter. Laws, p. 207. Applying this rule to the case under consideration, it is evident that it was not the intention of the Legislature that chapter 88, p. 165, Sess. Laws 1899, should, by implication or otherwise, repeal section 2337, Rev. St., and operate retroactively to the prejudice of parties who had filed on school lands in pursuance of said section 2337, as the Legislature at the same session expressly continued in force the provisions of section 2337 "until all applications filed by virtue of the same are fully disposed of." It was stipulated, and the court found, "that plaintiff's grantors have occupied said land described in plaintiff's petition continuously from the month of August, A. D. 1867, to on or about the 26th day of September, 1895, at which time it was duly assigned to plaintiff." Appellant, in its brief, says: "The meaning and intent of the statute is to prefer and give certain advantages to actual settlers—those who had settled upon school lands with honest intent and purpose to establish and build a home thereon." It will thus be observed that appellant has proceeded upon the theory that, in order to be an occupant of real property, a party must reside thereon. This is not the law. Occupancy does not necessarily include residence. Webster defines "occupancy" as "the act of taking or holding possession"; and an "occupant" as "one who occupies, or takes possession; one who has the actual use or possession, or is in possession, of a thing." In 2 Ralp. & Lawrence's Dictionary, 893, we find that "in its usual sense, occupancy is when a person exercises physical control over land." In the case of Fleming v. Maddox, 30 Iowa, 239, the court said: "A mechanic is in the occupation of his shop when he carries on his business; a merchant, of his store; a lawyer, of his office; a farmer, his farm. It is not necessary, to make his occupation complete, that the mechanic should reside in his shop, or upon the same lot. He is in occupation because he uses and enjoys it in

carrying on his legitimate calling. So with the merchant, the lawyer, the farmer." 21 Am. & Eng. Encycl. Law, 767.

Another theory advanced by appellant is that, to entitle a party who has purchased the possessory right to school lands from the original settlers or occupants to the benefits of the foregoing provisions of the statutes, such party must first establish that the lands were purchased by him prior to January 1, 1894, and that he has since occupied them with the bona fide intention of building a home thereon. As heretofore stated, respondent's right to purchase the land in question must be determined by section 2337, Rev. St., which provides that when settlers have resided upon, occupied, or cultivated any land granted to the state for school purposes prior to a certain date, or who hold the same, or the possession thereof, by purchase from the original settlers, the occupants have the preference right to purchase such lands on the terms therein specified. It being admitted that respondent's grantors occupied the land in question continuously from August, 1867, to September 26, 1895, on which last date it was assigned to respondent, who made application to purchase the same in due form and in the manner prescribed by law, the question resolves itself into the following proposition: Is a party who has thus purchased a possessory right from an original settler entitled to the same privileges and benefits under the statutes as his grantor would have been had such grantor continued in possession of the land, and not parted with his interest therein? The Supreme Court of the United States, in construing certain provisions of an act of Congress known as the "Townsite Law," in a case wherein practically the same principles of law were involved as are raised in this case, held that an occupant of a town lot may sell his right, and the purchaser acquire such right to the occupancy as will entitle him to a judgment for a conveyance. *Hussey v. Smith*, 99 U. S. 20, 25 L. Ed. 314. The same court, in *Stringfellow v. Chin*, reaffirmed this same doctrine. 99 U. S. 610, 25 L. Ed. 421. *Hagar v. Wilkoff*, 2 Okl. 580, 39 Pac. 281. The principles thus declared by the highest court in the land are in harmony with our notion of justice and equity, and we know of no reason why they should be departed from in this case.

The judgment is affirmed, with costs.

BASKIN, C. J., and BARTCH, J., concur.

(27 Utah, 289)

#### STATE v. BOTHA.

(Supreme Court of Utah. Feb. 18, 1904.)

HOMICIDE—TRIAL—EXAMINATION OF WITNESSES—CROSS-EXAMINATION—DEFENSES—DEFILING A FEMALE—SUDDEN PASSION.

1. Rev. St. 1898, § 4168, provides that a homicide is justifiable when committed in a heat of passion caused by an attempt of deceased to

¶ 1. *State v. Mortensen*, 73 Pac. 562, 26 Utah, 312.

defile the wife of accused, or when the defilement has been committed. On a prosecution for murder it appeared that the wife of accused had left his house, and gone to that of a neighbor, and that defendant followed her, and killed the neighbor and the wife, and the defense was that the homicide was justifiable under the statute. On cross-examination of a witness by defendant, witness was asked whether she had heard the deceased wife talk about anything that referred to her leaving home, and answered that the wife had said she was afraid of defendant, and afraid that he would kill her. The state subsequently asked witness whether she ever heard the deceased wife say anything about defendant having said that he had killed people, to which witness said that the wife had said defendant told her he had killed two men. *Held*, that the answer was not objectionable, since the subject had been introduced by testimony drawn out by defendant, notwithstanding that the answer of the witness disclosed a fact tending to show that the conduct of the neighbor might have been induced through sympathy, rather than any improper relation with the deceased wife.

2. An objection that the answer of a witness was a mere opinion cannot be considered on appeal, where no objection was made or exception taken on trial, nor any motion made to strike out.

3. The propriety of a question put to a witness cannot be reviewed on appeal in the absence of any exception or objection.

4. Rev. St. 1898, § 4168, provides that homicide is justifiable when committed in a sudden heat of passion caused by the attempt by deceased to defile the wife or other female relative of accused, or when the defilement has actually been committed. *Held*, that the statute only applies to a killing done in a sudden heat of passion, and does not shield one who, because of mere rumors or appearances, has sought out another, and deliberately taken his life.

5. In a prosecution for murder it appeared that accused and his wife lived in a lonely place, that his treatment of her was cruel, and that he had informed her that he had previously killed a couple of men, and that shortly after that she went to the house of another man, a neighbor. There was no evidence of any improper relations between such neighbor and the wife, the only evidence in such direction being the statement of defendant that he had once seen the neighbor have his arm around the wife's waist. Defendant, on finding his wife gone, followed her to the neighbor's house, and shot the neighbor and the wife. It appeared that after the wife was shot she said that the neighbor was not to blame, and that, if any one was at fault, it was herself. *Held*, that under the evidence it was proper to refuse to charge under Rev. St. 1898, § 4168, that accused should be acquitted if the jury believed that he had at the time of the killing sufficient grounds for believing that the killing was justifiable.

6. An instruction that if the jury believed that the deceased neighbor had sexual intercourse with the wife of defendant, or attempted to have such intercourse with her, and that defendant killed the neighbor in a sudden heat of passion caused by such intercourse, the jury should find defendant not guilty, was more favorable than defendant was entitled to.

7. It appearing, together with the other evidence, that after the shooting defendant examined the wife's wound, and pronounced it a "good job," and stated that he believed she would die, and that he had "fixed her," a claim that the killing was an accident was untenable.

Appeal from District Court, San Juan County; Jacob Johnson, Judge.

Charles Botha was convicted of murder, and he appeals. Affirmed.

The defendant was prosecuted for the murder of William Tibbitts, and convicted of that crime. From the evidence it appears, among other things, that the prisoner and the deceased were living in the La Sal Mountains, as settlers, with houses about 15 miles apart. Both were married, but the wife of the deceased, at the time of and for some time previous to the shooting, was not living with him at his home. The shooting was witnessed by one Corydon Rose, who resided at the house of the deceased. Before the fatal occurrence, the prisoner occasionally worked for Tibbitts, and Mrs. Botha, the prisoner's wife, who was but 16 or 17 years of age, did some cooking for the family of the deceased, and some washing for him. When the prisoner was working for him, he and his wife generally slept at the deceased's house, and sometimes when the prisoner was away his wife slept there. At such times, it seems, Rose slept in the sitting room, Tibbitts in a room connecting with the sitting room by a door on the north side, and the prisoner and his wife occupied and slept in a room connecting with the sitting room by a door on the west side. The prisoner, according to his testimony, became suspicious of improper conduct between his wife and the deceased. He testified that on one occasion he saw the deceased have his arm around her, and upon upbraiding him for it the prisoner says he promised to let her alone. The witness Rose testified he never saw anything out of the way between the deceased and Mrs. Botha, and never saw him go into her bedroom while she was in it. No witness, except the prisoner, testified to any undue familiarity between the deceased and Mrs. Botha. Botha was poor, and did not provide a comfortable home for his wife. It appears they had no near neighbors; that she became dissatisfied with her home; and that sometimes she went away, and then her husband would induce her to return home again. There is testimony to the effect that she was afraid that her husband would kill her; that he had told her he had killed two men in Germany. It seems the wife's appearance and situation were the common talk of the neighborhood. Her condition was such that she needed help, and on account of her youth the neighbors seemed to sympathize with her. A petition was being circulated among the people to raise money to send her to her folks. Her mother lived in South Dakota, and her sister in Colorado. Mrs. Botha had left her husband, and, as appears, was on her way to her sister, when she was killed by her husband.

The witness Patterson, one of the nearest neighbors, although about six miles distant, described the Botha home as a "half dug out, dug in the bank, and then walled up in front with timbers," with one door and one window. They had no stove, simply a fireplace; and the room was very scantily furnished,

having a "bunk" for a bedstead. It seems the defendant would go away for several days at a time, and leave his wife at home alone. She appeared lonesome, and went to neighbors for company. This was so about the 17th of March, 1902. On that day, her husband being away, she went to the home of the witness Patterson, stayed there until the following day, when she begged the witness to get her trunk from the defendant's house and take it to a certain mail station, and then went with deceased to his home. Having been informed by the witness Patterson that he would not take her trunk to the mail station unless she would get it out of their house, she and the deceased, on the next morning, March 19th, the day of the homicide, went to the prisoner's house, took her effects, and returned to the home of the deceased; Mrs. Botha intending thence to go to her sister in Colorado. The defendant returned home, and, finding that his wife had gone, started to go to a neighbor, and on the way (so he testified) was informed of her whereabouts. He then went to a neighbor, borrowed a gun, and started from Mr. Patterson's house, after having eaten supper there, for the Tibbitts home, about eight miles distant. Arriving at the latter place, he shot and killed first his wife and then Tibbitts. Having accomplished his purpose, he returned, and arrived at the Patterson place about 12 o'clock the same night. Concerning his appearance, and what the prisoner said before and after the fatal shooting, the witness Patterson in part said: "He asked me for a gun to go up to Mr. Tibbitts' for his wife, and I refused to let him have a gun. He looked like he was in an angry passion. I didn't like to let him have a gun, for it appeared he was going up there to make mischief. He then turned and walked off right down past my house. We worked a little while longer, and went to our suppers. We just had supper over, when Mr. Botha came back. He said to me when he came up, 'George have you got a biscuit I can get to eat?' I said, 'Charley, come in and eat your supper.' He had a 44 Winchester gun with him. He ate his supper eagerly, like he was mad. He did not use any knife or fork. I said, 'Charley you stay here, and let me go up to Tibbitts and talk for you.' He said, 'No, no son of a b— can go up there but me.' He says, 'What business is it to you?' He said, 'Have you got a wiping stick that I can clean my gun?' I said, 'Yes.' I gave him one, and he wiped the gun. He said, 'I will settle this business,' and then started off. It is seven or eight miles from my house to Tibbitts'. I saw him after that on the same night about twelve o'clock. He came back on horseback; came in and asked for some coffee. 'Well,' he said, 'I have done the work for them folks up there. Now I don't know whether to give myself up or whether to travel,' and I said to Mr. Botha, 'What, you didn't kill the little woman?' And he said

to me, 'Yes, she was the first one to get it.' I said, 'That looks pretty hard, Charley.' He says: 'It does not bother me. I could do it right over again. I left May, but I guess she has gone to heaven by this time. I fixed them so they could go off to heaven together.' He told me how he shot Tibbitts through the wall of the pantry."

Corydon Rose, the only witness, except the prisoner, who was present at the shooting, testified respecting the occurrence as follows: "I was there on the day of the killing. I witnessed the shooting. The first I saw of Charlie, the defendant, on the day of the killing, he came into the house, and went to shooting. I was washing dishes at the time. I should judge that it was about eight o'clock when I saw Charlie—I mean the defendant. Charlie came into the kitchen door, right in from the porch. I was standing in the kitchen, washing dishes. Tibbitts stood right near me. Mrs. Botha was in the sitting room, out of my sight. When Botha came in, he had a gun in his hand, all ready for use. He wanted to know of Tibbitts what he was stealing his wife for, or something like that. Tibbitts said that he had not stolen his wife. Then he told him to give an account of himself. Tibbitts undertook to say something, and then Mrs. Botha stepped out here in sight, and a shot was fired, and she came running towards me, and said she was shot. I did not see her when the shot was fired. I was not looking at her, because Charlie was pointing his gun at Bill. Mrs. Botha was leaning on the table, and she begged of Charlie not to kill Tibbitts. She said she was only in the fault, and if there was any fault it was on her side. At that Tibbitts ran into the pantry. Charlie kept saying for Bill to come out and explain, and Bill says, 'If I come out, you will shoot me.' 'No,' Charlie says, 'I won't.' Charlie shot through the partition four times I think. He never hit Tibbitts until the last shot, then Tibbitts fell." After he was shot, Charlie wanted to see the wound, and I pulled the clothes around the best I could, and he saw the wound, and Bill was begging to be carried out onto the step, and I told Charlie I couldn't do it. I was shaking so I couldn't. Charlie said, 'I will carry him out,' and he took him and dragged him out onto the porch. He said he had got so as he could fix him, or something like that. Mr. Botha said something about it being a good job, and he would die. He said he had done a good job. He made an examination of the wound of Mrs. Botha before Bill was taken out. He said he believed they would die from the wounds. He went out to the stable, and got a horse, and went, after we had got Bill out onto the porch."

Under this and other evidence of a similar character the jury convicted the defendant of murder in the first degree, and the court sentenced him to be executed. He thereupon appealed to this court, and assigned numerous errors.

Will F. Wanless and M. M. Warner, for appellant. M. A. Breeden, Atty. Gen., and W. R. White, Dep. Atty. Gen., for the State.

BARTCH, J., having made a statement of the facts as above, delivered the opinion of the court.

The first assignment of error which requires consideration relates to the admission of evidence. The court permitted, over the objection of the defense that it was leading, and not proper, the witness Rose, who was present at the commission of the crime charged, to answer a question propounded by the prosecution, as follows: "Did you ever hear Mrs. Botha give reasons for saying that she was afraid of Botha? As to what she had heard him say about killing people, or anything of that nature." The witness answered: "I heard her say that Charlie had told her that he had killed two men in Germany." The objection urged here cannot avail the appellant, under the circumstances disclosed by the transcript of the record. The defense itself, on cross-examination, laid the foundation for the objectionable question by interrogating the witness and receiving answers, as follows: "Did you hear Mrs. Botha talk about anything that referred to her leaving home? A. No, nothing more than I heard her say she was afraid to stay at her home. Q. Did she say why? A. Why she said she was afraid of Mr. Botha. Q. Did she say why she was afraid of him? A. Well, no; I don't know as she did. Q. Do you know whether she did or not, in your presence? A. No, I don't think she said really why. She was afraid he would kill her was all." After the defense had thus introduced the subject, it was not improper for the court to permit the prosecution to pursue it in the same line, and ascertain the real reason why she was afraid of her husband. The witness evidently having forgotten one of the main reasons included within the scope of the questions propounded by the defense, it was within the discretion of the court to permit the prosecution, by a leading question, to revive the recollection of the witness, and thus ascertain the exact reason or cause of her fear. Underhill, Crim. Ev. § 213. The defense having gone into the subject, the prosecution had a right to have the witness explain fully what Mrs. Botha stated as her reasons for leaving her husband's home, in explanation of the conduct and actions of both herself and Mr. Tibbitts, and as indicating that she had not left home and was not stopping at the latter's place on the fatal night because of undue familiarity with him, but because she was afraid of her husband, and was simply stopping there on that occasion on her way to her sister in Colorado; that she was on her way to her sister appearing from other evidence.

It is true that the answer of the witness to the disputed question has some significance in this case. It tends to show that the ac-

tions and conduct of Mr. Tibbitts—who, it appears, was present when she related her fears because of her husband—towards Mrs. Botha may have been induced through sympathy, rather than improper relations or motives. It also discloses the fact that the prisoner had himself created a fear in the breast of his wife that he would kill her, and that, under existing circumstances, he had no right to assume on the fatal night, as by his testimony he affects to have assumed, that undue familiarity existed between his victims. Such testimony tends to rebut the idea that he was acting under an uncontrollable impulse in the heat of passion. If, therefore, the prosecution had elicited the evidence in dispute in the examination of the witness in chief, before the defense had introduced the subject, we might hesitate to hold, even under the circumstances of this case, that the question was proper. Where, however, the defendant in a criminal action, through his counsel, upon cross-examination, sees fit to open up an avenue for questions, which, otherwise, it would be improper for the prosecution to propound, he must be content to take the consequences which legitimately flow from his indiscretion. Thereafter he will not be heard to complain of that for which he was himself responsible. *State v. Mortensen*, 26 Utah, 312, 73 Pac. 502.

The appellant also complains of the action of the court respecting some of the testimony of the witness Patterson. In answer to a question by the prosecution he testified: "He (the defendant) asked me for a gun to go up to Mr. Tibbitts' for his wife, and I refused to let him have a gun." He was then asked, "Why?" This was objected to, but upon what ground does not appear. The objection was overruled, and the witness answered: "He looked like he was in an angry passion. I didn't like to let him have a gun, for it appeared he was going up there to make mischief." It is insisted that the phrase "to make mischief" was a mere opinion of the witness; that it was error to receive such opinion to show what the intent of the defendant was on that occasion; and that it was the province of the jury to determine what the prisoner's purpose was. The reply to all this is that there was no objection made nor exception taken to the phrase, or any other portion of the answer of the witness. Nor was there any motion made to strike out. The objection thus urged must therefore fail.

For like reasons the objection now urged on behalf of the prisoner against the question propounded to the witness Stocks by the prosecution, as follows: "While you were there, did you learn personally about any petition or subscription that was going around with reference to Mrs. Botha?" even if it were sound, could not avail the appellant.

At the time of submitting the case to the jury, the defendant requested the court to charge, *inter alia*, as follows: "The jury are



instructed that, even though they should find from the evidence that the accused killed the deceased under such circumstances as would constitute a killing murder under the ordinary conditions, it would still be the duty of the jury to acquit the accused if the jury believed from the evidence that the defendant had at the time of the said killing reasonable and sufficient grounds for believing that the said killing was justifiable, and that he acted upon that belief. And this is true even though the information upon which the accused acted was untrue, provided it was received by the accused in such a form and manner as would cause a careful and cautious man to act upon it." The court refused this request, and upon the subject of the justification of the killing charged the jury, among other things, that homicide was justifiable "when committed in a sudden heat of passion, caused by the attempt of the deceased to commit a rape upon or to defile the wife, daughter, sister, mother, or other female relative or dependent of the accused, or when the defilement had actually been committed. The defilement of a female, as meant by these instructions, is accomplished when any male person, not the husband of such female, has had sexual intercourse with such female. And the attempt to defile a female has been accomplished when such male person has attempted to have sexual intercourse with such female. The fact of the defilement or attempted defilement may exist where the female has given her consent to such sexual intercourse as well as when she has not given her consent. If the jury believe from the evidence in this case that the deceased, William Tibbitts, had sexual intercourse with the wife of the defendant, or attempted to have such intercourse with her, and if the jury further believe from the evidence that the defendant killed the deceased, William Tibbitts, in a sudden heat of passion, and if the jury further believe from the evidence that said sudden heat of passion was caused by the said sexual intercourse, then the jury should find the defendant not guilty." Notwithstanding the charge thus given, the appellant insists that the court erred in refusing his request. His contention is that the charge of the court limits justifiable homicide to cases in which the act of defilement can be actually proven, while he claims the law is that one is justified in acting upon appearances, with due limitations as to caution, even where the appearances may deceive the person acting. Neither in his request nor in his contention does he make any limitation as to time—whether the appearances which led to the homicide must have been present at the very time of its commission, or whether they may have occurred hours or days or any time previous thereto. Nor does this proposition require that the appearances at the time of the fatal act be such as would be likely to arouse in an ordinarily reasonable man an uncontrol-

lable heat of passion, or that the act must have been committed by the accused while under the influence of such passion, and before sufficient time for cooling had elapsed, and for reason to again assert itself. This would certainly be a very broad and liberal construction of our statute, in favor of criminals of this character. Under such an interpretation of the law, whether an act by which the accused took the life of a human being was justified would depend almost exclusively upon the belief of the perpetrator of the crime. And this whether he acted upon appearances as they were at the time of the homicide or previous thereto, or upon information, derogatory to his victim, received hours, or even days, previous to the commission of the fatal act, whether true or false. Such a construction of the law, indeed, would not only shield and protect the heinous criminal, but expose the lives of law-abiding citizens to the villany of the murderer, and become a reproach to civilization. The statute, in section 4168, Rev. St. 1898, provides, *inter alia*, that homicide is justifiable "when committed in a sudden heat of passion caused by the attempt of the deceased to commit a rape upon or to defile the wife, daughter, sister, mother, or other female relative or dependent of the accused, or when the defilement has actually been committed." It will be noticed that under this provision an accused must have acted while in "a sudden heat of passion," caused by the defilement or attempted defilement of one of the females mentioned, in order that his claim of justification for the killing of him who defiled or attempted to defile may avail him. The "sudden heat of passion" must have, at the time of the homicide, controlled his actions, stifled his power of reasoning, and, for the time being, rendered him incapable of distinguishing between right and wrong. Such uncontrollable passion must therefore necessarily have been aroused at such close proximity, in point of time, to the fatal act, as to have left no sufficient time intervening for cooling and for reason to again assert itself; and it follows that if, in any such case, sufficient time has elapsed between the obtaining of knowledge by the accused of the defilement or attempted defilement and the commission of the homicide for cool reflection and deliberation by him, the killing is not justified, even though there has been a defilement or an attempt to defile. It is evident, therefore, that an accused cannot rely, for justification of the homicide, upon mere rumours heard or appearances observed by him at any distance of time before he commits the fatal act. In the enactment of the provision of the statute under consideration the Legislature evidently designed it to apply only to cases where the accused had come suddenly upon the defiler, in the act of defiling, or of attempting to defile, or where he had unexpectedly received reasonably reliable information of the same,

and the fatal blow was struck or act done in an uncontrollable passion, suddenly aroused because of the suddenness of the occasion, and in the absence of sufficient time for deliberation and for reason to gain sway over the passion. The law was not intended to shield an accused who, because of mere rumors or appearances, which he himself deems but to be evidence of undue familiarity between the male and the female, determines to kill them, and then with that purpose in view, pursues them, and deliberately and willfully shoots them down while in no act of defilement, and not even in a compromising position. Such a killing renders the perpetrator guilty of murder in cold blood, and the statute will furnish him no protection.

In *People v. Halliday*, 5 Utah, 467, 473, 474, 17 Pac. 122, this court, construing a like statute, said: "The provision of law quoted justifies a homicide committed by the husband in a sudden heat of passion caused by the attempt of the man slain to defile his wife, or caused by her defilement. But the killing must be without deliberation after knowledge of the fact. The law will not permit the husband to say that he slew the defiler of his wife in a sudden heat of passion after deliberating upon the defilement 24 hours.

\* \* \* The law is that if the husband, after learning of the defilement of his wife, waits and deliberates, and then kills the defiler, in so doing he commits the crime of murder." *Price v. The State*, 18 Tex. App. 474, 51 Am. Rep. 322. In the absence of such a statute, proof that accused had done the killing in a heat of passion while the deceased was in the act of defiling, or in an attempt to defile, the wife or relative of the slayer, would not justify the homicide. Such proof at common law would only reduce the crime to manslaughter. "If a man," says Blackstone, "takes another in the act of adultery with his wife, and kills him directly upon the spot, though this was allowed by the laws of Solon, as likewise by the Roman civil law (if the adulterer was found in the husband's own house), and also among the ancient Goths, yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape; but it is manslaughter. It is, however, the lowest degree of it, and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation." 4 Bl. Comm. 191. So in 2 Bishop, Crim. Law (7th Ed.) 708, the author says: "If a husband finds his wife committing adultery, and, provoked by the wrong, instantly takes her life or the adulterer's, \* \* \* the homicide is only manslaughter. But if, on merely hearing of the outrage, he pursues and kills the offender, he commits murder. The distinction rests on the greater tendency of seeing the passing fact, than of hearing of it when accomplished, to stir the passions; and if a husband

is not actually witnessing the wife's adultery, but knows it is transpiring, and in an overpowering passion, no time for cooling having elapsed, he kills the wrongdoer, the offense, is reduced to manslaughter."

As we interpret the statute, it was intended to so modify the common law that a homicide would be justified where by that law the facts and circumstances would reduce the offense to manslaughter. It follows, therefore, that the proof of facts and circumstances which would be insufficient to reduce the offense to manslaughter at common law is insufficient to justify the homicide under the statute.

The proof in the case at bar shows the accused was a man 28 years of age. He married a girl of 15—a mere child—and took her to his home, a "half dug-out of one room," away from friends and neighbors, greeted by nothing but poverty, and left her there alone for several days at a time. She, in her loneliness, went to neighbors, which was but natural, and which any man of reason would expect. The neighbors sympathized with her, and, seeing that she was in a condition that she needed help, circulated a petition to raise money to send her to her people, living in other states. On several occasions, when, as appears, she had left home, the accused induced her to return to him. In her solitude she had at various times gone to other neighbors besides Mr. Tibbitts, and remained all night, but no witness except the accused observed any conduct on her part that created the impression or a suspicion of improper relations between her and Mr. Tibbitts, or any one else, and the most that the accused could charge her with, it seems, was undue familiarity, and this because, as he says, at one time, long prior to the commission of the homicide, he saw Mr. Tibbitts have his arm around her waist; but this it appears was not observed by the witness Rose, who was there at the same time, and who, although present at the Tibbitts home during the times Mrs. Botha was there, testified that he never saw anything improper between her and Mr. Tibbitts. Without doubt the young wife's lamentable situation was still more intensified when she learned from her husband's own lips that he was a murderer. Having received this horrifying information, can it be wondered at that she should become alarmed for her own safety? When she became aware that she had a husband who admittedly was guilty of the most heinous offense in the catalogue of crimes, how could she know she might not be—as, indeed, she proved to be—his next victim? Is it, then, under such circumstances, to be marveled why she sought aid of a neighbor, at whose house both she and her husband had previously stopped, to secure her trunk and assist her, especially when such aid and assistance had been withheld by another? Under such circumstances, afraid of her own life, having through his own confession of

iniquitous guilt and the condition and situation in which he placed her and kept her, caused her not only to lose confidence in him, but also to lessen that wifely respect, admiration, and love which a woman naturally entertains for a worthy husband, her attempt to escape a life which evidently to her seemed unendurable was but a natural sequence. The circumstances of her situation serve largely to explain the design and actions of herself and Mr. Tibbitts, who, aware of her predicament, it may well be, assisted her out of sympathy, rather than for the purpose of defilement. When, therefore, the accused, on his return on that fatal day, found that his wife had left, and later, on his way to a neighbor, learned that Mr. Tibbitts had assisted her, with her effects, to his home, he was confronted with his own conduct toward, and course of treatment of, his wife, and with the results which naturally flow from such conduct and treatment. Being thus confronted with his own wrong, the prisoner had no right to assume, as he now affects to have assumed, that his wife had left him because of the existence of improper relations between her and him who was assisting her, and then, in the absence of any evidence of defilement or attempt to defile, pursue and deliberately slay them. There is absolutely no proof in the record to justify under the statute, or that would mitigate at common law, such a willful and premeditated murder as this is shown to be. There is no testimony showing that there was a defilement, or an attempt to defile the wife of the prisoner, and therefore there was no proof upon which to base such an instruction as the defendant requested. It is true there is evidence to the effect that, after the accused had shot his wife, she pleaded with him not to shoot Mr. Tibbitts, saying that he was not to blame; that, if any one was at fault, it was herself. But, in the light of the circumstances which caused her to leave the defendant, such statement so made by her cannot reasonably be construed into an admission of defilement. If the accused had been acting, as he would now have it appear that he acted, under the belief that there was defilement, that plea or statement of itself ought to have indicated to him that he might be mistaken, and caused him to hesitate, for, if there had been a defilement, or an attempt to defile, it would have been contrary to nature, especially in her tender years, for her, conscious of impending death, to plead innocence as to the author of her misfortune. Doubtless what the unfortunate young wife, stricken down by her own husband, meant, by her last utterance, was that, if there was any fault, it lay in her attempt to leave her husband, for which, evidently, in her opinion, Mr. Tibbitts was not to blame. Nor is there any evidence showing or tending to show that Mr. Tibbitts ever advised Mrs. Botha to leave her husband. Instead of hesitating, however, the accused simply de-

manded an "explanation," and, without giving time to explain, deliberately killed him whom his dying wife had just declared innocent, and thus committed the homicide for which he is here called upon to answer.

The prisoner now claims that the killing of his wife was an accident; that he put the gun to her back to push her aside, and accidentally shot her. But when his conduct in, immediately after shooting her, as appears from the evidence of witness Rose, examining the wound, and pronouncing it a good job, is considered in connection with his conversation with the witness Patterson, several hours after the killing, wherein, among other things, clearly showing malice aforethought, he declared, "She was the first one to get it," and said, "I fixed them both so they could go off to heaven together," his claim of accident becomes futile, and but suggests perjury added to hideous and shocking murder. Nature herself must revolt at such a crime, and pronounce the perpetrator an inhuman prodigy. Surely, it suggests the lamentable thought that, after all, no creature upon God's footstool is susceptible of greater cruelty than fallen man. It seems a mind once bent on total depravity has depths fathomless. As to such a case, a court of justice can but permit the majesty of the law to assert itself for the protection of law-abiding humanity and the purification of society.

Under the facts and circumstances disclosed by this record, we do not hesitate to hold that the request to charge under consideration was properly refused, and that the instructions of the court above quoted were more liberal, in favor of the prisoner, than was warranted by the proof. Nor do we think the court, under the circumstances erred in refusing either of the other requests of the defendant to charge. Nor, after careful examination and consideration of all the questions presented, do we find any reversible error.

The judgment must therefore be affirmed, and the case remanded for further proceedings according to law. It is so ordered.

BASKIN, C. J., and McCARTY, J., concur.

(27 Utah, 342)

#### JOHNSON v. HIBBARD.

(Supreme Court of Utah. Feb. 26, 1904.)

CHattel Mortgages—Validity—Failure to Record—Foreclosure—Pleadings—Sufficiency—Aider—Attorney's Fees—Reasonableness—Nonnegotiable Notes—Transfer—Notice of Assignment—Payment After Notice.

1. A complaint, in a suit to foreclose a chattel mortgage securing a note, alleging that the note and mortgage were made and delivered by defendant to the payee, who afterwards, before maturity, and for a valuable consideration, assigned and delivered the same to plaintiff, who has ever since been the owner and holder of the same, and that the note is due and wholly unpaid, is sufficient to withstand a general demurrer.

2. In a suit to foreclose a chattel mortgage, where the evidence is not before the Supreme Court, it must assume that the attorney's fee allowed by the trial court was reasonable and justified by the proof.

3. An omission in a complaint of the technical words rendering a note negotiable in form is supplied by an incorporation of the note itself, containing the words "or order," in the answer, and defendant is bound thereby.

4. Although a note was in form nonnegotiable, its assignment by the payee by delivery to plaintiff for a valuable consideration, and in good faith, operated as an equitable assignment of the same, and bound the maker after notice given to him by plaintiff before actual payment to an attaching creditor of the payee, and notice before levy of the attachment was not necessary.

5. Under Rev. St. 1898, § 150, declaring chattel mortgages invalid against the rights and interests of any person other than the parties, unless accompanied by affidavit of good faith, and filed in the office of the recorder, the fact that a mortgage was accompanied only by the affidavit of the mortgagor, and was not recorded or accompanied by an affidavit of the mortgagee, did not render it void as between the parties, where no rights of others, by purchase, attachment, or otherwise, had intervened.

Appeal from District Court, Cache County;  
C. H. Hart, Judge.

Action by Jacob C. Johnson against C. A. Hibbard. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. Q. Rich, for appellant. J. C. Walters, for respondent.

BARTCH, J. This is a suit to foreclose a chattel mortgage which was given to secure the payment of a promissory note of even date therewith. The complaint, among other things, alleges that on July 26, 1902, the note and mortgage were made and delivered by the defendant to Herman Spenst, the payee; that afterwards the payee, before maturity, for a valuable consideration, assigned and delivered the same to the plaintiff, who has ever since been the owner and holder of the same; and that the note is due and wholly unpaid. The defendant denied generally the allegations of the complaint, except certain matters which he admitted, and referred to the note and mortgage, and made them a part of the answer. As a further defense, it is averred in the answer that the note has been fully paid, satisfied, and discharged; the amount thereof having been paid, as is alleged, by the maker, to a judgment creditor in an attachment suit, wherein the payee was defendant, and in which such amount was attached. The note, as is shown by the answer, upon its face was payable to "Herman Spenst, or order." It appears from the findings of fact (the evidence not being before us) that on July 26, 1902, the defendant made, executed, and delivered to Herman Spenst the promissory note in dispute, for the sum of \$50, payable 60 days after date, and, as security for its payment, also executed and delivered to the payee a mortgage on personal property, but the mortgage

was never filed for record; that on September 1, 1902, the payee, for a valuable consideration, assigned the note and mortgage, without indorsement, to the plaintiff; that on September 25th, same year, the Sidney Stevens Implement Company, in an action pending in a justice's court, entitled "Sidney Stevens Implement Company v. Herman Spenst," attached the amount due from Hibbard to Spenst on the note, and on the next day (September 26th) the plaintiff, Johnson, notified Hibbard that he was the owner of the note and mortgage by assignment from the payee; that on October 25, 1902, Hibbard, notwithstanding the notice of Johnson that he was the owner of the note and mortgage, paid the amount due thereon to the attaching creditor; and that the assignment of the note and mortgage was not made to defraud the attaching or any other creditor. As conclusions of law, the court found that the plaintiff was the legal holder and owner of the note and mortgage, and that the defendant had no legal right to pay the amount due thereon to the attaching creditor, and rendered judgment in favor of the plaintiff for the amount of the note, \$25 attorney's fee, and costs of suit, and ordered a sale of the mortgaged property to satisfy the judgment.

The appellant insists that the court erred in overruling his demurrer to the complaint. We think not. The demurrer was a general one, and, while it must be admitted that the complaint is subject to criticism, and might have been vulnerable to a specific plea, still the allegations are sufficient to withstand a general demurrer.

Nor is the assignment of error respecting the attorney's fee allowed by the court well taken. The evidence is not before us, and therefore we must assume the fee allowed was reasonable and justified by the proof.

The main question herein presented is whether the court erred in deciding that the respondent was the legal owner and holder of the note and mortgage, and that he was entitled to a decree of foreclosure. The appellant's contention, in effect, is that it does not appear from the allegations of the complaint that the note was negotiable in form, it not appearing from such allegations that it was payable "to order" or "bearer"; that therefore the note was not negotiable, and thus the respondent, by delivery to him, became simply an assignee or transferee of the note and mortgage; that, being merely an assignee or transferee of a nonnegotiable instrument, in order to be protected as a purchaser of the note he was bound to give notice to the maker of his title, before notice of the attachment was served upon such maker; that, he having failed to give the maker such notice, the latter, immediately upon the levy of the attachment, became liable to the attaching creditor to the amount due on the note; that, upon payment being made to such creditor, the obligation or debt evidenced by

¶ 2. See Pleading, vol. 39, Cent. Dig. § 1344.

the note was discharged; and that thereafter the assignee had no recourse upon the maker, and no right to have the mortgage foreclosed. The position of the appellant, under the circumstances of this case, is not sound. It is true, the allegations of the complaint, giving merely a general description of the note, do not contain the technical words which render such an instrument negotiable in form; but the note is referred to and made a part of the answer, which shows that it was made "to Herman Spenst, or order," thus supplying the omission in the complaint, and the appellant must be held bound by his answer. But if it should be conceded that the note, in form, was nonnegotiable, still the assignment by the payee by delivery to the respondent, for a valuable consideration, in good faith, was binding upon the maker, after notice of the assignment given before actual payment of the money to the attaching creditor. The assignee was not bound to give notice to the maker of his title before the levy of the attachment. Such notice, given before payment by the maker, was sufficient. Upon receiving information or notice of the assignment, it became the duty of the maker, in his answer to the attachment proceedings, to state that fact, for the protection of his own rights as well as those of the assignee; and if he had already, at the time of notice of the assignment, made his answer, then it was his duty to amend it so as to inform the court of the actual state of facts, and enable it to relieve him from the payment of the money at his peril. Having failed to do this, and having paid the money due upon the note to the attaching creditor of his own volition, after notice of the assignment, he is not discharged from his obligation under the note and mortgage; nor can he now plead such payment in bar of this suit. That payment affords him no protection against this action to foreclose the mortgage, or against a second payment to the assignee.

The delivery of the note and mortgage, for a valuable consideration, operated as an equitable assignment of the same; and the assignee and holder of the note had a right, after notice of the assignment to the maker before voluntary payment by him to the attaching creditor in the suit against the assignor, to enforce a second payment to him, under our statute, by suit in his own name, without a written assignment or an indorsement.

In *Drake on Attachment*, § 608, the law applicable to this class of cases is stated thus: "An assignment of a debt will protect the rights of the assignee from a subsequent attachment against the assignor, though no notice may have been given to the debtor before the attachment, if it be given in time to enable him to take advantage of it before judgment against him as garnishee. And it is his duty at any time before such judgment to make such notice known to the court, failing in which, the judgment will avail him nothing

as a defense against an action by an assignee of the debt." And in section 607a the author says: "The obligation of the garnishee to state in his answer the fact of his having received information of an assignment of the debt is not dispensed with by the fact that the assignee knew of the garnishment, and might have intervened and asserted his right to the money." *Drake on Attachment*, §§ 607-610; *Wade on Attachment*, § 472; *Davis v. Johnson*, 4 Colo. App. 545, 36 Pac. 887; *B. B. Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153; *O'Neal v. Selxas*, 85 Ala. 80, 4 South. 745; *Raynor v. Hoagland*, 39 N. Y. Super. Ct. 11; *Littlefield v. Smith*, 17 Me. 327; *C. & St. L. R. Co. v. Killenberg*, 82 Ill. 293; *Dennis v. Twitchell*, 10 Metc. 180; *White v. Callinan*, 19 Ind. 43; 7 Am. Dig. (Cent. Ed.) 737, § 497.

Nor was the mortgage, which was accompanied only by the affidavit of the mortgagor, void, as between the parties thereto, or the mortgagor and assignee of the mortgage, because not recorded and unaccompanied by an affidavit of the mortgagee; no rights of third parties as to the mortgaged property, by purchase, attachment, or otherwise, having intervened. Section 150, Rev. St. 1898.

We find no reversible error in the record. The judgment is affirmed, with costs.

BASKIN, C. J., and McCARTY, J., concur.

(27 Utah, 36)

# STATE ex rel. BROWN v. THIRD JUDICIAL DIST. CT.

(Supreme Court of Utah. Feb. 25, 1904.)

## PROHIBITION—PROPRIETY OF ISSUANCE—CRIMINAL PROSECUTION—ISSUANCE OF WARRANT—PRELIMINARY PROCEDURE.

1. A writ of prohibition will not issue to restrain criminal proceedings on the ground that Rev. St. § 4612, providing that when a complaint is made before a magistrate, charging a crime, the magistrate must examine the complainant under oath, and may also examine other persons and take their depositions; and section 4615, providing that, where a complaint is made by a person other than the county attorney, the complaint and other evidence taken by the magistrate must be submitted to the county attorney before a warrant issues—were not complied with; the decision of the question being within the jurisdiction of the trial court, and the accused's remedy for an erroneous ruling being by appeal.

Original application for an alternative writ of prohibition by the state of Utah, on the relation of Arthur Brown, against the court of the Third Judicial District, criminal division; Judge Charles W. Morse, presiding. Writ denied.

W. H. King and O. C. Dey, for petitioner. M. A. Breeden, Atty. Gen., Dennis C. Eichnor, Dist. Atty., and Geo. Westervelt, Co. Atty., for respondent.

BASKIN, C. J. An information in the case of the State of Utah v. Arthur Brown having

¶ 1. See Prohibition, vol. 40, Cent. Dig. §§ 7, 15.

been filed in the Third District court of Salt Lake county by the district attorney, charging the defendant, Arthur Brown, with the crime of adultery, he afterwards appeared and moved the court to quash the information. The motion having been denied, the defendant entered a plea to the jurisdiction of the court, which having been overruled, the defendant on the 8th day of February, 1904, applied to this court for an alternative writ of prohibition, requiring Charles W. Morse, the presiding judge of the criminal division of said court, to show cause why said court should not be restrained from further proceeding in said case upon said information. It is alleged in the petition and affidavit of the petitioner "that the facts upon which said application is made are these: That the said procedure was begun by a complaint signed and sworn to before W. L. Emery, deputy clerk, and thereafter a warrant was issued by Hon. C. B. Diehl, judge of the city court of Salt Lake City; that said complaint was never shown to said C. B. Diehl prior to the issuing of the warrant; that the complainant was never examined by him, and no witnesses whatever were examined by the said C. B. Diehl before the issuing of said warrant; that the provisions of section 4612 of the Revised Statutes of 1898 were never complied with, in this, to wit: that the said magistrate, C. B. Diehl, did not examine the said complainant under oath, or any other person, or take any deposition, but, as a matter of fact, the complainant in said cause, one A. H. Steele, a deputy sheriff, had no knowledge whatever of the commission of said offense, of his own knowledge, and only heard of it; that the complaint was used merely as a formality, shown to the clerk, never examined by the magistrate, C. B. Diehl, and therefore this deponent alleges and claims that the issuing of the warrant was without authority, and the subsequent proceedings were without jurisdiction; that, upon the filing of the complaint in said city court, a warrant was prepared by said clerk and signed by the said judge, and thereafter the said defendant was arrested on the said warrant, and held to answer to a preliminary examination; that, upon the said preliminary examination, it developed that the said complainant, A. H. Steele, had no knowledge of his own as to the commission of the offense. Thereupon the said magistrate, Hon. C. B. Diehl, required the said defendant and affiant to appear in the district court to answer to an information therein to be filed, and thereafter the information heretofore mentioned was filed."

The foregoing alleged facts were among those upon which the motion to quash and the plea to the jurisdiction were based. Neither the form nor substance of the complaint, the warrant of arrest, the commitment, or the information is questioned; the only objection being that the preliminary steps mentioned in sections 4612, 4615, Rev. St. 1898,

were not taken. Before the motion and plea were overruled, several witnesses in behalf of the defendant were examined as to the preliminary steps taken. The district court had jurisdiction of the subject-matter of the information, and therefore was authorized to decide whether the steps taken, as shown by the testimony of the witnesses examined, were sufficient to sustain the information, and also to decide the question of jurisdiction incidentally raised by the defendant. In passing upon the motion to quash and the plea to the jurisdiction, the district court did not exceed its jurisdiction, but acted within the scope of its authority, and, if it erred (which is a matter not now before us for consideration), the defendant's remedy is by appeal, and not by the writ of prohibition. This view is sustained by the authorities upon the subject. In the case of *Murphy v. Superior Court*, 58 Cal. 520, which arose under section 811 of the Penal Code of that state, the provisions of which are substantially the same as section 4612 of the Revised Statutes of Utah of 1898, the court rendered the following opinion, to wit: "This is an application for a writ of prohibition to stop the trial of a case now pending in the superior court within and for the county of Colusa. The application sets forth that the petitioner is being prosecuted by information in said court for the crime of an assault with intent to commit murder, and that the magistrate before whom the preliminary examination took place 'did not examine, on oath or otherwise, the informer or prosecutor, and did not examine, on oath or otherwise, any witness or witnesses, and did not take any deposition or depositions of any witness or witnesses, and no depositions of the informer or prosecutor, or any witness or witnesses produced by the informer or any other person, was or were taken or subscribed at all or at said time.' Conceding the above facts, the omissions complained of did not affect the question of jurisdiction, and therefore prohibition is not the proper remedy." The same court, in *Spect v. Superior Court*, 59 Cal. 319, said: "The writ [of prohibition] is dismissed in this case on the authority of *Murphy v. Superior Court of Colusa County*, 58 Cal. 520." In *Strouse v. Police Court*, 85 Cal. 49, 24 Pac. 747, the court held that "where the petitioner was arrested under a warrant issued on a complaint filed in the police court, and charged with a misdemeanor, in having carried on business without a license, and pleaded 'Not guilty,' and also filed a plea to the jurisdiction of the court, a writ of prohibition will not be issued to restrain the court from proceeding with the trial of the action, as the petitioner has a plain, speedy, and adequate remedy at law, by appeal to the superior court, if he should be convicted." In *Mines D'Or, etc., Soc. v. Superior Court*, 91 Cal. 101, 27 Pac. 532, the court said: "We do not deem it either necessary or proper to determine at this time

whether the action now pending against petitioners in the superior court is one in which the summons can be legally served by publication. That court has jurisdiction of the subject-matter of the action, and whether it has obtained jurisdiction over the persons of petitioners is a question which it must determine for itself before entering judgment in the action, and which it has the same authority to pass upon as any other question of law or fact which may arise during its progress; and if, in the decision, error shall be committed, to the prejudice of petitioners, the law affords them a plain, speedy, and adequate remedy by an appeal from any judgment which may be entered against them. *Agassiz v. Superior Court*, 90 Cal. 101 [27 Pac. 49], and cases cited." In *Agassiz v. Superior Court*, 90 Cal. 101, 27 Pac. 49, the court held that the fact that the question of jurisdiction is incidentally raised in an action does not present a sufficient cause for granting a writ of prohibition. *Jacobs v. Superior Court*, 133 Cal. 364, 65 Pac. 826, 85 Am. St. Rep. 204, is to the same effect. In the case of *Murphy v. Superior Court*, 84 Cal. 592-596, it is said in the opinion that "it is contended by the petitioner that the respondent has no jurisdiction to appoint him guardian of these minors on his own petition therefore, on the ground that a guardian cannot be appointed by the court where one has already been appointed by deed. The Code provides that the superior court may appoint guardians of minors 'who have no guardian legally appointed by will or deed.' Code Civ. Proc. § 1747; Civ. Code, § 243. And provision is made for the appointment of a guardian by deed of the parents of minor children. Civ. Code, § 241. But the superior court has general jurisdiction of the matter of appointment of guardians, and, as an incident to this jurisdiction, it must have the power to hear and determine the fact whether a testamentary guardian has been legally appointed, or not. If so, its jurisdiction cannot be attacked in this collateral way. If, upon a direct appeal, it appeared that a testamentary guardian had theretofore been legally appointed, the order granting letters would, no doubt, be reversed, but not on the ground that the court had no jurisdiction of the subject-matter." In *Wreden v. Superior Court*, 55 Cal. 504, it is held that the writ of prohibition will not lie to restrain the superior court from passing upon a motion to dismiss an information, and in the opinion it is said: "As the court has jurisdiction of the subject-matter of the action and of the person of the defendant, it can, in the exercise of its jurisdiction, hear and determine any motion which may be made therein, and for that purpose may refer to and consider any papers on file in the case, or offered on the hearing of the motion, and do any and all things necessary and proper to a complete exercise of its jurisdiction." In *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. 143, the court

held: "A writ of prohibition is not allowable to prevent a justice's court from trying a charge of vagrancy, under section 647 of the Penal Code, without a jury. The justice's court has jurisdiction of the subject-matter, and any error as to its mode of procedure cannot be arrested or corrected by the writ of prohibition; the defendant having a plain, speedy, and adequate remedy by appeal to the superior court." "Where the inferior court has jurisdiction of the matter in controversy, prohibition will not lie. The writ does not lie to prevent a subordinate court from deciding erroneously or from enforcing an erroneous judgment in a case in which it has a right to adjudicate, and it matters not whether the court below has decided correctly or erroneously. Its jurisdiction of the matter in controversy being conceded, prohibition will not lie to prevent an erroneous exercise of that jurisdiction. The exercise of power which it is sought to prohibit must be wholly unauthorized by law." 23 Am. & Eng. Ency. Law, pp. 200, 201, 202. "It is usually held that a prohibition is not a writ of right, but that its allowance rests in the sound discretion of the court. In some jurisdictions the rule is that the granting of the writ is obligatory in clear cases, where there is an entire absence of jurisdiction; the courts holding that it is discretionary only where there is another legal remedy, or where the jurisdiction is doubtful or depends upon facts not apparent of record, or where the application is made by a stranger instead of by a party in interest." 23 Am. & Eng. Ency. Law, p. 212, and cases cited in notes.

It is ordered that the application for the writ of prohibition be denied, and that the applicant pay the costs.

BARTCH and McCARTY, JJ., concur.

(37 Utah, 265)

In re SNOW et al.

(Supreme Court of Utah. Feb. 15, 1904.)

ATTORNEYS-DISBARMENT - UNPROFESSIONAL CONDUCT - SCANDALOUS PLEADINGS - ATTACKING HONESTY OF JUDGE-DEFENSES.

1. Where false allegations employed in a pleading reflect upon the character of a justice of the Supreme Court as a judicial officer, the party using such language cannot be excused by filing, in disbarment proceedings, a disclaimer that any such meaning was intended.

2. Const. art. 6, § 19, provides that judicial officers shall be liable to removal from office for crimes, misdemeanors, or malfeasance in office. Rev. St. 1898, § 4156, makes it a criminal conspiracy for two or more persons to conspire to falsely maintain any action. Defendant's answer in an action alleged that a justice of the Supreme Court had conspired with plaintiff, and used the weight of his personal, as well as judicial, influence to induce plaintiff to bring the suit, and that it was not bona fide, but colorable, and brought solely for the purpose of gratifying the malicious instincts of the justice, and on an understanding that the fruits of the litigation should be divided between the justice and plaintiff. *Held*, that the language meant that the justice had bartered his judicial influence for a portion of the fruits of the liti-

gation, and hence charged a conspiracy rendering the justice, if true, liable to removal from office.

3. The action in which the answer was filed having been one for the cancellation of a contract between plaintiff and defendant, and the allegations in question having been false and irrelevant to the issue, the defendant in the action, who was an attorney and was responsible for the allegations in the answer, should be disbarred for a period of 60 days.

4. While the conduct of the attorney who drew the answer at the direction of defendant was such as to be condemned, in deference to the position of the committee of the bar who appeared in the matter, proceedings against him for disbarment would be dismissed.

Baskin, C. J., dissenting in part, and holding that two of the respondents should be permanently disbarred.

Disbarment proceedings against Alviras E. Snow, W. H. Wilkins, and J. M. Bowman. Alviras E. Snow ordered disbarred for the period of 60 days, and proceedings dismissed as to the other respondents.

In pursuance of an order made by this court in the case of Morrison v. Snow, 26 Utah, 247, 266, 72 Pac. 924, a citation was issued under the seal of the court to A. E. Snow, W. H. Wilkins, and J. M. Bowman, requiring them, and each of them, to appear in this court and show cause, if any they have, why their licenses as attorneys and counselors at law should not be revoked for unprofessional conduct and the violation of their oaths as such attorneys and counselors at law. The unprofessional conduct upon which the order and citation were based consisted of certain false and slanderous charges made by Snow in his answer filed in the suit of Morrison v. Snow et al., supra. By an examination of the record in that case it will be seen that Morrison brought an action in equity against Snow to have canceled and rescinded a certain contract entered into between them whereby Morrison sold and delivered to Snow 145,000 shares of mining stock. The only relief asked by Morrison was a cancellation and a return of the mining stock, which he alleged Snow had obtained from him through fraud. Snow, in his answer, denied the material allegations relied on by Morrison for a recovery, and further alleged that Mr. Justice Bartch, who was then, and is now, a member of this court, but who was in no way or manner connected with the transaction which was the subject-matter of the action, "conspired and confederated with the said Morrison, and used the weight of his personal as well as judicial influence to induce the said Morrison to bring his said suit; that the said suit is colorable, and is not a bona fide suit, but is brought and is the result of a conspiracy between the said Bartch and the said Morrison for the sole purpose of gratifying the malicious instincts of said Bartch, \* \* \* and it is agreed between them that the fruits resulting from this suit, if any, shall be divided between the said Bartch and the said Morrison." In his prayer Snow asked that Justice Bartch be made a party to the suit, which was done.

It will be readily observed that Justice Bartch was neither a necessary nor proper party to the action, as Snow's ability to defeat the action and prevent a recovery by Morrison in no way depended upon the truth or falsity of the charges made against Justice Bartch. Morrison's right to a recovery depended entirely upon his ability to prove the fraud alleged in his complaint, and any advice he may have received, or any influence, if any, that may have been brought to bear on him to induce him to bring the action, could in no way affect his legal rights. The evidence, however, in the case, affirmatively shows that the foregoing allegations against Justice Bartch were utterly false and without any foundation whatever. On this feature of the case the trial court found "that the allegations in the answer of the defendant Alviras E. Snow of and concerning the defendant George W. Bartch were and are false, and no evidence was introduced on the hearing tending in any degree to sustain the same, \* \* \* and all such allegations in the answer of Alviras E. Snow are false and made without foundation in fact, and they are not sustained by any testimony whatever." As a conclusion of law the court found "that the allegations in the answer of defendant Alviras E. Snow \* \* \* of and concerning defendant George W. Bartch are scandalous and malicious, and that the same be, and by order and decree of this court are, stricken from the files and records of this court as scandalous, malicious, and impertinent." In the decree the court "ordered and adjudged that the allegations contained in the answer of the defendant Alviras E. Snow \* \* \* concerning the defendant George W. Bartch are impertinent and scandalous, and that they be and are stricken from the files of this court."

Each of the respondents has filed his separate answer to the citation. Alviras E. Snow in his answer, so far as material here, alleges that "certain allegations were made by affiant in his answer in the case mentioned in the citation, to wit, C. D. Morrison v. Alviras E. Snow et al., which were construed to be prejudicial to the name of the said Honorable Geo. W. Bartch; but whatever was said by affiant, either in his answer or as a witness in said case, nothing was by him written or said with intent to impugn the honor or reflect upon the integrity of the said G. W. Bartch as a member of this honorable court, as a judicial officer." And again: "That affiant had no intention whatever of casting any reflection upon this court, or upon the Honorable Geo. W. Bartch, as a member of this court, and that, if there be anything which can be so construed, it was certainly not intentional on the part of this affiant." He concludes his answer by alleging that he only knows in a general way what charges are meant to be made against him, and asks that if any further action is to be taken against him that the charges be made more specific. This latter plea is also inter-



posed by respondent W. H. Wilkins. In the opinion of this court in the case of *Morrison v. Snow et al.*, supra, the scandalous matter above referred to, and upon which the order and citation is based, is set out in detail and very fully considered and discussed, and a casual reading of the opinion will not leave any doubt as to what the unprofessional conduct mentioned in the order and citation consists of; hence there is absolutely no merit whatever to the plea that respondents are not fully advised of what they have to meet and answer.

Respondent Wilkins, in his answer, alleges, in part, as follows: "Believing that a proper respect for this honorable court demands it, emphatically and unequivocally disclaims any intent to show disrespect to this court, and insists that none of his actions as an attorney or otherwise can be in any way construed as disrespectful to this court; that the allegations incorporated by said respondent into the answer of said Snow were so incorporated by him as Snow's attorney after the same were vouched for as true by said Snow, who was a man of truth and veracity, as well as of business standing in this community, respondent also being advised that said Snow was an attorney at law and an officer of this court, and Snow's said answer was therefore so prepared; \* \* \* that said charges were so incorporated into said answer after a careful consideration of, and a full and firm belief in the truth of, the same; that the said allegations were so made against the said Barch as an individual, and not as a judge of this court; that no charge was made of any abuse of his official position, but simply of the use of the 'weight of influence' derived from his said position, and that only, in so far as the said Barch could not, if he engaged in ordinary business affairs with men, divest himself of the 'weight of influence' derived from his official position. Respondent further expressly disclaims being actuated in said proceedings by any malice whatever against the said Barch in incorporating said charges in said answer as aforesaid, respondent being at the time a total stranger to, and having no relations of any kind whatever, official or otherwise, with, the said Barch; but respondent states that he was simply actuated in said proceedings by his sense of duty to his client, and, while hoping that in the conduct and management of so difficult a case he was able to and did do his whole duty in this regard, he does not feel, after a careful consideration of his acts, that he has exceeded that duty in any degree."

Respondent J. M. Bowman, in his answer, so far as material here, alleged: "That he was one of the attorneys for plaintiff and appellant Alviras E. Snow in the case above referred to; that this defendant did not prepare any of the pleadings or written or printed arguments in said case, and did not have anything directly to do in the preparation or dictation of them or either of them." After

stating that he participated in the trial and knew of the allegations contained in the pleadings, and that he honestly and conscientiously believed that the matters therein alleged were proper and legitimate subjects of investigation, and that they, if proved, would affect the legal rights of his client, he further alleged: "That any statements or allegations of facts contained in said complaint affecting the Honorable George W. Barch, a justice of this court, were vouched for by defendant's client, and defendant had no knowledge concerning them; but this defendant avers that giving such statements or allegations any apparent indorsement by signing his name to any of the pleadings or papers in said cause was done solely for the purpose of presenting the grievances of his client to a court for investigation, and was done without any malice or illwill against said Barch, and without any intent to reflect upon the integrity or character of said Barch, nor with the intent in any way or in any manner to attack the dignity of this or any other court or judge thereof." The defendant in the same dignified tone explains his connection with the case on appeal.

The disclaimers that respondents intended to reflect upon Justice Barch as a member of this court, or as a judicial officer, cannot excuse them, as the language used clearly shows the contrary to be the case. It charges the justice with having "conspired and confederated with the said Morrison, and used the weight of his personal as well as judicial influence to induce the said Morrison to bring the said suit."

Alviras E. Snow, in pro. per. W. H. Wilkins, in pro. per. J. M. Bowman, in pro. per. J. E. Frick, C. C. Richards, and E. M. Allison, Jr., amici curiæ.

MCCARTY, J., after stating the facts, delivered the opinion of the court.

It will be observed that Snow referred to Justice Barch as a person possessing, first, a "personal," and, second, a "judicial," influence, and he charges him with having used the weight of this dual influence—"judicial" as well as "personal"—to incite and stir up groundless litigation, and that his motives for doing so were, first, to gratify his malicious instincts, and, second, to share in the fruits, if any, of the litigation. In other words, Justice Barch was accused of bartering his judicial influence for a portion of the prospective fruits to be derived from vexatious and groundless litigation. The language used is not susceptible of any other interpretation. The meaning and intent must be determined by a fair interpretation of the language used. And it is a familiar rule of law that every sane man intends the natural and necessary consequences of his own deliberate acts. 1 Greenl. Ev. 18; *People v. Wilson et al.*, 64 Ill. 195, 16 Am. Rep. 528; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407. A member of this court is thus deliberately, wantonly, and falsely charged with having en-

tered into a criminal conspiracy (section 4156, Rev. St. 1898), a crime for which, if there were any facts from which guilt could be reasonably inferred, he could, and in all probability would, be made a defendant in a criminal proceeding, and he would also be liable to impeachment and removal from office (section 19, art. 6, Const.). Such false and scandalous accusations, when made by a sworn officer of the court, whose duty it is to maintain the respect, honor, and dignity of the judiciary, is a scandal that must necessarily affect the courts, and has a tendency to degrade and bring into public disrepute the entire judicial department of the state, and thereby weaken its efficacy and destroy its usefulness. If such practices are to be permitted and indulged in by attorneys who are indifferent to the duties imposed upon them by the oath they have taken, and who have but little or no regard for the ethics of the legal profession—and we regret to say experience has shown that occasionally one of this class is to be found in nearly every jurisdiction—the confidence that the masses of the people have always had in the courts of justice in this country, and the respect they have always entertained for them, are bound to be to some extent weakened and their moral support accordingly withdrawn. Accusations of so grave and serious a character, when made against a judge in his official capacity, as was done in this case, by an attorney, must necessarily have a much greater influence on the public mind than when made in the heat of passion by some defeated and disappointed litigant, as the public has a right to, and many no doubt will, because of the attorney's position and his connection and affiliation with the courts and judicial officers, give credence to the charges, however false and unjustifiable they may be. Take away the confidence of the people, and the moral influence of both the bench and bar is gone, and their effectiveness destroyed, because the interests of the court and bar are so interwoven that one cannot be undermined without pulling down the other. The enforcement and protection of public and private rights—in fact, civil liberty itself—depends upon the independence of the bar being upheld and maintained inviolate on the one hand, and the respect and dignity of the courts on the other. In fact, no man who values his character, honor, and good name more than public notoriety, and who has a decent respect for the good opinion of his fellow men, would ever aspire to become a member of a court if he is to be thus falsely and wantonly vilified and slandered by attorneys who are an integral part of the judicial machinery. And no attorney who has any regard for his own manhood and pride for his profession would care to practice before a court which has so far forgotten the respect it owes itself, and its duty to the public, as to permit such outrages to go unrebuked. Under our system of popular government, the only sure way for the courts to

maintain the high standing for integrity and incorruptibility they have always occupied in the public mind is to merit it by a fearless and conscientious discharge of every moral and legal obligation imposed upon them. But even when they have done this courts cannot maintain their dignity, and retain the respect and confidence of the people, if they permit attorneys to recklessly, falsely, and without any justification or excuse whatever, make sweeping charges of official misconduct and corruption against the judicial officers. And when an attorney in a judicial proceeding, or otherwise, for the purpose of showing his contempt and illwill for a judicial officer, willfully makes false and defamatory charges, criminal in character, of official misconduct against such officer, which tend to humiliate and disgrace him and bring into contempt the court of which he is a member, such attorney not only becomes a reproach to his profession, but a menace to the dignity of the court, and thereby hinders and obstructs the administration of justice. As was said by this court in considering this same question in *Morrison v. Snow et al.*, supra: "In the interest of good government and the protection of individuals and their own dignity, it is absolutely necessary that courts exercise their power, not only to compel their officers to perform their duties in accordance with law and proper decorum, but to revoke the license of an attorney when his conduct is reprehensible and he acts in violation of the statute, and when his retention as an officer would become a reproach to the court and a menace to its dignity and usefulness."

That courts are inherently clothed with this power, and that it is their duty, in proper cases, to exercise it, however disagreeable such duty may be, is supported by an overwhelming weight of authority. "The power to strike from the rolls is inherent in the court itself. No statute or rule is necessary to authorize the punishment in proper cases. Statutes and rules may regulate the power, but they do not create it. It is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients." *Weeks, Attorneys*, 154. In 4 Cyc. 908, the rule is stated as follows: "It is the duty of an attorney not merely to observe the rules of courteous demeanor in open court, but also to abstain out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts. For a breach of this duty the attorney may be suspended or disbarred." See case cited in note. And again, on page 911, same volume: "Professional misconduct or neglect of duty as an attorney is a good ground for suspension or disbarment." *People v. Green* (Colo.) 3 Pac. 65, 49 Am. Rep. 351; *In re Brown* (Wyo.) 4 Pac. 1085. "The obligation which attorneys assume when they are admitted to the bar is not merely to be obedient to the constitution and laws, but to maintain at all times the

respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but includes abstaining out of court from insulting language and offensive conduct towards the judges personally for their judicial acts;" and "so also using written or spoken language reflecting unjustly upon the character or integrity of the judge of the court is conduct unbecoming an attorney and an indignity upon the court, and will justify the summary disbarment of the attorney guilty of it. \* \* \* It is a general and well-settled rule that counsel are exempt from liability for defamatory language in the pleadings published or uttered in the course of judicial proceedings, provided such language is pertinent and material to the case. But this rule of lenience does not apply, and cannot be pleaded as a defense, in proceedings to disbar an attorney for maliciously slandering the judge before whom he has conducted litigation; in such a case the defendant can only protect himself by showing the truth of the charges alleged." A. & E. Enc. Law (2d Ed.) pp. 306, 307; State v. McClagherty, 33 W. Va. 250, 10 S. E. 407; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; People v. Green, 9 Colo. 506, 13 Pac. 514; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; State v. Winton, 11 Or. 456, 5 Pac. 337, 50 Am. Rep. 486.

We do not claim, nor do we wish to be understood as holding, that a judge cannot be made a party to an action or proceeding, or that he cannot be sued direct on matters relating to his private transactions, and the party suing, be he attorney or layman, has the same rights and privileges that are accorded to litigants generally. He may, in good faith, allege in his pleadings any facts pertinent to the case which, if proved, would entitle him to relief, and the party making the allegations will be protected, even though he should fail in his proof to substantiate them. What we do hold is that attorneys cannot be permitted to use the privilege thus accorded them as a shield to protect themselves in making false, scandalous, and defamatory charges against a court or judicial officer, or for that matter against any person, which charges were not in issue and upon which no relief could be granted, for the sole purpose of scandalizing and disgracing the party at whom they are directed. No attempt was made by respondents to prove the charges made against Justice Bartch, who waived all legal objections that could have been made to the order making him a party, and who came in and answered the allegations charging him with official misconduct, and demanded a full investigation, and the record shows that they not only refused to but were unable to produce a scintilla of proof to support them. Morrison, the only person, excepting Justice Bartch, who was in a position to know just what transpired between the justice and himself, testified emphatically and

positively that Justice Bartch never advised him to bring suit against Snow, but, on the contrary, advised him not to sue, and no attempt was made to contradict or disprove this evidence. The evidence on this point is copied in the case of Morrison v. Snow et al., supra. No claim is made in their answers to the order and citation that there was any truth in the accusations made, or that there was any fact or circumstance from which an inference could be drawn of improper conduct on the part of the justice. The only justification or excuse that Snow makes is that he did not intend to reflect upon the justice as a judicial officer.

By request and invitation of the court the bar association of this state appointed a committee consisting of three of their members, all gentlemen of high standing in their profession, to appear at the hearing of this matter, not as prosecutors nor as counsel for respondents, but as friends of the court. After a careful review of the case and the matter upon which the order and citation are based, they unanimously decided that there is not sufficient before the court to authorize it to further proceed in the matter, and that the proceedings should be dismissed; that, while the charges made against Justice Bartch might be a sufficient cause or ground for preferring charges against respondent Snow for unprofessional conduct, from the record as it now stands no penalty can be legally inflicted. The entire record containing the impertinent and slanderous matter under consideration as made and brought to this court by respondents is before us, and after a very thorough examination of it, and many of the adjudicated cases, wherein the same principles involved in this proceeding are exhaustively discussed, we regret to say that we are forced to a different conclusion, as to the court's powers and duties, from that arrived at by the able counsel who have appeared before us and so thoroughly discussed the questions involved. The attitude of counsel, and the grave and delicate responsibility imposed upon the court, have impelled us to proceed with caution and great deliberation, and to carefully and dispassionately consider every feature of the case, and we feel that to follow the course outlined by counsel would be a warrant and license for unscrupulous and evil-disposed attorneys in the future, whenever they form a personal dislike for a court or judicial officer, or have some fancied grievance against either, to commit similar outrages. For a court to sit supinely by and permit such slanderous and unwarranted charges to be made by one of its own officers against the official integrity of one of its members as was done in the case before us, which the records of the court show conclusively to be false, would be recreancy on the part of the court that would invite, if not merit, contempt for courts and judicial authority, the effect of which would be demoralizing and far-reaching.

In view of the fact that respondent Bowman had nothing whatever to do with the preparation of the case, and the manly and dignified tone of his answer, we are disposed to accept his plea that he entertained no malice or ill will in what he did, and dismiss the case as to him without further comment.

Respondent Wilkins stands in an entirely different light. He prepared the case and drafted the pleadings and assumed the management and control of the case throughout, and if he believed the statements and representations made by his client at the time he prepared the pleadings, respecting the alleged conspiracy between Morrison and Justice Bartch, he must certainly have known of their utter falsity before the trial was concluded, and, as these allegations contained no matter whatever that was pertinent to the case, it was his duty, as an attorney, to at least cease parading them before the court and public. The plea that he believed them to be material and relevant to the case cannot be accepted from a man of his intelligence and experience at the bar. That the plea is made in bad faith is evident from the fact that he repeatedly, during his argument of that case in this court, stated: "We [referring to himself and associates] do not ask for anything against Judge Bartch. We care nothing about him," etc. Therefore his conduct cannot be too strongly condemned. But in deference to the position of the bar as outlined by the members of the committee who have appeared in the case, and the allegations in his answer that he inserted the scandalous matter referred to in Snow's answer on the assurance of Snow that they were true, the case against him is also dismissed.

The position of respondent Snow, we regret to say, is different from that of either of the other respondents. He was not misled and deceived by any statement or representations of others, and he does not claim that there was any fact or circumstance that justified the slightest suspicion of official misconduct on the part of Justice Bartch. Under these circumstances it would be a reproach to the court and a violation of public duty to suffer to go unrebuked and unpunished one of its officers who has thus, without one single fact or circumstance to justify it, willfully, maliciously, and falsely charged one of its members with having entered into a criminal conspiracy, in which he bartered and sold the weight of his judicial influence for a portion of the prospective fruits of colorable and vexatious litigation, which he alleges such member incited and stirred up for the purpose of gratifying a petty vindictiveness on the part of such member. The offense of Snow is indeed of such gravity that we would be entirely within the law if we should proceed to inflict the severest penalty and permanently disbar him. But Snow, we may assume from the record in this case, has heretofore conducted himself in his pro-

fession with uprightness and integrity and as becoming a man of good moral character; and, as said by Justice Field in the case of *Ex parte Wall*, supra: "To disbar an attorney is to inflict upon him a punishment of the severest character. He is admitted to the bar only after years of study. The profession may be to him the source of great emolument. If possessed of fair learning and ability, he may reasonably expect to receive from his practice an income of several thousand dollars a year. \* \* \* To disbar him, having such practice, is equivalent to depriving him of his capital. It would often entail poverty upon himself and destitution upon his family." And further: "The power of inflicting such punishment should never be exercised unless absolutely necessary to protect the court and the public from one shown \* \* \* to be unfit to be a member of an honorable profession." We acquiesce in the views thus expressed by Justice Field, and therefore conclude that Snow is not unfit to continue in the practice of his profession, although his conduct in the particular matter under consideration was exceedingly reprehensible, and not only merits condemnation, but deserves and must receive such punishment as will emphatically communicate to such members of the profession as have any disposition to offend in like manner our disapprobation of such conduct by officers of this court, and as will impress upon them that similar transgressions in future will be visited with severe consequences, and that the lenity shown in this case must not be regarded as a precedent by which the court will be governed hereafter in dealing with a like offense.

If is therefore ordered that the respondent Snow be, and he is hereby, suspended from his rights and privileges as an attorney and counselor in the courts of this state for a period of 60 days from this date.

MARIONEUX, District Judge, concurs.

BASKIN, C. J. Under the provisions of subdivision 2, § 120, Rev. St. 1898, an attorney may be removed or suspended for a "violation \* \* \* of his duties as such attorney." Under section 122, "proceedings to remove an attorney \* \* \* may be taken by the court for matters within its knowledge, or taken upon the information of another." Under section 122, when the violation by an attorney of his duties is brought to the knowledge of the court, as in the pending matter, by the record in a case in which the attorney appears, the court on its own motion, without formal complaint, affidavit, or petition, may institute proceedings for disharment or suspension. 6 Ency. Pl. & Pr. 712. The facts upon which the citation in the pending matter is based were brought to the knowledge of this court by the record in the case of *Morrison v. Snow et al.*, presented to us on appeal from the judgment

of the Third District Court. These facts are not controverted, and the only question for our consideration is whether they show such misconduct on the part of the attorneys cited to show cause as warrants their disbarment or suspension.

It is clear from the undisputed facts, which are fully stated in the opinion by my associate, Mr. Justice McCARTY, that the allegations in the answer of Snow, relating to Mr. Justice Bartch, as stated in the decree and findings in the case of *Morrison v. Snow et al.*, are impertinent, scandalous, false, and malicious, and that no evidence was introduced to sustain in any degree any of said allegations. They constituted no defense to the action, and furnished no basis for any relief whatever. Their irrelevancy is so apparent, and their natural tendency so injurious, as to utterly exclude the idea that they were made through ignorance of their irrelevancy or for the purpose of asserting any right. The false and defamatory allegations constitute sufficient ground for the maintenance of an action for libel, unless, under the law, they are privileged.

In the case of *McLaughlin v. Cowley*, 127 Mass. 316, the declaration in the suit of *Leggate v. Moulton* charged McLaughlin with having "caused to be put to death, immediately after its birth, an illegitimate child born to him," and was signed by the attorney for the plaintiff in that suit. McLaughlin afterwards instituted an action of libel against the attorney, and the Supreme Court of Massachusetts held that "a defamatory statement contained in the declaration in an action, signed by counsel, if not pertinent or material to the issue, is not privileged; and in an action of libel against the counsel he cannot justify by showing his belief that it was true, the source of his information, or his instructions from his client." In the opinion that court said: "It seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings; and the same doctrine is generally held in the American courts, with the qualification, as to parties, counsel, and witnesses, that their statements made in the course of an action must be pertinent and material to the case. The doctrine thus qualified was set forth by Shaw, C. J., in an elaborate opinion in *Hoar v. Wood*, 3 Metc. (Mass.) 193. The qualification of the English rule is adopted in order that the protection given to individuals in the interest of an efficient administration of justice may not be abused as a cloak from beneath which to gratify private malice. \* \* \* To hold that such statements, thus uncalled for and irrelevant, are privileged, as part of pleadings in a cause, would be to disregard the salutary modification of the English rule which has been made by the American courts, and is stated in *Rice v. Coolidge* [121 Mass.

393]. The defendant stands, therefore, as to liability to an action on account of these statements, precisely as if he had published them in a newspaper, and cannot justify by showing his belief that they were true, the sources of his information, or his instructions from his client. It is only when words are published on an occasion which makes them privileged that the belief of the publisher that they are true can be shown." In the case of *State v. McLaugherty*, 33 W. Va. 250, 10 S. E. 407, it was held that "the disclaimer by the attorney of intentional wrong or disrespect to the judge or court will not excuse him, when the contrary appears upon a fair interpretation of the language employed." See, also, *People v. Wilson et al.*, 64 Ill. 195, 16 Am. Rep. 528.

Notwithstanding the manifest irrelevancy of the scandalous allegations, and the fact, as found by the court below, that "no evidence was introduced to sustain in any degree said allegations," and that the court ordered them to be stricken from the files, they were, on the appeal by Snow to this court, incorporated in the record; and in appellant's brief, which, as well as the answer in which the libelous matter is alleged, were prepared by Wilkins, he insisted, with an effrontery which showed an utter disregard of professional ethics, that there was evidence tending very strongly to prove the charges against Justice Bartch, and that the order striking them from the files was error, notwithstanding the admission in the appellant's brief that, if the court below had found that the charges were not sustained by the evidence, it would not have been error. Wilkins was the attorney who prepared the answer of Snow and conducted the proceedings both in this and the lower court, and, not content with drafting the obnoxious matter in the answer of Snow, he was instrumental in spreading the libel upon the records of this court, printing it in his brief, and in his oral argument uttering it in the face of this court. In view of these facts, and that the scandalous matter was manifestly irrelevant, he cannot justify on the ground that he acted under instructions of his client and upon information furnished by him, and that he did not intend to reflect upon Justice Bartch as a member of this court, as the natural tendency of the false charges was to degrade him, both as an individual and a judge, in the estimation of those who have heard of the charges, but who have not been informed that they are utterly false.

Nor can Snow justify on the ground that the irrelevant charges were made by him as a defendant in the action. In the case of *People ex rel. Skelton, etc., v. Brown*, 17 Colo. 431, 30 Pac. 338, the court held: "Where an attorney incorporated into a printed argument filed in this court upon demurrer scandalous and abusive language against his opponent, not pertinent to the argument, held, that his conduct was grossly unprofes-

sional, for which he might be punished as for contempt or malconduct in office." And in the opinion the court said: "In general, where papers are filed in a cause, it is not difficult to distinguish that which is germane and pertinent to the litigation from that which is foreign, impertinent, and introduced solely for the purpose of scandal and abuse. *People v. Green*, 9 Colo. 506 [13 Pac. 514]; *People ex rel. v. Berry*, 17 Colo. 322 [29 Pac. 904]; *Diamond Tunnel Co. v. Faulkner*, 17 Colo. 9 [28 Pac. 472]. That the language used by respondent in his printed argument filed in this court was grossly unprofessional admits of no controversy. In placing such a document upon the files of this court respondent was not only guilty of contempt, but of malconduct in his office as an attorney. The fact that he himself was a party to the proceeding did not relieve him from responsibility as an attorney when acting as his own counsel."

For the reason stated in the opinion of Justice McCARTY, I concur in so much of the order made in the matter as relates to J. M. Bowman, notwithstanding he is censurable for permitting his name to be used as an attorney in the answer of Snow, and in the appellant's brief, but in respect to Snow and Wilkins I cannot concur, as I am of the opinion that they should be disbarred.

(27 Utah, 284)

**WHITMORE v. PLEASANT VALLEY  
COAL CO. et al.**

(Supreme Court of Utah. Feb. 18, 1904.)

**PUBLIC LANDS—RIGHT OF WAY FOR DITCH—  
RIGHTS OF OWNERS OF DOMINANT AND  
SERVIENT ESTATES—ERECTION OF SALOON—  
REMOVAL OF MATERIAL.**

1. Under Act March 3, 1891, c. 561, 26 Stat. 1095, [U. S. Comp. St. 1901, p. 1535], forbidding the occupancy of a right of way over public lands acquired under the act for a ditch, except for the purposes of the ditch, and then only so far as may be necessary for the construction, maintenance, and care thereof, the acquirement of such right of way gives the owner no right to erect a saloon thereon.

2. The owners of land, deriving title from the government subject to such right of way, in directing their servants to remove, and they in removing, from the right of way, building material intended to be used in the erection of a saloon thereon by the owner of the right of way, so long as no unnecessary damage is done thereto, are acting within their rights.

3. An owner of land subject to such right of way is not bound to wait until the erection and completion of the building intended to be built thereon for saloon purposes by the owner of the right of way, before taking action; but, the material having been placed there for a wrongful purpose, and without the owner's consent, the owner has the right to remove it forthwith.

Appeal from District Court, Carbon County; Jacob Johnson, Judge.

Action by George C. Whitmore against the Pleasant Valley Coal Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Henderson, Pierce, Critchlow & Barrette, for appellant. Sutherland, Van Cott & Allison and E. A. Wedgwood, for respondents.

BARTCH, J. In this case the plaintiff claims the defendants unlawfully converted some of his building material to their own use, and seeks to recover damages therefor. From the record it appears that, after the plaintiff had interposed his evidence, a nonsuit was granted as to the defendants Pleasant Valley Coal Company and William G. Sharp, and the trial proceeded with as to the other defendants. It further appears that on, and for some time prior to, March 9, 1901, the Utah Fuel Company owned certain coal lands in Carbon county, Utah, including the southwest quarter of section 32, township 14 south, of range 14 east, Salt Lake meridian, and was developing the Sunnyside coal mine on the land; that the Grassy Trail creek flows down a cañon, and through that quarter section; that the plaintiff owned some land further down the stream than the coal land, which he irrigated from that creek, having previously appropriated all the water of the stream for that purpose; that, long before the date above mentioned, he acquired a right of way for a ditch along the stream, and through the quarter section of coal land, to convey the water to his land, and had constructed a pipe line for that purpose over the quarter section; that the fuel company's agent had charge of its coal lands and mine; that about March 8, 1901, the plaintiff hauled lumber and building material, and placed it upon a portion of said quarter section of coal land embraced within the right of way for the ditch, for the purpose of erecting a building upon the right of way to be used for a saloon; and that on the following day, March 9th, the defendants Bowen and Gibson, who were servants of the fuel company, acting under the direction of the company's agent, removed all the building material from the place where it had been deposited to a place beyond the limits of the quarter section, and notified the plaintiff where it was deposited. Under these facts the court rendered judgment for costs in favor of these defendants, and the plaintiff appealed.

We are of the opinion that the judgment must be sustained. The appellant claims he first acquired his right to the use of the water under the United States laws of 1866, and afterwards his right of way, of 100 feet in width, for a ditch, under the act of Congress approved March 3, 1891; all the land over which the controversy arose having then been a part of the public domain. 26 Stat. 1095, c. 561 [U. S. Comp. St. 1901, p. 1535]. That act provides the manner in which canal or ditch companies or individuals may acquire rights of way over the public lands for canals, ditches, and reservoirs, by complying with certain requisites specified in the enactment. Among other things, section 18 of the act provides "that the right of way

through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, \* \* \* to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof." Section 19 provides that, after the compliance with certain necessary requisites by the claimants of the rights of way, all public "lands over which such rights of way shall pass shall be disposed of subject to such right of way." Section 20, among other things, provides "that the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the finding of the certificates and maps herein provided for." Section 21 reads: "That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch."

From these several provisions of the statute, it will be noticed that the ditch company or individual that complies with the necessary preliminaries may acquire a right of way for a ditch over the public lands for purposes of irrigation, and that thereafter such lands over which the ditch passes must be disposed of subject to such right of way. The rights of way which may thus be acquired are for the specific purposes of constructing "canals, ditches, or reservoirs." Whether the possession of such a right of way would entitle the owner to construct a pipe line thereon is a question deemed unnecessary to be decided herein, under our view of the case, and we therefore refrain from expressing any opinion respecting it. It is clear that a right of way of this character constitutes but an easement granted for, and limited to, the purpose mentioned in the act, and it gives the owner of the easement no right to occupy or use the surface of the land embraced within it for any other purpose than that specified. Such owner may enter thereon and construct a canal, ditch, or reservoir, and after constructing, do all things necessary to maintain, care for, and operate the same; but, having merely an easement over, and not the fee in, the land, he has no right to occupy or use it for anything not necessary for the protection and operation of that which he has, lawfully constructed thereon. After the right to such an easement has been perfected or acquired in accordance with the provisions of the act, the title to the fee still remains in the United States. Thereafter, upon the land being disposed of by the government, such title passes to the patentee, and he or his grantee may prevent the use of the right of way for any

purpose foreign to that for which the easement was granted.

In the case at bar it is clearly shown by the evidence that the appellant had the lumber and material in question hauled and deposited upon the right of way for the purpose of erecting a building thereon, which was to be used for a saloon—a purpose wholly without the plain meaning and intention of the act and laws under which he secured his easement and right to the use of the water of the stream. It is too clear for argument that he had no right whatever to use his right of way for any such unlawful purpose, and that his attempt to so use it was an infringement upon the rights of the owner of the fee. Having thus invaded the domain of the fuel company, the owner of the fee in the soil, by depositing building material upon the land for an unnecessary and illegitimate purpose, that company had the undoubted right to remove such material, without unnecessary damage to it, off from its premises; and the defendants Bowens and Gibson, acting as the servants of the company on that occasion, are, in the absence of any showing of unnecessary damage to the material caused by the removal thereof, not liable to the appellant in damages for the performance of that service. Nor was the company bound to wait until the erection and completion of the building before taking any action. The material having been placed there for a wrongful purpose, and without the consent of the company, the company had the right to cause its removal forthwith. The appellant has shown no cause for complaint.

The judgment is affirmed, with costs.

BASKIN, C. J., and McCARTY, J., concur.

(27 Utah, 307)

SMITH et al. v. CENTENNIAL EUREKA MIN. CO. et al.

(Supreme Court of Utah. Feb. 25, 1904.)

MASTER AND SERVANT—DEATH BY WRONGFUL ACT—CONTRIBUTORY NEGLIGENCE—DISOBEDIENCE OF RULES.

1. A laborer employed by a mining company to fill freight cars with ore was required to loosen the brakes on cars left by the railroad company at a distance from the orehouse, allow them to move downgrade to the orehouse, and stop them there by means of the brakes. While letting two cars down he lost control of them. They ran to the bottom of the grade, and he was killed. The brakes were obviously very defective. On beginning work he had been instructed never to let more than one car down at a time, to place blocks on the track to stop the car at the orehouse, and to inspect cars before attempting to move them, and report defects. Held, that his failure to do any of these things on the occasion in question was contributory negligence, precluding recovery for his death from the mining company.

2. Where an employé of a mining company

¶ 1. *Butte v. Pleasant Valley Coal Co.*, 47 Pac. 77, 14 Utah, 232; *Higgins v. Southern Pac.*, 72 Pac. 690, 26 Utah, 164; *Burgess v. R. R. Co.*, 53 Pac. 1013, 17 Utah, 406.

¶ 2. See *Railroads*, vol. 41, Cent. Dig. § 895.

was killed while using cars which a railroad company had negligently allowed to remain in a defective condition, but deceased was guilty of contributory negligence in failing to observe rules prescribed by the mining company, the defense of contributory negligence was available to the railroad company, though no contract relation existed between the railroad company and deceased.

McCarty, J., dissenting in part.

Appeal from District Court, Juab County; T. Marioneaux, Judge.

Action by Loulla B. Smith and others against the Centennial Eureka Mining Company and another. From a judgment in favor of plaintiffs and against the Rio Grande Western Railway Company, defendant, it appeals. Reversed.

This action was brought by the heirs of John P. Smith to recover damages for his death, which, they claim, was caused through the negligence of the defendants. The allegations of the complaint, so far as material to this decision, are, substantially, that on May 4, 1901, and for six or more months previous to that date, John P. Smith, the deceased, was employed by the defendant mining company in filling ore and other materials from a mine chute and other building belonging to the mining company into freight cars belonging to the defendant railway company; that at and during such time the deceased was so employed at Eureka, Juab county, Utah; that the mining company had engaged the railway company to haul ore from Eureka to various places for the purpose of smelting and selling it, and to provide strong, safe, and suitable cars therefor, which should be safe for the use of the employes of the mining company in loading ore on them; that freight cars were provided for the mining company by the railway company, and that it was the duty of both defendants to see that the cars were in good repair and condition for the said John P. Smith in loading them with ore for freighting; that on the date above mentioned the railway company furnished the mining company and the deceased with two cars for ore, and placed them higher up on the track than the ore chutes and building containing ore, and on a higher grade than the place where the chute is opposite to the track, thereby leaving the deceased to drive the two cars down to the chute; that on both cars the brakes, and appliances connected with them, were badly out of repair and loose, "the equalizer, pins, bolts, bars, and other appliances connected with the brakes were out of repair and loose; the shoes connected with the brakes and wheels of the cars were worn out and thin and badly out of repair, and would not hold or block the wheels of said cars, and some of the shoes of the cars were entirely gone on said day, and were negligently permitted for some time previous to remain so;" that the defective and unsafe condition of the brakes and appliances could, with the exercise of ordinary care and diligence, have been discovered by the defend-

ants, and at the time mentioned was known to them, but the same was unknown to the deceased; that on the day mentioned, while the deceased was performing his duties of loading ore, it became necessary for him to drive said cars from the higher grade, a distance of several rods, down near and under the ore chute, and in attempting to do so lost control of the cars, by reason of the defects aforesaid, and the same went down the grade, past the ore chute and building where the ore was, at a high rate of speed, and collided with certain loaded cars below, with such force that the deceased was thrown between the cars, and there crushed and killed; and that the plaintiffs were dependent upon the deceased for support.

The railway company in its answer denies the allegations of the complaint respecting negligence, and pleads affirmatively contributory negligence of the deceased, and that his injuries and death were occasioned by the risks incident to his employment.

From the evidence it appears, in substance, that for about six months before and at the time of the fatal accident the deceased was in the employ of the defendant mining company, and his duties were to load ore from that company's orehouse, through ore chutes, into cars furnished by the railway company. The building stood alongside of a side track belonging to the railway company, extending in an easterly direction from the company's main line of railway to a point some distance beyond the orehouse. From the point where the deceased started the cars at the time of the accident to the orehouse there is a descending grade. In front of the building the track is level, but immediately after passing the building the track again has a down grade of about 4.35 feet in every 100 feet. From the point where the grade commences to descend to the lowest point in the grade before it commences to ascend the distance is about 610 feet. The railway company, in furnishing cars to the mining company, ran them from its main line onto this side track, and left them stand above the orehouse. It was then the business of the mining company to run the cars, as it required them, down to the orehouse, by means of the brakes, load them with ore, and, upon being loaded, run them down below the orehouse to the lowest point on the grade, to be taken thence by the railway company onto its main line. On May 4, 1901, and for some months prior thereto, the deceased was in the employ of the mining company, and it appears this work of so loading and running down the cars was intrusted to him. On the afternoon of that day he attempted to run two cars, Nos. 631 and 678, coupled together, down the track, doubtless, as indicated by the circumstances, with the intention of stopping them at the orehouse and loading them. This he attempted to do by means of the hand brakes, but was unable to stop them, and the cars ran past the orehouse down the steep grade



and collided with other cars loaded with ore. In the collision he was thrown between the cars, crushed, and killed.

The evidence introduced on behalf of the plaintiffs shows that the two cars which caused the collision were examined by a number of persons very shortly after the accident, and that the braking apparatus was badly out of repair; that on the one car the braking apparatus was so defective as to render it practically useless; that the brake shoes were worn very thin; that by manipulating the brake staff one could get no pressure on the brake wheel; that the brake chain on the staff was doubled on itself between a brace and the brake staff, so that the brake could not be set; that there was one cog broken out of the cog wheel on the brake staff; and that there was too much slack in the brake chain. As to the other car, the plaintiffs' evidence shows that the brake shoes were badly worn; that one of them was riding on the flange of the wheel, which prevented the even application of the braking power; that two guide bolts were gone; and that the point of the brake dog was so chipped and worn that it would not lock into the ratchet on the brake staff. It further appears from such evidence that, while the braking apparatus on one of these cars might possibly have held it, it was entirely inadequate, owing to the defects, to hold the two cars, and that the defects were so numerous and obvious that they could readily be discovered.

Respecting the braking apparatus, the witness B. L. Short, testifying for the plaintiffs, in the course of his testimony, inter alia, made statements as follows: "I got up on No. 678, and tried to set the brake, and found out that the shoes would make no effect upon the brake wheel. I found that the chain was doubled on itself, and was binding with the brace that came down on the staff. You might twist there as long as you wanted to and you would not get any brake power, for the reason that it was iron-bound. The brake shoes did not take hold of the wheel. You could move it with your foot. After getting down out of the car onto the ground I examined the brake chain to determine whether there was too much slack in it or not, and found that there was; it could have been taken up. Assuming that the conditions on Saturday (day of accident) were the same as I found them on Sunday, I would say that the front car, No. 678, could not have been moved down that track by a man without its running away, because he would not have the brake power to hold the car—practically no brake power. My opinion is that if car 678 had been left standing on the side track loose, not coupled to any other car, it would not have remained stationary, for the brakes would not have held it. The car was simply held there by reason of the fact that it was coupled to the car above it (631). Coming down to the defects on car number 631, the dog which fits into the ratch-

et, thereby locking the brake after being set, was worn thick, and it would not lock into the ratchet. I could not get the dog to stay in the ratchet at all unless I put my foot against it. The brake chain was loose, but it did not seem to work just right. The brake shoe was out on the flange, which did not give an even pressure on both ends of the break beam. I discovered something was wrong immediately by turning the wheel. I found I could not get action on it like one in good order. I discovered at once that the dog was bad. I looked to see if it was in position, and saw that it was chipped. All I had to do to discover this was to look down at the dog. I examined the brakes on these two cars, and found that the brake shoes on 631 were defective in the extreme. If car 631 was in the same condition the day previous as when I found it, it could not have stood on the incline by means of the brakes and the dog and the ratchet. If I would have to answer the question whether or not, in my opinion, the brakes on car 631 were sufficient in the hands of an experienced brakeman to handle it down that grade, I would say they were not. My opinion is that two experienced men could not have handled and controlled those two cars by means of the brakes; two men could not have handled them going down that incline by the brakes." The witness also stated that the two cars could have been uncoupled by the use of brake blocks; and in relation to the ascertainable character of the defects in the braking apparatus the same witness, among other things, in the course of his testimony, said: "If a man had looked for anything of that kind, he certainly would have seen it. A man who is accustomed to the business can tell very readily, when handling a brake staff, if he is getting any pressure, whether the car is in motion or standing still. A man who is accustomed to braking can tell pretty well whether a brake is in good condition by turning the handle. If there is a failure of the braking apparatus to work, and a consequent failure to get pressure, this could be determined by standing on the platform of the brake staff. I exerted all my strength on the brake staff on car 678, and got no pressure. I discovered these conditions in a very short time after I got on the car. I discovered that both of them were apt to run away."

On the same subject the witness John F. Allen, testifying for the plaintiffs, and referring to the broken dog on the brake staff, said: "When Short called my attention to it I looked at it, and as soon as I looked I saw that it was broken off."

The witness Bonney, also one of the plaintiffs' witnesses, and who testified substantially the same as the witness Short respecting the defects in the braking apparatus of the two cars, and how readily a slight inspection revealed the defects, in the course of his testimony said: "When I went up on Satur-

day to inspect the cars I tried to apply the brake on car 678 and could not do it. I noticed this immediately—very soon—just as soon as I took hold of the brake wheel and turned it. This I determined very easily and quickly—within half a minute; for, from what little braking I had done, I knew that the brake was not in proper condition to let a car down on a steep grade. I am just testifying to the conditions as I found them. Before I got down I knew there was something the matter with the brake; that there was something wrong with the braking apparatus on the car. It took practically no time to find this out. I got up and tried the brake on 631, and immediately discovered that the dog was broken. It took a very short time to discover this. The broken dog was in plain view—easy to be seen. So far as holding these cars on a heavy grade is concerned, these cars might just as well have been stripped of their entire braking apparatus. That is my opinion."

There is also evidence to the effect that the cars, where they stood beyond the ore chute, would not start of themselves by gravitation after the brakes were off, so as to afford no opportunity for an inspection of the braking apparatus before starting. Upon this subject the witness Hickman, testifying for the plaintiffs, said: "I remember May 4, 1901, when Mr. Smith was killed. I saw him that day before he was killed. He was getting ready to lower a car with ore at the orehouse. I assisted him. It was about four o'clock. The car was being loaded at the orehouse. While performing that labor I observed some cars standing on the same track west of the orehouse—I should judge about one hundred feet west. As near as I can remember the cars were standing in the usual place. The cars that he got hurt on were standing in the usual place as the cars which were put in there on other days. The track at that point is practically level. I know he had a pinch bar for the purpose of moving those cars. I believe the mining company that employed him furnished him with the bar, which was used for that purpose—pinching cars so as to set them in motion. I say that it requires a pinch bar to start a car out of there when the brake is off; that is, to start the car east. After a car started it would run. It would run on to such a force that he would have to put on the brakes in order to hold the car when he got to the scales, which were right at the orehouse."

On this same subject, Mrs. Loulia B. Smith, plaintiff, testified: "Before Mr. Smith was killed \* \* \* I used to go up there frequently, and have seen him engaged in performing that work. He used to take a long crow bar, and put it under the wheel, and get the car in motion, and then he would get up quickly on the car and take hold of the brake; that is the way he ordinarily did it."

The defendant railway company introduced

evidence tending to show that the braking apparatus was in proper condition, and, in support of its affirmative plea of contributory negligence, testimony respecting rules and instructions of the mining company, the employer of the deceased, for his guidance in his employment. On this subject of rules and instructions the witness Hope, who immediately preceded the deceased in the employment, testified: "When I quit that job on November 12, 1900, Mr. Smith succeeded me, and he commenced work at that time. I worked with him the first day that he worked there, and instructed him in his duties, pursuant to instructions I received from the Centennial Eureka Mining Company. I showed him the way to load cars and handle them. I instructed him never to load a car until he inspected the brakes to see whether the chain was all right and the dogs were on the car. I told him to do this for his own safety. I told him to be very careful with the handling of the cars, and take proper precautions to use track blocks, or stop blocks, as we termed them, which are pieces of timber made of Oregon lumber, probably three feet in length, and probably three or four inches in thickness. There were such blocks there for that purpose. I first showed him how to drop the cars. I went up and let the cars down to the scales, using the block on this occasion in order to show him, and put it on the track across both rails, it being long enough to do this, on the scales opposite the chute, where I wanted to stop the car. After putting it there, I let the car down against it, and told him always to follow that routine of work. I told him never to let down more than one car at a time. I told him never to let the cars away from the chutes until the chutes were raised so that he could pull the chutes out. I talked with him during this day right along concerning his duty. I told him that every car we loaded that day was typical of how he should perform his work. I don't know how many cars we took down and loaded on that day. We loaded as a rule anywhere from one to eight or nine cars—probably on an average of four or five cars a day. I was with him all the time that day. I let the cars down in the first place, and he stood on the ground watching me. After I had thus instructed him verbally, I reduced these various instructions to writing at his request. He asked me to write out the company's rules, so as to help him do the work, in the event that he should overlook anything. I tacked these instructions up in the scalehouse—the house that the scale bar is inclosed in. He saw me tack them up."

The testimony of the superintendent of the mine, the witness Brown, in part, on this subject is: "When I employed him I gave him instructions concerning his duties. I told him to see that all the brakes on the cars were set, to examine them, and see if there were any defective parts, and, if so, to report to

the mine office; to use his brake club and brake blocks, and move but one car at a time. I told him to examine them when they were put on the side track by the railroad company. I didn't specially mention the brakes, but I told him to examine the cars, and see if there were any defective parts. I instructed Mr. Hope, the gentleman who testified this afternoon, to go and assist him, and instruct him in his work."

The witness C. E. Allen, the general superintendent of the mining company, testified: "I saw him at work probably within a week from the time he began. About a week after, when I first saw him at work, the first thing I asked him was if he had plenty of brake blocks, and told him not to neglect using them, both at the scales where they loaded the ore and also at the place above where the last empty stood; that there were plenty of brake blocks at the mine, and any time that he got short he should send for more, and never be out of them. \* \* \* I admonished him about keeping the scales clean, and called his attention to the fact that he should never let but one car down the grade at a time, and that he should always see that the brakes were kept on the empties above it, and before letting cars down that he should examine them, and see if they were in good condition to be handled and ready to come down the grade. I told him that he should inspect the brakes and the braking apparatus in order to see that he could control his cars when he came down the grade."

The testimony of the witness Barnard is of the same character and import, and none of this evidence appears to be contradicted. It is not shown by the evidence that the deceased used brake blocks in his attempt to handle the two cars at the time of the accident.

At the close of the plaintiffs' testimony a motion for a nonsuit on the part of the mining company was sustained by the court, and one overruled as to the railway company, and thereupon, after the evidence of the railway company had been introduced, the case was submitted to the jury, who returned a verdict in favor of the plaintiffs. This appeal is from the judgment.

Sutherland, Van Cott & Allison, for appellants. W. R. White and L. R. Rogers, for respondents.

After a statement of the case as above, BARTCH, J., delivered the opinion of the court.

At the conclusion of the evidence in this case the defendant railway company requested the court to instruct the jury to return a verdict in its favor. The refusal of this request, among other things, has been assigned as error.

The appellant railway company contends that the jury ought to have been so instructed, for the reason, as is insisted, that the uncontradicted evidence shows the deceased

was guilty of contributory negligence which was the proximate cause of his injury and death. It is argued that the deceased was negligent in failing to observe and in deliberately violating the rules and instructions provided and given by his employer for his guidance and safety in the performance of his work.

The contention of the respondents on this point appears to be that the relation of master and servant did not exist at the time of the accident between the appellant railway company and the deceased, and that, therefore, if the railway company was negligent in furnishing cars with defective braking apparatus, and the death resulted from handling such cars, the railway company cannot, for the purpose of avoiding liability for its negligence, avail itself of a violation of the rules of the mining company. Such, at least, seems to be the result of the contention of the respondents.

That the braking appliances of the two cars in question were greatly defective is manifest from the evidence of the plaintiffs, as shown in the statement of the case, and, while this is contradicted by evidence of the defendants, the jury must have found that the appliances were defective, and that the railway company was negligent in placing such cars upon the side track, and such finding, based, as it is, upon conflicting evidence, is conclusive on us upon such question. Whether the allegations of the complaint, as well as the evidence introduced by the plaintiffs, show such obvious defects in the braking appliances that the deceased ought to have observed them, and have refrained from attempting to handle the cars on the steep grade, and that his failure to do so rendered him guilty of contributory negligence fatal to a recovery for his death, is a question unnecessary to decide. It may be said, however, that the complaint itself shows that a mere cursory examination would doubtless have revealed the dangerous condition of the braking appliances. Was, then, the deceased himself so negligent, under the circumstances, as to preclude his heirs from recovering as against his employer?

Under agreement with his employer, the railway company placed the cars which he was to operate upon the side track. When so placed they were under his exclusive charge. It seems he was both conductor and brakeman respecting the movements of those cars. That his employment was more or less hazardous was apparent from the character of the grade and the nature of the labor to be performed. All this was obvious, and must have been known by the deceased. Upon engaging to perform the work, he assumed the risks ordinarily incident to the employment. Having entered into such a service, it was his undoubted duty, aside from any specific instructions, not only for his own safety, but also for the protection of

the property of his employer, before attempting to run the cars down to the ore chute to inspect the appliances with which he expected to handle and stop them. Had he done this, it seems clear that he might have avoided the accident; for, if the defects existed, they were, according to the plaintiffs' evidence, open, obvious, and discoverable upon slight inspection. Notwithstanding his plain duty, however, to inspect the cars and their appliances, even without special instructions to do so, his employer did give the deceased, upon entering the service, special instructions, and adopted rules for his guidance and safety, which were to the effect that the employé should never attempt to run down on the side track more than one car at a time; that before letting a car down he should always examine it, and see that it was in condition to be handled, and that the brakes were kept set on the empties above it; that before loading a car he should inspect the brakes and appliances, and see if there were any defective parts, and, if there were, to report to the mine office; and that he should take care to use track blocks across the track where the last empty car stood, and also at the orehouse to stop the car to be loaded. These instructions were promulgated for the employé's own safety as well as for the protection of the property of his employer, and the law is well settled that an employer, engaged in a hazardous business, has the right, and that it is his duty, to formulate reasonable rules to enhance its orderly and safe conduct, so as to secure protection to property and the public, and to reduce the risks assumed by the employés.

In this case the employer not only promulgated reasonable and proper rules, but, upon the employé entering into the service, imparted to him special instructions for the safe management and performance of the business. The rules and instructions, made and given for the employé's special benefit and safety, were by him, on the occasion of the accident, as appears from the plaintiffs' own testimony, wholly disregarded; for that testimony, which is binding upon the respondents, whatever, under the circumstances, the real fact may be, discloses, not only that, in violation of the positive instructions of the master, the deceased ran two cars coupled together down the grade instead of one, as instructed, but also that the braking appliances were so grossly defective as to be practically useless, a condition which required but slight inspection to reveal, and that no inspection could possibly have been made before the moving of the cars and the defects remain undiscovered. Nor was any report, so far as shown in evidence, made to the mine office. Thus, the evidence shows such a palpable disregard by the employé of the rules and instructions of the employer as clearly absolves the employer, the mining company, from all liability to the plain-

tiffs for the unfortunate consequences of the disobedience of the employé; the proof clearly showing that the want of the employé's observance of the rules and instructions were the proximate cause of the resultant injuries and death.

It is plainly indicated by the evidence that the deceased made no effort to discover an open peril. There is nothing to show that he even made use of any brake blocks, while it is manifest that, in total disregard of his employer's rule, he attempted to move two cars down the steep grade, with a braking apparatus wholly insufficient to hold one, and the insufficiency of which could have been ascertained upon slight inspection, in accordance with his instructions. The conclusion, from the evidence, is irresistible that the lamentable misfortune was the result of his own heedlessness, being directly attributable to his disobedience of the rules and instructions of his employer at a time when, so far as appears from the record, there was the existence of no emergency which required hasty action. This is so patent from the proof as to leave no room for reasonable minds to differ in relation thereto. Such disobedience, under the circumstances, rendered him guilty, in law, of contributory negligence, and such negligence, without doubt, was the proximate cause of his death. Clearly, therefore, no action is maintainable by the heirs against his employer, the mining company. The rules and instructions were proper and reasonable, and it was the duty of the deceased, under the law, to obey them, and, having failed to do so, his employer was released from liability for the injuries which were the direct result of such failure.

"It is," says Mr. Beach, "contributory negligence of an aggravated character on the part of an employé to disobey reasonable rules and regulations enacted to protect him from injury. If he is injured through such a gross and unwarranted disregard of his own safety, his remedy is gone. Such negligence is the most pronounced contributory negligence possible. It properly leaves the person injured by it wholly remediless." Beach, Contr. Neg. § 373.

In *Scott v. Eastern Ry. Co. (Minn.) 95 N. W. 892*, the Supreme Court of Minnesota, speaking through Mr. Justice Collins, said: "The universally established doctrine is that if an employé, of ordinary intelligence, is injured by reason of his disobedience or disregard of reasonable rules and orders issued by the master, and brought to his attention in ample time, and opportunity being given in which to obey, he cannot recover, as against the master, for an injury received, when a violation of a rule is the proximate cause of his injury. He will, as a matter of law, be deemed guilty of contributory negligence."

The same court, in *Nordquist v. Great Northern Ry. Co. (Minn.) 95 N. W. 322*, said: "An employé is bound to obey all of the reasonable rules of his employer with refer-

ence to the conduct of his business. Disobedience of such rules, if it contributes directly to the injury of the employé, conclusively charges him with negligence, which will bar any recovery of damages for his injury."

In *Karrer v. D. G. H. & M. R. R. Co.*, 76 Mich. 400, 43 N. W. 370, where the employées were acting under printed orders relating to their safety, which the plaintiff failed to obey, the court said: "It was the plaintiff's duty to examine into the coupling arrangements of both cars before he attempted to couple them, and, as they were only a rod apart at most before he started the train back, and as he says the defect was visible at once to any one looking, one or two seconds would have furnished all the time needed to satisfy himself, had he been acting under any one else's orders and not for himself; but as he had personal direction of the engineer's movements, and could move when he pleased, the case, as he presents it, was an aggravated one of the grossest carelessness, for which he, and no one else, was responsible."

So, in *La Croy v. N. Y., L. E. & W. Ry. Co.*, 132 N. Y. 570, 30 N. E. 391, the plaintiff, who had been injured, was employed as a brakeman on defendant's freight train. One of the printed rules required brakemen, before starting, to test the hand brakes. This was not done on the occasion of the accident which caused the injury for which recovery was sought. The court, holding that disobedience of the rules caused the accident, and that, therefore, the plaintiff was not entitled to recover, said: "In the absence of printed instructions, the plaintiff and the rest of the train crew well knew that their duty to their employer, and a proper regard for their own personal safety, made it incumbent upon them to know, before reaching the point where the steep descent began, which continued for nearly six miles, whether the train contained the requisite number of brakes to properly check its speed, and as a necessary consequence the plaintiff cannot require the defendant to make good to him the damages resulting from an injury which could not have been sustained had he and his co-employés observed that reasonable care and caution which their experience suggested and the situation demanded."

In *Darracott v. C. & O. R. R. Co.*, 83 Va. 288, 2 S. E. 511, 5 Am. St. Rep. 266, where the injury complained of was a result of a disregard of rules, it was said: "At all events, the evidence shows that the dangerous condition of the coupling was obvious, and that the plaintiff, in violation of the rules of the company, voluntarily put himself in a position of danger, in consequence of which he was injured. Under these circumstances, in the eye of the law, he was the author of his own misfortune; that is to say, his negligence, or, what is the same thing, his want of ordinary care and caution, was the proximate cause of the injury complained of. The

action is therefore not maintainable." *C. & A. R. R. Co. v. Bragonier*, 119 Ill. 51, 7 N. E. 688; *Bennett v. Northern Pac. R. R. Co.*, 2 N. D. 112, 49 N. W. 408, 13 L. R. A. 463; *Higgins v. Southern Pac.*, 26 Utah. 164, 72 Pac. 690; *Butte v. Pleasant Valley Coal Co.*, 14 Utah, 282, 47 Pac. 77; *Burgess v. R. R. Co.*, 17 Utah, 406; Ill. Cent. R. R. Co. v. Jewell, Adm'x, 46 Ill. 99, 92 Am. Dec. 240.

The heirs of the deceased, being thus precluded from a recovery against the employer because of the contributory negligence of the deceased, have they a right of recovery against the railway company who furnished the cars? It seems, as to this question, the respondents assume the position that the railway company cannot rely upon the contributory negligence of the deceased, because at the time of the accident he was not in its employ, and its rules were not violated. They claim that when the deceased entered the services of the mining company, and received its instructions, a contract relation was created between them, and that the railway company, being no party to the contract, can take no advantage of its breach by the deceased.

The answer to this is that this action is one sounding in tort against the railway company, and not upon contract, to recover for the death of the deceased, and that the proof shows such death was caused by the deceased's own wrong, no act of gross or wanton negligence on the part of the railway company being charged. Such being the case, the tortious acts or negligence of the railway company, if it was guilty of any, cannot be made the basis of a recovery for injuries resulting from the wrong or negligence of the deceased. Clearly, if the unfortunate occurrence had resulted but in injuries, and not in death, and the deceased had brought an action against the railway company to recover damages for negligence, proof that his own negligence, and not that of the company, caused his injuries, would have been a complete defense, and where, as in this case, the recovery is sought for the death, the heirs are in no better situation than the deceased himself would be if living. Wherever contributory negligence is established as the proximate cause of an injury it is always a complete defense, and bars a recovery for such injury. In such case the maxim, "*Volenti non fit injuria*," applies.

The existence of contract relations is not essential to an invoking of the rule as to contributory negligence. The right to the application of that rule is founded upon the principle that no person can be permitted to make his own wrong, or his own voluntary act, whether tortious or not, the basis for a recovery against another. Where an injury results to a person because of his own wrongful act or violation of duty, neither he nor his heirs can recover damages from another for such injury. In such a case no action is maintainable. One who, through want of or-

inary care, inflicts a wound upon his own body, must be content to bear the suffering and the loss, and neither he, nor, in the event of death, his heirs, have any redress. "Contributory negligence, in its judicial sense, is usually the personal default of the plaintiff himself. The general rule is that when the plaintiff's own want of ordinary care is a proximate cause of the injury he sustains he cannot recover damages from another therefor." Beach, Contr. Neg. § 100.

Mr. Thompson, in his Commentaries on the Law of Negligence, vol. 1, § 185, says: "Where a person, by his own deliberate act, brings an injury upon himself, he cannot make it the ground of recovering damages against another, where he is not impelled thereto by some imminent danger, or by some exciting or exasperating circumstances, for which that other is responsible. The principle that a person cannot make his own wrong, or his voluntary act, whether wrongful or not, the ground of recovering damages from another, has found an expression in the maxim, 'Volenti non fit injuria.'"

In Railroad Co. v. Aspell, 23 Pa. St. 147, 62 Am. Dec. 323, Mr. Chief Justice Black said: "It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained." 1 Thomp. Comm. Neg. § 186; Wharton, Neg. § 73; 2 Jaggard on Torts, 960; Ray, Neg. Imp. Dut. Pass. 669, 670; Texas & P. Ry. Co. v. Moore (Tex. Civ. App.) 27 S. W. 962; New York, C. & St. L. R. Co. v. Perriguy, 138 Ind. 414, 34 N. E. 233, 37 N. E. 976; Lewis v. Flint & P. M. Ry. Co., 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790; Langridge v. Levy, 2 M. & W. 519; Carter v. Towne, 98 Mass. 567, 96 Am. Dec. 682; Crain v. Petrie, 6 Hill, 522, 41 Am. Dec. 765.

Viewing the pleadings and the evidence contained in the record thus in the light of the law applicable to this case, we are of the opinion that the plaintiffs have shown no right to recover damages against the railway company, that the contributory negligence of the deceased is available to that company as a defense to this action, and that the court erred in refusing to instruct the jury to return a verdict as requested by the defense. This disposes of the case, and it is therefore of no importance to pass upon the other questions presented.

The judgment must be reversed, with costs, and a new trial granted. It is so ordered.

BASKIN, C. J., concurs.

McCARTY, J., concurs in the order of reversal, but dissents from the grounds stated

and the reasons given therefor in the majority opinion.

There are three reasons given in the foregoing opinion why this case should be reversed. The first is that the facts, over which there is no substantial conflict in the evidence, considered in its entirety, show that the alleged defective condition of the braking apparatus of the two cars which John P. Smith, the deceased, was moving at the time he was killed, was so open, plain, and obvious that he, by the exercise of ordinary care and diligence, could have discovered it before he started to move the cars, and therefore he was guilty of contributory negligence; second, that his failure to observe and follow, on that occasion, the instructions given him by his superiors not to move more than one car at a time, also constituted contributory negligence on his part; and, third, that the court erred in refusing, after the evidence was all in, to peremptorily instruct the jury to return a verdict in favor of defendant railway company.

I am unable to agree with my Brethren not only as to the facts in the case, but as to the law applicable to the facts. The record shows that the two empty cars, at the time John P. Smith started to move or run them down to the ore chute, were standing on a descending grade, with the brakes sufficiently set to hold them in place on the track without pulling on their couplings or the couplings of the cars standing above them and to which they were attached. The great preponderance of the evidence shows that the moment a car standing on the track, at the point where these cars were taken from by the deceased on the day of the fatal accident, is uncoupled from the one above it, and the brakes loosened or thrown off, it would start of its own accord. T. D. Fenton, the conductor under whose directions the cars in question were left on the switch track at the point from where they were moved by the deceased, just before his death, was called by the appellant, and testified on this point as follows: "The surface of the track which leads along these orehouses is on an incline to the east. \* \* \* We put the cars on to this side track from the west end. \* \* \* This was done on May 4, 1901, the day of the accident to Mr. Smith. \* \* \* We pushed twelve empty cars on to the side track that day. \* \* \* The grade was such that it became necessary to apply the brakes to keep the cars from running down. \* \* \* The brakes are first applied on the east end, toward the ore chute. This is done so as to keep the slack against the other cars, in order \* \* \* to enable the Centennial Eureka Mining Company's men to uncouple the car. The hand brake was applied and set first on the first car, and then in regular order till the last car was reached, from the east to the west, up the incline—up towards the switch. When the brakes are all set, each car on the incline was held by the

hand-brake power. It was not held at all on the incline by the couplings to the adjoining cars. \* \* \* If the brakes were off the lower car, and the car was pulling on the coupling, you could not uncouple it. If the brakes were off the two lower cars, and a string of cars were standing on that incline, you could not uncouple these two cars from the remainder. I know of my own knowledge that when I left those cars that morning (May 4, 1901) \* \* \* on this side track above the Centennial Eureka orehouse that the brakes were on and the pressure applied on every one of those cars."

J. A. Houtz, a brakeman under Fenton, testified that the brakes were set on the lower or first end, and then on the other cars higher up in succession; that "the brakes were so set in order that Smith would have no trouble in getting the various cars off, for, if the slack was allowed to run out, it would be impossible for him to get the cars off, because the weight of the cars would be drawn against the draw rod, thereby preventing the raising of the lock. \* \* \* As the cars were upon the side track, and the brakes set in the manner I have described, our custom was that each individual car should be held in place by its own brakes. If a brake on any particular car would not hold it, the result would be that the minute you move the car in front away, it—the car with no brake—would pull down on the remaining cars, and you could not cut it off from them. \* \* \* It was necessary on such a grade as that to apply the brakes in order to stop and hold the car."

William Freckleton, a witness for the plaintiffs, testified that a car would not stand on this incline "unless it was braked or blocked." The record also shows that two days after the accident the two cars mentioned were taken by appellant and replaced on the track above the ore chute on the same grade and in the vicinity of where they were standing when the deceased started to move them at the time he was killed.

L. D. Dickenson testified that one Herbert Hayes let these two cars down over the same track by the hand brakes. "He let down only one car at a time. He let down the head one first. \* \* \* He released the brake, and the car started. \* \* \* Stopped it once on the way down. \* \* \* Then he went back and got the other car, and went through the same performance. \* \* \* When we went back to start the hind car we released the brake, and it started immediately."

Herbert Hope, another of the appellant's witnesses, testified, in part, as follows: "I got up on the car lower down on the grade—my impression is that it was 678—and kicked the brake off. \* \* \* I let the brake off and the car started, and I let it down the grade. I then went back to the lower car. When I got to it—car 631—I got up and re-

leased the brake. \* \* \* The car started immediately when the brakes were let off."

Appellant concedes that cars standing on this incline, when uncoupled and the brakes thrown off, would start without any propelling force except that furnished by their own weight. Counsel for appellant in their brief say: "It is apparent from the great weight of the evidence that the cars would set themselves in motion if the brakes were released and if they were uncoupled."

There is a sharp conflict in the evidence respecting the condition and general appearance of these two cars immediately after the accident. Upon one point there is but little, if any, conflict in the testimony, and that is the alleged defective condition of the braking apparatus was discovered by the parties making the examination either by getting upon the cars and testing the brakes by applying and setting them, or by having the defects pointed out to them by parties who had made the tests. Regarding the general appearance of the cars, B. L. Short testified, in part, as follows: "I got upon car No. 678, and tried to set the brake. The shoes would make no effect upon the brake wheel, and I got no pressure. I got down, and the shoes \* \* \* on that car were in their places. I noticed their thickness, and they were apparently in pretty good shape. So far as the shoes were concerned, they looked all right."

William Freckleton, another witness for plaintiffs, testified, as follows: "The mere fact that the shoes on 631 were worn thin is no defect so long as they took effect;" and again, "I didn't notice what caused the brake to get out on one side, and the brake shoe to pass on the flange of the wheel. All the other brake shoes except this one were in their proper place on car 631. All were good shoes, not broken—good for the purpose of pressure. The only thing wrong with the car on Saturday night (the day of the accident) was the brake shoe pressing on the flange. With that exception the braking apparatus on that car was in good condition, so far as I know." He also testified that the brake shoes on car 678 were in fair condition.

The witness Bonney, in giving his testimony, said: "I examined the brake shoes upon car 678. They were all in very good condition except this one, that was in the brakehead, and it was in fair condition. It had been worn."

A. J. Bauer, a witness for defendant, testified that he examined the brakes on these two cars, and that "they were in good condition"; that "they worked first class."

T. D. Fenton, the conductor, testified that he made a very thorough test and examination of the braking apparatus on these two cars, and "found that it worked all right." Again he says: "I inspected the entire braking apparatus on each car, and found that its condition was good." Several other witnesses

for the appellant testified that they examined and tested the brakes on these cars, and found them to be in good condition.

Now, it must be borne in mind that John P. Smith, the deceased, had no such opportunity for examining and testing these brakes as the witnesses in the case. When the tests were made by the witnesses the cars were standing on comparatively level track, and it was not necessary to apply the brakes in order to hold the cars in place while the tests were being made.

The foregoing testimony tends to show that the alleged defective condition of the brakes was not really discernible without making a physical test by applying or setting them. And there also is evidence that this could not be done while the cars were standing on the incline above the ore chute, for the reason that they would start to move down the grade the moment the brakes were loosened and thrown off and the cars uncoupled. This evidence, considered in connection with the fact that the brakes were set and applied on these cars at the time the deceased uncoupled them from the car standing immediately above, which fact was at least an indication that the brakes were not disabled, creates too much uncertainty as to whether or not deceased knew, or in the exercise of ordinary care and diligence would have known, of the alleged defects before he started to move the cars, for this or any other court to say, as a matter of law, that he was guilty of contributory negligence because he moved these cars in their alleged disabled condition down the track on the occasion referred to.

Appellant contends, and this court in the opinion written by Mr. Justice BARTCH in the case holds, that the deceased was guilty of contributory negligence in moving two cars at a time down the incline in violation of the instructions given him by those under whom he was working, which the railway company can successfully plead as a defense in this case.

The evidence, as I view it, is far from conclusive that the act of moving the two cars at the same time, on the occasion referred to, was in and of itself negligence per se. In fact there is evidence in the record that tends to show that it was not negligence. When the employes of the railroad company removed the two cars in question from where Smith was killed, they took them, coupled together, back up the main line, where they were "kicked" onto the switch by the engine, and set going down the incline above the ore chute at the rate of eight miles an hour, and were controlled and stopped by one man on the steepest part of the grade by the application of the brakes on the head car only, and a little later they were taken down, one at a time, to the ore chute, loaded with ore, and then let down the track below the orehouse by means of the hand brake. From the orehouse down the grade is almost twice as great as it is above. And, further, some five or six of appellant's employes, men of

experience in this kind of work, testified in the case, and not one of them so much as intimated that it was extra hazardous to let two empty cars down the incline above the ore chute at the same time, but, on the contrary, three of them showed by actual demonstration that it was not.

I know of no rule or principle of law that would permit the appellant, by virtue of instructions given the deceased by the mining company respecting his duties in the handling of the cars, to which the railway company was in no way privy, to shift upon him the legal duty it was under to inspect and use ordinary care to see that its cars were in reasonably good condition before placing them upon the switch track to be loaded with ore. The deceased in the handling of these cars owed the railway company no greater duty than his master, the Centennial Eureka Mining Company, did, and it must be conceded that the only duty the mining company owed was to exercise that same degree of care and caution as is usually observed by men of ordinary prudence engaged in this kind of work, and this is all that appellant could legally exact from the deceased, notwithstanding the mining company may have, through a superabundance of caution, instructed its employes to exercise extraordinary care in the handling of these cars. Suppose, for example, the superintendent of the mining company had given the deceased positive instructions never to take a loaded car down the incline below the orehouse without first making a personal inspection of the track, and through some inadvertence or oversight on the part of Smith he had omitted to make the inspection, and had taken a car down loaded with valuable ore, and ran into an open switch, which the employes of the railway company had failed to close, or into an obstruction which they had left upon the track, under circumstances showing negligence on the part of the railway company, and ditched the car, and a portion of the ore was lost and Smith severely injured thereby, would it be seriously contended that because Smith had failed to perform a duty that devolved upon the railroad company that it could successfully interpose and plead as a defense, in a suit by the mining company for the loss of its ore, that Smith had failed to observe the instructions given by his master, and perform a duty that legally devolved upon the railroad company? I think not, because there can be no question but what the mining company, under these circumstances, could recover. Yet, if the doctrine announced in the prevailing opinion is the law, Smith could not recover for his injuries resulting from the ditching of the car. In other words, Smith owed the railroad company, with which he had no contractual relations whatever, a greater duty than did his master, between whom and the railroad company such relations existed; which, I respectfully insist is contrary to all precedent. The two com



panies occupied the relative legal positions that usually exist between shippers and common carriers and nothing more. As the relation of master and servant did not exist in the remotest degree between the railroad company and the deceased, all that this company could legally exact of him, while he was engaged in the handling of its cars, was that he exercise ordinary care for his own safety, and this he was bound to do before he could complain of the negligence of the company.

There are only two questions involved in appellant's plea of contributory negligence, and they were questions of fact for the jury. The first is, were the defects in the braking apparatus of these two cars so open, plain, and obvious that the deceased, by the exercise of ordinary care, would have discovered them, and did he in moving the cars exercise that degree of care and caution that men of prudence, skilled in that kind of work, usually observe when engaged in its performance? And, second, were the risks and hazards incident to, and which naturally arose from, the taking of two empty cars, coupled together, down the incline above the ore chute by one man experienced in the work, so great that a man of ordinary prudence, understanding and appreciating such hazards and dangers, would not attempt its performance?

The trial court gave the following instructions, wherein the law applicable to the facts is correctly stated:

"You are further instructed that in respect to the instructions which it is claimed on behalf of the defendant railway company were given to the deceased, John P. Smith, at the time he entered upon his employment, that if you believe from the evidence such instructions were given, the mere violation of or neglect to observe such instructions was not contributory negligence on the part of said John P. Smith; but if you believe from the evidence that at the time in question said John P. Smith violated or neglected to observe any of these instructions, and further believe from the evidence that in the violation or neglect of the same he was, under the circumstances of the case, guilty of a failure to exercise reasonable care for his own safety, and that except for such failure on his part the accident in question would not have happened, then he was guilty of contributory negligence, and the plaintiffs in this action cannot recover.

"You are further instructed that it was the duty of the deceased to inform himself of the dangers peculiar to the work in which he was engaged, and it was his duty to go about his work with his eyes open. It was his duty to use ordinary care to learn the dangers which were liable to beset him in his employment. If, therefore, you believe from the evidence that the injuries to and death of the deceased resulted from being

exposed to dangers which were known to him, or which could have been known to him by the exercise of ordinary care on his part, then the plaintiffs cannot recover in this action."

The authorities cited in the opinion written by Mr. Justice BARTCH are cases wherein the rules of law relating to master and servant governed, but which I contend can have no application in this case, as the deceased and the appellant stood in the same relation to each other as the servant of the shipper does to the common carrier, which is entirely distinct from that of master and servant.

Few cases arise wherein there is a sharper and more substantial conflict on all of the material issues than is shown to exist in this action; therefore it would have been an unwarranted invasion of the province of the jury for the court to have given the peremptory instructions asked for by appellant.

The court gave the jury the following instruction: "The cars were operated to and from a point immediately underneath the chute from the orehouse by the power of gravitation, and the evidence shows that the method employed by Smith was to 'pinch' the cars with a crowbar in order to set them in motion, and that he would bring them to a stop by the use of the hand brakes." Appellant excepted to this instruction, and now assigns the giving of it as error. By an examination of the record it will be seen that there is a sharp conflict in the evidence as to whether the cars were set in motion by the use of a pinch bar or started of their own accord by the power of gravitation. Therefore the giving of the instruction was error.

I am of the opinion that the case should be reversed, with costs, with instructions to the trial court to grant a new trial, and permit the parties to amend their pleadings should they so desire. I concur in the reversal.

(27 Utah, 348)

## HENDERSON v. BARNES.

(Supreme Court of Utah. Feb. 26, 1904.)

### APPEAL—TIME FOR TAKING—ENTRY OF JUDGMENT—WHAT CONSTITUTES.

1. Rev. St. 1898, § 3301, provides that an appeal may be taken within six months from the entry of the judgment appealed from. Judgment was entered on June 10th, and notice of appeal filed December 16th. On June 16th a written instrument, purporting to be a judgment, was signed by another judge than the one before whom the hearing was had, and was filed in the case. *Held*, that the appeal was too late, and would be dismissed.

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Suit by Nettie Henderson against Abbotline Barnes, executrix of the estate of Henry

Barnes, deceased. Judgment for defendant, and plaintiff appeals. Dismissed.

Shepard & Shepard, for appellant. D. B. Hempstead, for respondent.

**BARTCH, J.** This suit is the result of a real estate transaction between the plaintiff and Henry Barnes, deceased. It appears that in the year 1888 the plaintiff conveyed to the deceased, by warranty deed, a certain tract of land, situate in the state of Kansas, for the sum of \$950. The plaintiff claims that she borrowed that sum from the deceased; that the deed was, in effect, only a mortgage; and that she had a right of redemption. The grantee afterwards sold the property to an innocent purchaser, and after the death of said grantee, defendant's testator, the plaintiff brought this action to recover the value of the property and annual rentals of the same, less the sum paid therefor by the deceased, and interest. The complaint was filed November 26, 1902. Afterwards the defendant interposed a demurrer thereto, which was sustained by the court, and, upon the plaintiff electing to stand upon her complaint, and refusing to amend, judgment was entered in favor of the defendant. Thereupon this appeal was prosecuted.

The respondent now challenges the right of the appellant to be heard on the merits of the cause on the ground that the appeal was not taken within the time limited by the statute, and asks that the judgment be affirmed. The statute (section 3301, Rev. St. 1898) provides that "an appeal may be taken within six months from the entry of the judgment or order appealed from." Judgment, as shown by the abstract of the record, was entered herein by order of the judge who presided at the hearing of the case on June 10, 1903, in favor of the defendant, dismissing the action, and for costs, to be thereafter taxed. The notice of appeal was filed December 16, 1903, which was not within six months from the entry of the judgment. The appeal is therefore ineffectual, and the objection to the right of the appellant to be heard on the merits must prevail. This is so notwithstanding the fact that on June 16, 1903, a written instrument, purporting to be a judgment, was signed by another judge than the one before whom the hearing was had, and filed with the papers of the case, which filing was just six months prior to the taking of the appeal. The filing of that instrument was not necessary, as the judgment which was previously entered was effective. If, however, the appeal had been taken within time, still the appellant could not prevail, because, looking into the merits, as the case appears from the record, we are of the opinion that she has shown no right of recovery against the respondent.

The appeal is dismissed, and the judgment affirmed, with costs.

**BASKIN, C. J., and McCARTY, J.,** concur.

(9 Idaho, 629)

### CURTIS v. KIRKPATRICK.

(Supreme Court of Idaho. Feb. 16, 1904.)

**MENTAL CAPACITY—WHEN COMPETENT TO TRANSACT BUSINESS—UNDUE INFLUENCE—APPEALS—FINDINGS OF COURT—INTOXICATING LIQUORS—SPIRITUALISM.**

1. When it is shown that the party conveying property by warranty deed, or executing and delivering a mortgage on property, understood and knew the nature and effect of such conveyances at the time of their execution, he is competent to make such conveyances.

2. Undue influence must be shown to have existed at the time of the execution and delivery of the instrument complained of, or it will not be set aside or canceled in a court of equity.

3. Excessive use of intoxicating liquors is not, alone, sufficient to disqualify one from transacting business or conveying real estate, unless it be shown that at the time of the transaction he did not fully understand the nature of the transaction.

4. The fact that one is a believer in spiritualism, and makes many statements apparently unreasonable, is not evidence of insanity.

5. Findings of a jury in an equity case are only advisory, and may be adopted, or amended and adopted, as the findings of the court, or the court may make its findings independent of the findings of the jury.

(Syllabus by the Court.)

Appeal from District Court, Bingham County; Joseph C. Rich, Judge.

Action by H. W. Curtis, administrator of John Garrett, deceased, against John E. Kirkpatrick. Judgment for defendant, and plaintiff appeals. Affirmed.

F. S. Deitrich and E. E. Chalmers, for appellant. N. H. Clark, S. J. Rich, John A. Bagley, and K. I. Perky, for respondent.

**STOCKSLAGER, J.** This is an appeal from the district court of Bingham county. Defendant had judgment in the lower court. From the whole of the judgment, the appeal is taken. Plaintiff, as the administrator of the estate of John Garrett, deceased, commenced his action to cancel and set aside a certain mortgage, dated the 6th day of November, 1895, and a deed from said Garrett to John E. Kirkpatrick, dated the 10th day of November, 1898, for the reason and upon the grounds that grantor, John Garrett, was incompetent to execute and deliver the said mortgage and deed. John Garrett was the grandfather of defendant, the grantee. A jury was selected, and 43 questions were submitted to them, to be answered and returned to the court: and, much to their credit, they waded through the long list, and answered each one of them. Thereafter, and after argument of counsel, the court adopted the findings of the jury, with certain amendments, which amendments, counsel for appellant claim, were not warranted by the evidence. Question 26, as submitted to the jury, is as follows: "Did John Garrett, on the 9th and 10th days of November, 1898, when he directed John Montgomery, his attorney in fact, to make the deed

¶ 3. See Deeds, vol. 16, Cent. Dig. §§ 149, 155.

in question to John E. Kirkpatrick, know what he was doing?" Answer: "Not fully." Question 31 follows: "Was John Garrett, on the 10th day of November, 1898, possessed of sufficient mental capacity to understand an ordinary business transaction?" Answer: "Not fully." Question 41: "Was he possessed of sufficient mental capacity to understand the nature of the mortgage, and the effect of its execution and delivery?" Answer: "Not fully." To the answers returned by the jury to questions 26, 31, and 41, the court, in its findings, adds to each the following language: "But sufficient for the purpose of making a valid conveyance of the property described in said deed to grantee, John E. Kirkpatrick."

Twenty-eight errors are assigned by counsel for appellant, nearly all based on the theory that the evidence, taken as a whole, does not warrant the findings of the court that deceased, John Garrett, was mentally capable of executing and delivering the mortgage and deed to respondent. It is impossible to fully comprehend the issues involved, and the facts upon which a judgment in this case was rendered, without fully setting out the findings of the court, which were the findings of the jury, with the amendments heretofore referred to, which are as follows: "Question 1. On the 10th day of November, 1898, at the time the deed in question was made, what was the age of John Garrett? Answer. Over 80 years of age. Q. 2. What relationship existed between John Garrett and the defendant? A. Grandfather to defendant. Q. 3. During the last five or six years of his life, was John Garrett addicted to the use of intoxicating liquors, and to what extent? A. Yes; to excess. Q. 4. Was John Garrett, during the last six or eight years of his life, a firm believer in the doctrine of spiritualism? A. Yes. Q. 5. Did John Garrett, during the last five or six years of his life, suffer hallucinations or delusions; i. e., did he believe that he saw and heard, entertained and enjoyed the company of, persons who were not in fact physically present, and who did not in fact exist physically? A. Yes. Q. 6. Was John Garrett, in his later years, filthy, or ordinarily cleanly, in his person? A. Filthy. Q. 7. Was he filthy, or ordinarily cleanly, in his household? A. Filthy. Q. 8. Did John Garrett, in the last five or six years of his life, accept the advice and follow the directions of supposed spirits, against those of a practical surveyor or engineer, relating to the location of water ditches? A. Yes. Q. 9. Did John Garrett, in the last five or six years of his life, accept the advice and follow the directions of supposed spirits concerning the practical business affairs of his life, and, if so, to what extent? A. Yes; to a great extent. Q. 10. Did John Garrett in his earlier life accumulate considerable property, and in his later years spend some of it, without knowing or being able to state what

he had spent it for, and, if so, to what extent? A. Yes; to a great extent. Q. 11. Was John Garrett in his later life as prudent and careful in his money and business affairs as he was in his earlier life? A. No. Q. 12. During the last five or six years of his life, was John Garrett physically sound, or decrepit and feeble? A. Decrepit and feeble. Q. 13. Did he then walk with a firm and steady step, or with a shambling or stumbling gait? State how he walked. A. With a shambling gait. Q. 14. What was the mental capacity of John Garrett during the last four or five years of his life? A. Impaired. Q. 15. Was John Garrett, during the last four or five years of his life, and immediately preceding his death, capable and competent to manage and transact his more important business transactions? A. No. Q. 16. Were the intellectual faculties of John Garrett more acute or less acute in 1898 than in 1894 and 1895? A. Less acute. Q. 17. Were the intellectual faculties of John Garrett weakened or lessened between the years 1894 and January 1, 1899? A. Weakened and lessened. Q. 18. Did John Garrett at any time after 1895 possess the full use of his mental faculties? A. No. Q. 19. Was John Garrett, at the time the deed in question was executed, competent to transact his own important business affairs? A. No. Q. 20. Was the said John Garrett, at the time of the execution and delivery of the deed dated November, 1898, mentally capable of understanding the nature of his act, and the effects of the same? A. No. Q. 21. Was said John Garrett made acquainted with the contents of said deed at the time of its execution and delivery? A. Yes. Q. 22. By whom was John Garrett's name to the deed in question signed? A. By John Montgomery's clerk. Q. 23. Did John Montgomery sign the name of John Garrett to the deed in question? A. No. Q. 24. Did John Garrett on the 9th and 10th day of November, 1898, direct John Montgomery to execute the deed in question to John E. Kirkpatrick? A. Yes; on the 10th. Q. 25. If so, what instructions did he give him? A. To transfer as is described in the deed. Q. 26. Did John Garrett on the 9th and 10th day of November, 1898, when he directed John Montgomery, his attorney in fact, to make the deed in question to John E. Kirkpatrick, know what he was doing? A. Not fully, but sufficient for the purpose of making a valid conveyance of the property described in said deed to grantee, John E. Kirkpatrick. Q. 27. Did John Garrett at that time know what property he was conveying? A. Yes. Q. 28. Did he know to whom the property was being conveyed? A. Yes. Q. 29. Was it his desire and wish to convey the property in question to John E. Kirkpatrick? A. Yes. Q. 30. Did John Garrett at that time understand the nature and effect of the deed? A. Not fully. Q. 31. Was John Garrett on the 10th day of November, 1898, possessed of sufficient mental

capacity to understand an ordinary business transaction? A. Not fully, but sufficient for the purpose of making a valid conveyance of the property described in said deed to grantee, John E. Kirkpatrick. Q. 32. What was the consideration paid by John E. Kirkpatrick to John Garrett for the property in question, if anything? A. \$650. Q. 33. Did John Garrett on the 10th day of November, 1898, give any reasons to his attorney in fact, John Montgomery, for making the deed in question, other than the money consideration? A. Yes. Q. 34. If so, what reason did he give? A. That they had been good to him. Q. 35. Did John Garrett on or about the 6th day of November, 1895, execute and deliver to John E. Kirkpatrick a promissory note? A. Yes. Q. 36. What was the amount of and consideration of this note? A. Five hundred dollars (\$500), with interest at ten per cent. Q. 37. On the 6th day of November, 1895, at the time John Garrett executed and delivered the mortgage referred to in the complaint to secure the payment of a note for \$500 to John E. Kirkpatrick, did he know what property was covered by the mortgage? A. Yes. Q. 38. Did he know to whom the mortgage was given? A. Yes. Q. 39. Did he understand the nature and effect of the mortgage? A. Not fully. Q. 40. On the 6th day of November, 1895, at the time John Garrett executed and delivered the said mortgage, was he possessed of sufficient mental capacity to understand the nature and effect of an ordinary business transaction? A. Not fully. Q. 41. Was he possessed of sufficient mental capacity to understand the nature of the mortgage, and the effect of its execution and delivery? A. Not fully, but sufficient for the purpose of making a valid conveyance of the property described in said deed to grantee, John E. Kirkpatrick. Q. 42. Was any part of the principal or interest evidenced and secured by said note and mortgage ever paid before making the deed? A. No. Q. 43. What was the value of the land and water in question on November 10, 1898? A. Twelve and one-half dollars (\$12.50) per acre."

Many reasons are assigned why deceased, Garrett, was mentally incapacitated to make the conveyances in controversy. Old age, his firm belief in spiritualism, excessive use of intoxicating liquors, the loss of his wife a few years before the execution of the conveyances, are all urged as reasons for unbalancing his mind and rendering him incapable of knowing and fully understanding the effect of the conveyances. A great volume of evidence is before us of persons who were well acquainted with deceased for a number of years before his death. We have the evidence of Dr. J. W. Givens, superintendent of the Asylum for the Insane at Blackfoot, as an expert on the subject of insanity. Then we have the evidence of those who were acquainted with his daily habits. We do not feel justified in referring to this evidence

very extensively in this opinion, for the reason of the well-established rule that where a case comes to this court on appeal from a judgment based upon disputed facts in the lower court, either where the trial was with or without a jury, the judgment will be affirmed. As has been so often said by the courts of last resort, the trial court has many opportunities to see and know things connected with the trial that cannot be brought to this court in the record. Such courts have the opportunity of observing the manner and conduct of the witnesses, and their means of information. All evidence looks alike on paper, and then, under the rules, we get it in an abbreviated form. The district courts are the trial courts for actions of the character under consideration. Thus, unless it is very plain that the judgment is fatally defective, for want of sufficient evidence to sustain it, it should not be disturbed in this court. With these views, we have carefully examined the evidence in the case at bar, and find many conflicts as to the physical and mental condition of deceased, Garrett, dating from the early settlement of the country surrounding Blackfoot up to the time of his death. One witness testifies to an acquaintance with him dating back to 1863, and numbers of them, for both plaintiff and defendant, testify to an acquaintance dating back 20 or more years. It is shown by the evidence, beyond controversy, that in the later years of his life he was addicted to the use of intoxicating liquors to excess; that he was a firm believer in spiritualism; made many statements as to conversations with spirits—prominent were Cleopatra and Socrates—and claimed that his company was from the spirit world, that they (naming many of them) were frequently his visitors, and that he was never lonesome, for this reason. This may be considered evidence of insanity by some, and by others as a high order of intelligence and advancement in religion or science. It is shown that he was an educated man, and read other books than those treating on the subject of spiritualism—in fact, was what is termed a "great reader"—did not ignore politics, and was informed on, and ready to discuss, the current events of the times. It is also shown by the evidence of Mr. Gagon, who took his acknowledgment to the mortgage, that he believed him capable of knowing and fully understanding the nature of the transaction; also by the evidence of Mr. Montgomery, who was his attorney in fact at the time of the execution of the deed, that he believed he fully understood the transaction; and by the evidence of Mr. George L. Wall, who took his acknowledgment to the power of attorney appointing Norman Jones his attorney in fact. Mr. Wall says: "I explained to him what it was, and he said he knew what it was—a power of attorney firing J—— S——, and giving Norman Jones charge of his affairs, or words to that effect." Frank W. Beane testifies to business

transactions and conversations with deceased—some of them but a short time, about three weeks, before his death—and pronounced him sane. On the other hand, a number of witnesses, who had known deceased as long and as intimately as those who testify to his sanity, are of the opinion that he was incapable, by reason of his mental condition, of transacting business for himself, or of fully knowing and comprehending the nature and effect of the execution and delivery of the mortgage and deed to respondent. Dr. J. W. Given testifies as an expert on the subject of insanity. He is a recognized authority on this subject, not only in this state, but wherever he is known, and his evidence necessarily carries much weight with the court and jury. It will be observed that his answers were based upon the testimony of other witnesses and hypothetical questions, and not upon any knowledge or experience with the deceased. We have said the evidence on the material issues involved in this case was very conflicting. We find it so much so that we do not feel that we would be justified in saying that the findings of the court should be set aside and a new trial granted on this account.

Counsel for appellant, in the oral argument, relied on *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260. This was a case where an old, feeble woman conveyed her property to a stranger on certain conditions of payment, and, before any payments of consequence were made, she died. It was shown that, when she made and delivered the deed, no one was present except the grantee, his agent, and his attorney. The property was worth at the time of the conveyance between \$6,000 and \$8,000. It is said in this case: "In November, 1863, the defendant obtained from her a conveyance of this property. A copy of the conveyance is set forth in the bill. It contains covenants of seisin and warranty by the grantor, and immediately following them an agreement by the defendant to pay her \$250 upon the delivery of the instrument, an annuity of \$500, all her physician's bills during her life, the taxes on the property for that year, and all subsequent taxes during her life; also that she should have the use and occupation of the house until the spring of 1864, or that he would pay the rent of such other house as she might occupy until then. The \$250 stipulated were paid, but no other payment was ever made to her. She died in a few weeks afterward." The opinion then discusses the evidence as to the habits of deceased, certainly showing a much worse condition of mind than is shown of the deceased in the case at bar. It was not shown that the defendant—respondent—ever attempted to exert undue influence over the deceased, Garrett, or asked him to make the deed. He says, and it is not contradicted, that he wanted his money due him on the mortgage, but that his grandfather insisted on giving him the deed. It is shown that

Mr. Montgomery, who was attorney in fact for deceased at the time of the execution of the deed, refused to make it when he was first requested to do so by deceased, and on the next day deceased came back and insisted that the deed should be made and, when asked for his reasons, said they had been good to him—evidently meaning the Kirkpatrick family. From this evidence it is shown not only that deceased knew just what he wanted done, but, when asked, gave his reasons for the course he was taking. Many authorities are cited by counsel for appellant to the effect that whenever there is a great weakness of mind, arising from age, sickness, or other cause, in a person executing a conveyance of land, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper showing, and reasonable application of the injured party, or his representatives or heirs, annul and set the conveyance aside. We do not think this rule can be questioned, but, under the facts as established in this case, and the findings of the court, largely depending on the findings of the jury, it does not come within this rule. Counsel for respondent rely on the case of *Kelly v. Perrault*, 48 Pac. 45, 5 Idaho, 221. This opinion was written by Mr. Justice Quarles, and concurred in by all the members of the court. It says: "There is absolutely no evidence in the record before us which shows that at the time the deed in question was executed the grantor was under undue influence, but, on the other hand, the evidence of the subscribing witnesses to the deed, and of the witnesses to its delivery, as well as that of other witnesses, shows conclusively that the execution and delivery of the said deed was the free and voluntary act of the grantor, and made by him in pursuance of his preconceived determination to give the property conveyed by it to the grantee."

It is urged by counsel for appellant that there was error in the instruction given by the court, to wit: "The opinion of an expert is not entitled to much weight, as against the testimony of persons who are familiar with the party and the transaction, and who testify as to the facts from which the competency of a grantor is to be determined." This instruction was copied from the language of the opinion in *Kelly v. Perrault*, and in support of this position that opinion cites *Rutherford v. Morris*, 77 Ill. 397, and *Burley v. McGough*, 115 Ill. 11, 3 N. E. 738. These three cases are very instructive on the question under consideration. The language may be strong, but we do not think it was error.

A number of errors are assigned, but, owing to the fact that it is stated in the brief of appellant that the question upon which this case must be determined is whether or no deceased, Garrett, was so incapacitated at the time he executed the deed as to render him incompetent to know the effect of

his act, and all the evidence having been aimed at that feature of the case, we deem it unnecessary to pass thereon.

It is urged by counsel for appellant that if the court had adopted the findings of the jury, as they were returned, the judgment would have been in favor of appellant. The court had the right to adopt all the findings of the jury, or any portion of them, or reject any or all of them, and prepare its findings independent of theirs, and there was no error in the amendments to the findings of the jury complained of.

We find no error in the record, and the judgment of the trial court is affirmed. Costs are awarded to the respondent.

SULLIVAN, C. J., and AILSHIE, J., concur.

(9 Idaho, 577)

ABBOTT et al. v. REEDY et al.

(Supreme Court of Idaho. Feb. 6, 1904.)

APPEAL—CONFLICTING EVIDENCE—ISSUES COVERED BY PLEADINGS.

1. Evidence examined, and held, that there is a substantial conflict upon the point urged, and that the appellate court cannot, therefore, disturb the findings and judgment based thereon.

2. Where the issue as to the existence of a separate and distinct water right and appropriation is not made by the pleadings, and the proofs tend to establish such right, and no amendment of the pleadings is offered in the trial court, this court will not go beyond the issues so made to modify a judgment.

(Syllabus by the Court.)

Appeal from District Court, Blaine County; K. I. Perky, Judge.

Action by George H. Abbott and others against William B. Reedy and others. From a decree settling the respective water rights of all the parties defendant, John Wardrop appeals. Affirmed.

R. F. Buller, for appellant. L. L. Sullivan and T. W. Thomas, for respondents.

AILSHIE, J. This was a suit in equity, commenced by several plaintiffs in the district court in and for Blaine county, against numerous defendants, to determine the respective rights and priorities of water consumers on Soldier creek, in said county. Most of the defendants answered by way of cross-complaint, setting up their several interests and claims. The defendant Wardrop, who is the only appellant in this court, filed his answer and cross-complaint, specifically denying all the allegations of the complaint, and setting up a prior right to the use of the waters of said stream sufficient to irrigate a tract of 360 acres lying under the stream. The case went to trial, and the various plaintiffs and defendants introduced their evidence establishing, or tending to establish, their several rights and priorities, and thereafter findings of fact and conclusions of law were made, and judgment was thereupon entered decreeing the several in-

terests and priorities of the respective parties to the suit. The defendant Wardrop was awarded 120 inches, dating from November 30, 1882, and 125 inches dating from June 1, 1885. Wardrop was dissatisfied with the quantity of water awarded him by this decree, and thereupon prepared and had settled a statement on appeal containing the evidence which relates to his claims for the use of water and the dates from which he is entitled to have the same attach. It appears from the evidence, and was found by the court to be a fact, that this appellant had the oldest water right on Soldier creek, and that his claim was prior to all others in point of time. The question presented upon this appeal goes to the sufficiency, or rather insufficiency, of the evidence to justify the court in awarding the appellant the amount of water designated in the decree dating from the dates therein mentioned. It is here urged that the court should have awarded Wardrop two inches of water per acre, instead of one inch per acre, as provided for in the decree. It appears from the evidence of the defendant himself that he owned 360 acres of land on Soldier creek, and that 160 acres of this tract, which was farthest up the stream, was originally located and patented by him, and that he purchased the next claim of 120 acres below him from one C. E. Sampson, and another claim of 80 acres next below that from George Sampson. Appellant testified upon the trial as follows: "The C. E. Sampson place is the lower place—120 acres. About 100 acres of this can be irrigated. The main channel of the stream runs through 40 acres of that place and through the George Sampson place. Eighty acres—possibly 100 acres—of the 120 (C. E. Sampson place) is covered by the ditch or ditches that I have made on it. About 120 or 125 acres of my upper place is covered by my ditches, and I cultivate and irrigate 20 acres of the George Sampson place out of Soldier creek, and that is all that Soldier creek will cover on that 80." It will be seen from this evidence of the appellant that not exceeding 245 acres of his entire tract of 360 acres can be irrigated from his ditches. He was, therefore, according to his own evidence, awarded one inch of water per acre for all his land lying under his ditches. Upon this phase of the case there is no conflict in the evidence.

We next come to the question as to the amount of water necessary for successful irrigation of these particular tracts of land. Wardrop testified that he had been in the habit of using about two inches per acre, and that he thought it would take about two or two and a half inches per acre to successfully irrigate these lands. A number of witnesses were called, and testified as to the amount of water necessary to irrigate appellant's land, and most all of them testified that they thought one inch per acre was a sufficient quantity of water for that purpose. Some of the witnesses were men who had

had many years of experience in the irrigation of arid lands. A couple of them had been water masters in various irrigation districts in Idaho. The testimony of these witnesses was only an estimate on this point, but that estimate was based upon their knowledge of the country and class and character of land to be irrigated, and their experience in the irrigation of similar lands. Appellant was but little more definite and certain as to his estimate of the quantity of water necessary to irrigate his lands. It is true that he said he had been using about two inches per acre, but the law only allows the appropriator the amount actually necessary for the useful or beneficial purpose to which he applies it. The inquiry was, therefore, not what he had used, but how much was actually necessary. There was a clear and substantial conflict in the evidence as to the quantity of water per acre necessary for the successful irrigation of appellant's lands. This being the case, we cannot interfere with the findings of the trial court, or disturb the judgment founded thereon. It is unnecessary to cite the numerous cases decided by this court in which it has declined to disturb findings and judgments where there has been a conflict in the evidence.

It is also contended that the defendant Wardrop should have been awarded at least 25 inches of water, dating from 1887, diverted by means of a ditch three-quarters of a mile north of his ranch, and covering some 30 acres on the west side of the creek. There seems to have been only slight mention of this ditch and water right at the trial, and the appellant seems to have spoken of his ditches (in the plural) and the lands covered by them in such a general and indiscriminate way (as illustrated by the evidence above quoted) that we are not prepared to say from the record before us that appellant is entitled to any such right as now claimed. This also goes beyond the issue made by appellant's cross-complaint. By this complaint he claims a right dating from 1882, and another dating from 1885, but no claim was there made for any right dating from 1887. Under the pleadings and facts as presented here, we do not think we would be justified in directing any modification of the judgment upon this ground.

We therefore conclude that the judgment of the trial court must be affirmed, and it is so ordered, with costs to the respondents.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

(9 Idaho, 619)

COWDEN v. FINNEY, Sheriff.

(Supreme Court of Idaho. Feb. 13, 1904.)

CHATTEL MORTGAGE—UNRECORDED MORTGAGE—ACTUAL NOTICE TO PURCHASER—VALUE OF PROPERTY SEIZED.

1. Where a chattel mortgage has not been filed for record with the recorder of the county

¶ 1. See Chattel Mortgages, vol. 9, Cent. Dig. § 255.

where such property is located and kept, as required by section 3386, Rev. St. 1887, as amended (Sess. Laws 1899, p. 121), a subsequent purchaser of such property is not bound by the mortgage, unless he be shown to have had actual notice of the same.

2. *Held*, further, that where there is a direct and substantial conflict in the evidence as to whether the purchaser had actual notice of the mortgage, and the trial court finds that he had no such notice, the appellate court will not disturb such finding.

3. In an action to recover the possession of personal property wrongfully seized, or the value thereof in case a return cannot be had, the plaintiff cannot be limited in his right of recovery to the price for which defendant may have sold the same.

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Geo. H. Stewart, Judge.

Action by Ralph Cowden against William Finney, sheriff. Judgment for plaintiff, and defendant appeals. Affirmed.

Hawley, Puckett & Hawley, for appellant. W. E. Borah and Frank J. Smith, for respondent.

AILSHIE, J. This action was commenced by the plaintiff against the defendant, as sheriff, in the district court of Blaine county, for the recovery of the sum of \$21,474, as the value of a band of sheep which had been seized by the sheriff, and for damages for the detention thereof. The defendant answered, and admitted the seizure of the property, and justified the same under a chattel mortgage executed by one R. L. Shaw, alleging that due and regular affidavit and notice had been delivered to him requiring him to seize and sell the property in payment of the mortgage debt under the provisions of the statute providing for foreclosure proceedings of chattel mortgages. By a stipulation of the respective parties, the cause was transferred to Canyon county, and was there tried before the court without a jury. After all the evidence was introduced and the case was finally submitted, the court made his findings of fact and conclusions of law, and thereupon entered judgment in favor of the plaintiff for the sum of \$8,281.35, as the value of 2,629 head of sheep unlawfully seized and sold by the defendant, and for the costs of the action.

It appears from the record that on November 30, 1901, R. L. Shaw and J. B. Gowan were partners engaged in the sheep business in Canyon county and neighboring counties, and that on that date Shaw executed and delivered to the Flato Commission Company, a corporation, a chattel mortgage for the sum of \$18,625.55, covering a large number of sheep, cattle, and other personal property, and reciting therein that the sheep were located and kept in Ada county, state of Idaho. This mortgage was executed by Shaw individually, and it appears to have been for his individual debt, and purported to be given upon his individual property. It was not accompanied by an affidavit, as required by section 3386, Rev. St. 1887 (Sess. Laws 1899, p.

121). Shaw had no such property in Ada county, and none of the Shaw-Gowan sheep appear to have ever been kept in that county, but were, at the time of the execution of the mortgage, in Canyon county. In the spring of 1902, about 2,100 head were taken to Blaine county. The mortgage was never filed for record in Canyon county, and was not filed until July 23, 1902, in Blaine county—the county where the property was found and seized by the defendant sheriff on the following day. After executing this mortgage, Shaw disappeared, and, while it does not appear just when he left the country, it is conceded that it was prior to June 8, 1902. His whereabouts since that date seems to be a mere matter of speculation, and it appears that many persons have been anxious to see him. At this time the firm of Shaw & Gowan was indebted in the sum of \$4,000, and their creditors were beginning to urge payment. Thereafter, and on June 10, 1902, Gowan sold all the sheep belonging to the firm of Shaw & Gowan to the plaintiff in this action. At the time of the sale about 2,100 head of the sheep were in Blaine county, and the balance were in Boise county. It should be remembered that up to this time the Flato Commission Company's mortgage had never been filed for record in either of the counties of Blaine or Canyon, and could therefore give constructive notice to no one dealing with the property in those counties.

Upon the trial the defendant sheriff introduced evidence tending to show that the plaintiff, Cowden, had actual notice of the execution of the mortgage prior to the time of the purchase of the property which purported to have been covered by the mortgage. On this point there is a direct conflict, Cowden denying positively that he had any intimation as to the existence of the mortgage, while one witness for the defendant claims that either on the day prior to the purchase, or the day of the purchase, appellant told the witness about Shaw's conduct and of the existence of this particular mortgage. There are some things connected with this purchase on the part of the appellant which do not entirely satisfy us of the fairness of the transaction, and, if the evidence as presented in the record were before us in the first instance for our consideration, we might find differently; but since there is a direct conflict in the evidence upon this point, and the trial court has heard the same and made his findings thereon, we cannot disturb such findings and judgment.

Several other questions have been discussed in this case, but we will only notice the objections urged to the rulings of the court as to the admission and rejection of evidence. The plaintiff was permitted to introduce some evidence that we think was immaterial to prove any issue in the case; but since we have concluded that appellant could not have succeeded at the trial upon any theory of the case without showing that plaintiff had, prior

to the purchase of the property, either actual or constructive notice of the execution of that mortgage, and none of the evidence of which appellant here complains having been directed either to the proving or disproving of this particular issue, its admission or rejection could not have in any way affected him as to the final result of his case. We therefore conclude that appellant was not prejudiced by the action of the court in reference to the admission or rejection of such evidence.

Appellant also complains of the action of the court in receiving testimony as to the value of the property at the time and place of its seizure by the sheriff. We have carefully examined all this testimony, and think it was competent and properly admitted, and that the value allowed the plaintiff was fairly established by the proofs. Counsel argues that the plaintiff should have been limited in his right of recovery to the amount for which the property was actually sold in the Chicago market, less the cost and expenses of delivering them to that market. We cannot agree to such a method of fixing the value of property which has been wrongfully converted. The price received might or might not be the true value of the property, but the plaintiff in such cases cannot be limited in his right of recovery to any bargains the defendant may make as to the price thereof.

The judgment and order denying a new trial are affirmed, with costs to respondent.

SULLIVAN, C. J., and STOCKSLAGER, J., concur.

(9 Idaho, 626)

COWDEN v. MILLS, Sheriff.

(Supreme Court of Idaho. Feb. 13, 1904.)

UNRECORDED MORTGAGE—ACTUAL NOTICE TO PURCHASER—VALUE OF PROPERTY SEIZED—DAMAGES.

1. Where a chattel mortgage has not been filed for record with the recorder of the county where such property is located and kept, as required by section 3386, Rev. St. 1887, as amended (Sess. Laws 1899, p. 121), a subsequent purchaser of such property is not bound by the mortgage unless he be shown to have had actual notice of the same.

2. Held, further, that where there is a direct and substantial conflict in the evidence as to whether the purchaser had actual notice of the mortgage, and the trial court finds that he had no such notice, the appellate court will not disturb such findings.

3. In an action to recover the possession of personal property wrongfully seized, or the value thereof in case a return cannot be had, the plaintiff cannot be limited in his right of recovery to the price for which defendant may have sold the same.

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Geo. H. Stewart, Judge.

Action by Ralph Cowden against J. C. Mills, Jr., sheriff, to recover possession of certain sheep. Judgment for plaintiff, and defendant appeals. Affirmed.

¶ 1. See Chattel Mortgages, vol. 9, Cent. Dig. § 253.



Hawley, Puckett & Hawley, for appellant.  
W. E. Borah and Frank J. Smith, for respondent.

**AILSHIE, J.** This is an action brought by the respondent against J. C. Mills, Jr., as sheriff of Boise county, to recover the sum of \$20,866.50, alleged to be the value of a certain band of sheep seized by him on the 1st day of August, 1902. By stipulation of the respective parties the case was transferred from Boise county to Canyon county, and was there tried before the court without a jury. The answer made by the sheriff admitted the taking, and pleaded a justification thereof under notice and sale for the foreclosure of a certain chattel mortgage executed on the 30th day of November, 1901, by one R. L. Shaw in favor of the Flato Commission Company, a corporation, mortgagee. The mortgage under which the sheriff seized this property is the same instrument referred to in the case of *Cowden v. Finney*, 75 Pac. 765 (decided by this court at the present term). The facts and circumstances connected with making and executing this mortgage are the same as set out in that opinion, and the ownership, situation, and location of the property is there sufficiently set forth, and we do not deem it necessary to repeat it here. The same evidence was given in this case as in the *Cowden-Finney* Case with reference to any actual notice which the plaintiff, Cowden, had as to the execution or existence of the mortgage. At the time the mortgage was made the property was located in Canyon county, but the mortgage was never filed for record there. At the time of the seizure of the band of sheep in controversy in this action they were located and kept in Boise county, and had been grazing in that county for considerable time prior thereto. The mortgage was never recorded in Boise county until July 31, 1902, which was one day prior to the seizure of the property by the sheriff in the foreclosure proceedings.

The facts above set forth, read in connection with those detailed in the *Cowden-Finney* Case, constitute a sufficient statement for the determination of this case. It should be borne in mind that the plaintiff claims to have purchased the sheep on or about June 10, 1902, which was long prior to the filing of the mortgage for record. Since plaintiff had no record notice of the existence of this mortgage, and there was a direct and substantial conflict in the evidence as to whether or not he had actual notice of the mortgage, and the trial court having found in favor of the plaintiff's contention, we have concluded that the case must be disposed of upon that point. The defendant sheriff could not have succeeded on any theory of the case as made by the pleadings, unless he could establish the fact that the plaintiff had either actual or constructive notice of the existence of this mortgage prior to the purchase of the property. The trial judge found

that he had failed to establish that fact, and it was therefore impossible for him to succeed upon the trial.

We think the court improperly admitted some of the evidence offered by the plaintiff, but since none of it tended to either prove or disprove notice to the plaintiff of the existence of this mortgage, it did not affect the defendant's right of recovery, and it was therefore not prejudicial to him in this action, and what we have said in the *Cowden-Finney* Case with reference to such evidence is applicable here.

The same question arises in this case as to the admission of evidence touching the value of the property at the time and place of its seizure. This evidence was of the same kind and character, and admitted on the same theory, as was similar evidence in the *Cowden-Finney* Case, and what we have there said with reference to this question applies here with equal force.

For the reasons here stated, and upon the authority of *Cowden v. Finney*, supra, the judgment and order appealed from are affirmed, with costs to respondent.

**SULLIVAN, C. J., and STOCKSLAGER, J., concur.**

(142 Cal. 201)

**SULLIVAN v. CALIFORNIA REALTY CO.**  
(L. A. 1,395.)

(Supreme Court of California. Feb. 12, 1904.)

**BUILDING CONTRACT—CANCELLATION—VALIDITY BETWEEN PARTIES—MATERIAL ALTERATION—FINDINGS BY COURT—CROSS-COMPLAINT—AFFIRMATIVE JUDGMENT—JURISDICTION.**

1. Code Civ. Proc. § 1183½, which makes void a building contract for over \$1,000 where plans and specifications referred to therein are not completed and signed at the time of its execution, was intended to protect subcontractors, materialmen, artisans, and laborers, and preserve their rights to liens, and it does not authorize one of the original parties to such a contract to claim that by reason of his own failure to comply with the statute it is void as to him, without showing or claiming any damage therefrom.

2. A contract will not be canceled if there is no offer by plaintiff to pay for work done and material furnished by defendant thereunder, or to place the latter in his former position.

3. An erasure, in a building contract, of words acknowledging the receipt of payment of the first installment due thereunder, is not material where the installment has not in fact been paid.

4. A finding that words in a contract were attempted to be erased does not imply that they were erased.

5. In an action brought in the superior court to cancel a building contract, wherein plaintiff failed to establish his case, and defendant established a just claim for less than \$300 under a cross-complaint for an installment due him under the contract, the court had jurisdiction to give him an affirmative judgment, under Code Civ. Proc. § 442, authorizing a cross-complaint whenever a defendant seeks affirmative relief depending on the contract or transaction on which the action was brought.

¶ 2. See *Cancellation of Instruments*, vol. 8, Cent. Dig. §§ 32, 33.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; W. P. Conrey, Judge.

Action by John Sullivan against the California Realty Company. From a judgment for defendant, plaintiff appeals. Affirmed.

G. C. De Garmo, for appellant. Chas. H. Mattingly, for respondent.

COOPER, C. Appeal from judgment on the judgment roll.

In August, 1901, plaintiff and defendant entered into a written contract by the terms of which defendant was to construct a dwelling house for plaintiff, upon a lot described in the contract, for the sum of \$1,060, payable in installments as provided therein. The defendant proceeded to place materials upon the ground, and began the work, as contemplated by the terms of the contract, when this action was commenced by the plaintiff for the purpose of having the contract declared void, delivered up, and canceled, and to enjoin the defendant from further proceedings thereunder. The defendant answered, and, in addition to the denials contained in its answer, set up, by way of cross-complaint, that the plaintiff was indebted to it in the sum of \$180, being the first installment due under the contract, for which sum it prayed judgment. The case was tried before the court, and upon the findings, which are not challenged, judgment was entered for defendant for the amount claimed in its cross-complaint. Plaintiff insists that the judgment is erroneous, for certain reasons herein discussed in their order. He contends that the contract is void for the reason that the plans and specifications for the building were not signed by the parties, and recorded, as provided by section 1183½, Code Civ. Proc., which was in force at the time of making the contract. The section, so far as material here, reads: "Whenever such contract [over \$1,000] refers to plans and specifications in accordance with which the work is to be done, it shall be void unless such plans and specifications be completed and signed by the parties to the contract at the time of the execution thereof." Plaintiff, being one of the original parties to the contract, and having made and signed it without showing or claiming any damage by reason of the failure to sign the plans and specifications, now claims that, by reason of his own failure to comply with the statute, the contract is void as to him.

We conclude that, for the reasons fully given in the late case of *Laidlaw v. Marye*, 133 Cal. 176, 65 Pac. 391, the plaintiff cannot claim the contract to be void as between the parties to it. The statute was intended for the protection of subcontractors, materialmen, artisans, and laborers, and to preserve to them the right to liens. They are not parties to the contract, and may be justly entitled under the law to the value of their ma-

terials and labor, even though the original parties fail to make the contract as directed by the statute. In *Laidlaw v. Marye*, the court said: "But the law never meant to reward the contractor for his disobedience, by conferring upon him, for its violation, greater rights than would have been his had he obeyed it. Therefore, as between him and the owner, the contract must remain, not the basis of his recovery, but the measure and test of his rights to recover. He must still show a substantial compliance with its terms to warrant any recovery at all, and the measure of his recovery, even under implied assumpsit, must be limited as to him by the contract price. \* \* \* This declaration of law, we think, is eminently just and sound. It is, as was before said, a rescission from the earlier views of the court, and a declaration of the true principle. It is applicable to every case where the contract fails for lack of recordation; for in all of them it is still the understanding of the parties that such work, and only such work, as is called for by the terms of the contract, shall be performed."

In addition to what has been said concerning the validity of the contract as between the parties, even if it be conceded that the contract is void, the plaintiff cannot be allowed, under the facts of this case, to have a decree canceling it. He alleges, and the court finds, that since making the contract the defendant placed upon the lot certain building material, and commenced work and operations under the said contract. There is no offer by plaintiff to pay for this work or material, or to place the defendant in his former position. Plaintiff cannot have the aid of a court of equity for the purpose of canceling a contract without offering to do equity on his part.

Plaintiff claims that the court found that defendant altered the contract in a material respect after it was executed, and that for this reason it is void. The finding on this point is: "That plaintiff and defendant entered into said contract in good faith, and for a valuable consideration; that after said contract was signed and entered into by plaintiff and defendant, and after the failure and refusal of plaintiff to pay the first installment of \$180 according to the terms of said contract, the defendant, without the knowledge and consent of the plaintiff, made an attempted erasure of the following words of said contract by drawing a pen and ink mark through them: 'One hundred and eighty dollars, cash, the receipt of which is hereby acknowledged to Davis & Company;' that there was no agreement between plaintiff and defendant whereby Davis & Co. were to become parties to said contract, or that said contract was not to become operative until said Davis & Co. should sign the same; that said contract contains all the terms and conditions thereof between the parties thereto; that there was no written, oral, or other contract between the parties

to this action with respect to the subject-matter embraced in said contract." The court elsewhere found "that the plaintiff at all times has failed and refused, and still fails and refuses, to pay the first installment of \$180 under said contract." As neither plaintiff nor Davis & Co. paid the \$180, the question of erasure was wholly immaterial. The court found the contract, with the words claimed to have been erased as part thereof. That the words were attempted to be erased does not imply that they were erased. The court found that they were not, and disposed of the case on that theory. In order to affect the question of the admissibility of a writing in evidence, it must appear that the alteration was in a part material to the question in dispute. If so, the party offering the instrument may show that the alteration was made by the consent of the parties, or properly or innocently made, before he can introduce it in evidence. Code Civ. Proc. § 1982. The court here finds that the alteration was made without the knowledge or consent of the plaintiff, but does not find that it was not properly or innocently made. For aught that appears, the plaintiff himself may have and probably did introduce the contract in evidence. As the court found it, in the language in which it was originally made, the attempted erasure becomes immaterial. The language used in plaintiff's brief shows the point untenable, for he says: "The second point raised by appellant is that after appellant refused to pay respondent \$180, which, according to the terms thereof, was payable on the day of the contract, respondent, without the knowledge or consent of appellant, made an attempted erasure of that part of the contract which would constitute a receipt for said sum of \$180, which appellant refused to pay according to the contract." If we are to understand from this that appellant, while admitting his refusal to pay the \$180, desired the court to consider the erased part of the contract for the purpose of evidence, in order to show that he had paid it, it is evident that his position finds no support in law or fair dealing between man and man.

Finally, it is claimed that, as the amount under the cross-complaint is less than \$300, the court had no jurisdiction to give defendant a judgment for the amount found due him. This presents the question as to whether or not, in an action brought in the superior court, where plaintiff fails to prove his allegations and the defendant established a just claim for less than \$300 under his cross-complaint, the court has jurisdiction to give defendant an affirmative judgment. If plaintiff had not brought defendant into court to answer concerning the contract, the superior court would have had no jurisdiction as to the \$180 due on the first installment. But the plaintiff sought relief concerning the contract and transaction set forth in his complaint, and sought to be relieved from the payment of the \$180 and all other amounts

that might accrue under the contract. The defendant sought to establish the fact that plaintiff was liable for the \$180 and for all sums that might become due under the contract. The result of the judgment was that plaintiff was held to be bound by the contract, and, necessarily, that that portion of it under which the \$180 had become due was valid. The plaintiff having invoked the aid of the court in order to obtain affirmative relief, the court had power in the one case, and then and there, to give defendant judgment for such sum as had become due under the contract. Its power extended equally to each and every part of the case, and to every issue therein. A court of equity is not so impotent that it can find that a contract is valid and that \$180 is due to the defendant thereunder, and yet not be able to give defendant a judgment. The Code provides (Code Civ. Proc. § 442): "Whenever the defendant seeks affirmative relief against any party relating to \* \* \* the contract or transaction upon which the action is brought, \* \* \* he may, in addition to his answer, file at the same time \* \* \* a cross-complaint." It is clear that the defendant sought affirmative relief depending upon the contract and transaction upon which the action was brought. Although plaintiff sought to have the contract canceled, yet his action was based upon it, and was for relief concerning it. In *Freeman v. Seitz*, 126 Cal. 292, 58 Pac. 690, in speaking of a counterclaim for less than \$300 under a similar section of the Code, this court said: "The law abhors a multiplicity of actions, and the evident intent of the Legislature, in passing the Code provision, was that all matters that may be the subject of litigation between the parties, within the limitations prescribed, shall be settled in the one action." The object of a counterclaim is to prevent litigation by enabling the parties to arrive at an adjustment of their mutual demands in a single action. *Waddell v. Darling*, 51 N. Y. 327; *Allen v. Shackleton*, 15 Ohio St. 145. The Code provision should receive a liberal construction to the end that controversies between the same parties and concerning the same subject-matter may be adjusted in one proceeding. *Glen and Hall Co. v. Hall*, 61 N. Y. 226; *Van Brunt v. Day*, 81 N. Y. 251. It was intended to abrogate the rule previously existing, and to enable litigants to adjust all differences as effectually as they might do by bill and cross-bill in equity. *Gleason v. Moen*, 2 Duer, 642; *Boston Silk Works v. Eull*, 37 How. Prac. 299. The complaint stated facts giving the superior court jurisdiction. When such jurisdiction attached in an equity proceeding, it attached for all purposes connected with the case. It has accordingly been held that when the superior court has jurisdiction of the original case, and an indemnity bond was given by several sureties, with a several liability of each for less than \$300, the superior court had jurisdiction, upon motion under section 1055, Code

Civ. Proc., to order judgment against each surety for the amount for which he was severally liable. *Moore v. McSleeper*, 102 Cal. 277, 36 Pac. 593. It was held that this court had jurisdiction on appeal from an order made after final judgment directing the payment of a sum less than \$300, as the superior court had original jurisdiction as to the subject of the action. *Harron v. Harron*, 123 Cal. 509, 56 Pac. 334. So, where the defendant recovered a judgment upon his counterclaim for the sum of \$1 and costs, the judgment was affirmed here, although the question as to the jurisdiction of the court to render such judgment was not discussed. *Davis & Son v. Hurgren & Anderson*, 125 Cal. 48, 57 Pac. 684. And in all cases at law, where the complaint states a cause of action giving the superior court jurisdiction, the plaintiff may recover judgment for a less sum than \$300, the only penalty being that he cannot recover costs. Plaintiff relies upon *Griswold v. Pieratt*, 110 Cal. 259, 42 Pac. 820. There the counterclaim did not arise out of the transaction set forth in the complaint. That case is discussed and distinguished in *Freeman v. Seltz*, and it is not necessary to repeat the reasons therein stated.

We advise that the judgment be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

(142 Cal. 208)

MILLER & LUX et al. v. ENTERPRISE CANAL & LAND CO. et al. (MOWRY, Intervener). (S. F. 2,715.)\*

(Supreme Court of California. Feb. 12, 1904.)

WATERS — NAVIGABILITY — EVIDENCE — OBSTRUCTION OF STREAM — INJUNCTION — DEFENSES — APPEAL.

1. The navigability of a stream is shown where it appears that a great many years previously boats navigated it at certain seasons of the year, and there is no evidence that its condition has changed.

2. In a suit by the owner of a dam across a navigable stream to restrain defendants from diverting water above plaintiff by means of a dam erected subsequent to plaintiff's operations, the fact that plaintiff was obstructing a navigable stream was no defense.

3. Code Civ. Proc. § 653, providing that a judge may settle and sign a bill of exceptions after he ceases to be such judge, will not be held unconstitutional, since the power has generally been considered as valid, and acted on, and the principle of stare decisis is applicable, though the question as to the statute may not have been decided.

In Banc. Appeal from Superior Court, Fresno County; J. R. Webb, Judge.

Suit by Miller & Lux and another against the Enterprise Canal & Land Company and another, J. C. Mowry intervening. From that portion of the judgment denying relief

to the San Joaquin & Kings River Canal & Irrigation Company, it appeals. Reversed.

Geo. A. Rankin and Houghton & Houghton (Frank H. Short, of counsel), for appellant. W. E. Grave, Caldwell & Borland, Octave G. Du Py, N. C. Caldwell, and Archibald Borland, for respondents. Mastick, Van Fleet & Mastick and Isaac Frohman, for intervenor.

McFARLAND, J. This is an action to restrain the defendants from diverting water from the San Joaquin river by means of a certain dam and ditch. The plaintiffs Miller & Lux and the Intervener, Mowry, assert rights as riparian owners on the river below defendants' dam. The plaintiff the San Joaquin & Kings River Canal & Irrigation Company asserts rights as the owner of a ditch constructed long prior to that of defendant, and also as a riparian owner on the said river. The court below rendered judgment as prayed for against defendants in favor of Miller & Lux and the Intervener, and there is no appeal from such judgment; but the court found that there was no evidence introduced as to the ownership or riparian character of any land of the other plaintiff, and that "for purposes of the issues in this case only" its allegations as to its ownership of lands are not proved. The court also refused to give any judgment in favor of said plaintiff, and rendered, as part of the judgment, the following: "It is further ordered, adjudged, and decreed that the plaintiff the San Joaquin & Kings River Canal & Irrigation Company take nothing as against the defendants the Enterprise Canal & Land Company and Jefferson G. James, or either of them," and from this part of the judgment the said last-named plaintiff appeals. As the defendant James claims under the other defendant, the questions involved on this appeal may be considered as being solely between the appellant and the Enterprise Canal & Land Company, respondent.

The following facts were averred in the complaint and found by the court: The appellant, the San Joaquin & Kings River Canal & Irrigation Company, was organized as a corporation for the purpose, among other things, of constructing canals from the San Joaquin river and other streams for the irrigation of agricultural lands and supplying the inhabitants of cities and towns with pure and fresh water. The San Joaquin river is a natural water course arising in the Sierra Nevada Mountains, and flowing through the San Joaquin valley. The appellant "is now, and for upwards of twenty-five years before the commencement of this action has been, the owner and in the possession of a water ditch or canal known as the 'San Joaquin and Kings River Canal,' with the lateral branches thereof"; and appellant "for more than twenty-five years before the commencement of this action has appropriated, taken out of,

\*Rehearing denied March 11, 1904.

and diverted from said San Joaquin river, through said canal, six hundred cubic feet per second of the waters of said river, and said water has, when so appropriated, taken out, and diverted, been used by said plaintiffs, or furnished to others to be used, for domestic, agricultural, stock, mechanical, manufacturing, and for other useful and beneficial purposes." The length of the main canal is "upwards of seventy-four miles," and the appellant has constructed and now uses and maintains "lateral and parallel canals in connection with said main canal of upwards of one hundred and twenty miles in length, which are in actual use for taking water from the said main canal which is used for the purpose of irrigating many thousand acres of agricultural land whereon cereals and other crops are raised, and whereon a large number of sheep and other domestic animals are pastured." The appellant also "is, and for more than three years before the commencement of this action has been, the owner and in possession of the water ditch or canal known as the 'Outside Canal' of the San Joaquin & Kings River Canal, with the lateral branches thereof," and for more than three years before the commencement of this action appellant by means of this last-named canal has appropriated and diverted from the said San Joaquin river 300 cubic feet of water per second, and has used the same for the useful and beneficial purposes above mentioned. This Outside Canal is in length "upwards of thirty-four miles," and its lateral branches are "upwards of forty miles in length." At the commencement of this action the land that is irrigated by appellant's canals "were occupied and cultivated by a large number of persons who were owners or tenants of said lands," who had on said lands "many thousand acres of growing crops" and were using also "a large number of acres of said lands for pasture for cattle, sheep, and other domestic animals, which animals were of great value." These canals, "except in unusually wet weather," cannot be supplied with water from any source other than the San Joaquin river. During the year 1898—the year before the commencement of this action, which was commenced March 8, 1880—the respondent the Enterprise Canal & Land Company "wrongfully dug away and removed a part of the bank of said San Joaquin river at a point \* \* \* above the said lands of plaintiff and above the said canals of plaintiff, and constructed a large canal or ditch running away from said river at that point, and known as the 'Enterprise Canal & Land Company Canal.'" That on or about the 1st day of March, 1899, the respondents "wrongfully and without right, by means of dams, levees, sticks, earth, and other obstructions by them wrongfully placed in the bed and channel of said San Joaquin river, obstructed the flow of said river and of the water to which plaintiffs were and are entitled as

aforesaid, flowing down the plaintiffs' canals, and to the plaintiffs' lands," and caused the same to flow through respondents' said canal. At the time of this diversion by respondents there was flowing in said river "not to exceed 650 cubic feet of water per second." The court also finds that "the defendants, the Enterprise Canal & Land Company, and Jefferson G. James, or their agents, servants, or employes, are not entitled to take or divert any of the waters flowing in said San Joaquin river."

If there were no facts in the case other than those above stated, there would seem to be no plausible reason for denying appellant any relief. Upon these facts the respondents would be simply naked trespassers, taking from the appellant property of immense value which it had owned and possessed for a great many years, and in which respondents had no rights whatever. We learn, however, from counsel, that the refusal of the court below to grant appellant any relief was based upon two other findings, to wit: First, that the San Joaquin river, at the point where appellant's canal taps the same, is a "navigable stream"; and, second, that the dam by which appellant diverts the water into its canals obstructs the navigation of said stream. And it is contended that for these reasons the appellant, notwithstanding its long ownership and possession of this valuable and useful property, is without any legal means to protect it against trespassers, and that appellant and a large number of persons, the value of whose lands is dependent upon the water furnished by said canals, are at the mercy of any one who, without any right whatever, may choose to prevent such water from flowing into said canals, and thus practically destroy the entire property of appellant therein. It is contended by appellant that the two findings last above referred to are not sustained by the evidence, but we do not think that this contention can be maintained. There was no evidence that the stream in question was navigable for several years before the commencement of this action; but there was evidence that a great many years ago boats and barges did, at times, at certain seasons of the year, pass up and down it, and, as there was no evidence that the condition had changed, it must be held that for the purposes of this appeal the stream is, in a legal and technical sense, "navigable." There is, however, no evidence that there are any persons desirous of navigating the stream, or that this navigability is of any value. And while the evidence of the effect of appellant's dam on the navigability of the stream is not very conclusive, still it is sufficient to warrant the court below in finding that it would, to some extent, obstruct such navigability, although it does not appear that any one who desired and attempted to navigate it was ever prevented from doing so by the said dam.

The position of respondents is that the obstruction of a navigable stream is unlawful, and a public nuisance, and that because appellant's dam, by which it diverts water into its canal, obstructs the navigability of the San Joaquin river, it cannot have the aid of a court of equity to protect its property against even a mere trespasser. The respondents themselves professedly have no right in the premises. They do not claim that, as persons desirous of navigating the stream, they have sustained any special damage, or any damage at all. They do not assert any right to navigation, but show that they themselves are trying to obstruct navigation by an act which they assert to be unlawful. They stand upon the bald proposition that although, under the general law, the appellant has clearly property rights with which they are interfering, appellant is helpless to assert those rights or to stop respondents' trespasses. The contention of respondents rests on certain maxims—as that "no one acquires a right of action from his own wrong"; "out of a base transaction a cause of action does not arise"; "he who comes into equity must come with clean hands," etc. But these maxims have their limitations, and will not be allowed to work a great injustice and wrong, when the alleged unlawful act is entirely unconnected with any transaction between the parties to the suit. Usually these maxims cannot be successfully invoked where the objectionable act in no way affects the equitable relations existing between the parties. *Pomerooy*, speaking of the maxim that "he who comes into equity must come with clean hands," after declaring that the principle "must be taken with reasonable limitation," says: "The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties and arising out of the transaction. It does not extend to any misconduct; however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern." The same rule is declared in *Langdon v. Templeton*, 66 Vt. 173, 182, 28 Atl. 866, and in *Meyer v. Yesser*, 32 Ind. 294, it was held—in line with the general principle—that fraud without injury is never available as a defense in equity. The same principle was declared in *Ely v. Supervisors*, 36 N. Y. 297, where it was held that in an action for the destruction of property by a mob the fact that the houses destroyed were used for illegal purposes was no defense, and in *Lawrence v. M. E. R. Co.*, 126 N. Y. 483, 27 N. E. 765, 13 L. R. A. 102, where it was held that in an action for damages to premises by the maintenance of an elevated railroad it was no defense that a house on the premises

was kept as a house of prostitution. In the case at bar it does not appear that the maintenance of appellant's dam—whether unlawful or not—in any way affected the equitable relations existing between appellant and respondents. It had nothing to do with any contract or transaction whatever between said parties. Respondents do not represent the state or any person who suffered special damage from the alleged public nuisance. The state has allowed the maintenance of the dam for a long period of time, and it may never conclude to interfere to inquire into its lawfulness in the interest of a mere potential navigability which is apparently of little consequence, when such interference might destroy what, in this instance at least, seems to be a much more valuable public use of the water of the stream for irrigation. At all events, the state should be heard on that question; and in this private suit the decision should be in accordance with the rights of the individual parties as against each other, leaving the state or the federal government to determine whether or not it will initiate proper proceedings to inquire into the alleged public nuisance. Under the general law governing the acquisition of property in the use of water, as determined by the decisions of the courts, the appellant has, as against respondents, a complete right to have the water of the stream in question flow into its canals as it has flowed therein for many years, and to a decree restraining respondent from preventing such flow. The issue here is simply between the appellant and the respondents, not between the former and the state. In accordance with these views, the part of the judgment appealed from which refuses any relief to the appellant is erroneous, and should be reversed. (In their brief respondents argue that appellant also interfered with navigation by taking water out of the river, thus diminishing its current; but there is no averment of that kind in their answer, and, moreover, the effect of that kind of obstruction, so far as this action is concerned, is covered by the views above expressed.)

There is a bill of exceptions in the record, which was settled by the judge of the superior court before whom the case was tried after his term of office had expired; and it is contended by respondents that this bill cannot be considered, because the part of section 653, Code Civ. Proc., which provides that a judge "may settle and sign a bill of exceptions after as well as before he ceases to be such judge" is unconstitutional, as attempting to confer the power to do a judicial act upon one who is not a judicial officer. This power, however, has been continuously recognized and declared by this court for too long a period of time to be now questioned. *Cummings v. Conlan*, 66 Cal. 403, 5 Pac. 796, 903; *Leach v. Aitken*, 91 Cal. 484, 28 Pac. 777; *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129. The bar has, no doubt, generally con-

sidered the power as valid, and acted upon it; and numerous cases are probably here, or on their way to this court, in which the bills of exceptions and statements have been settled as in the case at bar, and great injustice would be done if former rulings on the matter were not adhered to. And although the point of the unconstitutionality of the section may not heretofore have been expressly raised and decided, still we think the principle of the rule of stare decisis should apply, and the settlement of the bill be held to be valid.

We see no necessity for another trial of this case. The findings show that appellant's main canal carries 600 cubic feet of water per second from said stream, and that the Outside Canal carries 300 cubic feet per second "of the water of said San Joaquin river," and upon the findings the appellant is entitled to a judgment against respondents restraining them from any diversion of water from the said river which will interfere with the flowing of said amounts of water, respectively, into said two canals of the appellant.

The part of the judgment appealed from is reversed, and the superior court is directed to render judgment in favor of the plaintiff and appellant, the San Joaquin & Kings River Canal & Irrigation Company, and against the defendants and respondents, the Enterprise Canal & Land Company and Jefferson G. James, enjoining and restraining them from any diversion of the water of the San Joaquin river through the Enterprise Canal & Land Company Canal, or by any means whatever, at any point on said river above the heads of appellant's two canals, which will obstruct or interfere with the flow of 600 cubic feet per second of the water of said river into appellant's main canal, known as the "San Joaquin & Kings River Canal," or which will obstruct or interfere with the flow of 300 cubic feet per second of the water of said river into the canal of appellant known as the "Outside Canal."

We concur: BEATTY, C. J.; HENSHAW, J.; SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.; LORIGAN, J.

(142 Cal. 173)

TOWN OF UKIAH CITY v. UKIAH WATER & IMPROVEMENT CO.

(S. F. 2,830.)\*

(Supreme Court of California. Feb. 10, 1904.)

**MUNICIPAL CORPORATIONS—CONTRACT WITH WATERWORKS COMPANY—GENERAL FIRE PROTECTION—LOSS OF MUNICIPAL PROPERTY—LIABILITY OF COMPANY—DUTIES IMPOSED ON COMPANY—EVIDENCE TO ESTABLISH CONTRACT.**

1. Where a city attaches fire hydrants to the mains of a water company, and by ordinance regulates the charge therefor, which the company collects, a contractual relation is established relative to furnishing water for fire pro-

tection, no statute requiring a formal written contract to bind the city.

2. A water company contracting with a city to furnish water for general fire protection is bound to use ordinary care to supply a sufficiency therefor.

3. A city which, under its power to conserve the general public good, contracts with a water company for general fire protection, has no cause of action against the company for municipal property destroyed by fire through the company's failure to supply a sufficiency of water.

Department 2. Appeal from Superior Court, Mendocino County; F. M. Angellotti, Judge.

Action by the town of Ukiah City against the Ukiah Water & Improvement Company. From an order granting a new trial after judgment for plaintiff, it appeals. Affirmed.

W. S. Goodfellow, J. C. Ruddock, and Seawell & Pemberton, for appellant. McGarvey & Bledsoe, for respondent.

HENSHAW, J. This action was instituted by the town of Ukiah City to recover damages against the defendant water company for the destruction of plaintiff's property by fire, the liability of defendant being predicated upon its negligence, and upon the breach of its contract with the plaintiff for supplying water in its supply pipes and fire hydrants under sufficient pressure for effective use. A general demurrer was interposed to the complaint and overruled. The defendant answered, and trial was had, resulting in a verdict of the jury, under the instructions of the court, in favor of the plaintiff. The defendant moved for a new trial, which motion was granted, and plaintiff appeals from this order.

The learned judge of the trial court expressed his views upon granting the motion for a new trial in the following language:

"The case presents the novel question as to the extent of liability on the part of one engaged in the business of furnishing water appropriated for sale, rental, and distribution, to a municipality, to which it has undertaken for a consideration to furnish water for the extinguishment of fires within the municipal limits, the property of which has been destroyed by fire by reason of the failure of such person to furnish water under a sufficient pressure at the time of the breaking out of the fire, such failure being due to negligence on the part of such person. It cannot be seriously disputed that the evidence adduced on the trial of this case warranted the jury in finding the facts to be as embodied in the above proposition, at least as to a portion of the property destroyed by fire. It appeared that defendant corporation was at the time of the fire, July 16, 1899, and for more than six years immediately preceding that time, engaged in the town of Ukiah City in the carrying on of the business or employment for which it was incorporated, viz., the maintenance and operating of waterworks in said town, and the furnishing to said town and its inhabitants of pure, fresh

\*Rehearing denied March 11, 1904. BEATTY, C. J., dissenting.

water for all purposes. It further appeared that, at the time the defendant commenced business, hydrants for fire purposes were connected with its mains and pipes at various places in the streets of said town, in such a manner that there was no way to shut water out of the hydrants except by shutting off the mains. That these hydrants, which, according to the testimony of witness Smith, were owned by plaintiff, have ever since been maintained and used by the town almost solely for the extinguishment of fires, and that in each of the ordinances passed from year to year by the trustees of plaintiff, fixing the rates to be charged for water furnished the town and its inhabitants, a provision has been made for fire hydrants, the ordinance in force in July, 1899, providing, among other charges against the town for water for municipal purposes, 'For fire hydrants each per month, \$1.00;' that for the whole time defendant has at regular intervals presented its bills against plaintiff for water furnished, and has always included in said bills a charge for the hydrants connected with its pipes, at the rate fixed by the ordinance in force, the bill rendered for the period covering the fire charging for 36 hydrants from June 1st to September 1st, at one dollar per month; and that all of these bills have been paid by plaintiff. The foregoing is substantially the only evidence as to a contract.

"In ruling upon the demurrer to the complaint, I stated that I had not been referred to nor did I know of any statute or rule of law that would, independent of contract, make the defendant liable on the facts stated in the complaint; in other words, that the mere fact that a corporation was engaged in the business of furnishing water appropriated for sale, rental, and distribution would not place upon it the obligation of having constantly on hand a sufficient quantity of water available for use by the town for the extinguishment of fires, for the failure to observe which it would be liable to the municipality for the value of municipal property destroyed by reason of such failure. Further thought has satisfied me that there can be no question as to the correctness of these views, that something additional is essential to the creation of such a liability, and that, if there be any such liability here, it must arise from contract.

"A contract for furnishing water to the plaintiff town by defendant for the purpose of extinguishing fires in said town is, however, alleged in the complaint. I am unable to concur in the views of learned counsel for defendant—that no contractual relation is shown by the evidence. It is true that no written contract covering the time of the fire is shown; but no particular form is prescribed by the statute for such contracts, and the evidence forces the conclusion that at the time of the fire the same relations existed between the town and the defendant as to the furnishing of water for general fire pur-

poses as ordinarily exist between the private consumer and the water company as to water for domestic purposes. Where a private property owner demands of a water company that it connect its system with his residence, and tenders the rate prescribed by the town ordinance for the water to be supplied, and the company complies with his demand, as it is required by law to do, it can hardly be denied that a contractual relation is established between the parties, the company, on its part, undertaking to furnish water to the consumer so long as he may desire it and pays the established rates therefor, or at least to use all reasonable efforts to furnish it, for I hardly think that the company would be held bound, in the absence of an express undertaking, to do more than to exercise ordinary care in the management of its business. Doubtless, too, a water company is required, upon proper demand by the municipality, to furnish water to the municipality for the extinguishment of fires that may arise therein, at the established rates, and when, in pursuance of such requirement, it undertakes the service, a contractual relation is established, and the company is bound to continue the service it has undertaken. No formal written contract seems to be required by our statute to establish this relationship between the municipality and the company. That the plaintiff town, through its board of trustees, required this service for general fire purposes on the part of defendant, and that defendant undertook the same, and was actually employed therein at the time of the fire, is, in my judgment, fully shown by the evidence. If this be so, it was incumbent on the defendant, in order to fully perform its undertaking, to use ordinary care to have a supply of water, adequate for the extinguishment of fires that might arise in the town, constantly available at the various hydrants.

"Whether or not such obligation on the part of the company would carry with it any liability for the value of municipal property destroyed by fire, by reason of its failure to perform the service required of it, is another question; and this precise question does not appear to have ever been decided. The evidence clearly shows that whatever the relationship between plaintiff and defendant was, so far as the furnishing of water for fire purposes is concerned, it was entered into by the town in the execution of the power conferred upon it to provide protection against fire for the benefit of all the inhabitants, and there is nothing to indicate that the protection of any specific property was contemplated. In providing for a water supply for general fire purposes, a municipality exercises the same character of functions that it does when it provides fire engines and other apparatus for the extinguishment of fires, or when it employs policemen or watchmen for the protection of its inhabitants against crime. Where, in the exercise of this power, it establishes or acquires its own system of waterworks,



and undertakes to itself provide an adequate supply, it is settled beyond controversy that the city is not liable to its citizens whose property is destroyed by fire, for failure to provide an adequate supply, the power vested in the city being in its nature legislative and governmental, requiring the exercise of judgment and discretion. *Patch v. Covington*, 17 B. Mon. 722; *Van Horne v. Des Moines*, 63 Iowa, 447, 19 N. W. 293, 50 Am. Rep. 750; *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Ins. Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667; *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Foster v. Lookout Water Co.*, 3 Lea, 42. See, also, *Sievers v. S. F.*, 115 Cal. 654, 47 Pac. 687, 56 Am. St. Rep. 153. Where, instead of acquiring its own system and attempting to itself provide the water for such purpose, it contracts with a water company to furnish such service, thus making such company practically the agent or employé of the city, the many decisions of the appellate courts of other states are practically unanimous in holding, upon apparently the soundest reasoning, that the water company is not liable at the suit of a third person whose property was destroyed by fire, by reason of its failure to supply sufficient water to the town for such purpose. *Becker v. Water Works*, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377; *Davis v. Water Works*, 54 Iowa, 59, 6 N. W. 126, 37 Am. Rep. 185; *Britton v. Water Co.*, 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856; *Ferris v. Water Co.*, 16 Nev. 44, 40 Am. Rep. 485; *Beck v. Water Co. (Pa.)* 11 Atl. 300; *Nickerson v. B. Ry. Co.*, 46 Conn. 24, 33 Am. Rep. 1; *Fowler v. Water Works*, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313; *Atkinson v. Newcastle*, 2 Exch. Div. 441; *Foster v. Water Co.*, 3 Lea, 42; *Eaton v. Water Works*, 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653, 40 Am. St. Rep. 510; *Fitch v. Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; *Mott v. Water Co.*, 48 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267; *Howsmon v. Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654.

"The rulings in these cases are generally to the effect that there is no privity of contract between the water company and a citizen which will support the action, and that the contracting company cannot be charged with a greater liability than the city itself. Only two appellate courts have held otherwise—those of Kentucky and North Carolina. The North Carolina ruling (*Gorrell v. Water Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598) was based on the opinion of the Kentucky court in *Paducah Lumber Co. v. Water Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536, and, as there was in that case a private contract between the plaintiff and

the water company, the opinion consists principally of dicta. It is true that the question does not appear to have been presented to our Supreme Court, but I can see no reason to doubt the correctness of the rule approved by the great weight of authority.

"If such be the true rule, and if the defendant be liable here, the only property in the town specifically protected by such a contract for water for general fire purposes, and the only property for loss of which a recovery could be had in an action for damages based on a breach of such contract, is the property of the municipality itself. Doubtless a water company may so bind itself by contract with a person to furnish him water for the extinguishment of fires as to render itself liable for the value of property of such person destroyed by fire by reason of its failure to furnish him a sufficient supply of water. See *N. O. & N. E. R. R. Co. v. Water Works Co.*, 72 Fed. 227, 18 C. C. A. 519; *Knappman Co. v. Water Co. (N. J. Err. & App.)* 45 Atl. 692, 49 L. R. A. 572; *Paducah L. Co. v. Water Supply Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536. It may be assumed here that it is within the power of a municipality, as a property owner, to enter into such a contract with a water company for the protection of the property which it owns as a legal individual; but it certainly needs something more than evidence showing an accepted service for general fire purposes to establish such a contract, and the evidence here shows nothing more. The distinction between the powers conferred on municipal corporations for public purposes and for the general public good, and those conferred for private corporate purposes, is clearly marked by the decisions. See *Springfield Fire & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667. In providing protection against fire to its inhabitants, the municipality exercises a power conferred solely for the general public good, and from the exercise of which the municipality, as a property owner, derives the same incidental benefit that every other property owner does, no more, no less. Yet in each there is a contractual relation. The bar to such a recovery in each case is that the contract was not for the protection of any particular property or person, but was for general benefit of all the property and persons within the municipal limits, and was entered into by the town as a public agency, solely for that purpose, and in the exercise of its power to furnish such general protection. I cannot escape the conclusion that the relations between plaintiff and defendant, as shown by the evidence, are susceptible of no other construction, that the defendant assumed no obligation regarding plaintiff's property different from that assumed by it regarding all of the other property within the town, and that the plaintiff, as a property owner, is without right of action."

These views and the conclusions expressed are hereby adopted as the views and conclusions of this court. A consideration of the cases presented by appellant to this court, which cases were not before the learned judge of the trial court, do not in any wise serve to shake the soundness of the conclusions which he there expressed. *Paducah Lumber Co. v. Paducah Water Supply Co.* charged upon an express contract, whereby, for the granting of a franchise for 40 years, the water company agreed, with other things, for the benefit of the inhabitants of the town and their property, to maintain "two pumping engines each having capacity to force into the standpipe two million gallons of water every twenty-four hours, and to keep a head of water sufficient to throw from any eight of the hydrants, simultaneously and for five consecutive hours at any one period of time, streams through fifty feet of hose one hundred feet high." A recovery was sought for the breach of the express terms of this contract. *Gorrell v. Water Supply Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, was in principle identical with the *Paducah Case*, which it cites with approval. There, too, it was alleged that the defendant company "contracted to furnish said city with pure and wholesome water for the use of its citizens and of force at all times sufficient to protect the inhabitants of the city against loss by fire, and, further, to erect and maintain reservoirs, water towers, pump houses, and other appurtenances and attachments necessary or expedient for the proper conducting and carrying on said waterworks so as to supply at all times the greatest protection against fire," and to maintain "a pressure of water for fire purposes sufficient to throw six streams of water from six hydrants to a vertical height of one hundred feet in still air, each stream being taken from one hydrant and with one hundred feet of hose and with a one-inch ring nozzle; and the said companies shall constantly, day and night, except from unavoidable accidents, keep all the said hydrants supplied with water for fire purposes, and shall keep them in good order for such service." In *Planters' Oil Mill v. Monroe Water Works & Light Co.*, 52 La. Ann. 1243, 27 South. 684, a franchise and grant for 30 years had been made by the city with the defendant company under this express contract: "To supply and have ready at all times for use in pipes and hydrants erected on the premises by plaintiff as a protection against fire, water in sufficient quantities and with a specified force of pressure sufficient to serve the purpose of the extinguishment of fires." The Supreme Court, dealing with the facts of the case, declared that the municipality is not liable in damages where it has a contract with a private company which fails adequately to meet its obligations, but that it is not so clear that the private company making such contract and failing to meet its duties thereunder

may not be held answerable to the citizen for loss he sustains in consequence of such failure. In each of these cases it will be observed that the court was dealing with contracts whereby the water companies, for valuable concessions and exclusive privileges, had agreed to do and to maintain certain specific things by way of protection from fire, and the gravamen of the charge against each and all of the companies was that they had violated their contract in failing to do the particular things for the doing of which they had expressly contracted. The broad distinction between those cases and the one at bar is, as pointed out in the opinion of the trial judge, that there is no express covenant in the contract between this plaintiff and this defendant, and the security to plaintiff's property was only the same security which in the exercise of its governmental functions the plaintiff had obtained for the whole town.

The only other cases cited by appellant are Kentucky cases following the decision in the *Paducah Lumber Co. Case*, above cited, and the case of *Watson v. Inhabitants of Needham*, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287. In this last case an action by a citizen against the town, which itself was supplying the water, was upheld, but that was under a doctrine at variance with the established rule in this state, which denies a right of action against a municipality for damages occasioned by the negligence of its officials or employes. *Huffman v. San Joaquin County*, 21 Cal. 426; *Chope v. City of Eureka*, 78 Cal. 591, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113; *Sievers v. San Francisco*, 115 Cal. 655, 47 Pac. 687, 56 Am. St. Rep. 153.

The order appealed from is therefore affirmed.

We concur: MCFARLAND, J.; LORIGAN, J.

(142 Cal. 199.)

JUSTICE v. ROBINSON, Tax Collector. (L. A. 1,118.)

(Supreme Court of California. Feb. 12, 1904.)

TAXES — PAYMENT — PROTEST — SUFFICIENCY — PRACTICE — DISMISSAL OF ACTION.

1. Where the court sustained an objection to evidence on the ground that the complaint did not state a cause of action, dismissing the action, and plaintiff's counsel, who was present, did not object, and the complaint could not have been amended so as to state a cause of action, the dismissal without a formal motion for that purpose did not prejudice the plaintiff.

2. A notice of protest to the payment of taxes in a drainage district stated that the drainage district was not legally formed and that the assessment was not legally made; that the commissioners did not make any assessment of the land in question, and return the same to the board of directors; that no certified assessment rolls had ever been returned to the tax collector of any assessment in said district; and that the tax was wholly void. *Held*, that the notice showed that protestant was under no legal compulsion to pay the tax, and hence the payment was voluntary, giving him no right to recover the same.

3. Pol. Code, § 3819 (St. 1893, p. 32, c. 20), providing that a payment of taxes under protest shall not be regarded as voluntary, and that, if taxes so paid are recovered, and such taxes, or a portion thereof, may have been paid by the county treasurer into the state treasury, it shall be regarded as an amount due the county, applies only to county and state taxes, and not to those of drainage districts.

Department 1. Appeal from Superior Court, Orange County; J. W. Ballard, Judge.

Action by E. P. Justice against F. M. Robinson, as tax collector, etc. From a judgment for defendant, plaintiff appeals. Affirmed.

McKelvey & Bowes, for appellant. Victor Montgomery, for respondent.

VAN DYKE, J. The action was brought to recover back taxes paid to the defendant, a tax collector of Orange county, and ex officio tax collector of Bolsa drainage district, under protest. The defendant's demurrer to the complaint was overruled, and thereupon an answer was served and filed. Upon motion by plaintiff certain defenses set up in the answer were stricken out by the court. Thereafter the case was set for trial, and, the parties appearing in court, and a jury being waived, the plaintiff was called as a witness, whereupon defendant objected to the introduction of any evidence, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the objection of the defendant, and thereupon dismissed the action. The appeal is taken from the judgment entered upon the dismissal.

Appellant claims that it was error upon the part of the court to dismiss the action as stated, without a formal motion being made for that purpose, contending that the plaintiff could have met such motion by asking leave to amend its complaint. But the plaintiff was present in court by counsel, and had an opportunity then and there to ask such leave, and failed to do so, simply reserving an exception to the ruling of the court. Besides, no possible benefit could have been derived by the plaintiff if the cause had been left pending in the court after the refusal to hear evidence in the case. It is quite true, as suggested by the appellant, that the objection to the introduction of evidence raised practically the same question which had been decided by the court in overruling the demurrer. Still, the court upon further consideration of the case may have arrived at the conclusion, and probably did, that the complaint was fatally defective, and that the demurrer should have been sustained instead of being overruled. The complaint, however, could not have been amended so as to state a cause of action, for the reason that the notice of protest itself was fatally defective, and that, of course, could not be amended. The plaintiff, therefore, was not prejudiced in not being allowed leave to amend.

In the notice of protest attached to and made a part of the complaint, it is stated

that the Bolsa drainage district was not legally formed; that the assessment was not made by duly elected and qualified assessment commissioners; that they did not make any assessment of plaintiff's land, and return the same to the board of directors; that no certified assessment rolls had ever been returned to the tax collector of any assessment in said district; and that the tax was wholly void and levied contrary to law. The general rule in reference to the payment of taxes under protest, where not controlled by some statutory provision, is that, in the absence of acts amounting to duress or coercion, the payment is deemed to be voluntary, and a mere protest made at the time of such payment does not divest it of its voluntary character. Where there is no legal compulsion, the legal effect of the payment is not impaired by protest. *McMillan v. Richards*, 9 Cal. 417, 70 Am. Dec. 655; *Bucknall v. Story*, 46 Cal. 597, 13 Am. Rep. 220; *Bank of Woodland v. Webber*, 52 Cal. 73; *Wills v. Austin*, 53 Cal. 152; *Dear v. Varnum*, 80 Cal. 86, 22 Pac. 76. Therefore, according to the statement in the notice of protest, the plaintiff was under no legal compulsion whatever to pay said taxes, and the payment, in law, was made voluntarily upon his part, and he has no right of action to recover the same.

The amendment to the Political Code of 1893 (section 3819), providing that a payment of taxes under protest shall not be regarded as voluntary, applies to the collection of state and county taxes only. It provides that in case suit be brought for the recovery of taxes so paid, and judgment is recovered, it "shall be entered against such county therefor," and in case such tax or portion thereof may have been paid by the county treasurer into the state treasury it "shall be regarded as an amount due the county from the state, and shall be deducted in the next settlement had by the county with the controller." St. 1893, p. 32, c. 20. The drainage act of 1897 (St. 1897, p. 334, c. 228), under which this case arose, does not contain any such provision, nor did it adopt the Political Code in reference to the assessment and collection of state and county taxes; and the rule as at common law applies in this case.

Judgment affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(142 Cal. 152)

In re ROBINSON'S ESTATE. (S. F. 3,592.)  
(Supreme Court of California. Feb. 9, 1904.)  
EXECUTORS-SALES BY EXECUTOR-VALIDITY  
-STATUTE OF FRAUDS-CONFIRMATION-APPEAL.

1. Where a memorandum of a sale of lands by executors under a power in the will contains the names of the parties, a sufficient description of the property for identification, and the price and terms of the purchase, and states that the sale is made subject to confirmation by the superior court, it is sufficient to take the contract out of the statute of frauds. Civ. Code, § 1741.

2. On appeal from an order confirming a sale of real estate by executors, no legatee having appealed, an unsuccessful bidder for the property was in no position to raise the question that the consideration for the sale would not be sufficient to pay all legacies in full.

3. Where executors acting under a power of sale in the will orally agreed to sell certain property, and received a portion of the purchase money, such sale was binding as against a subsequent oral offer of another to pay more.

4. Code Civ. Proc. § 1552, declares that on a return of a sale by executors, if it appears that the price is disproportionate, and a sum exceeding the bid by 10 per cent. can be had, the sale may be vacated. *Held*, that an executor's contract for sale must be confirmed; unless the price bid was disproportionate, and an increase bid of 10 per cent. could be obtained.

5. Code Civ. Proc. § 951, declares that on appeal from an order appellant must furnish a copy of all papers used on the hearing. *Held*, that on appeal from an order confirming a sale of real estate by executors it was the duty of appellant to furnish the return of sale.

Commissioners' Decision. Department 2. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Judicial proceedings in the matter of Charles Robinson, deceased. From an order confirming a sale of property, Nickels & Brown Bros., a corporation, appeals. Affirmed.

Bell, York & Bell, for appellant. F. E. Johnson, Webber & Rutherford, F. E., H. L., & L. E. Johnson, for respondent.

COOPER, C. This is an appeal by Nickels & Brown Bros., a corporation, from an order confirming a sale of real and personal property to Buhman Bros., and comes here on a bill of exceptions. It is claimed by respondent that, as the court made an order refusing to confirm a sale of the same property to appellant, and the time for appealing from said order has expired, therefore appellant is not a party aggrieved in this case, and cannot appeal, and that its appeal should be dismissed. It is not necessary to decide this question, as we have concluded that the order should be affirmed. The facts, as shown by the record, are substantially as follows: Deceased left a will, of which the respondents Kyser and Hottell were duly appointed executors. This will authorizes the executors to sell at public or private sale, with or without notice, any or all property of the estate without an order of court authorizing the same. A few days prior to October 15, 1902, the executors made a parol agreement to sell the property to Buhman Bros. for \$20,000. After the oral agreement had been made, and \$500 deposited, the attorney for appellant informed the executors that appellant would give \$20,500 for the property, and was ready to make a deposit in the amount required. The executors telephoned to their attorney, and were informed that Buhman Bros. had been in their office, and left a deposit of \$500 on the sale to them. They then refused to accept a deposit from appellant. On October 15, 1902, the executors, acting under the power of sale in the will, and carrying out the oral agreement,

sold the property known as the "Robinson Ranch," together with the personal property thereon, to Buhman Bros., for the sum of \$20,000, the sum of \$500 having been paid down when the oral agreement was made. A memorandum of sale was made as follows:

"Napa, Cal., October 15th, 1902. Received from J. J. Buhman, Jr., C. J. Buhman, J. S. Buhman and E. J. Buhman, the sum of five hundred dollars as a deposit on the purchase price of \$20,000 for what is commonly known as the 'Robinson Ranch' in Browns Valley, Napa County, together with the personal property situate thereon, belonging to the Estate of Charles Robinson, deceased. Said sale is made subject to the confirmation of the Superior Court of Napa County. In case said sale be confirmed the balance of the purchase price, \$19,500 to be paid on delivery of deed. In case said sale be not confirmed, the said sum of \$500 to be returned to the said Buhman. D. S. Kyser, E. W. Hottell, Executors of the Estate of Chas. Robinson, Deceased."

After the deposit had been made, and the above memorandum signed, and before any return of sale had been made, the executors were advised that the appellant would pay more for the property than the sum for which it had been sold. Without returning the \$500 to Buhman Bros., and without their consent, the executors published a notice in a newspaper calling for bids. The notice was dated October 22, 1902. In response to the published notice, and with knowledge of the agreement with Buhman Bros., the appellant made a bid in writing offering the sum of \$20,400 for the real estate, and \$200 for the personal property, and accompanied the bid with a deposit of \$500, as required by the notice. The executors filed a return of the latter sale to appellant, in which the facts as to the prior sale were set forth, and it was stated therein that by reason of the larger bid by appellant the executors had concluded to withdraw the acceptance of the former sale, and asked that the sale to appellant be confirmed. The return of sale came on for hearing on November 17, 1902, at which time objections to the confirmation were filed by Buhman Bros., in which they set forth the facts as to the prior sale to them, the neglect of the executors to report such sale, and the claim that they were the parties entitled to purchase the property. After having been regularly continued, the hearing on the return came up on the 24th of November, 1902, when the attorneys for the executors moved to dismiss the return of sale to appellant upon the ground that it had been erroneously made, and that the prior sale to Buhman Bros. was valid. The court did not then dismiss the return of sale to appellant, but, by consent, continued the matter for two weeks, in order to enable the executors to make a return of the prior sale to Buhman Bros. The attorneys for appellant not only consented to the continuance, but waived objections to the filing

of a return of sale to Buhman Bros. The executors, on the 26th day of November, 1902, filed a return of the former sale to Buhman Bros., but which return does not appear in the record. No objection appears to have been made by appellant to this latter return of sale, and, the matter coming up regularly on the 30th day of December, 1902, the court made an order confirming the sale to Buhman Bros., and also made an order dismissing the return and account of sales to appellant. No exception appears to have been taken to either order, and no appeal from the latter. The real estate was appraised at \$16,000 and the personal property at \$267.67. The evidence without contradiction shows that the sum of \$20,000 is a fair price for the property sold, and that a sum 10 per cent. in excess of the said amount could not probably be obtained on a resale. There is no evidence in the record to show that appellant is responsible, or that it would have paid for the property if the sale to Buhman Bros. had not been confirmed. Upon this record we will consider the appellant's points in the order presented in its brief.

The first contention is that the memorandum of agreement herein set forth was not sufficient "to take the sale out of the statute of frauds." No reason is given as to why the memorandum is not sufficient, and no authority is cited which shows that it is not. The sale being made under a power in a will, the purchaser deals with the executor in such a case as he would with any other vendor, except that the court must confirm the sale. In *re Pearsons*, 98 Cal. 612, 33 Pac. 451. The memorandum contains the names of the parties, a sufficient description of the property for identification, and the price and terms of purchase, and states that the sale is made subject to confirmation by the superior court. This is sufficient. Civ. Code, § 1741; *Moss v. Atkinson*, 44 Cal. 16; *Browne on the Statute of Frauds*, § 371 et seq.

The second contention in the appellant's brief is that the sale of the real and personal property en masse was voidable for the reasons that \$600 more was offered for the property by appellant, and that \$20,000 would not be sufficient to pay all legacies in full. As to the latter proposition, if it could be considered at all, we cannot see how appellant is in a position to raise such question. It is not a legatee, and no one of the parties named as a legatee has appealed from the order. It is true that appellant bid \$600 more for the property, but its bid was made only after the sale to Buhman Bros. After the executors had verbally agreed with Buhman Bros., and before the memorandum in writing was made, the agent of appellant inquired of one of the executors as to the bid of Buhman Bros., and when told that it was \$20,000 said "that his firm would give more than that, but he did not tell me how much

more he would give. He did not put it in writing. I asked him if they would give 10 per cent. more than the offer of Buhman Bros., and he said, 'No.'" One of the executors testified that appellant "had been dickering around for a long time to purchase the property, but they never would make any kind of a decent or reasonable offer for the property. At one time, in a half-hearted way, they offered \$17,000, but we never heard anything further about it." There is not a word of evidence that appellant ever offered any sum for the property prior to the deposit made by Buhman Bros. When the memorandum was made to Buhman Bros., the executors had exercised the powers conferred upon them by the will, and the sale, in absence of fraud or irregularity, was binding upon the estate, subject, of course, to confirmation by the court. There is no evidence of fraud, but, on the contrary, the executors tried to repudiate the sale to Buhman Bros., but the court properly held it valid. As to the offer to pay \$20,500 after the oral sale to Buhman Bros., it was not in writing, and when it was made the \$500 had been deposited by Buhman Bros. If the oral sale was not then binding, it was certainly good as against an oral offer to pay more. At the time the written memorandum was made, no binding offer had been made by appellants. The court must confirm the sale unless the price bid is disproportionate to the value of the property and it is made to appear that an increased bid of 10 per cent. may be obtained. Code Civ. Proc. § 1552; *Estate of Leonis*, 138 Cal. 197, 71 Pac. 171. Appellant could have filed objections to the return of sale, but does not appear to have done so. It could have raised the bid 10 per cent., but declined to do that. As this appeal is from the order confirming the sale to Buhman Bros., it must be presumed to be correct. Error must affirmatively appear. It may be, so far as this record shows, that appellant consented to the confirmation of the sale to Buhman Bros. As the record contains no return of the sale upon which the order was made, we could not well reverse the order upon such return. It may be that the return showed to the court that appellant had withdrawn its bid. This record shows "that, the proofs having been received and the argument of counsel heard, the court on the 30th day of December, 1902, made and entered its decree confirming the said sale to J. J. Buhman et al." The decree is not in the record. The return of sale was a paper used on the hearing in the court below, and it was the duty of appellant to furnish it. Code Civ. Proc. § 951. It is advised that the order be affirmed.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

(142 Cal. 146)

**PEOPLE v. STOUTER. (Cr. 1,034.)**

(Supreme Court of California. Feb. 9, 1904.)

**CRIMINAL LAW—SEXUAL CRIMES—ATTEMPTS—WITNESSES—DISCRETION OF TRIAL COURT—INSTRUCTIONS AFTER RETIREMENT.**

1. It was error for the court, after having instructed the jury, and having given them two forms of verdict, "Guilty, as charged," and "Not guilty," and, on their return to the courtroom after deliberating, having reiterated the same instructions, to give them a further instruction on a subsequent return to the courtroom, after over 24 hours' deliberations, and after the opinions of the jurors were fully disclosed, and they had announced that they could not reach a verdict under the instructions as they then stood, to give them, for the first time, an instruction and form of verdict authorizing a conviction of attempt to commit the crime.

2. Under Code Civ. Proc. § 1880, declaring children under 10 years of age incompetent witnesses when they are incapable of receiving or relating just impressions of fact, the competency of a child on whom a lewd act was alleged to have been committed, contrary to Pen. Code, § 288, making it a felony to commit such an act on a child under 14 years of age, was a matter within the discretion of the trial court.

3. A person may be guilty of an attempt to commit the crime, described in Pen. Code, § 288, of committing a lewd or lascivious act on a child under the age of 14 years.

4. To constitute the crime of committing a lewd or lascivious act on the body of a child under 14 years of age, there must not only be a lewd act, but it must have been committed on the body of the child.

5. An attempt to commit a crime may be punished by imprisonment for a definite term of years, although the crime, if accomplished, is punishable for a term which may be for life.

Department 2. Appeal from Superior Court, Napa county; Wm. S. Wells, Judge.

F. J. Stouter was convicted of an attempt to commit a lewd act with the body of a child under the age of 14 years, and appeals. Reversed.

A. J. Hull, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

**McFARLAND, J.** The defendant was charged with the offense defined in section 288 of the Penal Code, namely, the commission of a lewd or lascivious act upon or with the body "of a child under the age of fourteen years with intent," etc. He was convicted of an attempt to commit such offense, and was sentenced to 14 years' imprisonment in the state prison. He appeals from the judgment and from an order denying his motion for a new trial.

This crime belongs to that class of offenses of which it has been often said that the charge is easy to make and hard to disprove. In such cases jurors are sometimes moved by abhorrence of the offense to convict upon slight evidence; and, on appeal, a court will look closely into the conduct of the trial, and to see that there was some substantial evidence to warrant a verdict of guilty. In the case at bar our opinion is that there must be a reversal for an instruction given by the court on the subject of the "attempt" of which

the appellant was convicted, and we also think that there was not sufficient evidence to warrant a verdict of guilty of said attempt.

In the information, after a general statement that defendant had committed a lewd and lascivious act upon a certain named girl under 14 years, it was specifically charged that the act which constituted the alleged crime was committed as follows: "That the said F. J. Stouter did then and there willfully, unlawfully, feloniously, and lewdly insert in the vagina of the said child a finger of him, the said F. J. Stouter, with the intent," etc. Before the jury retired for deliberation, the court, after reciting the part of the information above quoted, instructed them as follows: "And in order to find the defendant guilty under said information, you must find from the evidence, beyond a reasonable doubt, that the said defendant did insert a finger of him, the said defendant, into the vagina of said" (giving the name of the child), "and unless you so find from the evidence, beyond a reasonable doubt, your verdict must be 'Not guilty.'" And the jury were further instructed as follows: "I have, for your guidance simply, gentlemen, prepared two forms of verdict, only one of which you will use, laying the other to one side. If you find from the evidence in this case, and beyond a reasonable doubt, as I have explained 'reasonable doubt' to you, that the defendant committed the crime as charged in the information here, then the form of your verdict would be something like this: 'We, the jury in the above-entitled cause, find the defendant, F. J. Stouter, guilty as charged in the information.' Again, if, after a full, careful and impartial consideration of all the evidence in this case, you find that the defendant did not commit the offense as charged, or if you have a reasonable doubt of his guilt, it would be your duty to find the defendant not guilty, and the form of your verdict will be something like this: 'We, the jury in the above-entitled cause, find the defendant, F. J. Stouter, not guilty.'" The case was thus given to the jury upon the theory that they should find one or the other of these two verdicts, and it may be fairly assumed that it was argued and submitted to the jury entirely upon that theory.

The jury retired at 9 o'clock p. m. of January 18th, and returned into court the next day at 10:49 o'clock a. m., having been out nearly 14 hours without being able to agree. The court asked them if they had agreed upon a verdict, and one of them answered, "We have not." They were then asked what they desired, and one of the jurors, as spokesman, answered: "We have some questions here that different ones of us would like to have instruction upon, but all do not care for these instructions. The first question is: 'Is it necessary, in order to bring in a verdict of guilty, that the evidence prove beyond a reasonable doubt that the defendant

Stouter did insert his finger into the vagina?" To this question the court answered: "That was the instruction as given you by the court. I will read that instruction to you;" and the court then re-read the instruction as hereinbefore quoted. The juror then asked, "Would the attempt to insert the finger in the vagina be sufficient to render a verdict of guilty?" To this the court answered: "That question is answered, gentlemen, by the instruction as given. In order to convict the defendant you must find that he did insert his finger into the vagina of the said child. The court further said that a complete entrance was not necessary, but that "any penetration of the vagina, or any insertion of the finger into the vagina, would be sufficient." Another question was asked by a juror, to which the court answered: "That goes to the proposition as to whether he did or did not insert his finger into the vagina, and, under that instruction that I have already given you, it fully covers that question in my mind." The juror said, "I think that some of the others have something beside this." The court said: "Are there any other instructions you desire read? I will re-read the main instructions, if you so desire this morning." The juror said, "I don't think so." The court then said: "Very well. Just retire to the jury room." The jury then retired, and at 9:40 o'clock p. m. again returned into court, having been out altogether over 24 hours. They then stated that they could not agree, and the court questioned all the jurors individually, and they all expressed the opinion that they could not agree. After a good deal of conversation between the jurors and the court, by which the opinions of most of the jurors were very fully disclosed, one of the jurors said: "My opinion is, if the instructions that have been given of the law were probably worded just a little bit different, we could come to an agreement. As they are, if we have got to take them just as they are without any further advice on the matter, I don't think we can agree." The court said: "That is what I am here to instruct you in. In what way do you want further advice or further instruction?" The juror said: "Some contend for this: the evidence must prove exactly what the information charges." The court said: "That is, it must prove as you have been heretofore instructed." After further conversation, the court again reiterated the charge that the jury must find the defendant not guilty unless they find beyond a reasonable doubt that the defendant had committed the said act described in the information. At this juncture, however, the court, for the first time, gave the jury a new instruction, to the effect that they might find the defendant guilty of an "attempt" to commit the crime charged, and read section 1159 of the Penal Code; and at the request of the district attorney, and over the objection and exception of defendant, gave to the jury a third form

of verdict, to wit: "Guilty of an attempt to commit the crime charged in the information." The jury then retired again, and returned the verdict convicting defendant of the attempt.

There is no doubt of the general rule that after a jury have retired for consultation they may be called into court for further instructions; but we think that it was erroneous and unfair to defendant to give the last instruction as to the attempt, at the time and under the circumstances at and under which it was given. The jury had been out for a very long time without being able to agree under the instructions which had been given them, and which had been on subsequent occasions repeatedly reiterated, and many of the jurors had practically told the court what their opinions were, and that if the instructions were changed so as to meet their views they could find a verdict of guilty, contrary to the former instructions. The project of instructing the jury for the first time, after they had been unable to agree for 24 hours, that they might, notwithstanding the former instructions, convict the defendant of the attempt, was clearly an afterthought suggested by the statements of the jurors as to how they then stood, and apparently intended to help them, not generally to arrive at a verdict, but to arrive at some sort of a verdict of guilty. Such a proceeding is, we think, a most dangerous interference with the right of a defendant to a fair trial. We do not know what occurred in the jury room. Some of the jurors may have believed the evidence too slight to convict the defendant of any offense, and, for the purpose of argument, may have admitted that he might have been convicted of the attempt if the former instructions had allowed it, and after the last instruction had been given may have been embarrassed by their former admissions. Moreover, the jury might very well have considered the last instruction as an intimation of the desire of the court that the defendant be convicted of some offense. Jurors exhausted by a long confinement, and naturally desirous of being released, are not in a suitable frame of mind to thoroughly consider an entirely new phase of the case under a new instruction which might fairly be construed as an expression of the court hostile to the defendant.

Moreover, if the evidence was not sufficient to convict the defendant of the act charged—and the jury so found—it is difficult to see how it was sufficient to find him guilty of an attempt to commit that act. The child herself testified that defendant did not do the act charged in the information; and if a certain condition of her person claimed by the prosecution to have been proved, and other circumstantial evidence, did not warrant the jury to find defendant guilty of doing the act charged, it was not sufficient to support a verdict of guilty of an

attempt to do that act. The jury evidently must have considered the last instruction as giving them a wide power to find the defendant guilty of something, under the general category of an attempt to do the act charged in the information.

For the foregoing reasons the judgment and order must be reversed.

We do not think that any of the other points made by appellant would warrant a reversal. It was not error to admit the testimony of the child upon whom the offense is charged to have been committed; whether or not she was an incompetent witness on account of her age was a question within the discretion of the court. Code Civ. Proc. § 1880; *People v. Craig*, 111 Cal. 469, 44 Pac. 186. The remarks of the district attorney when addressing the jury furnish no ground for a reversal. There were no errors in giving or refusing instructions except as hereinbefore stated. A person might, in law, be guilty of an attempt to commit the crime defined in section 288, Pen. Code. A mere licentious act is not itself a crime under the section. There must be such an act committed upon the body of a child under 14 years old, and there could be an attempt to commit such an act without accomplishing it. It was settled in *People v. Burns*, 138 Cal. 159, 69 Pac. 16, 70 Pac. 1087, 60 L. R. A. 270, affirming *People v. Gardner*, 98 Cal. 127, 32 Pac. 880, that an attempt to commit a crime may be punished by imprisonment for a definite term of years, although the crime, if accomplished, is punishable by a term which may be for life.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: HENSHAW, J.; LORIGAN, J.

(142 Cal. 120)

RUPERICH v. BAEHR. (S. F. 3,648.)\*

(Supreme Court of California. Feb. 11, 1904.)

MUNICIPAL CORPORATIONS—OFFICERS—SALARIES—SUBJECTION TO DEBTS—STATUTORY PROVISIONS—CONSTRUCTION—VALIDITY.

1. Code Civ. Proc. § 710, providing that a transcript of a judgment may be filed with the Controller of the State or auditor of any municipal corporation from "which money is owing to" the judgment debtor, whereon the Controller or auditor shall draw his warrant in favor of the creditor, or pay so much money into court as will cancel the judgment, and which "belongs to or is owing to the judgment debtor," applies to legislative officers, making their salaries subject to the payment of their debts.

2. Code Civ. Proc. § 710, relates to a class which is founded on intrinsic differences justifying special regulations, and is therefore not a special law within Const. art. 4, § 25, subd. 3, prohibiting the Legislature from passing special or local laws relating to the practice of courts.

3. Code Civ. Proc. § 710, which provides that a transcript of a judgment may be filed with the auditor of a municipal corporation from which money is owing to the judgment debtor,

and which requires the auditor to then "draw his warrant in favor of, or pay into the court" the money to apply on the judgment, etc., authorizes the auditor to pay the money into court, or, if he chooses, or if from special charter provisions he is not authorized to make payments out of the treasury, he may draw his warrant necessary to satisfy the judgment.

Beatty, C. J., dissenting.

In Bank. Application for a writ of mandate by George E. Ruperich against Harry Baehr to compel defendant, as auditor, to audit and allow a demand in favor of the petitioner against the city and county of San Francisco. Denied.

Thos. V. Cator and Dibble & Dibble, for petitioner. John H. Mee, for respondent.

SHAW, J. This is an application for a writ of mandate to compel the defendant, as auditor of the city and county of San Francisco, to audit and allow in favor of the petitioner certain demands against the city and county.

The petitioner is a stenographer in the department of electricity of the city and county, and as such is entitled to a monthly salary of \$90. He served for the months of April and May, 1903, and thereafter, for his salary of each of said months, he presented to the auditor written demands as required by the charter, and requested that they be audited and allowed in his favor. The defendant, as auditor, refused to audit or allow the demands, justifying his refusal on the grounds that he had been served by a creditor of the petitioner with a certified copy of a judgment for \$98, in favor of the creditor against the petitioner herein, rendered by the justice's court of the city and county, together with an affidavit under the provisions of section 710 of the Code of Civil Procedure, enacted in 1903 (St. 1903, p. 362, c. 263); and he claims that this section requires him to audit and allow the demand, and issue a warrant in favor of the creditor, to the amount necessary to cancel the judgment, instead of in favor of the petitioner. The petitioner claims that this section of the Code is inapplicable to salaries of public employes, and that, if it is applicable, it is unconstitutional. This presents the only questions for consideration in the case. The act is as follows:

"710. The duly authenticated transcript of a judgment, for money, against a defendant, rendered by any court of this state, may be filed with the Controller of the State of California, or the auditor of any county, city and county, city, or other municipal or public corporation, from which money is owing to the judgment debtor in such action (and in case there be no auditor, then with the official whose duty corresponds to that of auditor), whereupon it shall be the duty of any such official, or of such public officer with whom such transcript shall have been filed, to draw his warrant in favor of, or to pay into the court from the docket of which the transcript was taken, so much of the money, if suffi-

\*Rehearing denied March 11, 1904.



cient there be, over which such state of California, county, city and county, city, or other municipal or public corporation, of which he is an official, or over which such public officer has control and custody, and which belongs to or is owing to the judgment debtor in the cause designated in said transcript, as will cancel said judgment; the money so paid into court shall be a discharge pro tanto of any amount so due or owing to such judgment debtor. For filing such a transcript any such official or public officer may charge a fee of fifty cents. Upon the receipt by any court of money under the provision of this act, so much thereof as is not exempt from execution shall be paid to the judgment creditor, the balance to the judgment debtor. Such transcript when so filed, shall be accompanied by an affidavit on behalf of the person in whose interest the same is filed, stating the exact amount at the time due on such judgment, and that such person desires to avail himself of the provisions of this section."

The reasons advanced in support of the contention that the law is inapplicable to salaries of public officers and employes are that the phrases "money owing," "money which belongs to or is owing to the judgment debtor," and "amounts so due or owing," being words of general import applicable to ordinary debts, cannot, under a familiar rule of statutory construction, be applied to such salaries, and that the phrase "judgment debtor," upon like grounds, cannot be held to include such officers or employes. It is true that it is generally held to be against public policy to apply general statutory provisions for garnishee process to public corporations, so as to make them subject to such process, to reach claims for money due from them to a judgment debtor. And, for the same reason, general provisions making property subject to execution or liens are construed to apply only to the property of private persons and corporations, and not to that of public corporations or bodies politic. *Skelly v. School Dist.*, 103 Cal. 652, 37 Pac. 643; *Witter v. School Dist.*, 121 Cal. 350, 53 Pac. 905, 66 Am. St. Rep. 33; *Mayrhofer v. Board*, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451; *Whittaker v. Tuolumne Co.*, 96 Cal. 100, 30 Pac. 1016; *Rec. Dist. v. Sacramento*, 134 Cal. 480, 66 Pac. 668; *Sav. Soc. v. San Francisco*, 131 Cal. 363, 63 Pac. 665. The rule is said to be that "the state is not bound by general words in a statute, which will operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it." *Mayrhofer v. Board*, supra. The state and its subordinate bodies perform their governmental functions through their officers and employes elected or appointed for that purpose. Therefore any process of law which would tend to embarrass such officers or employes while in office, and hinder or distract them in the discharge of official duty, would injuriously affect the capacity of the state to perform its functions,

as much as, if not more than, the annoyance of having its funds subjected to garnishee process. There has been no decision on this branch of the subject in this state, but in many of the sister states the same rule of construction has been applied to such cases, and a statute making public corporations liable to ordinary garnishee process has been held to furnish no authority for intercepting the salary of a public officer or employé by such means. *Troy, etc., Co. v. Denver* (Colo. App.) 53 Pac. 256; *Lewis v. Denver* (Colo. App.) 48 Pac. 317; *Bank v. Dibrell*, 3 Sneed (Tenn.) 379; *Pruitt v. Armstrong*, 56 Ala. 306; *Roeller v. Ames*, 33 Minn. 133, 22 N. W. 177. It is said that "the salary of a public officer is a provision made by law for his maintenance and support during his term, to the end that, without anxiety concerning his means of subsistence, he may be able to devote himself entirely to the duties of his office." *Lewis v. Denver*, supra. "By reason of high considerations of public policy, the salary of a public official, whether state, county, or municipal, is not subject to garnishment; not because of any exemption right to which the officer is entitled, but because the interests of the public demand it." *Troy, etc., Co. v. Denver*, supra. "It would be very embarrassing generally, and under some circumstances might prove fatal to the public service, to allow the means of support of the servants of the government to be intercepted," and if the funds were thus "allowed to be diverted from their legitimate object, by process of attachment in favor of creditors, or otherwise, the functions of the government might be suspended." *Bank v. Dibrell*, supra. It may be conceded that it is as much against public policy to subject the salaries of public officers and employes to garnishee process as it is to subject the public funds to such process, or the public property to liens or executions. The Legislature, however, undoubtedly has the power to determine its own policy on this subject with respect to the offices, officers, and employes within its control. We are not here concerned with constitutional offices and officers, and we do not wish to be understood as holding that the act under discussion can be applied to them. But with respect to those within legislative control, if it fairly appears that by this act, properly construed, the legislative intent to declare, as its policy, that the salaries or wages may be thus diverted to the payment of debts of such officers and employes, is manifested by the language used, then the courts are bound by this declared policy with respect to the officers to whom it can be applied, and the rule of construction above mentioned becomes to that extent inapplicable. The section in question is to "be liberally construed with a view to effect its objects." Code Civ. Proc. § 4. It must be construed as a whole, and some effect must be given to each of its provisions, if reasonably possible.

It provides, among other things, that when the auditor, or other officer with similar functions, pays the money due from the state or public corporation into court, "so much thereof as is not exempt from execution shall be paid to the judgment creditor, the balance to the judgment debtor." It was, of course, intended that this provision as to money exempt from execution should have some application. The Legislature must have had in mind some class of persons entitled to receive money from the public funds who are entitled also to claim such money as exempt from execution. There is no such class in existence, except officers and employes engaged in public service. Section 690, subd. 10, Code Civ. Proc., exempts from execution "the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of the execution or attachment." The intention is therefore, by this clause of section 710, made manifest that salaries and wages of public officers and employes are included in the meaning of the phrases "money owing," "money which belongs to," and "amounts so due or owing," and it necessarily implies that such officers and employes are among those persons classed as "judgment debtors" to whom such money is due or owing, and that they are subject to the garnishment authorized by the section.

The two objections that the law is special, and that it creates a class of debtors against whom it is not necessary to issue execution, whereas, in case of private employes, an execution is necessary as a process to reach such assets of the judgment debtor, and that it is therefore a special law regulating practice in the courts (article 4, § 25, subd. 3), and that, if it is a general law, it is not uniform in its operation, will be considered together. A law is not special if it relates to a class, and the class is founded upon intrinsic differences requiring or reasonably justifying different regulations. *Rode v. Siebe*, 119 Cal. 521, 51 Pac. 869, 39 L. R. A. 342. And a general law does not violate the constitutional provision requiring uniformity in its operation if it applies alike to all persons or objects within the class to which it relates. *Vail v. San Diego County*, 126 Cal. 35, 58 Pac. 392. The fact that there has been heretofore no means by which moneys due from the state, or from its public corporations, could be reached and applied upon the debts of the persons to whom they were due, and that considerations of public policy required that public corporations and public officers and employes should not be held subject to the ordinary provisions and processes of law for the garnishment of debts and claims due or owing, sufficiently distinguishes the classes of persons and assets to which this section relates to justify the Legislature in making special regulations concerning the persons concerned and the mode of reaching the assets. It does not destroy its character as a general law, nor its uniformity of operation,

that its provisions in these particulars differ somewhat from the ordinary processes of attachment and execution.

Some objections are urged on account of the difficulty of making a practical application of the law in connection with the provisions of the San Francisco charter respecting the manner of auditing and paying demands on the treasury. The law requires the auditor to "draw his warrant in favor of, or pay into, the court" the money to apply on the judgment. We have punctuated the above quotation to accord with our construction of its meaning. The provision means that the auditor may himself pay the money into court, or, if he chooses, or if, from special provisions of the law or the charter under which he is acting, he is not authorized to make payments out of the treasury, then he may draw his warrant for the amount necessary to satisfy the judgment, or for the whole salary due, in favor of the court, or the proper officer authorized to receive money paid into court. The law applies generally to all public corporations, and it may be that in some cases the auditor is authorized, or will be authorized, to make such payments from the treasury. The San Francisco charter gives the auditor authority only to audit and allow demands and indorse his allowance thereon. And this indorsement appears to be the only "warrant" for its payment contemplated by that instrument. Charter, art. 4, c. 2, §§ 3, 7. Payment can be made by the treasurer only of such demands as have been thus allowed by the auditor. *Id.* c. 3, §§ 2, 5 and 6. When the court, or its authorized officer, has received the warrant, or, in the case of San Francisco, the demand properly audited, allowed, and indorsed, it will be the duty of such court or officer to attend to the presentation of the demand to the treasurer, and to receive the money thereon and apply the same, or the part thereof not exempt from execution, to the satisfaction of the judgment. We can see no insuperable difficulty in carrying out the purposes of the law.

For the foregoing reasons, we hold that the auditor is justified in refusing to audit and allow the demand in favor of the petitioner, except as to the excess above the judgment. As no demand was made except for the whole sum, a mandate cannot be issued requiring the allowance of a part only. The auditor is entitled to a proper demand before he becomes subject to a suit in mandamus. It may be that upon a demand for the correct amount he would comply.

The petition is denied.

We concur: ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

VAN DYKE, J. I concur in the foregoing, as it is expressly limited to such offices as the Legislature may create or abolish, at its pleasure, in the interest of the public service. As to such offices, the Legislature may doubt-

less subject the employés or officers appointed or elected to fill the same to the garnishee process. The act under consideration, adding a new section to the Code of Civil Procedure, is, however, broad enough in its terms to cover all offices in the state. As to constitutional offices, however, the salary or compensation of the incumbents of which is provided for by the Constitution, it is clearly not within the power of the Legislature to interfere with the payment of such salary or compensation in the least. For instance, the Constitution provides in express terms that the Governor and other executive state officers "shall at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished during the term for which they shall have been elected." And as to the judicial department, the Constitution declares "Justices of the Supreme Court and judges of the superior courts shall severally, at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished after their election, nor during the term for which they shall have been elected." The Constitution also declares that members of the Legislature "shall not be subject to any civil process during the session of the Legislature, nor for 15 days next before the commencement and after the termination of each session." Clearly the garnishee process cannot be employed to intercept or reduce the salary or compensation of these officers, as in the Constitution provided. And the act in question as to such offices is clearly unconstitutional.

BEATTY, C. J. (dissenting). If section 710 of the Code of Civil Procedure requires a construction which makes it applicable to the salaries of legislative officers, it must by the same construction be held applicable, in terms and intention, to the salaries provided by the Constitution for constitutional officers. This seems to be conceded, but Justice VAN DYKE holds that as to the latter class of officers it is unconstitutional, while the principal opinion leaves this question open. According to my view of the case, the question thus left undecided is important, if not vital. A law will not be so construed as to bring it in conflict with the Constitution if such construction can be avoided without disregarding the plainly expressed intention of the Legislature, or, in other words, if it can be given any reasonable construction in harmony with the fundamental law. This law is, in my opinion, at least susceptible of a construction limiting its application to debts other than salary demands, and ought to receive that construction, if, according to the construction placed upon it by the court, it is even in part unconstitutional. Concurring as I do in the view expressed by Justice VAN DYKE upon the constitutional question, I must dissent from the judgment.

75 P.—50

(142 Cal 142)

COBB v. DOGGETT. (S. F. 3,428).\*

(Supreme Court of California. Feb. 6, 1904.)

JUDGMENTS—ASSIGNMENTS—ACTION BY ASSIGNEE—EVIDENCE—VARIANCE—PLEADINGS—AMENDMENT.

1. In an action on a judgment, a finding that a payment had been made to assignees of the judgment on a compromise agreement was not against the evidence, though the compromise was with the attorney of the assignees, it appearing that the assignees authorized him to act and received the benefits.

2. It was immaterial, as affecting the finding, that the attorney signed the receipt and the satisfaction of the judgment as attorney for the original plaintiff in the action in which it was rendered, as Code Civ. Proc. § 385, provides that on transfer of interest in a suit it may be continued in the name of the original party.

3. Plaintiff, as assignee of a judgment, brought suit thereon, and defendant claimed that the judgment creditor had also assigned the judgment to S., to whom defendant had paid a certain sum by way of compromise in full satisfaction. The assignment to S. was in ordinary form, except that he was constituted attorney in fact to collect and discharge the judgment. This assignment was modified by a contemporaneous agreement, not filed, reciting that the assignment was to S. as attorney for the assignor to secure payment of fees, and that the assignor was to receive a certain amount on collection, and that he reserved the right to sell the judgment after submitting offers to S. for approval. Held that, as the two writings formed but one contract under Civ. Code, § 1642, declaring that several contracts relating to the same matter between the same parties, and made as parts of substantially one transaction, are to be taken together, it was prejudicial error to refuse to admit the contemporaneous writing.

4. Though the complete contract showed a variance from the contract of simple assignment alleged, the variance was immaterial, and the court should have proceeded in conformity with Code Civ. Proc. § 470, providing that where the variance is immaterial the court may direct the fact to be found according to the evidence, or may order an immediate amendment.

5. If the defendant wished to make the defense that he had no notice of the contemporaneous agreement, he would be entitled to amend.

Commissioners' Decision. Department No 2. Appeal from Superior Court, City and County of San Francisco; H. Z. Austin, Judge.

Action by William H. Cobb against R. V. Doggett. From a judgment for defendant and from an order denying new trial, plaintiff appeals. Reversed.

Geo. W. Schell and F. E. Cook, for appellant. J. C. C. Russell, for respondent.

SMITH, C. This is a suit to recover the balance alleged to be due on a judgment against defendant in favor of Max Gutter, of date October 15, 1894, for the sum of \$1,041.90. Judgment was entered for the defendant, from which, and from an order denying his motion for a new trial, the plaintiff appeals.

The plaintiff is the assignee of Gutter, under an assignment of date October 20, 1894. It is not disputed that there was paid

\*Rehearing denied March 7, 1904.

on the judgment, by defendant, about February 5, 1895, or shortly afterwards, the sum of \$580, and that this was all that has been paid. But it is claimed by defendant, and found by the court, that, prior to the payment, Gutter, by instrument in writing of date October 20, 1894, had assigned the judgment to Scrivner, Schell & Morgan, who had been his attorneys; and that the said amount so paid on judgment was paid in pursuance of an agreement of compromise with the assignees named, and in full settlement and satisfaction thereof. The latter finding is fully supported by the evidence. It is, indeed, objected that the settlement was not made directly with Scrivner, Schell & Morgan, but with one Holland, their local attorney; but the objection, we think, is untenable. Holland was authorized to act for them, and his acts were ratified by them in receiving the money paid, and the note and mortgage given to him in satisfaction of the judgment, which were afterwards satisfied by the defendant. Nor is it in any way material that Holland signed the receipt and the satisfaction of the judgment as "Attorney for Max Gutter." He was authorized by Scrivner, Schell & Morgan to act for them, and the use of the name of the nominal plaintiff in the suit was not improper. Code Civ. Proc. § 385.

With regard to the assignment to Scrivner, Schell & Morgan, the finding is also supported by the evidence actually introduced, which was an instrument in writing, of the date named in the finding, in terms assigning the judgment to them. But it appears that, accompanying the assignment, there was a contemporaneous agreement in writing, materially modifying its effect, which was offered in evidence by the plaintiff, but on the objection of the defendant excluded; and it is urged by the appellant that this ruling was erroneous. The assignment in question is in ordinary form, except that, in a clause following the assignment, the assignees are constituted the attorneys in fact of the assignor to collect the money due on the judgment, "and, on payment, to acknowledge satisfaction or discharge of the same." The accompanying agreement, which is signed by both parties, is as follows: "Whereas said Max Gutter has assigned his said judgment as security for our fees and costs advanced, it is therefore mutually understood and agreed as follows, to wit: That said Max Gutter shall be entitled to have and receive one-half of any and all money received, recovered or rendered upon said judgment after first deducting the costs therefrom, and that said Max Gutter shall have the right and privilege of negotiating the sale, satisfaction or compromise of said judgment, but any offer received by him before acceptance to be submitted to us for our approval." The former document was filed among the papers in the case December 2,

1894. The latter was not filed, nor was there any evidence introduced or offered tending to show that defendant had notice of it. There can be no doubt, we think, that the latter document should have been admitted. The two writings make but one contract (Civ. Code, § 1642, and authorities cited in Pomeroy's edition), and it was clearly improper to exclude any part of it. The contract thus offered to be proved did, indeed, vary from the contract alleged—which was a simple assignment—but the variance was not of a character to mislead the defendant, and was therefore immaterial; nor, indeed, was objection made on that ground. *Morehouse v. Morehouse*, 73 Pac. 738. The court should therefore have admitted the evidence and found the fact accordingly, or directed an amendment. Code Civ. Proc. §§ 469, 470.

Nor do we think the error was immaterial. The effect of the transaction as a whole was, indeed, to transfer the legal title, and thus to authorize the assignees to sue or to prosecute the pending suit in their own name. Code Civ. Proc. § 369; *Gradwohl v. Harris*, 29 Cal. 154; *Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 497, 33 Pac. 550; *Greig v. Riordan*, 99 Cal. 323, 33 Pac. 913; *Giselman v. Starr*, 106 Cal. 657, 40 Pac. 8; *Cortleyou v. Jones*, 132 Cal. 132, 64 Pac. 119; *Iowa & Cal. Land Co. v. Hoag*, 132 Cal. 630, 64 Pac. 1073; *Pomeroy's Code Rem.* § 132. But to the extent of the interest reserved by the assignor, they occupied the position of trustees of an express trust, and their powers were limited by the terms of the contract, by which they were authorized merely to collect the money due on the judgment, "and, on payment, to acknowledge satisfaction or discharge the same." They had no power, therefore, to compromise the judgment, or to receive less than the whole amount due in satisfaction of the same. It is indeed true that the assignment, without the accompanying writing, is absolute; and if it had appeared that the defendant dealt with the assignees without notice of the latter, and relying on the assignment alone, this might have been a good defense, and the error would thus have become immaterial. But such a defense is not pleaded, nor, though there is some evidence that might have justified the court in so finding, is there any finding upon the point. We cannot say, therefore, that the ruling complained of did not operate to the injury of the plaintiff. The defendant should be allowed, if advised, to amend his answer.

We advise that the judgment and order complained of be reversed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment and order complained of are reversed: *McFARLAND, J.*; *HENSHAW, J.*; *LORIGAN, J.*

(142 Cal. 182)

## WILSON v. ALCATRAZ ASPHALT CO. (L. A. 1,219.)\*

(Supreme Court of California. Feb. 11, 1904.)

CONTRACTS — CONSTRUCTION — EXCUSE FOR NONPERFORMANCE — ACTIONS — EVIDENCE — HARMLESS ERROR — DIRECTED VERDICTS.

1. A contract whereby plaintiff agreed to deliver to defendant such oil as it should need for a certain period, and providing that plaintiff should not be liable for damages from failure to supply oil when due to the act of God or unavoidable accidents, the complete exhaustion of the oil wells in the vicinity, or the revocation of certain leases by the lessors, and further providing that, except where plaintiff should be "unable for the last aforesaid causes to deliver the oil which may be demanded of him under this contract," he should during the term be required to supply defendant all the crude oil which it should require, did not contemplate the release of plaintiff from the obligation to supply oil on the revocation of the leases therein mentioned, if, after such revocation, there should be oil enough produced from other wells in the vicinity with which to supply defendant under the contract.

2. In an action on a contract, error, if any, in receiving in evidence certain letters and invoices, was harmless, where it did not cause the court to construe the contract in any other way than according to its provisions.

3. In an action on a contract for the sale of oil it was proper to permit a witness to summarize testimony as to oils purchased from other parties, and the cost thereof, where the calculations involved many additions and subtractions in figures.

4. Where the evidence would not have authorized a different verdict, it was proper to instruct the jury as to the verdict which they should find.

Commissioners' Decision. Department 2. Appeal from Superior Court, Santa Barbara County; D. K. Trask, Judge.

Action by J. C. Wilson against the Alcatraz Asphalt Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. W. Taggart, for appellant. Canfield & Starbuck, for respondent.

COOPER, C. At the close of the testimony the judge directed the jury to return a verdict for defendant in the sum of \$2,145.95, which it did, and judgment was accordingly entered. Plaintiff prosecutes this appeal from the judgment on a bill of exceptions.

This controversy arose out of the following facts: In December, 1894, the Southern Pacific Company leased to Austin and Doulton, the assignors of plaintiff, for a term of five years from January 1, 1895, for oil development purposes, certain lands in the town site of Summerland, in the county of Santa Barbara, for which the lessor was to receive a royalty of one-fourth of the oil produced from the land. The lessor, in the leases, reserved the privilege of terminating the same at any time upon 30 days' notice. On the 14th of November, 1895, the plaintiff was in possession of the leased lands, and had wells thereon producing some eight car loads of oil per

month, and he also owned and controlled other oil-producing wells at Summerland, outside those on the leased lands. The defendant corporation was using, and required for its use, at its works in Santa Barbara county, near Summerland, a large quantity of oil. After some negotiations, and after the oils produced and controlled by plaintiff in Summerland had been tested by defendant, the contract was entered into in regard to the sale and delivery by plaintiff to defendant of certain oil as specified in the contract.

This action was brought by plaintiff to recover \$1,449.20 for oil furnished defendant under the contract. Defendant, in its answer, set forth facts showing a breach of the contract on the part of the plaintiff, and claimed damages for such breach in the sum of \$5,497.19. The evidence showed, without conflict, that the plaintiff had furnished oil to defendant under the contract, for which plaintiff had not been paid, amounting to \$1,447.20. The defendant claimed that by reason of the breach of contract by plaintiff it was compelled to buy oil elsewhere, and that the amount it had to pay, including freight charges, in excess of which the oil would have cost if plaintiff had complied with his contract, was the sum named in its answer. It appeared, without conflict, that the defendant bought oil of other parties in Summerland and at Santa Paula to make up the plaintiff's deficiencies which he failed to furnish under the contract, and that the extra cost to defendant was the sum of \$3,593.45. In the calculation the court refused to allow the defendant for certain sums claimed to be the differences in value of the oils purchased from the oils agreed to be furnished. The court directed the jury to return a verdict for defendant for the difference between the latter sum and the amount so due for oil furnished under the contract, the amount of the verdict being \$2,145.95.

The main argument of counsel, and the issue in the case, is as to the construction of the contract. The Southern Pacific Company gave 30 days' notice, and thus terminated the leases of the lands from which plaintiff was obtaining the principal part of the oil which he was furnishing to the defendant under the contract, and the claim of plaintiff is that the termination of this lease had the effect of releasing him from his contract with defendant, and upon the solution of this question the case must be determined. The evidence shows that the lease was terminated at the urgent request of plaintiff, and that he wrote several letters to the Southern Pacific Company urging the giving of the 30 days' notice, so that the lease might be terminated, and that he might be thus relieved from his contract with the defendant. He afterwards wrote to the Southern Pacific Company asking that it destroy the letters thus written, so that they could not be used as evidence against him. After the leases were terminated he procured a new

\*Rehearing denied March 12, 1904. BEATTY, C. J., dissenting.

lease from the Southern Pacific Company, which he had previously negotiated, by the terms of which the company took the entire product from the leased premises at a price more advantageous to plaintiff than he was getting from defendant. But these matters are not deemed very material, as, under the view we take of the case, the plaintiff was liable in damages for a breach of his contract, even if the lease had not been terminated by his own procurement.

The contract, so far as material here, is as follows: "Said J. C. Wilson hereby agrees that on the conditions and terms hereinafter set forth he will furnish and deliver to said Alcatraz Asphalt Company at Summerland, in the County of Santa Barbara, State of California, so much crude mineral oil, produced or to be produced during the term of this agreement, at the said Summerland as the said Alcatraz Asphalt Company shall require for their business and work in the County of Santa Barbara, (whether for fuel or for other purposes), and as the said Alcatraz Asphalt Company shall from time to time order from said J. C. Wilson; said quantity, however, not to exceed twelve cars per month, but the said Alcatraz Asphalt Company shall have the privilege of purchasing as much more oil as they may require at the same price as herein mentioned on condition that the said J. C. Wilson shall produce enough more oil after giving the Southern Pacific Company their one-quarter share. \* \* \* The said J. C. Wilson shall not be liable to the said Alcatraz Asphalt Company for losses or damages resulting from his failure to supply and deliver oil to said corporation hereunder as demanded, when such failure shall be due to the act of God or unavoidable accidents over which the said Wilson has no control, the complete exhaustion of the oil wells now in operation or hereafter to be opened in the said Summerland or vicinity, or the Southern Pacific Railroad Company revoking their leases, made out to J. H. Austin and H. J. Doulton, December 20, 1894; but excepting in causes where said Wilson shall be unable for the last aforesaid causes to deliver the oil which may be demanded of him under this contract, he shall at all times during the term hereof be required to supply to said Alcatraz Asphalt Company all of the crude Summerland oil which it shall order or require, excepting as hereinabove mentioned, and he shall also from time to time keep on hand such supply of said oil as will enable him to meet the current demands and orders of the said Alcatraz Asphalt Company and shall not, for the purpose of supplying any other customer or person ordering oil from him, diminish his supply or stock of said oils to such a point as to interfere with the fulfillment by him of all orders which he may receive during the term hereof from said Alcatraz Asphalt Company. This contract and the obligation of said parties here-

under are to continue in force and effect from date hereof to and until the 31st day of December, 1896, inclusive. \* \* \* And in consideration of the above covenants and agreements on the part of said Wilson, said Alcatraz Asphalt Company binds itself and agrees hereby to pay for the oil which may be ordered and received by it hereunder from said Wilson at the rates hereinabove specified, and further agrees that during the said period of this contract they will make no purchase of crude mineral oils for use at their said works in the County of Santa Barbara, other than from said Wilson as hereinabove provided; excepting, however, that said Alcatraz Asphalt Company shall have and hereby reserves the right to purchase and receive from other persons than said Wilson during the term of this contract such other oils, not exceeding in any calendar month an amount equivalent to four (4) tank cars full, as they shall desire or require of lighter quality than that usually furnished or offered to them by said Wilson."

It is evident that the above contract does not release plaintiff from damages for his failure to perform the same except in the cases therein mentioned. The first is the act of God or unavoidable accidents, and no claim is made that plaintiff was released upon that ground. The second is the complete exhaustion of the wells in operation or to be operated in Summerland or vicinity. It is not contended that the oil wells in Summerland or vicinity were exhausted. The third, upon which plaintiff relies, is the Southern Pacific Company revoking its leases to Austin and Doulton. If, by reason of the termination of the leases, without the fault of plaintiff, there was not a sufficient supply of oil produced at Summerland to enable plaintiff to supply the amount required by defendant under the contract, then to that extent he would be released; but it is the contention of the plaintiff that revoking the leases operated to release him completely from his obligations under the contract. In a letter to defendant dated May 13, 1896, after he had received the 30 days' notice from the Southern Pacific Company, he wrote to the defendant inclosing the notice, and in the letter said: "The enclosed document is self-explanatory, and you will see by reading it that I had notice to vacate the R. R. premises, and of course that will sever our contracts as well, but I will let you have what oil I can up to the time of my removal." On the following day plaintiff wrote to the manager of the Southern Pacific Company in reference to the contemplated new lease, and said: "How soon will you have the new lease ready for me to sign? \* \* \* I do not want to seem too hasty but I am very anxious to get to work under the new lease and new contract." The leases were terminated by the notice given by the Southern Pacific Company on July 1, 1896, and plaintiff never offered nor endeavored to furnish the de-

fendant with oil after that date. There was no proof that there was not sufficient oil elsewhere from the production at Summerland and vicinity with which to supply the defendant. The manager of plaintiff testified (and it is not contradicted) "that there were twelve car loads of oil produced in that field outside of Mr. Wilson's production." The contract contemplated the release of plaintiff only in case the failure to deliver the oil was caused by the leases being revoked, and otherwise he shall "be required to supply" such oil as contemplated by the contract. If the plaintiff were to be released from his contract by reason of the revoking of the leases, why was it therein stated that he should be released by the complete exhaustion of the oil wells therein surrendered or thereafter to be opened therein? If the contract had reference to the oil to be produced from the leased lands only, why did it state that the oil was to be produced at Summerland? If plaintiff had procured the oil from other outside parties at Summerland and tendered it to defendant, could defendant have refused it because it was not produced from the leased lands? The contract and each and every clause thereof must be read together so as to arrive at its true intent and meaning. The exhaustion referred to in the contract was to be so complete as to leave either no oil or not enough procurable anywhere in the market from the production at Summerland to enable the plaintiff to fulfill his contract. If the leases should be revoked, it was contemplated that the oil should be procured elsewhere if it could be obtained in Summerland. When the contract recites that unless plaintiff, from the aforesaid causes, shall be unable to supply the oil demanded under the contract, it shall at all times be required to supply the same, it excludes all other causes by implication. If, after the leases were revoked, there was oil enough produced from other wells in Summerland with which to supply defendant under the contract, it would not lie in the mouth of plaintiff to say that he could not purchase the outside oils or obtain control of them. Such condition would have been good if inserted in the contract, but it was not so inserted. The scheme and purpose of the contract are inconsistent with the idea that the oil to be furnished under it was to be limited to that produced or controlled by plaintiff from the leased lands, and it necessarily contemplated the possible delivery to the defendant of other oils to be produced by other parties at Summerland, and which the plaintiff, if necessary, undertook to procure for that purpose. The rule is that, if performance of a contract is possible, it is none the less a breach although the obligor himself may have become wholly unable to perform. The impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it. If what is agreed

to be done is possible and lawful, it must be done. Difficulty of accomplishing the undertaking will not avail the party who commits a breach of the contract. If a party expressly undertakes to do a thing, lawful in itself, and not necessarily impossible under all the circumstances, and does not do it, he must make compensation in damages, though the performance was rendered impracticable, or even impossible, by some unforeseen cause for which no provision is made and over which he had no control, but against which he might have provided in his contract. The rule has its foundation in common sense and honesty, and compels parties to abide by their contracts. Any other rule would leave all contracts in a sea of uncertainty, without rudder or compass. See, generally, on the subject, *Klauber v. San Diego St. Car Co.*, 95 Cal. 353, 30 Pac. 555; *Hare on Contracts*, 639; *Sample v. Fresno Plume, etc., Co.*, 129 Cal. 223, 61 Pac. 1085; *Wilmington Trans. Co. v. O'Neil*, 98 Cal. 1, 32 Pac. 705.

Counsel claims that the court erred in receiving in evidence certain letters and invoices because they were only admissible for the purpose of showing the construction put upon the language of the contract by the parties, and as the court held that the contract could be construed by the language therein contained, and was not ambiguous, for this reason the evidence was not admissible. The evidence, if immaterial, was harmless. It did not cause the court to construe the contract in any other way than to hold it valid according to its mandates. The evidence was consistent with the construction placed upon the contract by the court.

The claim is made that it was error for the court to permit the witness Bell to summarize the testimony as to oils purchased by defendant from other parties, and the additional cost to plaintiff. No reason is given as to why it was error, and we do not perceive any. The jury were not required, nor was the court required, to make calculations involving many additions and subtractions in figures. The course pursued was the proper one. *Code Civ. Proc.* § 1855, subd. 5; *Greenleaf on Evidence* (16th Ed.) § 563h, and cases cited. There was, in fact, no dispute as to the figures, and, if the construction placed upon the contract was correct, the instruction to the jury was proper. The evidence would not have authorized a different verdict, and, in such cases, it is proper to instruct the jury as to the verdict they should find. *Los Angeles F. & M. Co. v. Thompson*, 117 Cal. 601, 49 Pac. 714; *O'Connor v. Witherby*, 111 Cal. 528, 44 Pac. 227. In this case there was no conflict in the evidence as to any material fact upon which the jury were required to pass.

We have examined other alleged errors, but find nothing that would call for a reversal of the judgment. We therefore advise that the judgment appealed from be affirmed.

We concur: HARRISON, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

(142 Cal. 158)

In re DE LAVEAGA'S ESTATE. (S. F. 3,588.)

CEBRIAN et al. v. DE LAVEAGA et al.  
(Supreme Court of California. Feb. 9, 1904.)

BASTARDS—ADOPTION—PUBLIC ACKNOWLEDGMENT—STATUTES—EVIDENCE.

1. Civ. Code, § 230, provides that the father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such. *Held*, that a will recognizing an illegitimate child as the son of testator, but which remained in the possession of testator's brother until after testator's death, was not a "public acknowledgment," within the statute.

2. A witnessed instrument declaring the one executing it to be the father of a certain illegitimate child, naming the child's mother, and stating that the child was "living as a foster son with D.," was no adoption, within the statute.

3. Where the father of an illegitimate child had no family except the child, and paid for his support in another family, but the child never lived with the father at his home, there was no adoption under the statute.

Beatty, C. J., dissenting.

In Banc. Appeal from Superior Court of City and County of San Francisco; J. V. Coffey, Judge.

Judicial proceedings on the settlement of the estate of Jose Vicente de Laveaga, deceased. From a decree of a final distribution, Maria Josefa Cebrian and others appeal. Reversed in part.

Timothy J. Lyons and Garret W. McEnerny (E. S. Pillsbury, of counsel), for appellants. J. J. Dwyer, Lloyd & Wood, W. L. Pierce, Graves & Graves, Garber, Creswell & Garber, Daniel Rogers, and Thos. F. Barry, for respondents.

VAN DYKE, J. This appeal is from a decree of final distribution of "the residue of the estate" of Jose Vicente de Laveaga, deceased. The appeal is taken by Maria Josefa Cebrian, Maria C. de Laveaga, and Miguel A. de Laveaga, who were respectively the two sisters and the brother of said decedent. The said decree distributed said "residue" of said estate among said three appellants and the respondent Anselmo J. M. de Laveaga. The appeal is not taken from the whole of said decree, but only in so far as it adjudges that the respondent Anselmo J. M. de Laveaga is entitled to one-fourth part of said "residue" thereby distributed, or to any other part thereof, or to any interest at all.

Although the record in this case is very voluminous, and the printed argument of counsel on the respective sides quite elaborate, and also voluminous, the questions involved are reduced to two propositions. These, as stated by the appellant, are: First, whether, under section 1387 of the Civil Code, to be found in the title on succession to estates, it is possible for an illegitimate to inherit from a collateral kin, except in the event of the marriage of his parents, and his adoption into the family created by that marriage. The section in question reads as follows: "Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate." The second point upon which the appellant relies is that the respondent was never legitimated or adopted under section 230 of the Civil Code, which section reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes, legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." On the other hand, it is contended that the respondent was adopted under the provisions of section 230, Civ. Code, and, as such, entitled to inherit through his deceased father, the brother of the decedent whose estate was distributed, and in which this appeal is taken. The case was tried before the court without a jury, and the court found, among other matters: That the respondent was the illegitimate child of Jose Maria de Laveaga, by one Basilia Sanchez, who was a servant in the household of the father of said Jose Maria, and was living therein in the city and county of San Francisco at the time respondent was begotten. But before his birth

¶ 1. See Bastards, vol. 6, Cent. Dig. § 17.



his mother, said Basilia Sanchez, removed to the city of Mazatlan, in Mexico, where he was born. "That said Jose Maria de Laveaga and said Basilia Sanchez were never married. That the said Basilia Sanchez was never married. That the said Jose Maria de Laveaga was never married, and had no family except his said child, Anselmo Jose Maria de Laveaga. That the said Anselmo Jose Maria de Laveaga was born illegitimate, and was born the illegitimate child of said Jose Maria de Laveaga." That after the death of his mother, Basilia Sanchez, said respondent, then a child, was brought to San Francisco in September, 1873, and was received here and taken in charge by his father, said Jose Maria, who placed him under the care of Dr. Wilhelm Dohrmann, and paid for his support and education in the family of said Dr. Dohrmann, "and thence, continuously until his own death, said Jose Maria de Laveaga took said Anselmo Jose de Laveaga into his custody and control and under his protection in said state of California, and till his own death did continue to have and exercise the same in said state of California over said Anselmo Jose Maria de Laveaga as the father of said Anselmo Jose Maria de Laveaga, and in a fatherly manner, and did receive the said child, Anselmo Jose Maria de Laveaga, into his said family as his own child, and from on or about the 20th day of September, 1873, thereafter until his death as aforesaid, said Jose Maria de Laveaga caused said Anselmo Jose Maria de Laveaga to be cared for, nurtured, maintained, reared, and educated in said city and county of San Francisco by said Dr. Wilhelm Dohrmann, \* \* \* and said Dr. Dohrmann, with his wife, acted, by the direction, consent, request, and procurement of said Jose Maria de Laveaga, as the foster parents." That "said Jose Maria de Laveaga, having no family except as aforesaid, did, to his acquaintance, friends, associates, kindred, and other persons, publicly acknowledge and declare the said Anselmo Jose Maria de Laveaga to be his own child and son. That from and after the said arrival of said boy Anselmo in said city and county, and until his own death, said Jose Maria de Laveaga had, in said city and county of San Francisco, certain kindred, to wit, parents, brothers, sisters, and other collateral kindred, and they resided therein from the date of said boy's arrival in said city and county continuously thereafter until said Jose Maria's death, with the exception that his father died on March 14, 1874, and into and among said kindred said Jose Maria de Laveaga did receive the said child, Anselmo Jose Maria de Laveaga, as his own child, and did not deny to said kindred, or to any of them, that the said child was his child, or his own child, or that he was the father of the said child. \* \* \* And did otherwise treat said Anselmo Jose Maria de Laveaga as if he were a legitimate child of said Jose Maria de Laveaga, and did thereby

adopt said Anselmo Jose Maria de Laveaga as and for his legitimate child, and did legitimate said Anselmo Jose Maria de Laveaga, and thereby said Anselmo Jose Maria de Laveaga became for all purposes the legitimate child of said Jose Maria de Laveaga, from the time of the birth of the said Anselmo Jose Maria de Laveaga."

It is also found that said Jose Maria de Laveaga left a so-called will, in the words and figures following, to wit:

"In the name of God, amen. I, Jose M. de Laveaga, of Los Aguilas Ranch, San Benito County, State of California, of the age of 33 years 1 mth & 27 days, and being of sound and disposing mind, and not under any restraint, or the influence or representation of any person whatever, do make, publish and declare this my last will and testament, in manner following, that is to say:

"First. I direct that my body be decently buried without undue ceremony or ostentation; but with proper regard to my station and condition in life, and the circumstances of my estate.

"Secondly. I direct that my executors hereinafter named, as soon as they have sufficient funds in their hands, pay my funeral expenses, and lawful debts.

"Thirdly. Whereas all my kindred and relations are in good and easy circumstances, I herewith distinctly declare that I not give, bequeath nor devise anything to any of my kindred or relatives however near; with the exception of my brother Jose Vicente, and this only in below specified case; but give, bequeath and devise all of my property to my son Anselmo Jose Maria, born in Mazatlan, Mexico to Basilia Sanchez, deceased, on the 21st day of April, 1868, and to-day residing with Doctor Wm. Dohrmann at No. 535 Bryant St. corner of Zoe, to the exclusion of all and everybody else, as this is the only child, I swear before God and men to have.

"Fourthly. I wish to have it understood, that said Anselmo Jose Maria, will not enter into possession of anything now belonging to me, before he reaches his full age, and has learned some profession, for which purpose the executors hereinafter named will give him a thorough education.

"Fifth. In case of death of said Anselmo Jose Maria, all of my estate goes to my brother Jose Vicente de Laveaga.

"Lastly. I hereby appoint my said brother Jose Vicente de Laveaga and my friend Frederick W. Dohrmann (of the firm of B. Nathan & Co.) both of the City of San Francisco, California, the executors of this my last will and testament; hereby revoking all former wills by me made.

"In witness whereof, I have hereunto set my hand and seal this 8th day of November in the year of our Lord one thousand eight hundred and seventy-seven.

"J. M. de Laveaga. [Seal.]

"The foregoing instrument, consisting of one page besides this, was, at the date there-

of, by the said Jose M. de Laveaga signed and sealed and published as, and declared to be his last will and testament, in presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

"A. M. Abrego, Residing at Los Aguilas.

"Green Devaul, Residing at Los Aguilas."

It is further found that another instrument in writing, in the German language, was executed by said Jose Maria de Laveaga in his lifetime, of which the following was a translated copy:

"Done

"San Francisco, California.

"May 24th Anno 1878.

"By these presents and by my name, hereunto subscribed with my own hand, I, Joseph Maria de Laveaga, before and in the presence of the witnesses whose names have been likewise hereunto subscribed with their own hands, and being in the full possession of my intellect and in good health, (having come here temporarily from my rancho, Los Aguilas, San Benito County,) do truthfully and solemnly declare:

"That the boy, born at Mazatlan in Mexico on April 21st Anno 1868, therefore at present 10 years old, named Joseph Anselm Sanchez, who, since September 20th of the year 1873, has been, and is now, living as a foster son with Wilhelm Dohrmann, M. D., engaged here in medical practice, and with the latter's family, is my own son, and is hereby acknowledged as such by me, his own true father, before these witnesses orally and in writing, just as I have already after the death years ago of his own mother, Basilla Sanchez, by means of a testamentary disposition (that is, to say, years ago) made him my sole and only lawful heir of the estate to be left by me, and I hereby repeatedly acknowledge and confirm him with all his legal claims of inheritance and other rights and consequences connected with and in law and justice arising out of this my acknowledgment, which an own son may have.

"Whereof this preliminary instrument is witness (viz. of this my act of acknowledgment) (and at the same time of the previous testamentary disposition as to the inheritance of my estate) amongst the living and in case of death, reserving compliance with the further formality, if required by law, of a proper notarial instrument and other like things, which owing to the absence of the notary public, Mr. E. V. Sutter, of this city, will be effected and regularly done in addition hereto after his return.

"Thus done and subscribed, under date and in the year, as above, on May 24th, 1878.

"J. M. de Laveaga.

"As witnesses and for the genuineness of the above signature:

"F. A. Schroder,

"Wilhelm Dohrmann, Dr. M."

And it is further found that the said will of Jose Maria de Laveaga was admitted to probate December, 1895; that by reason of the premises the court concludes that the said Anselmo Jose Maria de Laveaga is one of the four heirs at law next akin of the testator, Jose Vicente de Laveaga, and is entitled to one-fourth part of the residue of his estate.

The findings of the court to the effect that the respondent was adopted by Jose Maria de Laveaga are challenged by the appellants as being unsupported by the evidence. From the evidence, the following appear to be the facts of the case. In 1867 the family of the elder de Laveaga moved from Mazatlan to San Francisco. He was a banker, and possessed of considerable means. He had three sons and three daughters. One son, Jose Maria de Laveaga, and three daughters, came with the family. Miguel A. de Laveaga, one of the sons, and an appellant herein, was at the time at school in Germany; and the other son, Jose Vicente, whose estate is now under consideration, came up subsequently. With the family two sisters of the mother and several servants also came. Among the servants was Basilla Sanchez, claimed to be the mother of the respondent by Jose Maria de Laveaga, who was at that time 22 or 23 years of age, and the said Basilla Sanchez about 25 years of age. After remaining in San Francisco about three months, this Basilla Sanchez, in the fall of 1867, the same year in which they arrived here, returned to Mazatlan, where she gave birth to the respondent, as already stated, April 21, 1868. She died in Mazatlan in May, 1872. The respondent was brought from Mazatlan to San Francisco September 20, 1873, when he was about 5 years of age, and was taken by Jose Maria de Laveaga to the house of Dr. William Dohrmann, a German physician who lived at 535 Bryant street, in San Francisco. At this time, and for some time prior thereto, said Jose Maria was a clerk with T. Lemmen-Meyer & Co., a house in this city then doing a large South American business. He continued to be a clerk in that house until his father's death in 1874. The respondent, from the time he arrived here, remained a member of Dr. Dohrmann's household for 14 or 15 years, with the exception of some short absences. In 1874, the year following the arrival of respondent to San Francisco, the elder de Laveaga died, leaving an estate of the value of from \$1,500,000 to \$2,000,000. Jose Maria de Laveaga inherited \$75,000 from his father. This inheritance he received in 1874 and 1875, and in June, 1875, he purchased 23,000 acres of land at Hollister, San Benito county, called "Los Aguilas Ranch," and took up his residence there in 1875 or 1876. He remained on said ranch until 1879, in the meantime making occasional trips to San Francisco, and then returning again to his ranch. In the latter year, being finan-

cially embarrassed, he conveyed the said ranch to his mother, who paid the mortgage that had been given thereon. Jose Maria then departed on a visit to Colorado, where he died April 21, 1880, at which time respondent herein was 12 years of age. In July, 1874, the year following the arrival of the respondent from Mazatlan, he was entered as a pupil in the German-American School in San Francisco as Joseph Sanchez, and continued a pupil therein until and including July, 1875. In September, 1875, his name was changed to Joseph Dohrmann, and he continued a pupil in the German-American School under that name until 1877, at which time he was entered as a pupil in the South Cosmopolitan Grammar School of San Francisco under the name of William Dohrmann, and continued under that name to be a pupil of that school for a year. On October 21, 1878, he entered the Lincoln Grammar School under the name of William Dohrmann, and continued a pupil therein until and including May 28, 1881. He was thus a pupil in a private school and in two public schools in the city and county of San Francisco, from the time he was six years of age until after the death of his father, under the name of Dohrmann. His Christian name, as first given, was Joseph, but it seems it was subsequently changed to William, perhaps from the fact that the name of Dr. Dohrmann was William. In October, 1881, he was registered in a school under the name of William Dohrmann, and as a German and a Protestant. On June 30, 1882, he sailed as a cabin boy in the ship Willie Reid for an 11-months voyage to Wales and Ireland, and returned home to San Francisco May 31, 1883. He was registered in that ship, as the custom-house records showed, as William J. Dohrmann, and in 1887 he is found in the directory of San Francisco as Joseph Dohrmann, a machinist living at 535 Bryant street, which, as appears, was the number of Dr. Dohrmann's residence. Mrs. Paulsen, a daughter of Dr. Dohrmann, deceased, called as a witness on the part of the respondent, testified that the respondent was everywhere known as and called Dohrmann; that she objected to his being called Dohrmann, not only to her own father, but to Jose Maria, his real father; and that Jose Maria said circumstances prevented the boy from taking his own name, which he would take in due season; and she testified, also, that her father, Dr. Dohrmann, grew quite angry and was displeased at the idea that he should be called de Laveaga or Laveaga, and not continue to be called Dohrmann. In the will of Jose Vicente de Laveaga, whose estate is here involved, respondent is referred to as "Jose Maria Dohrmann, a Mexican boy adopted, de facto, by and at Wm. Dohrmann's house." In 1895 respondent filed a petition for partial distribution to him of a legacy of \$20,000 in the present estate, and appellants herein resisted the petition of partial distri-

bution on the ground that by the will the Los Aguilas Ranch, which at that time belonged to the testator, was bound for the payment of all legacies; that the proceeds of the ranch were insufficient to pay the legacies in full. The lower court granted the petition for payment of the legacy in full, but on appeal that decree was reversed by this court. Estate of de Laveaga, 119 Cal. 651, 51 Pac. 1074. In the clause of the will in reference to the legacy it is provided that "the income and dividends of 200 shares to Jose Maria Dohrmann, a Mexican boy adopted de facto by and at Wm. Dohrmann's house"; and on the hearing of the petition for partial distribution the respondent testified that he was the individual mentioned by the name of Dohrmann, that he was everywhere known as and called Dohrmann, and that he did not know that he was a de Laveaga until the year before the death of Dr. Dohrmann, which occurred in 1886. It appears, therefore, from respondent's own testimony in that proceeding for partial distribution in this same state, that, up to five years after the death of Jose Maria de Laveaga, his real father, he did not know that he was a de Laveaga. He there says, "I did not know any better;" and upon the hearing from which this appeal was taken he was asked about the writing of three letters to Dr. Dohrmann and his wife, wherein he addressed them as "dear father and dear mother," and subscribed himself as "your loving son," and he was asked why he permitted himself to be called "Dohrmann," and said, "I did not know any better," and further testified that a year before Dr. Dohrmann's death the doctor told him that his name was not Dohrmann, but de Laveaga, and that that was the first information he had upon the subject. Dr. Dohrmann kept what is known in the record of the proceedings as "Joseph's Book," giving a history of the respondent, which book opens with these words, "Joseph Anselm Sanchez (Dohrmann) \* \* \* came to us his foster parents in San Francisco Sunday afternoon, the 20th of September, 4 o'clock p. m., A. D. 1873, 5 years 5 months old." Dr. Dohrmann claimed throughout his life that he and his wife were foster parents to the respondent, and the latter, as shown, bore their name, and was also known in the different schools under that name. Jose Maria de Laveaga, from the time he purchased the Los Aguilas Ranch, in 1875 or 1876, to 1879, resided on said ranch. He had a ranch house, consisting of three rooms, and had hands employed on the ranch, one of whom had a family, and made that his home for three or four years, yet he never received the respondent under his roof. And further he was never received in the family of the father of Jose Maria, nor is there any evidence that he ever entered their house, or was received or recognized by any of the members of his father's family. In fact, it appears from the evidence

that, when his intrigue with the servant girl was discovered, Jose Maria left his father's house in anger and for good, and that he never returned and slept in his father's house afterwards. But it seems, however, that the relations of affection between Jose Maria and his parents did not cease, as the numerous letters produced at the trial written by him would show, and they also show that in none of them was any reference ever made to the respondent in this case. In fact, it seems to have been his studied purpose not to refer to or introduce the subject of his illegitimate child in his intercourse or correspondence with his parents.

The will of Jose Maria, set out in the findings above, remained in the possession of Jose Vicente, his brother, until after the latter's death, when it was found among his effects and probated, as already stated. This, therefore, could not have been any public acknowledgment. In fact, respondent's counsel complain that the will was suppressed and kept from the public by Jose Vicente while he lived.

The other document signed by Jose Maria de Laveaga, and witnessed by F. A. Schroder and Dr. Dohrmann, and said to have been drawn up by Dr. Dohrmann, simply declares that the respondent here is his own son, born at Mazatlan, in Mexico, and that his mother was Basilla Sanchez, and that he "is now living as a foster son with Wm. Dohrmann, M. D., \* \* \* and with the latter's family." This is a good acknowledgment of an illegitimate child, so as to make him the heir of the person acknowledging him, under section 1387, Civ. Code, but falls far short of an adoption under section 230, Civ. Code. But section 1387, Civ. Code, however, does not aid respondent in this case, for, by its express terms, he does not represent his father by inheriting any part of the estate of his kindred. The court finds that Jose Maria de Laveaga had no family except his said child, but, as shown by the evidence, his said child never lived with him anywhere, either on his ranch, or while he was a clerk in the city of San Francisco, or elsewhere. It is true, he paid for his support and education in the family of Dr. Dohrmann up to the time of his own death, and that his brother Jose Vicente thereafter, up to his death, did contribute something towards the support and education of the respondent. But Jose Maria never received him into his family, or into or among his kindred, and did not treat the respondent as if he were a legitimate child, but, on the contrary, treated him and referred to him as an illegitimate child. The findings of the court in the premises are not supported by the evidence, and the conclusion that "thereby said Anselmo Jose Maria de Laveaga became, for all purposes, the legitimate child of said Jose Maria de Laveaga from the time of the birth of said Anselmo Jose Maria de Laveaga," is contrary to law. The court be-

low seems to have acted upon the theory that, where the father of an illegitimate child has no family, the provision of the Code in question in that respect may be dispensed with. This cannot be done. The Legislature adopting section 230 evidently went as far as public policy would justify in this respect, and the language is too plain to be misunderstood. The father of an illegitimate child, in order to adopt him as legitimate, must not only publicly acknowledge him as his own, but must receive him into his family, and, if he have a wife, with her consent. It does not say that he must receive him into his family if he has a family, and, if not, in that case can receive him or send him elsewhere; but having a family, or at least a home in which he can receive him, is one of the cardinal conditions prescribed for such adoption.

There is no former decision of this court which can be taken as authority against the views above expressed, although some expressions of individual justices adverse to those views may be found. In *re Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 6 L. R. A. 594, is the only case where an opinion concurred in by a majority of the court has intimated any contrary views; but in that case what was intimated, although not clearly expressed, on the subject, was unnecessary to the decision. Moreover, the opinion was concurred in by only four of the justices, one of whom afterwards expressed dissatisfaction with it, declaring that it was, so far as the question here involved is concerned, mere dicta, and said: "I concurred in the opinion; but as I was thoroughly convinced that the facts in the case did not bring it within the Code, under any possible construction of it, I must have failed to consider as thoroughly as I should have done the views above referred to. Upon mature deliberation, I am satisfied that they are wrong. See *Blythe v. Ayres*, 96 Cal. 593, 31 Pac. 915, 19 L. R. A. 40." Under these circumstances, in *re Jessup* cannot be taken as an authority on the subject in any way controlling. In *Blythe v. Ayres*, 96 Cal. 557, 31 Pac. 915, 19 L. R. A. 40, in an opinion by one of the justices there were views expressed contrary to those above stated; but these views were unnecessary to the decision of the case, and, moreover, were concurred in by only two of the other justices. Justice McFarland, whose concurring opinion was signed by Justice De Haven, concurred in the judgment on the ground that the plaintiff therein was heir of the deceased under section 1387 of the Code, but says: "I dissent from the proposition that plaintiff was adopted by deceased under section 230. \* \* \* How can there be a compliance with a statute in the absence of conditions contemplated by the statute, and absolutely necessary to give it effect? The provision of the Code in question assumes the existence of a family; and it assumes that there may

be a family in which there is no wife, because it provides that, if there be a wife, she must consent to receive the illegitimate child into the family. \* \* \* There must, however, be a family into which the child can be received; and, when that condition is not present, the provision of the Code under discussion can have no operation." In *Garner v. Judd*, 136 Cal. 394, 68 Pac. 1026, cited by respondent, the question here involved was not before the court, and was not considered.

With lax laws on the subject of divorce, and the lax administration of such laws, it only requires that all distinction between legitimates and illegitimates be abolished, to practically abolish also the marital relation, and thus destroy the home, with all its hallowed associations. Society itself is but the aggregation of families, and to the extent that we weaken the family tie we sap the foundation of society. The history of mankind fortunately illustrates that no laws of any people have ever attempted to abolish all distinctions between legitimate and illegitimate children. For a brief period in the terrible history of the French Revolution an innovation, in a limited sense, was attempted, and in reference to this innovation Chancellor Kent says: "In June, 1793, in the midst of a total revolution in government, morals, and laws, bastards, duly recognized, were admitted to all the rights of lawful children. But the Napoleon Code checked this extreme innovation." 4 Kent's Com. 415. That the marriage relation is the foundation of all society has been so frequently expressed by this court that it is entirely unnecessary to refer to the cases wherein it is so held. Courts of other jurisdictions, it may be said, have also uniformly so decided. In *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244, the Supreme Court of the United States, passing upon the anti-polygamy legislation, says: "Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." In *Murphy v. Ramsay*, 114 U. S. 15, 5 Sup. Ct. 747, 29 L. Ed. 47, it is said by the same court: "Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony—the sure foundation of all that is stable and noble in our civilization, the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." Also by the same court in *Maynard v. Hill*, 125 U. S.

190, 8 Sup. Ct. 723, 31 L. Ed. 654, speaking of marriage, it is said: "It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." As already said, the Legislature, in adopting section 230, Civ. Code, has gone as far as public policy will justify, and the court does not feel inclined, even if it had the right so to do, to go beyond the plain language of the law declared by the Legislature in this respect.

Our conclusion from the foregoing, therefore, is that the respondent was never adopted so as to be deemed a legitimate child of Jose Maria de Laveaga as required by section 230, Civ. Code, and therefore is not entitled to inherit any part of this estate. Whether, according to the provisions of section 1387, Civ. Code, it is possible for an illegitimate child to inherit from a collateral kin, except in the event of the marriage of his parents, and his adoption into the family created by that marriage, as contended by appellants, it is not necessary here to determine.

The portion of the judgment and decree appealed from is reversed, and the cause remanded for further proceedings in accordance with this opinion.

We concur: McFARLAND, J.; HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

(March 11, 1904.)

BEATTY, C. J. (dissenting). For want of time, I have never been able to make such an examination of the voluminous record and printed arguments in this case as would warrant me in saying that the judgment of the superior court is free from error; but the denial of respondent's petition for a rehearing gives me occasion to say that, so far as the opinion of the court may seem to imply that the evidence does not sustain the findings of the trial judge to the effect that respondent's father did publicly acknowledge him as his own child, and treat him as if he were legitimate, it is not, in my opinion, sustained by the record. There is not only sufficient evidence, but, I think, strongly preponderating evidence, in support of these findings. The principal ground of the decision, however, as I understand the opinion of the court, is the failure of his father to receive the respondent into his family; and, in connection with this point, it is held that reception into the family of the father is an indispensable condition of legitimation, under section 230 of the Civil Code, rendering it impossible for a father who is without a family and without a home to confer the status of legitimacy upon a child born out of wedlock. The contrary was held in the *Jesup Case*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 6 L. R. A. 594; and it was a point decided, and not, as stated in the opinion of the

court, obiter dictum. The effect of the decision in that case was to remand the cause for a new trial, and it was the duty of the court to decide the questions which must necessarily arise upon the new trial, one of which was the proper construction of section 230, as to the possibility of legitimation in the case of a father without a family and without a home. Neither was the decision then made upon this point concurred in by a bare majority of the court. The four justices who signed Justice Fox's opinion awarding a new trial necessarily concurred in what he said, and a fortiori the three justices who dissented from the judgment have concurred on this point, for it was absolutely essential to an affirmance of the judgment to hold that, where the father has no family and no home, he is not by that circumstance deprived of the power to confer the status of legitimacy upon his illegitimate offspring. It is possible, notwithstanding the mature consideration given to the Jessup Case, that the court may have been in error in applying the principle of liberal construction to the statute, instead of construing it strictly and literally, as it is construed here; but I cannot concur in a reversal of that case which is put upon the untenable ground that the point was not decided, and that the so-called dictum of the court was concurred in by a bare majority of the justices. Under the circumstances, I think the case deserved further consideration.

(142 Cal. 216)

**PEOPLE v. GOODRICH.** (Cr. 1,060.)

(Supreme Court of California. Feb. 13, 1904.)

**EMBEZZLEMENT—INFORMATION—SUFFICIENCY—FIDUCIARY CAPACITY—FORMATION OF INTENT—TIME—DEPOSITIONS—DILIGENCE.**

1. Pen. Code, § 503, defines embezzlement to be the fraudulent appropriation of property by a person to whom it has been intrusted. *Held*, that an information for embezzlement need not necessarily set out the particulars constituting the fiduciary relation.

2. Where an information for embezzlement alleged that defendant was intrusted as bailee with a launch for the purpose of taking it to a certain place, and there purchasing it, or, in case he did not purchase it, delivering it to its owner, and that defendant did not take the launch to the place agreed or purchase it, and embezzled the same, etc., the information sufficiently showed that defendant was intrusted with the launch as a bailee.

3. On a prosecution for embezzlement of a launch, it appeared that in S. county defendant negotiated with the owner for the purchase of it, and it was agreed that defendant should take the launch from where it was in that county to another place in the same county, when he should have the privilege of purchasing it, but that instead of taking the launch to the place agreed on he took it to a place in another county, and shortly thereafter started with it on a sea voyage. Just before starting on the voyage defendant wrote the owner that he was going away on business. *Held*, that the evidence warranted a finding that the intent to embezzle was formed while defendant was in S. county, and not after he reached the place from which he commenced his voyage.

4. Pen. Code, § 503, defines embezzlement to

be the fraudulent appropriation of property by one intrusted with it. Defendant was intrusted with a launch for the purpose of taking it from one place to another, on an understanding that he might have the privilege of purchasing it after arriving at his destination, or else deliver it to the owner, but he did not take it to the place agreed, but took it to another place, and started on a voyage with it. *Held*, that it was not necessary for the owner to have made a demand for the return of the launch in order to constitute defendant's offense that of embezzlement.

5. On a criminal prosecution the trial was set for April 14th, and continued to May 5th, because of the absence of the prosecuting witness. Before offering the deposition of the prosecuting witness on May 5th, it was shown that efforts had been made to serve a subpoena on him, but that the only information that could be obtained about him was that he was in another state. *Held*, that the evidence of diligence was sufficient.

Commissioners' Decision. Department 2. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

W. F. B. Goodrich was convicted of embezzlement, and he appeals. Affirmed.

See 71 Pac. 509.

William F. Renfro, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

**CHIPMAN, C.** Defendant was convicted of the crime of embezzling a certain gasoline launch, the property of one McDade, in the county of San Joaquin. Defendant appeals from the judgment of conviction and from the order denying his motion for a new trial. The information charged that defendant, "on or about the 16th day of November, 1901, prior to the filing of this information, \* \* \* was then and there intrusted as bailee by one Hugh McDade with one gasoline launch, for the purpose of bringing the same from Staten Island in said San Joaquin county, California, to the city of Stockton, in said San Joaquin county, and there purchasing the same, or in case he, the said W. F. B. Goodrich, did not purchase the said gasoline launch on or before the 16th day of November, 1901, he, the said Goodrich, agreed then and there to deliver the said gasoline launch to its owner, the said Hugh McDade, on or about the 16th day of November, 1901." Ownership and value of the property in McDade is then alleged, and that Goodrich did not bring the launch to Stockton or purchase it then or at all, or deliver it to the owner as agreed or at all; "but thereafter, on or about the 16th day of November, 1901, the said W. F. B. Goodrich did willfully, unlawfully, and feloniously embezzle and fraudulently convert to his own use the said launch, without the consent or authorization of said Hugh McDade, and not in the due and lawful execution of his said trust, contrary," etc.

1. Defendant urges error in the order of the court overruling his demurrer to the information, because, first, the launch was delivered on condition that the title should pass on the payment of the purchase price at some future day, and hence he was not a

¶ 4. See Embezzlement, vol. 18, Cent. Dig. § 9.

ballee; second, the time within which defendant had to purchase the launch, namely, November 16, 1901, had not expired at the time of the alleged conversion, namely, November 16, 1901. Defendant's argument is that "the contract of bailment set forth in the information shows that the delivery of the launch to appellant was on the footing of a sale and payment would have been a complete performance." It was said in *People v. Gordon*, 133 Cal. 328, 65 Pac. 746: "The essential elements of embezzlement are the fiduciary relations arising when one intrusts property to another, and the fraudulent appropriation of the property by the latter. Pen. Code, § 503. The origin or particulars of the relation need not be stated"—citing 2 Bishop's Crim. Law, § 323a. The information in the present case would have been sufficient without setting forth the particulars constituting the fiduciary relation. But having stated them, the pleader should perhaps be bound by their legal effect. We are unable to agree with appellant that the facts show a conditional or any sale. It plainly appears that the launch was intrusted to defendant as bailee "for the purpose of bringing the same from Staten Island, in San Joaquin county, California, to the city of Stockton, in said county, and of there purchasing the same." He was to bring the launch to Stockton, and when he did so he was to have the privilege of purchasing on or before a certain day. Upon what terms he could purchase does not appear. He was charged with the trust of first delivering the launch to its owner, and nothing in the information shows that defendant was authorized to deal with the property as his own or to pay for it at any price. What the details of the agreement were must be looked for in the evidence, and this cannot be imported into the information. He is distinctly charged with being intrusted as bailee with the property of another, and of having feloniously embezzled and converted it to his own use in violation of his trust. The information, in our opinion, is sufficient. *People v. Johnson*, 71 Cal. 384, 12 Pac. 261; *People v. Gordon*, supra; *People v. McLean*, 135 Cal. 306, 67 Pac. 770.

2. It is urged that the court was without jurisdiction, the claim being that the launch was in the city and county of San Francisco on the day of the alleged conversion, "on or about November 16, 1901." It appeared from the evidence of McDade that defendant came to witness at his ranch near Stockton, and stated that he had heard that witness had a launch for sale. The launch was then at Eagle Tree, Staten Island, San Joaquin county, in charge of Herbert Waite. Witness told defendant the boat was for sale, but he would first have to communicate with Waite. He made an appointment to meet defendant in Stockton, on Saturday, October 10th, and they did meet there on that day. McDade testified that defendant was to go to Staten

Island and bring the launch to Stockton, which defendant said he could do in thirty-six hours. Witness told defendant to "be here by Thursday; if not, not later than Saturday;" and he replied, "I will be here."

On the following day (Sunday) McDade gave defendant a written order directed to Waite for the launch, and Waite testified that defendant presented the order between the 10th and 15th of November, 1901. "Witness showed defendant how to run the launch, and he took it and started away down the Mokelumne river, and that was the last the witness saw of him. There was a man named Odin with defendant at the time." Odin testified that on defendant's taking possession of the launch they went directly to Benicia, thence to San Francisco, where the launch was fitted out and provisioned for a sea voyage, and after 10 or 15 days they put to sea through the Golden Gate, and proceeded south along the coast, putting into harbor occasionally, and defendant was finally arrested at Santa Barbara in possession of the launch. To reach San Francisco it was necessary for defendant to pass down the Mokelumne river to its junction with the San Joaquin river, and to take the launch to Stockton, as he had agreed, he should have turned up the San Joaquin river. Instead of doing so he made for Benicia, where he arrived the day he departed from Eagle Tree, Staten Island. We think the jury were warranted in finding that the intent of defendant to embezzle the launch was formed while he was in San Joaquin county, and not after he reached San Francisco. The inherent difficulty of proving by direct evidence the intent with which an act is conceived makes the intent a legitimate inference from the act itself and the attendant circumstances. The fact that defendant reported by letter to McDade while defendant was at San Francisco is not necessarily inconsistent with his having the intent to embezzle at the time he received the launch. This he may have done to allay the owner's suspicions. On defendant's own admission he wrote to the owner shortly before he put to sea that he was going to Albany, Or., to arrange some business there. He did not go to Albany, but turned the nose of the launch along the southern coast.

3. We think also the time of embezzlement was established by sufficient evidence. Nor was it necessary for the owner to have first made a demand for the return of the launch in order to constitute the offense that of embezzlement. *People v. Gordon*, supra; *People v. Ward*, 134 Cal. 301, 66 Pac. 372.

4. It is contended that the deposition of McDade was improperly admitted. The trial was first set for April 14, 1903, and on motion of the district attorney the cause was continued to May 5th, because of the absence of McDade from the state. The cause was called May 5th, and a jury obtained May 6th. Preliminarily to offering McDade's deposi-

tion, it was shown that reasonable effort was made to serve a subpoena upon him, and that the only information the sheriff and his deputy could get was that McDade was in the state of Nevada, and this was also satisfactorily shown by the testimony of McDade's wife.

We think the evidence of diligence was sufficient. *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779.

The certificate of the shorthand reporter complies with the requirements of section 869, Pen. Code. It is free from the infirmities found in the certificate in *People v. Ward*, 105 Cal. 652, 39 Pac. 33, cited by appellant. The question suggested as to the regularity of the appointment of the shorthand reporter is not before us. On the point raised, see *People v. McIntyre*, supra.

There was an attempt to show that the deposition as read varied in some particulars from the reporter's notes. The variance was inconsequential, and it clearly appears it was not in the least harmful. *People v. McIntyre*, supra.

5. Objection is made to certain modifications made by the trial judge in defendant's instructions Nos. 16 and 26, and in refusing instruction No. 27. The court instructed the jury quite fully, and as favorably we think as defendant was entitled to, upon the principles of law involved in the case, and upon the points covered by instructions 16 and 26. So far as we can see, the modifications made by the court were necessary to a correct statement of the law. No. 27, among other things, stated: "That a bailee is not bound to deliver a thing deposited without demand, even where the deposit is made for a specified time;" and that defendant could not be convicted unless it should appear "that a demand was made upon this defendant by McDade for the return of said launch, and that the defendant had refused to return the same." Conceding that such a rule would be applicable in some cases, this one was not in that class.

The judgment and order should be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: LORIGAN, J.; MCFARLAND, J.; HENSHAW, J.

(34 Wash. 216)

LOUDIN & BERGMAN FIRE CLAY MIN. & MFG. CO. v. CONLAN et al.

(Supreme Court of Washington. March 1, 1904.)

CORPORATIONS—TRUSTEES—QUALIFICATIONS—OWNERSHIP OF STOCK—STOCKHOLDERS—RIGHT TO CONTROL ASSETS—APPEAL—DISMISSAL—DETERMINATION OF CONTROVERSY.

1. Under 1 Ballinger's Ann. Codes & St. § 4255, requiring trustees of a corporation to be

stockholders, where a trustee of a corporation sold all of his stock he thereby ipso facto ceased to be a trustee.

2. A mere stockholder of a corporation has no right to possession and control of the corporation's property as against a regularly qualified trustee who was also president of the company.

3. Where, pending a suit to restrain a trustee of a corporation, and one who was merely a stockholder, from exercising any control over the corporation's affairs, the trustee testified under oath that he had sold all of his stock, and had no interest in, and had severed his connection with, the company, an appeal by such trustee and the stockholder from a judgment for plaintiff will be dismissed on the ground that there was no controversy between the parties.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Suit by the Oudin & Bergman Fire Clay Mining & Manufacturing Company against Thomas F. Conlan and another. On motion to dismiss appeal. Motion granted.

Danson & Huneke and R. L. Edmiston, for appellants. Thayer & Bell, for respondent.

PER CURIAM. Respondent moves to dismiss this appeal on the ground that the controversy between the parties has ceased, as far as matters involved in this appeal are concerned. The suit was brought by the respondent corporation against the appellants to procure an injunction against appellants, preventing them from interfering with respondent's business, from exercising or assuming to exercise any control over the affairs of the corporation, or authority over the workmen engaged at respondent's place of business, and from selling or offering to sell any of the property of the corporation. It is alleged that until the 22d day of April, 1903, the entire stock of the corporation was owned as follows: Charles P. Oudin, 1 share; Eva M. Oudin, 749 shares; Thomas F. Conlan, 375 shares; and Martin L. Bergman, 375 shares; that on said 22d day of April said Bergman transferred to said Conlan all of the stock theretofore owned by Bergman; that until the time of said transfer said Charles P. Oudin and said Bergman constituted the board of trustees of said corporation; and that said Charles P. Oudin was president and treasurer, and said Bergman was vice president and secretary of the said board. It is further alleged that on April 21, 1903, said Bergman resigned his office as vice president and secretary, and notified the president, who was also the remaining trustee, to that effect; that on the 23d day of April respondent, through its said president, notified said Bergman, who had theretofore been working at the pottery of respondent, that, having severed his connection with respondent, he must forthwith leave the premises of the company, and cease to have anything to do with its business; that said Bergman thereupon surrendered peaceable possession of the company's property to said Oudin, as the sole representative of the com-

¶ 1. See Corporations, vol. 12, Cent. Dig. § 1261.



pany, and withdrew from the premises peaceably and without resistance or protest of any kind; that after said Bergman had peaceably withdrawn, and within a few hours thereafter, he returned to the pottery of respondent with said Conlan; that said Conlan had at no time been either an officer or trustee of respondent, or in any way connected with said corporation, except as a stockholder therein; that said Bergman and Conlan thereupon entered upon respondent's premises, and assumed to assert exclusive control and authority over the premises and property there located, and said Conlan entered in the books of the company a statement to the effect that he thereupon took charge; that since said time said Bergman and Conlan have gone upon the premises of the respondent, and, without right or authority, have assumed to represent respondent, and, against the wishes and without the consent of respondent, have sold and delivered its goods, have exercised control over its workmen, have collected money due to it, have countermanded orders given to the workmen by said Oudin, have disputed the authority of respondent's officers over its workmen, and have induced the workmen to violate such orders; that said acts have been continued since the date above mentioned, are now continuing, and will be indefinitely continued unless restrained. The answer admits the sale and transfer of Bergman's stock to Conlan, but it is claimed that he is still a trustee of the corporation, and that he employed Conlan to assist in the management of the business. A temporary injunction was granted, and the appeal is from the order granting such injunction.

In support of the motion to dismiss, respondent submits the following affidavit: "Charles P. Oudin, being first duly sworn, on oath deposes and says: I am the president of said respondent Oudin & Bergman Fire Clay Mining & Manufacturing Company, and make this affidavit upon its behalf, and state that Martin L. Bergman has severed his connection with respondent, and has so admitted in open court under oath, and on August 12, 1903, in a case then pending in the superior court of Spokane county, state of Washington, said Bergman, being examined in regard to his connection with respondent, testified as follows: 'Q. Do you still claim to be a trustee of this company? A. I have never resigned. Q. Do you still claim to be a trustee? A. No; I do not. Q. How much did Mr. Conlan pay you for the quarter interest? (Objected to as immaterial. Objection sustained.) Q. How much did he pay you for the half interest? (Same objection. Objection sustained. Exception.) Q. Do you still own any stock in this company? A. No, sir. Q. Have you got any agreement by which you could get stock from Mr. Conlan? A. No, sir. Q. You are absolutely out of it? A. Absolutely out of it. Q. Ceased your connection with the company? A.

Except my resignation as secretary and manager. Q. Do you claim to be manager yet? A. No; I do not claim it, but my resignation has not gone in, that I know of. Q. You have severed your connection with the company? A. Yes, sir.'" In response to the above affidavit, and in resistance of the motion to dismiss, appellants submit the following affidavit: "Martin L. Bergman, being first duly sworn, on oath deposes and says that he has never resigned nor tendered his resignation as secretary, vice president, and manager of the Oudin & Bergman Fire Clay Mining & Manufacturing Company; that he has at all times claimed to be such secretary, vice president, and manager, and now claims to be such; that when affiant testified on August 12, 1903, as set forth in the affidavit of Charles P. Oudin, all that he intended to say was that he had sold all his stock in said company, and was not a stockholder, but that he was still an officer, of said company, as above stated; that affiant has been advised by his attorneys that he has at all times been, and now is, a trustee of said corporation, and claims to be such trustee, and, as stated by affiant in said testimony, affiant has never resigned or tendered his resignation as trustee of said company."

It will be observed that Bergman, in his affidavit, does not deny that he testified as stated in Oudin's affidavit. It is therefore a conceded fact, both in his affidavit and in the answer, that Bergman is not a stockholder in the corporation. He says, however, that he still claims to be a trustee. Not being a stockholder, he is no longer a trustee. Our statute (section 4255, 1 Ballinger's Ann. Codes & St.) requires that trustees of a corporation shall be stockholders therein. "Where the charter requires the director to be a stockholder, he must continue to hold stock during his term of office. If he sells all his stock in the company, he thereby becomes disqualified, and ceases ipso facto to be a director." 1 Cook on Stock & Stockholders, etc. (3d Ed.) § 623. Again, in Clark & Marshall on Private Corporations, the discussion of this subject in section 661 is concluded as follows: "According to the better opinion, when the ownership of stock is necessary to qualify one as a director, a person ceases to be a director if he ceases to be a stockholder, without any proceedings to remove him, although he may have owned stock when elected." Again, in Mr. Thompson's recently prepared and exhaustive treatise of the Law of Corporations, as found in 10 Cyc., the following statement appears at page 738 of said volume: "Where the statute requires that the members of the board must be holders of at least a given number of shares, a director who assigns all his shares to another ipso facto divests himself of his title to the office. \* \* \*" The following cases are also in point on this subject: Chemical National Bank v. Colwell, 132 N. Y. 250, 30 N. E. 644; Sinclair v. Dwight, 9

App. Div. 297, 41 N. Y. Supp. 193; Ditch Co. v. Reno W. Co., 17 Nev. 166, 30 Pac. 695. Within the above authorities, Bergman has ceased to be a trustee, and is not, therefore, entitled to exercise any control over respondent's property. Conlan, being a mere stockholder, has not the right to possession and control of the property of the company as against a regularly qualified trustee who is also the president of the company. At the time of the hearing below, Bergman also claimed to be manager of the company; but his testimony, set forth in Oudin's affidavit, above, shows that subsequent to said hearing he said he did not claim to be manager. True, he said he had not resigned, but he unqualifiedly answered that he had severed his connection with the company. It is admitted that that testimony was solemnly given under oath. The examination was so direct and simple that its import could not well have been misunderstood. Since he is neither stockholder nor trustee, his connection with the company is, in law, effectually severed; and that fact, taken together with his own statement under oath, we think, establishes that he no longer possesses any power to control the affairs of the corporation. There is therefore no controversy here to be determined on this appeal. In such a case it was held in *Hice v. Orr*, 16 Wash. 163, 47 Pac. 424, that the appeal should be dismissed.

The motion here is therefore granted, and the appeal is dismissed.

(34 Wash. 221)

#### STATE v. GLINDEMANN.

(Supreme Court of Washington. March 3, 1904.)

#### INCEST — INFORMATION — CONSTITUTIONAL LAW—INSANITY OF ACCUSED—EVIDENCE—REMARKS OF COURT.

1. 2 Ballinger's Ann. Codes & St. §§ 7228, 7229, defining and punishing incest, though they do not include knowledge of the relationship of the parties as an element of the crime, are not violative of Const. U. S. Amend 14, providing that no state shall deprive any person of liberty without due process of law.

2. Under 2 Ballinger's Ann. Codes & St. §§ 7228, 7229, defining incest, but not including knowledge of the relationship of the parties as an element of the crime, an information need not allege such knowledge.

3. On a trial for incest, in which the defense of insanity was set up, where it was shown that the accused had been adjudged insane, it was not reversible error to exclude evidence of the appointment of a guardian for him after such adjudication; such evidence being merely cumulative.

4. For the court, in the presence of the jury, to dispute the statements of counsel and the shorthand report of two stenographers as to what the answer of a witness was, to strike out her answer, and to permit her to adopt the court's version of what her answer had been, was erroneous, as a comment on the evidence.

Appeal from Superior Court, Spokane County; William E. Richardson, Judge.

John Glindemann was convicted of incest, and appeals. Reversed.

P. C. Shine, Townsend & Moore, and W. F. Townsend, for appellant. Horace Kimball and Miles Poindexter, for the State.

HADLEY, J. Appellant was charged with the crime of incest, committed with his own daughter. Having been tried and convicted, he has appealed to this court.

He first assigns as error that the court overruled his demurrer to the information. The essential part of the information is as follows: "That the said defendant, John Glindemann, in the county of Spokane and state of Washington, on or about the 1st day of January, 1902, did willfully, unlawfully, and feloniously have sexual commerce with and carnally know one Marie Glindemann, the said Marie Glindemann then and there being a female, and a daughter of said John Glindemann, thereby committing the crime of incest." Incest is defined in sections 7228, 7229, 2 Ballinger's Ann. Codes & St. as follows: "Incest is the sexual commerce of persons related within the degrees wherein marriage is prohibited." "Persons being within the degrees of consanguinity or affinity, within which marriages are prohibited by law, who intermarry with each other, or who commit fornication or adultery with each other, or who carnally know each other, shall be deemed guilty of the crime of incest. \* \* \*" It is urged that actual knowledge on the part of the accused that the relationship is within the said degrees of consanguinity is necessary in order to constitute the crime. It is insisted that the criminal intent cannot exist without actual knowledge of the relationship. Appellant contends that the statute defining incest should include the element of knowledge on the part of an accused, and that its failure so to do is in violation of the fourteenth amendment to the Constitution of the United States, as an attempt to deprive one of liberty without due process of law. But if the statute itself shall not for that reason be held to be violative of the constitutional principle, it is urged that in any event the information must go farther than the statute, and include the element of knowledge in its charging part, before it can be held that it charges a crime. Appellant cites *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115, as supporting the view that the information charging one with the crime of incest must charge knowledge of the relationship on the part of the defendant. What is said at page 250, 20 Wash., page 117, 55 Pac., is particularly referred to, as follows: "The third and last objection to the sufficiency of the information is that it does not allege that Carrie Barnett had knowledge of the relationship existing between herself and the defendant. The information does allege that defendant had knowledge of the relationship, and this

¶ 2. See Incest, vol. 27, Cent. Dig. § 9.

is sufficient, under our statute, without alleging that the female also had that knowledge." It is true, the inference may be drawn from the above language that the court in that case might have held that the allegation of knowledge was necessary, if it had been omitted as to the defendant. However, the point raised here was really not decided in that case. On this subject the following statement of the rule appears in volume 16, Am. & Eng. Enc. of Law (2d Ed.) 138: "Where the statutes are silent as to any scienter, as where they do not use the words 'knowingly,' 'willfully,' or the like, in describing the offense, it will not be necessary to allege and prove affirmatively that the defendant knew the relationship existing between him and the particeps. While this is true, still it would seem, upon reason, that the defendant's ignorance of such fact would constitute a valid defense." The crime here is charged substantially in the language of the statute, and is sufficient, within the rule above stated. See the following cases in support of the rule, as applied particularly to cases of incest: *State v. Bullinger*, 54 Mo. 142; *Simon v. State*, 31 Tex. Cr. R. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802; *State v. Wyman*, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753; *State v. Dana*, 59 Vt. 614, 10 Atl. 727. It was held by the United States District Court, District of Washington, *In re Nelson*, 69 Fed. 712, that a statute of Washington Territory similar to the present state statute was not invalid because of the omission of the word "knowingly," or any equivalent word or phrase to make knowledge of the relationship an element of the crime. Under the above authorities, we hold here that the court did not err in overruling the demurrer to the information.

It is next assigned that the court erred in excluding evidence offered by appellant that the wife of appellant had been, and then was, the duly appointed, qualified, and acting guardian of appellant. Appellant not only denied the commission of the alleged crime, but also interposed the defense of insanity. A record was introduced to the effect that he was adjudged to be insane by a California court in the year 1898, and also another record showing that he was in September, 1902, adjudged by the superior court of Spokane county to be then insane. Following the last adjudication, the said superior court appointed Anna Glindemann, the wife of appellant, as his guardian, on the ground that appellant was of unsound mind. It was the record of said appointment that appellant sought to introduce in evidence. It is argued that the fact that appellant was still under guardianship tended to support the presumption of mental disability. We believe, however, that it could have been no more than cumulative evidence in this case, and that it was not reversible error to exclude it. The record of the actual adjudication of his insanity made just prior to the

guardianship proceeding was in evidence, and the guardianship record was valuable for the same purpose only that the insanity record was introduced. It is further urged that the record was competent as bearing upon the contention that appellant's wife is prejudiced against him in this prosecution. It is argued that, whereas it was her duty, as guardian, to see that appellant was defended in this action, yet she in fact was the instigator of the prosecution. We think the real spirit of the wife's attitude toward the husband can be better shown by other evidence than by this offered record. It was therefore not error to exclude it when offered for that purpose.

It is next assigned that the court erred in disputing the statements of counsel and the shorthand report of two stenographers as to what a certain answer of the prosecuting witness had been, in stating what he believed her answer to have been, in striking out the former answer of the witness, and in permitting her to adopt the court's version of what her answer had been, all in the presence of the jury. This assignment, we believe, involves error. We are compelled to set forth here a portion of this record, which we would fain omit, but we see no other way to make clear the point raised under this assignment of error. The following is the portion of the record to which we refer: "Q. What did you mean by saying in cross-examination that you supposed the reason you did not become pregnant was because he did not reach your private parts? A. I don't understand. Q. I understood you to say that the reason you did not become pregnant was that your father's private sexual organ did not reach up to your private parts? The Court: She did not say that. Q. Just explain what do you mean by that? Mr. Townsend: Objected to. (Objection sustained.) Q. Explain what you meant by the answer that the reason you supposed you did not become with child was that it did not reach up to your privates? A. What he passed away. Q. What he passed away did not reach up to your womb—is that what you mean? Mr. Townsend: Objected to. The Court: She did not say that. I don't think the witness said that. (Here the former question from the cross-examination of this witness and her answer was read by the stenographer for the state and for the defendant as follows: 'Q. Why? A. Because it did not come up my privates.') The Court: The stenographers are wrong. She said the reason was because it did not reach up far enough. Q. I will ask you if that is what you said in answer to that question? A. I think I did. Mr. Poindexter: I move to strike out that former answer. The Court: The motion is granted. Mr. Townsend: Exception." It seems to us that the above extract from the record is largely self-explanatory. Owing to the peculiar nature of the crime charged, it will be seen that the testimony over which

the controversy arose was very important. As counsel for both the state and the defense, as well as both stenographers, seem to have understood it, the argument might well have been made to the jury that actual penetration was wanting, and that the crime of incest was therefore not committed. We think the remarks of the learned judge were direct comments upon material testimony in the presence of the jury. It was for the jury to say what the witness had testified, and it was appellant's constitutional right that the court should not express an opinion before the jury upon evidence of such vital importance to his defense. Moreover, the record discloses that the court's remarks, together with counsel's subsequent question, amounted to suggestions to the witness which she readily followed. The well-known tendency of jurors to give much weight to the court's views of the testimony, if they are able to discover what those views are, we think, made the remarks of the court prejudicial to appellant's constitutional rights. We see no essential distinction between the principle involved here and that which was discussed in *State v. Priest* (Wash.) 72 Pac. 1024. Counsel argue that there is a distinction, in that the court's remarks in the above case were directed to the jury, while in the case at bar they were directed to counsel. They were, however, made in the presence and hearing of the jury, and in practical effect this case, we believe, should not be distinguished from the one cited. We think the matters discussed under this assignment were so material that they constituted reversible error.

For the foregoing reasons, the judgment is reversed and the cause is remanded, with instructions to the lower court to grant the motion for new trial.

MOUNT, ANDERS, and DUNBAR, JJ.,  
concur.

(34 Wash. 211)

#### CHANTLER v. HUBBELL

(Supreme Court of Washington. March 1, 1904.)

CONSTRUCTIVE TRUST—EVIDENCE—FRAUDULENT CONVEYANCES—APPEAL—REVIEW—CONFLICTING EVIDENCE.

1. Where a mortgage was given on an understanding that the mortgagee should protect the mortgagor's title against any judgment obtained against him by satisfying the same, but the mortgaged premises were sold under execution based on a judgment against the mortgagor, and thereafter the mortgagee purchased them, he will, as constructive trustee, be decreed to reconvey to the mortgagor on repayment to him, with interest, of the sum expended by him in purchasing the land.

2. Where a mortgage was fraudulently given in order to defeat the claims of the mortgagor's creditors, but the land was sold under execution based on a judgment against the mortgagor, and subsequently repurchased by the mortgagee, the mortgagor could obtain no relief in a suit against the mortgagee.

3. Findings of the trial court based on conflicting evidence will not be disturbed on appeal.

Appeal from Superior Court, Clarke County; A. L. Miller, Judge.

Action by Peter Chantler against Edward Hubbell. From a judgment for defendant, plaintiff appeals. Affirmed.

Geo. W. Joseph and N. H. Bloomfield, for appellant. E. M. Green, for respondent.

FULLERTON, C. J. In 1890 the appellant, Chantler, being then the owner of certain real property situate in the city of Vancouver, Clarke county, mortgaged the same to a loan company to secure a loan of \$800, and shortly thereafter conveyed the fee of the property, subject to the mortgage, to one Bud Van Atta. Later on, and prior to July 5, 1894, he became the owner of two other tracts of land situated in the same county, and on that date gave a mortgage on the same to the respondent, Hubbell, purporting to secure a loan of \$800 made to him by respondent, payable, according to the terms of the mortgage, on or before five years after date. Subsequent to the execution of this latter mortgage, the loan company brought foreclosure on the first one, prosecuted the same to judgment and sale, and obtained a deficiency judgment against Chantler for some \$391. Execution was issued on this judgment, and the property mortgaged to respondent levied upon and sold in satisfaction thereof, the loan company becoming the purchaser of the property for the full amount of the deficiency judgment. Later on, the respondent purchased the land from the loan company, paying therefor \$50 and the back taxes on the land, amounting in the aggregate to about \$100, taking a quitclaim deed to the property. In this action the appellant sought to have the respondent declared a trustee holding the property in trust for him, subject to be reconveyed on his paying to the respondent the amount the respondent had advanced in procuring the legal title to the property and in the payment of taxes thereon. He asked, further, that these amounts be determined, and that the respondent be required to reconvey the property to him on his paying the amounts so determined to the respondent, or into court for his use. The trial court, after hearing the evidence of both sides, entered a judgment dismissing the action for want of equity, taxing the costs against the appellant. This appeal is from that judgment.

In his complaint the appellant alleges, in substance, that prior to the execution of the mortgage to the respondent he learned that the loan company contemplated foreclosing the mortgage he had theretofore given on the land conveyed to Van Atta, and that he anticipated a deficiency judgment against himself as a result of such foreclosure; that, to procure a means of satisfying such deficiency judgment and protecting his real property from the sacrifice of a forced sale, he entered

into a contract with the respondent, by the terms of which the respondent agreed that in consideration of the execution of the above-mentioned mortgage he would satisfy such deficiency judgment and protect the appellant's property from sale thereunder, and treat such sums of money necessarily advanced for that purpose as secured by such mortgage, and that the mortgage was thereafter executed in pursuance of such understanding and agreement. His testimony given on the witness stand was not quite so specific. He stated, when being interrogated directly by his counsel, that the mortgage was given for purposes substantially as alleged in his complaint; but when he undertook to detail the transaction, and in his cross-examination, he testified that prior to the execution of the mortgage nothing was said about the advancement of money thereunder; that the mortgage was first intended as a "blind mortgage" to protect his property from sale under the deficiency judgment, should one be obtained against him, and that the agreement on the part of the respondent to satisfy and pay off the deficiency judgment was made after the execution of the mortgage. On the other side, the respondent testified that there was no agreement made, either before or after the execution of the mortgage, to the effect that he was to make advancements for the purposes stated, or advancements for any purpose on behalf of the appellant; that the appellant sought him out and asked to be allowed to execute the mortgage to him, stating that the property was liable to be sold on a judgment which was certain to be obtained against him, and that he thought such a mortgage would "scare away" the judgment creditor. He further testified that he consented to hold the mortgage, after being advised that it would not "get him into trouble," and with the understanding that if any question arose concerning it he would tell the truth about it. He also testified that he purchased the property after informing the mortgage company that the mortgage he held was sham and without consideration, and after the company had given the appellant the opportunity to purchase the property at the same price. This latter statement, however, the appellant denied. No other witness testified concerning the transaction.

Whether or not the respondent took the title to the property charged with a trust in favor of the appellant depends, it seems to us, upon the effect that is given to this testimony. If it be the fact that the mortgage to the respondent was given on the express understanding that he would, in consideration thereof, protect the title of the appellant against any deficiency judgment obtained on the mortgage to the loan company, then he is obligated to reconvey the title he did acquire to the appellant, on the repayment to him, with interest, of the sums he has advanced

for that purpose; and it may be that the same result would follow were it true that the mortgage was first conceived in fraud, and the parties afterwards repented and agreed to make an honest transaction out of it. But if it be a fact that the mortgage was fraudulent in its inception and remained such throughout, then no rights can grow out of it which a court of justice will enforce. While there are certain admitted exceptions to the general rule that courts will refuse to aid either party to a fraudulent transaction, this case does not fall within them. The courts refuse to aid in fraudulent transactions because of public policy, and the rule operates, of course, only in cases where the refusal of the courts to aid either party frustrates the object of the transaction and takes away the temptation to enter into them; that is to say, when it tends to promote good morals not to aid either party, aid is refused by the courts; but whenever public policy is considered advanced by giving relief to either party, then such relief will be given. Cases, however, where public policy will be best subserved by aiding or enforcing a fraudulent transaction are very rare, and instances where the rule has been put in force are not many, but a frequently cited instance is found in the case of *Montefiori v. Montefiori*, 1 W. Bl. 363, where one brother gave to another a note in order to enable the latter to make a wealthy marriage. This note was enforced because such contracts would best be discouraged by enforcing them. But it is evident that the case at bar does not fall within any such rule. If the mortgage is to be held free of fraud, then there is no question of public policy involved. If, on the other hand, it was intended to defraud the appellant's creditor, the appellant cannot by any proceeding in the courts compel the respondent to share with him or turn over to him the profit the respondent may have made by reason of the fraud. Such a rule would encourage, not discourage, fraudulent transactions.

On the question of fact we are not disposed to overrule the findings and conclusions of the trial court. As we have said, there were but two witnesses to the main transaction, the appellant and the respondent, and their evidence was squarely in conflict. As the trial court had the opportunity to observe the appearance, conduct, and demeanor of the witnesses while testifying, its conclusion is much more apt to be the right one than is the conclusion of this court, which must make up its findings from the transcript.

The findings of the trial court require an affirmation of the judgment, and the order of this court will be that the judgment stand affirmed.

HADLEY, ANDERS, MOUNT, and DUNBAR, JJ., concur.

(34 Wash. 205)

**DUNHAM et al. v. CITIZENS' INS. CO.  
et al.**(Supreme Court of Washington. March 1,  
1904.)**FIRE INSURANCE—POLICY—VALUE OF PROP-  
ERTY—MISREPRESENTATION—FORFEITURE  
—RIGHTS OF CREDITORS OF POLICY HOLDER  
—COMPROMISE.**

1. In an action on a policy of fire insurance, providing that the entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstances concerning the insurance or the subject thereof, there can be no recovery where the applicant stated to the agent, in answer to a question, not included in the written application, as to the value of the property, that he had paid \$1,500 on the contract price of the building, when in fact he knew he had paid less than \$700, though the statement was not communicated to the home office of the insurer prior to the issuance of the policy.

2. Where persons who had furnished material and labor for the building of a house demanded payment or security, and the owner promised to obtain insurance on the house which he stated should secure all the creditors, and afterwards obtained a policy in his own name without informing the insurer that the policy was for the benefit of any one but himself, a forfeiture of the policy for misrepresentation in procuring the insurance is available to the insurer as a defense in an action by such creditors on the policy.

3. Where an insurer issues a policy of fire insurance on a false representation, rendering the policy void according to its terms, the fact that the insurer pays to the holder a sum of money in compromise of a claim against it, after notice to it by creditors of the holder that they claim an interest in the money due on the policy, does not render the insurer liable on the policy, in an action by the creditors of the holder.

Appeal from Superior Court, Walla Walla County; Thomas H. Brents, Judge.

Action by J. A. Dunham and another against the Citizens' Insurance Company and another. From a judgment for plaintiffs, the insurance company appeals. Reversed.

Sharpstein & Sharpstein, for appellant. W. T. Dovell, for respondents.

MOUNT, J. On the 11th day of April, 1902, the defendant J. W. Powell entered into a contract with L. D. Pettit and wife to purchase a lot in the city of Walla Walla. The purchase price was \$2,000, \$200 of which was paid down, and the balance was to be paid in monthly installments of \$15 each, beginning on December 1st of that year. A deed was executed by Pettit and wife, and placed in escrow, to be delivered to Powell when the balance of the \$2,000 was finally paid. Powell took immediate possession of the lot, and thereupon entered into a contract with one Fields, by which contract Fields agreed to furnish the material, and erect a dwelling house upon the said lot for the sum of \$1,650. While the house was being constructed, respondents and their assignors, at the request of Fields, furnished materials and labor to the value of \$1,039.40 for the construction of the building. After the materials and labor had been furnished,

respondents demanded payment of Powell, or security therefor, and Powell promised to obtain insurance upon the house, which he said should secure all the creditors. Immediately thereafter, and on July 16, 1902, Powell applied to the agent of appellant for a policy of insurance upon the said building for the sum of \$1,800, without informing the agent that the policy was for the benefit of any one but himself. The agent thereupon inquired of Powell the value of the house, and was informed by Powell that the house was worth \$1,800, and would cost when finished \$2,200, and that he had already paid \$1,500 thereon, when as a matter of fact he had paid less than \$700. Powell thereupon signed a written application for the policy of insurance to be issued in his own name, which application made no reference to the value of the property, but did contain questions relating to the title, which were answered as follows: "Q. What is your title to the ground? A. Deed. Q. Is property mortgaged? A. No." The agent thereupon, on the same day, relying upon the statements and the written application, issued the policy as applied for, and delivered it to Powell. Four days later, viz., on July 20th, the building was destroyed by fire. It was then worth \$1,800. Thereafter, upon the refusal of Powell to assign the policy to respondents, they and their assignors served notice on the insurance company, claiming a lien upon and an equitable assignment of the proceeds of the policy for the amount of their respective claims. After receiving these notices of claims by respondents, and when Powell made a claim for loss under the policy, the insurance company questioned the validity of the policy, because of misrepresentations made by Powell, both as to his title and as to his interest in the property, and also as to the amount he had paid on the contract for the construction of the building. Subsequently Powell and the insurance company agreed upon a compromise, and the insurance company paid Powell \$700 in full settlement, disregarding the claims of respondents. Powell thereupon left the country. Respondents brought this action against Powell and the insurance company to recover the amount of their claims, alleging an equitable assignment of the amount due on the policy of insurance. Powell made no appearance. The insurance company defended upon several grounds, one of which was that the policy was void because of misrepresentations made by Powell to the agent as to the amount Powell had paid for the construction of the building insured. Upon a trial before the court without a jury, a judgment was entered against the insurance company for the amount of the claim. This appeal is prosecuted from that judgment.

A number of errors are assigned and argued, but upon the undisputed facts, as we view them, the cause must be reversed be-

cause of the invalidity of the policy. The evidence shows conclusively—in fact, there is no dispute—that at the time Powell applied for the policy, and before it was issued to him, he stated to the agent that the house when completed would be worth \$2,200, and at that time he had paid thereon \$1,500, when as a matter of fact he had paid less than \$700, and afterwards paid no more. This was a material fact for the company to know. The information was sought by the agent in order to determine the amount of the risk. The false statement was no doubt made in order to induce the insurance company to take the risk for a much larger sum than it would have done had the truth been known. The statement, while not a warranty, was clearly material and fraudulent, and therefore vitiated the policy. 2 Joyce on Insurance, § 1896, and authorities there cited; 2 May on Insurance (4th Ed.) § 373; 1 Wood on Insurance (2d Ed.) p. 562 et seq.

In order to avoid the effect of this representation, respondents argue that it does not appear that the statements were intentionally made, and that they were not included in the written application, and were not communicated to the home office, and therefore the company did not rely thereon when it issued the policy. This argument cannot avail the respondents. The evidence is conclusive that, in answer to the inquiry of the agent as to the value of the property, Powell stated that he had paid \$1,500 on the contract price of the building, when in fact he had paid less than \$700. This fact was peculiarly within the knowledge of Powell. He knew it was false, and must be presumed to have made the statement intentionally. It is true that there was no question in the written application as to the value of the property, but this was a material fact which the company was entitled to know in order to determine the risk which it was requested to assume. The agent inquired for the fact when he received the application for the policy. He was wrongly and fraudulently informed. There is a provision in the policy as follows: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof." This provision clearly contemplates other information than the information contained in the written application. The agent relied upon the information, and immediately issued and delivered the policy. It was not necessary for the agent to send the application to the home office. He was authorized to issue the policy himself, and did so, and immediately delivered it to Powell. The information which the agent relied upon must, under these circumstances, be held to be information which the appellant company relied upon. Powell certainly could not have recovered upon the policy in the face of his fraud,

and, even if he obtained the policy for the use and benefit of respondents, they are in no better position than Powell. It is true the company had notice, before it settled with Powell, that respondents claimed an interest in the money due on the policy; but if the policy was void there was nothing due, and a compromise thereof did not render the insurance company liable to any person upon the policy. The validity thereof, unaffected by the compromise, might still be litigated as between the insurance company and any other person interested. The insurance company, in fairness to the respondents, might have notified them of the settlement about to be made with Powell, but no legal liability was incurred merely by a failure to do so.

For the reason that the policy was void because of the false representations named, the cause is reversed, and the lower court is directed to dismiss the action.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

(34 Wash. 201)

#### BENSON v. TOWN OF HAMILTON.

(Supreme Court of Washington. March 1, 1904.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—INJURIES—ACTION—EVIDENCE—COMPETENCY—WITNESSES—INTOXICATION—CONTINUANCE—TRIAL COURT'S DISCRETION—REVIEW.

1. A continuance is in the discretion of the court, and subject to review only for abuse of discretion.

2. 2 Ballinger's Ann. Codes & St. § 5093, declares that a person intoxicated when he is called as a witness is incompetent to testify. Section 4977 declares that on a motion to continue for absence of evidence, if the adverse party admit that certain evidence alleged would be given, and that it be considered as given, the trial should not be continued. *Held*, that where, on a motion for a continuance because of the intoxication of one of the moving party's witnesses, the adverse party admitted that the witness would testify to all the facts stated by the moving party, as those to which the witness would testify, it was not error to deny a continuance.

3. Where, in an action against a city for injuries from a defective sidewalk, a witness testified that plaintiff told her that her injury was sustained on plaintiff's own doorstep, a motion for a new trial on the ground of newly discovered evidence consisting of that of a witness who would testify that plaintiff admitted having received the injury on the doorstep was properly denied.

4. In an action against a city for injuries owing to an alleged defective sidewalk, it was not necessary that plaintiff's evidence as to the place where she was injured should be corroborated in order to take the case to the jury.

5. In an action against a city for injuries owing to an alleged defective sidewalk, the facts that the sidewalk was an old one, and that plaintiff had been over it many times, and had seen the defect, were competent on the question of contributory negligence.

6. That one injured owing to a defective side-

¶ 6. See Municipal Corporations, vol. 36, Cent. Dig. §§ 1677, 1755.

walk had been over the walk many times, and seen the defect, did not conclusively show contributory negligence.

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by Clara A. Benson against the town of Hamilton. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Smith & Brawley and Shrauger & Barker, for appellant. Millim & Houser, for respondent.

MOUNT, J. Respondent was injured by a fall on a defective sidewalk in the town of Hamilton. She recovered a judgment in the court below. The town prosecutes this appeal, alleging error of the trial court upon the following grounds: (1) In denying appellant's application for a continuance of the trial on account of the drunken condition of a witness; (2) in denying a motion for a new trial on the ground of newly discovered evidence, and upon the ground of the insufficiency of the evidence to justify the verdict.

1. At the trial appellant called a witness by the name of W. H. Rugg. This witness, after being subpoenaed on the part of the appellant, became so intoxicated that when called to the witness stand the court excluded him therefrom, and refused to permit him to testify in the case, and also inflicted punishment for contempt upon him. Thereupon appellant made an application to the court for a continuance of the trial until the witness could become competent to testify in the case, stating the facts to which the witness would swear when in condition to give evidence in the cause. Respondent thereupon admitted that the witness would testify to the facts stated, and the court denied the application. The statute provides that a person intoxicated at the time he is called for examination is incompetent to testify in a cause. 2 Ballinger's Ann. Codes & St. § 5993. A continuance of the trial of a case rests largely in the sound discretion of the court, and is subject to review only for abuse of such discretion. There is nothing in the record before us indicating that the appellant was in any wise to blame for the condition of the witness, or that it knew of any predisposition of the witness to become intoxicated. There is no showing as to the length of time required for the witness to become competent. It does appear, however, that the trial of the cause was continued from one day until the next in order to obtain the attendance of this witness. It also appears that one other witness had testified in the case to the same facts that this witness was expected to swear to, and the counsel for respondent promptly admitted that the witness, if sober, would testify to the facts as stated by appellant. It was said in *Fox v. Territory*, 2 Wash. T. 297, 5 Pac. 603: "The exclusion of the intoxicated witness was not error, but it might have constituted

strong ground for a new trial if the defendant, upon the exclusion of the witness, had informed the court of the importance to the defense of his testimony, and had asked an adjournment of the cause until he became competent to testify, and the court had refused the request." In this case the court was informed of the importance of the testimony of the witness, but the respondent admitted that the witness would testify to all the facts stated. This admission was sufficient under the statute (section 4977, 2 Ballinger's Ann. Codes & St.) to justify the court in refusing the continuance, and such refusal was therefore not error.

2. After verdict in favor of respondent, appellant filed a motion for a new trial upon the ground of newly discovered evidence, and this motion was denied. The newly discovered evidence was that of another witness, a Mrs. Rupe, who, in her affidavit in support of the motion, stated that the appellant told her shortly after her injury that she received the injury complained of by a fall upon her own doorstep, and not by a fall upon the street of the appellant city. This issue was the principal one in the trial. Appellant had one witness upon the trial who testified that respondent told her the same thing, and it was also admitted at the trial that the witness Rugg, hereinbefore referred to, would, if sober, testify to a similar statement made to him. So that it clearly appears that this evidence is cumulative, and for that reason the court below did not abuse its discretion in denying a motion upon this ground. Appellant contends that the evidence was insufficient to justify the verdict, because the plaintiff was not corroborated as to the place upon the sidewalk where she was injured, and because she was guilty of contributory negligence in going upon the sidewalk. The plaintiff herself was the only witness who testified as to the place where she was injured, and no one was with her, or saw her fall and receive her injuries. No corroboration was necessary in order that the jury might consider her testimony. The credibility of the witness was exclusively for the jury. Respondent testified that the sidewalk upon which she was injured was an old sidewalk, and that she had been over it many times before, and had seen defects in it. These facts were competent to go to the jury upon the question of contributory negligence, but are not conclusive thereof. *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799; *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888; *Rowe v. Ballard*, 19 Wash. 1, 52 Pac. 321; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121; *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114; *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191. The evidence not being conclusive of contributory negligence, the trial court properly submitted that question to the jury. The motion was properly overruled.



There is no error in the record, and the judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

(34 Wash. 269)

DAWSON et al. v. McMILLAN et al.

(Supreme Court of Washington. March 11, 1904.)

**WATERS—NAVIGABILITY—OWNERSHIP OF BED OF STREAM—OBSTRUCTION.**

1. A slough emptying into the sea, which during the ebb and flow of the tide is navigable for scows and for rafting and booming logs, is a navigable stream.

2. The fact that title of the bed of a navigable slough has been vested in a person by purchase from the state as tide lands gives him no right to obstruct navigation.

3. Where a private party is specially damaged by the obstruction of navigable waters, he may maintain an action to abate the nuisance.

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Suit by W. A. Dawson and another against J. B. McMillan and another. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Elihu R. Sherman and C. H. Hurlbut, for appellants. T. E. Cade and Smith & Brawley, for respondents.

MOUNT, J. Plaintiffs brought this action for an injunction restraining defendants from obstructing navigation in the branch of the sea known as "McElroy's Slough," and for a mandate requiring the removal of such obstruction already made by defendants. After issues joined and a trial had, the lower court granted the relief prayed for. The defendants appeal.

No question is made here on the findings of the lower court, and they are therefore to be taken as true. They are as follows:

"(1) That at all of the times in plaintiffs' complaint mentioned and hereinafter mentioned the plaintiffs have been and now are copartners doing business under the firm name and style of W. A. Dawson & Co.; that during said times the said defendant Union Boom Company has been and now is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, having its principal place of business at Fairhaven, Whatcom county, Washington, and that during said times the defendants J. B. McMillan and Frances C. McMillan have been and now are husband and wife.

"(2) That plaintiffs are the owners of a large quantity of timber lands lying along and adjacent to a certain slough in Skagit county, Washington, commonly called 'McElroy's Slough,' which said slough enters into Bellingham Bay, the same being an arm of

Puget Sound, which said slough so enters said Bellingham Bay west of lots 1 and 2 in Sec. 21, Tp. 36 north, range 3 east of the Willamette meridian, in said Skagit county, and which said slough extends back in length about 4 miles from the mouth of said slough through sections 21 and 22, and that there is a channel the same being well defined, and about 3 to 4 feet in depth, extending from the mouth of said slough out into said Bellingham Bay for a distance of 1½ miles; that said channel is from 70 to 100 feet in width, and that down this channel there is constantly flowing a channel of fresh water averaging during the year from 4 to 24 inches in depth at the deepest, and from 20½ feet to 40 feet in width; that twice each day the tide ebbs and flows up said channel and slough and over portions of the tide flats to a depth of from 7 to 9 feet, and which tide covers all the flats surrounding said slough; that while the said tide is in, and while so flowing and ebbing, the said channel and slough is navigable, and has been and can be used as a public highway for boats, scows, and other ordinary modes of water transportation for general commercial purposes, and especially for the rafting, booming, and floating and towing of logs up and down the same; that said slough has been so used for at least twenty years prior to the time of the commission of the acts complained of by plaintiffs in their complaint.

"(3) That sufficient fresh water does not flow down said slough at any time to keep it navigable or floatable with the fresh water alone, but that said slough is only navigable and floatable with the aid of the salt water, and that at ordinary low tide there is no salt water in said slough.

"(4) That the plaintiffs at and for two years prior to the commencement of this action were engaged in logging off their said lands, which lands are adjacent to said slough, and that they have been taking the timber from said land, placing the same in said slough, there rafting and placing them in sections ready for market in the usual manner practiced by loggers, and towing the same down said slough and into said Bellingham Bay, and thence to market; that plaintiffs have no other feasible or practicable way by which the plaintiffs can convey their said timber to the market only down said slough and channel; and that plaintiffs are the owners of a large quantity of standing timber, to wit, about 4,000,000 feet, on their said lands, for which there is no other outlet or way to market save and except down said slough and channel.

"(5) That on or about the 11th day of February, 1903, the defendants Union Boom Company and J. B. McMillan procured a pile driver and piles, and with the aid of such pile driver and piles they drove piles in the said channel as shown by the plaintiffs' Exhibit No. 1, to wit, a row of piles along the south bank of said channel, and other piles

¶ 3. See *Navigable Waters*, vol. 37, Cent. Dig. § 149.

in the center of said channel, which piling so driven by defendants was driven into the ground permanently, and is a permanent obstruction to navigation of said slough and channel, and deprives plaintiffs of the use of said slough and channel for the purpose of towing their logs down the same to market, and hinders and destroys navigation in said slough and channel, and that by reason of the location and manner in which said piles were so driven in the bed of said slough and channel hereinbefore described the said plaintiffs have been and now are unable to get any of their said logs to market, and that, if the said piling is allowed to remain there, plaintiffs will be unable to and will be prohibited from logging off their said lands or to remove the products of said lands and timber to market, and that it will be impossible for boats to navigate said slough.

"(6) That some time during the year 1902, and prior to the driving of said piles into said slough by defendants as aforesaid, a line of railway was constructed a few feet east of where said piles were so driven, and a railway bridge was constructed across said slough; that the piles which are in the fresh-water channel and nearest said bridge are opposite the bents of the said bridge, and that any logs or other timber products, boats, and scows that can go under the said railway bridge can float down the fresh-water channel of said slough without obstruction on account of the piles driven by defendants; that the openings under the railroad bridge through which the fresh water flows down through said slough are 21 feet and 15 feet in width.

"(7) That prior to the erection and construction of said railway bridge the plaintiffs and other persons along said slough rafted their said logs and placed them into sections ready for market a considerable distance above said bridge, and where said slough is of considerably greater width than where said bridge is erected; that after the erection of said bridge, and prior to the 11th day of February, 1903, the said plaintiffs and said other persons so rafted their said logs immediately below said bridge, and that steamboats and tugboats would come up said slough and tow said logs in rafts and booms to market; that prior to the erection of said bridge said boats navigated said slough above said bridge, and for considerable distance above the same; that the piling driven by defendants extend from the bridge and down said slough for a distance of 900 feet, and that beyond such piling it is unsafe and impracticable to raft and boom logs; that it is impossible for boats to go up said slough and take said logs down the same, and it is impossible to pass logs down said slough in rafts and booms on account of said piling.

"(8) That the defendant Union Boom Company has a contract with the state of Washington for the purchase of all of the second-class tide lands in front of said lots 1 and

2; that said contract was duly issued and is still in force; that the meander line runs some distance east of the piles in question, and directly across said McElroy's Slough about 100 feet east of the railroad; that said tide lands contract purported to convey to said defendant Union Boom Company all second-class tide lands in front of, adjacent to, and abutting upon said meander line, and that all of the piles in question are outside of said meander line and within the boundaries of said contract.

"(9) That none of the piles in question were driven for the personal use or benefit of the defendant J. B. McMillan, but they were driven under his direction as manager of the defendant Union Boom Company; that the location of the meander line across said McElroy's Slough is shown in defendant's Exhibit A; that said piles were being driven by said Union Boom Company for a boom.

"(10) That the defendant Frances C. McMillan had nothing to do with and was not interested in the driving of said piles."

The conclusions are as follows:

"(1) That this action should be dismissed as to the defendant Frances C. McMillan.

"(2) That the plaintiffs are entitled to an order of this court forever restraining and enjoining the defendants J. B. McMillan and Union Boom Company, and each of them, their officers, agents, servants, and employes, from driving piling or placing any other obstruction within the bed or channel of said McElroy's Slough as described in plaintiffs' complaint, or in the channel thereof where the same passes over and extends across the tide lands between the mouth of said McElroy's Slough out to the deep water of Bellingham Bay.

"(3) That the plaintiffs are entitled to a mandatory injunction compelling the said defendants to remove all piling placed by them or their agents, servants, officers, or employes in the said channel of said slough as aforesaid, so that the said plaintiffs may have free and uninterrupted use of said slough for the purpose of ordinary navigation.

"(4) That plaintiffs should have judgment for their costs and disbursements herein."

Appellants excepted to the second, third, and fourth conclusions, and argue (1) that the channel of the slough is not navigable under the law; (2) that, if it is navigable, it is under the control, disposition, and authority of the state; (3) that the action is prematurely brought, and under improper allegations.

The channel of the slough in question is navigable in a legal sense, if it is in fact navigable. 21 Am. & Eng. Enc. of Law (2d Ed.) pp. 426, 429; East Hoquiam Boom Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001; Griffith v. Holman, 23 Wash. 347, 63 Pac. 239, 54 L. R. A. 178, 83 Am. St. Rep. 821; Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199. In the second finding of fact

the court found that the tide ebbs and flows in the slough twice each day, and that "while so flowing and ebbing the said channel and slough is navigable, and has been and can be used as a public highway for boats, scows, and other ordinary modes of water transportation for general commercial purposes, and especially for rafting, booming, and floating and towing of logs up and down the same; that said slough has been so used for at least twenty years." This finding, which we must take as an admitted fact in the case, precludes any question of the navigability of the slough. Being navigable water, when the state sold the bed thereof to the appellants, as stated in the finding No. 8, appellants took the title subject to the paramount right of the public to use the same for navigation. *Watkins v. Dorris*, 24 Wash. 636, 644, 64 Pac. 840, 54 L. R. A. 199; *New Whatcom v. The Fairhaven Land Co.*, 24 Wash. 403, 64 Pac. 735, 54 L. R. A. 190. The fact, therefore, that the title of the bed of the channel or the land upon which an obstruction is placed is vested in the appellants does not confer upon them the right to obstruct navigation upon navigable water. It is no doubt true that the sovereign authority may control and regulate the use of navigable waters, but it does not follow that an individual over whose lands such waters flow may do the same. *People v. City of St. Louis*, 48 Am. Dec. 339. By the mere act of selling the land to the appellants the state conferred no right upon them to interfere with the rights of the public in the use of the highway.

Appellants' last position is based upon the claim that the United States is the only party having a right to prevent the obstruction, and that respondents are not injured until they are denied free passage. It has been frequently held by this court that where, by a public nuisance, a private party is specially damaged, his damage differing in kind and degree from that of the general public, he may maintain an action to abate such nuisance. *Carl v. West Aberdeen Land Co.*, 13 Wash. 616, 43 Pac. 890; *Smith v. Mitchell*, 21 Wash. 530, 58 Pac. 667, 75 Am. St. Rep. 858; *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 54 L. R. A. 178, 83 Am. St. Rep. 821; *Sultan W. & P. Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 558, 72 Pac. 114; 21 Am. & Eng. Enc. of Law (2d Ed.) p. 444.

By findings Nos. 4, 5, and 7 it is shown that respondents are specially damaged, and also that the obstruction exists, and that respondents are prohibited from using the highway and from removing their timber products to market.

The relief granted was therefore proper under the findings, and the judgment is affirmed.

HADLEY, ANDERS, and DUNBAR, JJ., concur.

(34 Wash. 248)

STATE ex rel. HARRIS v. SUPERIOR COURT OF KING COUNTY.

(Supreme Court of Washington. March 8, 1904.)

WRIT OF REVIEW—ADEQUATE REMEDY AT LAW.

1. Under Ballinger's Ann. Codes & St. § 5741, declaring that the writ of review shall only be granted where there is no appeal, and no plain, speedy, and adequate remedy at law, an order vacating a judgment cannot be reviewed by writ of review in the absence of any showing of an emergency which will prevent the questions at issue from being effectively determined by appeal from the final judgment.

Application by the state, on relation of Pluma M. Harris, against the superior court of King county, for a writ of review of an order vacating a judgment for plaintiff in an action by relator against William Levy and another. Writ denied.

E. F. Klenstra, for relator. R. R. George and G. E. De Steigner, for respondent.

MOUNT, J. Original application for a writ of review. It appears from the affidavit of the petitioner that in July, 1903, the relator, Pluma M. Harris, brought an action in the superior court of King county against William Levy and Jane Doe Levy, whose true name was unknown, to foreclose certain certificates of delinquent taxes. Summons was served upon defendants by publication. On October 7, 1903, a judgment was entered by default foreclosing the certificates for the amount due. Subsequently the real estate upon which the taxes were a lien was sold, and bid in by the petitioner, and a deed issued. Thereafter the defendants in said action filed a motion to vacate and set aside the judgment. This motion was granted on the 11th day of December, 1903, and the judgment vacated, and defendants permitted to defend the action. The plaintiff, relator here, now prays for a writ of review in this court to review the order vacating the judgment.

The writ of review will only be granted where there is no appeal, and no plain, speedy, and adequate remedy at law. Section 5741, Ballinger's Ann. Codes & St. It is true there is no appeal from an order vacating a judgment. *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78. But there is in this case a plain and adequate remedy by appeal from the final judgment which may be entered in the case, in which appeal the order herein complained of may be reviewed. *Freeman v. Ambrose*, 12 Wash. 1, 40 Pac. 381. It is not the policy of the law to try cases here by piecemeal. Every order which is not appealable is not the subject of a writ of review. No emergency is shown why the questions presented for review by the petition of relator may not as well and effectively be determined after final judgment in the case as at this time. Furthermore, if plaintiff is successful at the final trial, there

will be no necessity for a review of the questions now presented. The fact that the remedy by appeal is not as speedy as by writ of review is not of itself a sufficient reason for granting the writ. When no rights will be lost by delay, time will not be considered, unless the delay renders other remedies inadequate.

The writ is therefore denied.

HADLEY and ANDERS, JJ., concur.

(31 Wash. 262)

# STATE v. STOCKHAMMER.

(Supreme Court of Washington. March 11, 1904.)

## HOMICIDE — SELF-DEFENSE — INSTRUCTIONS — SEPARATION OF JURY — ADMONITION.

1. Under Ballinger's Ann. Codes & St. § 6947, declaring that jurors in a criminal case shall not be allowed to separate except by the consent of defendant and the prosecuting attorney, it is not necessary that defendant consent personally, consent of his attorney being sufficient.

2. Where the jury in a criminal case was admonished as to its duties on separation, failure to repeat the admonition on a subsequent separation was not error.

3. In a prosecution for murder, a question to the wife of defendant as to whether it was not true that her brother had such a bitter feeling against defendant that in giving witness a check he refused to write it in her married name, but wrote it in her maiden name, was objectionable, as calling for a conclusion.

4. Where the state's evidence, if uncontradicted, would warrant a conviction, it is not error to deny a motion to dismiss or direct acquittal.

5. In a prosecution for murder, in which the defense was self-defense, there being no plea of insanity, nor effort to show that insanity existed at the time, a certified copy of a county record, including a complaint in insanity and an order adjudging defendant insane, and a discharge from the hospital for the insane as improved, was inadmissible.

6. The exclusion of evidence that defendant had been adjudged insane was harmless to defendant where he was subsequently allowed to prove that he had been confined in an asylum.

7. A requested charge that, if defendant was where he had a right to be, and deceased had advanced upon him in a threatening manner, inducing defendant to believe that he was in danger of life or limb, the defendant need not retreat, but had a right to stand his ground, was properly qualified by stating that defendant would have no right to take the life of deceased without first warning him to desist from his attack, unless it was found that he had no time to give such warning.

8. One is not justified in taking life in self-defense merely because he believes his own life in danger, but he must, in addition, have reason to so believe.

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Joseph Stockhammer was convicted of manslaughter, and appeals. Affirmed.

C. W. Hodgdon and Sidney Moor Heath, for appellant. J. A. Hutcheson, for the State.

DUNBAR, J. The appellant was charged in the information with murder in the first degree, was convicted of manslaughter, and sentenced to two years in the penitentiary.

The first assignment is that the court erred in allowing the jury to separate without the consent of the defendant personally. It is conceded that the consent was given by the counsel of appellant, but the contention is that this is not sufficient. Section 6947, 2 Ballinger's Ann. Codes & St., provides that juries in criminal cases shall not be allowed to separate except by consent of the defendant and the prosecuting attorney. Appellant cites *State v. Place*, 5 Wash. 773, 32 Pac. 736, and *Brown v. State*, 38 Tex. 482, in support of the contention that the conditions of the statute have not been complied with. *State v. Place* does not in any manner support such contention, as it does appear in that case that there was no consent given by either appellant or counsel. *Brown v. State* was a case where the defendant was not present during the trial, he being in an adjoining room sick, having been removed by the instruction of his attending doctor during the argument; and, while the court in that case incidentally held that the attorney for the defendant could not consent to the jury separating, under the particular provisions of the Code, it was also said that, even if the defendant himself had consented, the case would still have to be reversed, for the reason that the separation was not such a separation as was provided for by the Code. But we think there are no cases which hold, under the provisions of a statute such as ours, that the consent of the counsel, the defendant being present and hearing the consent announced by the court, is not sufficient. In fact we think it is much the better practice, and is a more orderly proceeding, and a consent which is more likely to be intelligently given than a mere formal consent stated by the defendant. By reference to *State v. Holleder*, 15 Wash. 443, 40 Pac. 652, it will be seen that the procedure in this case was exactly in accordance with the suggestion of this court made to the trial judges of the state. It will be noted that in that case the consent was obtained from appellant's counsel, and the court refused, even under the circumstances of the case, to reverse the judgment for that alleged error alone, but said: "The appellant complains in his ninth assignment that the court erred in asking counsel for appellant, in the presence and hearing of the jury, if they had any objection to the separation of the jury. In the absence of any proof to the effect that the appellant was prejudiced in any way by the action of the court, we do not feel like reversing a case on this ground alone; but we desire to take occasion to say that, considering the difficulty of making such a showing of injury by the party who claims to be aggrieved, we think it is a practice which should not be indulged in by trial courts, because, as appellant complains, if they did entertain any objection to the separation of the jury, they were called upon to so state in the presence of the jury, and would thereby

¶ 8. See *Homicide*, vol. 26, Cent. Dig. § 161.

run the risk of incurring the displeasure of some juror. The court could very easily call counsel to him, and ascertain privately, and without the knowledge of the jury, whether there were any objections to their separation." This course having been pursued by the trial court in this case, no error was committed.

The next contention is that the court allowed the jury to separate without being admonished and instructed as to its duties. It is conceded that the court did, upon the first separation of the jury, give them full admonition concerning their duties as provided by the statute; but that upon the next separation the admonition was not given. The admonition having been once given, it was not necessary to repeat it; and, especially as no request was made therefor by the appellant, it will not be presumed that he was prejudiced by the failure of the court to give repeated admonitions.

It is claimed that the trial court erred in sustaining respondent's objection to the following question proposed by appellant's counsel on cross-examination: "Mrs. Stockhammer, is it not true that your brother had such a bitter feeling against Mr. Stockhammer that in giving you a check he refused to write it as 'Maria Stockhammer,' but wrote it as 'Maria Eligner'?" Objection was sustained to this question—and, we think, properly sustained—as calling for a mere opinion of the witness as to the motive of the deceased in preparing the form of a check. All that the witness could properly testify to was the fact, and it was for the jury to determine from such fact the feeling which prompted it, and the following question, viz., "Is it not true that your brother, in giving you a check, gave it to you as 'Maria Eligner' instead of 'Maria Stockhammer'?" was afterwards asked and answered without objection.

The fourth assignment is that the court erred in refusing to allow appellant's motion to dismiss or direct a verdict at the close of plaintiff's testimony. No error was committed in this respect, as there was sufficient testimony introduced by the state to warrant a conviction, if uncontradicted.

The fifth assignment is that the court erred in sustaining the objection of plaintiff to the introduction of evidence concerning the insanity of defendant. The evidence was a certified copy of the record of Pierce county, including a complaint in insanity and order adjudging defendant insane, made by the superior court of Pierce county, and also a discharge from the hospital for the insane as improved. It is insisted by the appellant that it may be shown in aid of the theory of present insanity that insanity existed at some prior time. This testimony was objected to as being irrelevant, immaterial, and inadmissible unless it should be followed up by showing that the condition of insanity still exists, and did exist at the time of the shooting. There was no plea of insanity in this case,

the defense being self-defense; no attempt to show that insanity existed at the time; and the counsel for the defense objected to making such a showing by stating that a condition once shown to exist is presumed to exist until the contrary is shown. This presumption would, in any event, be destroyed by the testimony which the counsel for the defense was attempting to offer, which showed that the defendant had been discharged from the asylum. But, in any event, under the proofs and claims made by the defendant in this case, the testimony was inadmissible; and, even if it were admissible, no prejudice obtained from the fact that the defendant afterwards was allowed to prove that he had been confined in the asylum in Pierce county on a charge of insanity.

Errors Nos. 6 and 7 are based on the modification or qualification attached by the court to instruction No. 15. Instruction No. 15 was as follows: "The court informs you that in law the defendant, if he was where he had a right to be, if the deceased advanced upon him in a threatening manner, or induced defendant to believe that he was in danger of life or limb, the defendant need not retreat, but had a right to stand his ground and defend himself. When a man is where he has a perfect right to be, and deceased so acts under such circumstances as to induce in him a reasonable and honest ground of apprehension that he is in danger of life or limb, he may at once use necessary force to prevent the threatened blow, even to the extent of taking his life." Then the court announced the qualifications which are objected to, as follows: "Gentlemen, I qualify this instruction No. 15 in this way: that, although defendant may have been where he had a right to be, and deceased was advancing toward him in a threatening manner, still he would have no right to take the life of deceased without first warning him to desist from his attack, unless you find from the evidence that defendant was justified in believing that he had not time to give such warning." We think that this was a proper and judicious statement of the law. No man should be permitted to take the life of another without an urgent necessity exists, for the right of self-defense is based upon the necessity of protecting one's self; and if one's life could be protected and the necessity of killing the adversary obviated by a warning, such warning should be given. It does not appear to us that the modification of this instruction was made more prominent than any other part of the instruction.

In assignment 8 it is also contended that the court erred by the insertion of the words "and has reason to believe," in instruction No. 18, the whole instruction being: "The court further instructs you that a man need not wait until the blow is actually struck before he has a right to act upon appearances and defend himself. It is enough if he honestly believes, and has reason to believe,

from the attitude, conduct, and manner of the deceased, that he was in danger of his life or of great bodily harm." If the appellant's objection should obtain, that the court erred in inserting the words "and has reason to believe," all that a defendant would be called upon to do to establish a complete defense would be to assert that he believed that he was in danger of life or of great bodily harm. This must not be a blind belief, but must be a belief founded upon circumstances; and it is for the jury to determine, under all the circumstances of the case, whether it is a reasonable belief. The rule is laid down by 1 Bishop's New Criminal Law, § 305, as follows: "If, in the language not uncommon in the cases, one has reasonable cause to believe the existence of facts which will justify a killing,—or, in terms more nicely in accord with the principles on which the rule is founded, if without fault or carelessness he does believe them,—he is legally guiltless of the homicide, though he mistook the facts, and so the life of an innocent person is unfortunately extinguished." So that it will be seen that, if a person acted without reason, he would not be acting without fault or carelessness. We think the whole instruction of the court was favorable to the appellant.

We perceive no error of the court in refusing instructions offered, all the instructions which properly stated the law having been given in another form by the court.

Nor can the last assignment—that the court erred in denying defendant's motion for a new trial—be sustained.

The cause was tried without error, and the testimony was sufficient to sustain the judgment. It will therefore be affirmed.

HADLEY, ANDERS, and MOUNT, JJ., concur.

(34 Wash. 286)

#### SNYDER et al. v. HARDING.

(Supreme Court of Washington. March 11, 1904.)

#### LEASE — RESCISSION — EXPENSES—DENIAL OF LANDLORD'S TITLE—ISSUES—FINDINGS—PARTIES.

1. Where a portion of a tract of land was owned by a husband and wife as community property, and the remainder by the community and another jointly, a lease of the entire tract by the husband without the concurrence of either the wife or the joint owner was invalid.

2. Suit by a lessee against the lessor, in which the former claims to be equitable owner of part of the land, and seeks to specifically enforce an alleged contract of sale, is a rescission of the lease.

3. Where a tenant has rescinded the lease by suing as equitable owner for part of the land and seeking to specifically enforce an alleged contract of sale, commencement of suit by the landlord to recover the land and quiet title thereto is an acceptance of the rescission.

4. Defendant in a suit to recover possession of and quiet the title to land pleaded a lease,

and plaintiff replied that defendant had sued for the land as equitable owner, and sought to specifically enforce an alleged contract of purchase. *Held*, that a conclusion of law that by so suing defendant had rescinded the lease was proper, and within the issues.

5. Where the allegations of a complaint were within Ballinger's Ann. Codes & St. § 5500, authorizing suits for possession and to quiet title against one in possession not as tenant, but claiming an interest in the property, the issuance of a so-called "writ of restitution" did not render the action one against a tenant.

6. A husband and wife owning a portion of a tract of land as community property and the remainder jointly with another may join with each other and the joint owner in a suit to recover possession of and to quiet title to the land.

Appeal from Superior Court, Adams County; C. H. Neal, Judge.

Action by Katherine M. Snyder and others against O. G. Harding. From a judgment for plaintiffs, defendant appeals. Affirmed.

O. R. Holcomb, for appellant. Merritt & Merritt, for respondents.

HADLEY, J. The statement of facts in this case was stricken at the time of the hearing. Therefore the only questions to be determined are whether the conclusions of law properly follow from the findings of the court, and whether the judgment is sustained by the findings and conclusions, and is within the issues. The complaint is for possession of real estate, and also prays that plaintiffs' title thereto shall be quieted. It is alleged that the plaintiffs George S. Snyder and Katherine M. Snyder are husband and wife, and that they hold an ownership in said real estate as a community. The lands are alleged to be owned by said community and by their coplaintiff Charles D. Snyder. It is also alleged that the defendant wrongfully entered into possession of the land; that he now wrongfully holds it, and claims some interest therein which is unfounded, and without right. The defendant answered that he leased the premises from the plaintiffs by an agreement with the plaintiff George S. Snyder; that with the consent and approval of plaintiffs he entered into possession, proceeded to cultivate the land, delivered to them the share of the crops as rent, and that the same was accepted by them. The reply alleges that the plaintiffs Katherine M. Snyder and Charles D. Snyder were in the state of California at the time said lease agreement was made, and that they neither joined therein nor knew thereof; that prior to the time the same was made the defendant knew of the marriage relation existing between the plaintiffs George S. and Katherine M. Snyder, and that the real estate attempted to be leased was their community property. It is alleged that the lease was void by reason of not having been executed by the wife of the community aforesaid and by said Charles D. Snyder, and for the further reason that it was made wholly without their knowledge or authority, and was not subsequently ratified

¶ 1. See Husband and Wife, vol. 26, Cent. Dig. § 932; Tenancy in Common, vol. 45, Cent. Dig. § 123.

by them. It is further averred that said Katherine M. and Charles D. Snyder believed that there was no lease upon said premises for any fixed period, and that the same were wholly free from any incumbrance of any character, and that such belief continued with them until the defendant in this action began a suit against said George S. Snyder by which he claimed to have purchased said real estate, and also that he was the owner thereof. Under the issues, practically as stated above, the court found substantially as follows: That the said community is the sole owner of a portion of said real estate, and is the joint owner with said Charles D. Snyder of the remainder thereof; that said George S. Snyder entered into a written contract of lease with the defendant for said real estate, by which the same was to be leased for a term of three years, but that said Katherine M. and Charles D. Snyder did not join in the execution of the lease; that at the time the lease was made the defendant knew of the existence of the marriage relation creating the community aforesaid; that said lands were prepared for crop during the fall of 1899 and spring of 1900, the crop harvested and threshed in the year 1900, and that settlement in relation thereto was made between the plaintiffs and defendant by the defendant delivering to one Fred Snyder, the father of George S. Snyder and Charles D. Snyder, who was acting for the plaintiffs, the share of the crop belonging to the land; that a portion of the land was by the defendant again seeded in wheat in the fall of 1900 and spring of 1901; that in June, 1901, the defendant commenced an action in the superior court of Adams county, claiming to have purchased a part of the land, and demanding specific performance of a contract of purchase from George S. Snyder; that after the commencement of said action by the defendant, and acting upon the notice thereby given that the defendant was not claiming to hold said real estate as the tenant of plaintiffs, but as the equitable owner thereof under his alleged purchase, the plaintiffs then instituted this action against defendant for possession without demand or notice. At the request of the defendant it was also found that at all times during his possession of the premises he fully performed all the covenants and provisions of said lease by him to be performed, and that the plaintiffs received and accepted the proceeds of the lease without objection to the possession of defendant. As conclusions of law from the foregoing facts the court concluded (1) that the said lease was not valid as against the plaintiffs; and (2) that by the commencement of said action for specific performance of said alleged contract of sale the defendant gave notice to plaintiffs that he did not hold or claim to hold said real estate under and by virtue of said lease, but that he was holding that part of it described in his complaint as equitable owner; that said acts

on the part of the defendant amounted to a rescission by him of said lease contract; and that by the commencement of this action by plaintiffs a mutual rescission of the lease was effected. Judgment was entered awarding possession to the plaintiffs and quieting title in them as against defendant and those claiming under him. The defendant has appealed.

Appellant contends that the first conclusion of law is erroneous, in that it does not follow from the facts which were found by the court at appellant's request. It is doubtless true that the lease contract was not good under certain findings of the court, in that it was found that the wife member of the said community, and also the other joint owner of a portion of the land, did not participate in the execution of the contract. Under other findings made, and particularly those made at appellant's request, it becomes a question whether such conduct of respondents appears as will estop them to deny the lease. If the findings were confined to that subject, we might conclude that respondents were estopped, and that the court was in error as to the first conclusion of law, and in a judgment based wholly thereon. It was further found, however, that appellant began a suit against one of these respondents, by which he claimed to be the equitable owner under a contract of purchase of a portion of this land, and sought specific performance of such contract. Appellant's position in that action was certainly notice to respondents that he did not claim to hold as tenant, but that he did claim to hold by the rights of a purchaser and equitable owner. Therefore, even if the conduct of respondents had theretofore been such as would estop them to deny the lease, yet appellant's position in his suit amounted to a declaration of rescission on his part of the lease contract, for he no longer claimed as tenant, but as owner. He cannot claim as a tenant while he occupies the position of one holding adversely. *White v. Brash* (Ariz.) 73 Pac. 445. Such rescission having been initiated by appellant, the present suit by respondents amounts to an acceptance thereof, and effects a mutual rescission. Appellant claims in this action only as tenant under the lease, and with the lease rescinded he appears to have no standing. We therefore believe the court's second conclusion of law was correct, and it sustains the judgment.

Appellant urges that the second conclusion of law is in conflict with the allegations of respondents' pleadings. We think not. It will be remembered from the statement of the pleadings hereinbefore made that the complaint alleges that appellant claims some interest in said land, but that the same is unfounded, and without right. The answer admits a claim of interest, but sets it up as a claim of tenancy. The reply avers the facts about appellant's aforesaid suit which amounted to a rescission of the tenancy agreement. Thus we think respondents'

pleadings in an orderly and logical manner introduced the features which form the basis of the second conclusion of law, and that the same is within the pleadings.

Appellant contends that respondents, from the beginning of this action, proceeded against him as a tenant, and procured a writ of restitution. The allegations of the complaint are within section 5500, 2 Ballinger's Ann. Codes & St., which provides for bringing suit for possession and to quiet title against one in possession who may not be a tenant, but who claims an interest in the property. Respondents' pleadings do not allege that appellant is a tenant. The findings, conclusions, and judgment are therefore within the issues, and, even though a so-called writ of restitution may have issued, we have only to determine whether the judgment of the court is within the issues, and is otherwise supported by the findings and conclusions.

Appellant suggests that respondents do not own the premises in dispute by unity of title, and that they have no common right to maintain action for possession. In volume 1, Pomeroy's Equity Jurisprudence (2d Ed.) § 245, the rule is stated that, in order to avoid multiplicity of suits, persons may unite in the same action "where a number of persons have separate and individual claims and rights of action against the same party, A., but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as coplaintiffs. \* \* \*". See, also, *Osborne v. Wisconsin Cent. R. Co.* (C. C.) 43 Fed. 824. Within the above rule these respondents were not improperly united. The several rights of action arose from a common cause, are governed by the same legal rule, and the whole matter may therefore be settled in a single suit.

We believe, for the reasons stated, that at least the second conclusion of law follows from the findings, and it sustains the judgment. The judgment is therefore affirmed.

DUNBAR, MOUNT, and ANDERS, JJ.,  
concur.

34 Wash. 257)

#### STATE v. DRUXINMAN.

(Supreme Court of Washington. March 11, 1904.)

RECEIVING STOLEN GOODS—INFORMATION—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY—TRIAL—ORDER OF ADMITTING TESTIMONY—INSTRUCTIONS—NEW TRIAL—MISCONDUCT OF JUROR.

1. An information for buying and receiving stolen goods sufficiently alleges that they were stolen where it describes the same as "stolen property," and alleges that defendant knew that it was "stolen property."

2. A conviction will not be interfered with on appeal where the evidence was conflicting, and

the testimony for the state, if believed, would have warranted the verdict.

3. The order in which testimony is admitted is in the discretion of the trial court, and, unless abuse by the admission of testimony out of its regular order is shown, a conviction will not be reversed therefor.

4. In a prosecution for buying and receiving stolen goods knowing the same to have been stolen the court instructed that the essential ingredient was knowledge that the goods were stolen, and that this must exist at the time of their receipt or purchase, but that it need not be direct knowledge, and that it was sufficient that circumstances accompanying the transaction were such as to make defendant believe the goods were stolen. *Held* a correct statement of the law governing such cases.

5. Where the jury were instructed to give the proper weight to the testimony of each witness, a claim that the instruction gave no definition of proper weight was hypercritical.

6. After a case was given to the jury, one of the jurors stated that he remembered that accused had been brought up several times before on similar charges, but that he had forgotten it when examined on his voir dire. It did not appear, however, that the evidence influenced the verdict. *Held*, that there was no error in denying a new trial on this ground.

Appeal from Superior Court, King County; W. R. Bell, Judge.

Moses Druxinman was convicted of buying, receiving, and aiding in the concealment of stolen goods, and he appeals. Affirmed.

Ballinger, Ronald & Battle, for appellant. W. T. Scott and Elmer E. Todd, for the State.

DUNBAR, J. The defendant was convicted of buying, receiving, and aiding in the concealment of stolen goods, knowing the same to have been stolen. The following errors are assigned on appeal: (1) Error in overruling objection to the introduction of any evidence; (2) error in denying motion at the close of the state's case to instruct the jury to acquit; (3) error in overruling challenge to the sufficiency of the evidence interposed at the close of the case, and denying motion for an instructed verdict of acquittal; (4) error in admitting certain testimony in rebuttal; (5) error in instructions given to the jury; (6) error in overruling motion for a new trial; (7) error in overruling the motion for arrest of judgment; (8) error in rendering judgment.

The first assignment of error is based upon the alleged insufficiency of the information to state a cause of action. The information alleges that the defendant "willfully, unlawfully, and feloniously did buy, receive, and aid in the concealment of the following stolen property [describing property], then and there being the property of the Northern Pacific Railway Company, a corporation, and the said Moses Druxinman then and there having bought, received, and aided in the concealment of the same knowing that said property, and all thereof, was stolen property." It is insisted by the appellant that, unless the property was stolen, the defendant could be guilty of no crime, and hence the fact that the property was stolen is a material fact, and must be alleged as well as

¶ 1. See *Receiving Stolen Goods*, vol. 42, Cent. Dig. § 9, 12.



proved; and it is asserted that this information nowhere alleges or states the fact that the property was stolen; that the allegation that the defendant did buy and "aid in the concealment of the following stolen property," and the further allegation that the defendant bought, received, and aided in the concealment of the same, knowing that it was stolen property, is only the statement of an inference that the property was stolen, and that an inference is not sufficient in a criminal case, but that the fact must be alleged. It would seem that there could certainly be no room for any other inference from the language of the information than the inference that the property was stolen, and the language therefore is, in substance, the statement of a fact. The test of the validity of the information, so far as this question is concerned, is, does it enable a person of common understanding to know what was intended? There can be no doubt that the defendant was plainly informed by this information of the nature of the crime the commission of which he was charged with. We think the information was in all respects sufficient.

The second assignment raises the question of the sufficiency of the testimony to sustain the judgment. The testimony was conflicting, and, if the testimony of the state's witnesses was believed by the jury, it would warrant the verdict returned. The jury being the judge of the credibility of the testimony, we do not feel justified in this case in interfering with its determination.

What is said with reference to this assignment will apply equally to the third assignment of error.

It is contended that the court erred in admitting certain testimony in rebuttal, which it is insisted was admitted out of its regular order. The testimony was in relation to the defendant's previous acquaintance with Fagan, who had stolen the property, and sold it to the defendant, and also to the manner in which Fagan was dressed at the time of the sale of the property to the defendant; it being contended that this testimony was properly testimony which should have been presented in the opening of plaintiff's case, and that some testimony bearing on that subject had been introduced by the state in its case in chief. But an examination of the record discloses the fact that this testimony was called out by the statement of counsel for defense to the jury, and, in addition to that, the order in which testimony is admitted in the trial of a cause is ordinarily largely in the discretion of the trial court, and, without it appears that injustice was done to one of the parties to a suit by the submission of testimony in this way, the court would be loath to reverse a cause on this ground. In this case it affirmatively appears that the defendant was not prejudiced by the admission of the testimony.

The court, among other instructions, gave

the following: "One of the essential ingredients of this crime is knowledge on the part of the buyer or receiver that the goods have been stolen, and this knowledge must exist at the time of the receipt or purchase of the goods. This, however, need not be such direct knowledge as comes from witnessing a theft. It is sufficient that circumstances were such accompanying the transaction as to make the defendant believe the goods had been stolen." We are unable to discover any error in this instruction. It seems to be a plain and correct statement of the law governing such cases. The court further instructed the jury that, "It is your duty to give the proper weight to the testimony of each and every witness who has testified before you," and it is claimed that the court, in effect, told the jury by this instruction that the testimony of every witness must have proper weight, and gave no definition of the meaning of proper weight. We think this contention is hypercritical, and that the jury was not in any way misled by the instruction complained of.

It is urged in support of the sixth assignment that the motion for a new trial, among other things, was made upon the ground of misconduct of the jury, and in support of this motion the defendant filed the affidavits of two jurymen showing that immediately upon the election of the foreman one of the jurors, whose name is not disclosed by the affidavits, stated that he remembered that the defendant had been brought up several times before on similar charges; that he had forgotten this at the time he was examined upon his voir dire, but remembered it as the case progressed. It does not appear from the affidavits that this remark had any influence upon the verdict of the jury, and it might be a matter of common knowledge, of which each particular juror was possessed, that the defendant had been tried before for a similar crime. But such knowledge would not be sufficient to disqualify a juror from sitting in the trial of a cause under an independent charge of the same character of crime. There was no error of the court in denying the motion for a new trial on this ground.

Nor does it appear that the jurors who tried the cause were not proper jurors under the law governing their selection.

The judgment is affirmed.

HADLEY, ANDERS, and MOUNT, JJ.,  
concur.

(34 Wash. 238)

COCHRAN et al. v. YOHO et ux.

(Supreme Court of Washington. March 8, 1904.)

MECHANICS' LIENS — FORECLOSURE — COMPLAINT—SUFFICIENCY—EVIDENCE TO SUPPORT FINDINGS—REVIEW—CONTRACT—DECISION—LIABILITY FOR DAMAGES.

1. A demurrer was filed to a complaint in an action to foreclose a mechanic's lien because it appeared that the original contractors were

plaintiffs, and a third person, who withdrew from the work, and because the complaint did not allege the owner's knowledge or consent to such withdrawal. It was alleged, however, that, immediately after the withdrawal, plaintiffs began to perform labor and furnish materials, and continued to do so up to a specified date, and before that time had completed two of the buildings, and delivered them to the owner, who accepted them. It further alleged payment of a large sum on account of the contract. *Held*, that it was fair to assume therefrom that defendants, the owner and his wife, knew that plaintiffs were the parties with whom they were dealing, and that such third party was not concerned therein, and that defendants, having knowingly dealt with plaintiffs, became liable for the labor and material as alleged, and the demurrer was properly overruled.

2. Evidence in an action to foreclose a mechanic's lien considered, and *held* to justify a finding that the defendant owner forcibly ejected plaintiffs from the premises before the completion of their contract.

3. A finding will not be interfered with where it is necessary to pass on the credibility of witnesses, and the weight to be given to their testimony.

4. Where work on a building contract is wrongfully stopped by the owner, the contractors are entitled to treat it as rescinded, and a subsequent notice to proceed with the work will not relieve the owner from liability for the damages occasioned thereby.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by C. D. Cochran and another against J. F. and Mary Yoho to foreclose a mechanic's lien. From a judgment for plaintiffs, defendants appeal. Remanded, with directions.

Sweeney, French & Steiner, for appellants. Ira Bronson, for respondents.

**PER CURIAM.** This action was commenced in the superior court of King county by C. D. Cochran and A. J. Webb, as plaintiffs, against J. F. Yoho and Mary Yoho, his wife, as defendants. Plaintiffs allege in their amended complaint that on or about the 17th day of December, 1900, they and one C. L. Huggins entered into a written contract with J. F. Yoho for the construction of four certain two-story frame buildings upon lot 4 in block 54 of the Second Addition to the city of Seattle. This contract is referred to as an exhibit, and is as follows:

"Seattle, Wash. Dec. 17th, 1901. We, the parties of the first part, C. L. Huggins, A. J. Webb and C. D. Cochran, and J. F. Yoho of the second part, do enter into a contract for the construction of four, four part tenement houses to be erected on lot 4, block 54, Sarah A. Bell's 2nd addition to Seattle, Wash. The parties of the first part agree to furnish all material and labor for construction, and completion of said buildings according to plans and specifications for the sum of forty four hundred dollars (\$4,400.00). Said buildings are to be commenced at once and completed as soon as possible. The party of the second part agrees to furnish a sufficient amount of money for the parties of the first part to get

the material for said buildings, but at no time to pay any in advance. All bills to be receipted and turned in to party of second part before final payment. Parties first part: C. D. Cochran, A. J. Webb, C. L. Huggins. Party second part: J. F. Yoho."

The complaint further alleges that, immediately after the execution of this contract, C. L. Huggins abandoned said contract, and so notified these plaintiffs, Cochran and Webb, verbally, without giving any reasons therefor; that on the 17th day of December, 1900, these plaintiffs commenced to perform labor and furnish materials to be used in the construction of such buildings, the contract price therefor being \$4,400; that plaintiffs continued to perform said labor and furnish said materials up to and including the 9th day of March, 1901, and before that time had completed two of said buildings, and delivered same to said Yoho, who thereupon accepted the same; that on the 8th day of March, 1901, said J. F. Yoho forcibly and unlawfully ejected these plaintiffs from said premises, and refused to allow them to complete said contract; that plaintiffs thereupon were compelled to, and did, cease to perform any further labor or furnish any further materials under such contract; that, when plaintiffs quit said work, an expenditure of \$150 would have completed the two remaining buildings; that the contract price of each building was \$1,100; that defendants are the owners and reputed owners of said premises; that J. F. Yoho advanced to plaintiffs \$3,687.92 under said contract; that there is a balance due plaintiffs of \$712.08, with interest thereon from March 9, 1901; and that, within 90 days after quitting work, plaintiffs made and filed their lien on said premises for labor and materials so furnished in the auditor's office of said King county, and the same was duly recorded. Plaintiffs asked judgment for the above amount and interest, for a foreclosure of their said lien, and costs, including an attorney's fee of \$150, and for general relief. Defendants filed a general demurrer to such complaint, which was overruled. Defendants, by their answer to such amended complaint, put in issue the material allegations thereof, and for further defense and counterclaim allege, in part, as follows:

"(2) That, in accordance with the terms of said contract, the said Cochran, Webb, and Huggins were to construct the said buildings in accordance with certain plans and specifications furnished, and that it was also provided that the lumber furnished was to be of good quality, and that the said houses were to be completed as soon as possible.

"(3) That, contrary to the terms of said agreement, the said lumber furnished was of an inferior quality, and was not suitable for the use to which it was put, the buildings were not and are not constructed in accordance with the plans and specifications provided, and the work was performed in a care-

less, indifferent, and unworkmanlike manner.

"(4) That contrary to the terms of said contract, after partially constructing said buildings, and before the completion thereof, and while the same were in an exposed and unfinished condition, these plaintiffs willfully abandoned said labor, on or about March 9, 1901, and then refused, and at subsequent times, when notified by the said J. F. Yoho to complete the said buildings, refused, to further perform labor or to further furnish material.

"(5) That up to and including the 9th day of March, 1901, when these plaintiffs abandoned said contract as above alleged, the said J. F. Yoho had paid these plaintiffs for use in the said houses the sum of four thousand twenty two dollars and twelve cents (\$4,022.-12)."

"(6) That the defendant J. F. Yoho was compelled to, and did, actually expend the further sum of five hundred sixty-six dollars sixty-nine cents (\$566.69) for the completion of said houses in accordance with the terms of said contract."

The defendants further allege damages in the sum of \$1,500, and ask judgment against plaintiffs for \$1,688.71 on their counterclaim. Plaintiffs, in their reply, deny each and all the material allegations of new matter contained in the answer.

The cause was tried to the court without a jury on the 6th day of January, 1902, and thereupon the following findings of fact, among others, were made by the trial court:

"(5) That on or about the 6th day of March, 1901, the defendant J. F. Yoho forcibly ejected the plaintiffs from said premises, and refused to allow them to further perform said contract, or to carry the same out or complete the same, and that thereupon the plaintiffs ceased to perform any further labor or to furnish any further materials upon said houses; that all of said labor and materials under said contract were performed and furnished between the 17th day of December, 1900, and the 9th day of March, 1901.

"(6) That, at the time when said defendant J. F. Yoho refused to allow the plaintiffs to further perform said contract, one hundred and fifty dollars would have completed said buildings, including all necessary material therefor.

"(7) That, during the construction of said buildings, it had been agreed between the plaintiffs and the defendant J. F. Yoho that four chimneys might be omitted from said houses, for which the plaintiffs agreed to allow the defendants their reasonable cost.

"(8) That the reasonable costs of said chimneys would have amounted to eighty dollars.

"(9) That the labor performed and materials furnished as aforesaid to be used in, and which were used in, the construction of said buildings, were furnished to the said J. F. Yoho in accordance with the terms and con-

ditions of said contract, except as in paragraph 7 hereof stated. \* \* \*

"(14) And the court further finds that it was agreed upon the trial of this cause, between the plaintiffs and defendants, and stipulated therein, that in case said lien were foreclosed, and a decree rendered in favor of the plaintiffs, that \$150 was a reasonable attorney's fee to be allowed the plaintiff in this cause."

The court thereupon stated the following conclusions of law:

"(1) That the defendants are indebted to the plaintiffs in the sum of \$482.10, together with interest thereon from the 9th day of March, 1901, at the legal rate, aggregating \$510.20, together with an attorney's fee of \$150, and their costs herein, and that the plaintiffs are entitled to a judgment against the defendants for said sums.

"(2) That the lien mentioned and described in the findings of fact herein is a good, first, and valid and subsisting lien upon the premises therein described, and that the plaintiffs are entitled to have said lien foreclosed, and the premises therein described sold by the sheriff of this county, and that the proceeds of such sale be applied in payment of such judgment, attorney's fees, interest, and costs, together with the costs and increased costs of such sale."

Defendants excepted to each of the above findings and conclusions of law. Defendants also made requests for findings and conclusions based upon the allegations of their answer and their contentions at the hearing, which were refused by the superior court, to which rulings they duly excepted. Judgment having been entered in conformity with the findings and conclusions of law, the defendants appeal to this court.

Appellants assign errors as follows: (1) That the trial court erred in not sustaining the demurrer to the amended complaint; (2) in making the findings of fact and conclusions of law to which appellants excepted as above noted; (3) in not making certain findings and conclusions of law proposed by appellants.

The main contention of appellants in support of their demurrer to the above complaint is based upon the proposition that it appears from such pleading that the original contract for the construction of these buildings was entered into between respondents and one Huggins, as parties of the first part, and J. F. Yoho, appellant, as party of the second part, and that said Huggins withdrew from the work, and that there is no allegation in the complaint of knowledge or consent to such withdrawal on the part of the owner, J. F. Yoho. Respondents, in their amended complaint, among other things, allege that immediately after the execution of the contract the said C. L. Huggins abandoned said contract, that respondents commenced to perform labor and furnish materials for the erection of these structures from December 17, 1900, and continued in so doing up to and in-

cluding March 9, 1901, and before that time had completed two of said buildings, and delivered same to appellant Yoho, who accepted the same. For the purposes of this demurrer, these allegations must be taken as true. Giving these averments a reasonable and liberal interpretation, they show that respondents performed labor and furnished materials to appellants between the above dates, by reason whereof the latter were benefited; that appellants accepted respondents' work and the materials furnished by them in erecting and finishing the two structures above named. The complaint further alleges that appellants paid respondents a large sum of money on account of such contract. Considering the complaint as a whole, we think it fair to assume from the allegations thereof that the appellants knew that respondents were the parties with whom they were dealing in these transactions; that the other party, C. L. Huggins, was not concerned therein; and that appellants, having knowingly dealt with respondents in the premises, became liable to them for furnishing the labor and materials alleged in this complaint. We are therefore of the opinion that this pleading states a cause of action, and that the superior court committed no error in overruling appellants' demurrer to the amended complaint.

Appellants contend there was no evidence to justify the finding of the trial court that "defendant Yoho forcibly ejected plaintiffs from said premises." Respondent Cochran testified that "on Monday, about the 4th or 5th of March, 1901, when we arrived at the premises, Yoho hadn't got there. We found our tools were locked up, and we waited a few minutes for Yoho. I asked him if he wanted us to go to work on the coal shed. He said, 'No,' he would not let us go to work at all. He said he would not let us have anything to do with it—he would not have anything to do with us any more, especially me; said he would not allow me around there; and we came around to see Mr. Bronson, and Mr. Bronson was not in his office, and when we came back he had our tools there on the back porch, and would not let us in at all." Respondent Webb substantially corroborates in his testimony Cochran's statements on this branch of the controversy. This witness also stated that on the above occasion Yoho remarked to him: "Well, there can't be any work here until this thing is adjusted. \* \* \* You and I can get along all right and do this work, but Cochran can never drive another nail here." Witness Sturm, in behalf of respondents, testified that he was engaged to paint the houses, and was discharged by Yoho. Appellant Yoho, referring to this matter about locking up respondents' tools, testified: "They stated I had the tools locked up. They had a key to the room themselves." Respondent Webb denied having any key, and testified that only one key came with each rim lock. Cochran testified that Yoho

got the keys from him on the Saturday night previous to this Monday morning when respondents quit work, in order to clean out one of the flats so that a tenant of appellants might move in. Appellant Yoho, on his cross-examination, testified: "Q. You told me [Bronson] you didn't have any objection to Mr. Webb, but that Mr. Cochran could not work there any more? A. Yes, sir, I told you that." It further appears from Yoho's evidence that, at and prior to the time respondents quit working on these buildings, he (Yoho) was very much dissatisfied with the quality of the work thereon, and that disagreements between him and Cochran were frequent; that, within a day or two after the alleged ejectment of respondents, appellant Yoho served a written notice upon Webb, Cochran, and Huggins, that, unless they proceeded at once with the construction of these four buildings, he would consider that they had abandoned the work, and look to them for whatever damages he might sustain thereby. Respondents admit the receipt and service of this notice upon them. We have examined the testimony carefully with reference to the finding of facts of the trial court above noted regarding the question whether the respondents voluntarily abandoned their contract, or whether appellant Yoho forced them to quit working on these buildings, and conclude that there was sufficient evidence to justify this finding. On the face of the record, the preponderance of the testimony seems to support the contentions of respondents as to that feature of the controversy. In arriving at this conclusion, we have taken into consideration the testimony of appellant J. F. Yoho and his witnesses with reference to the poor quality of the work performed on these structures, whereby Yoho claims he was justified in stopping work thereon. This evidence was directly in conflict with the testimony adduced in respondents' behalf, which tended to show that appellant J. F. Yoho rushed the work in order to get the buildings ready for tenants to occupy; that during much of the time while the buildings were in the course of erection the weather was unfavorable to good workmanship, especially as regards the plastering, which did not have an adequate opportunity to dry. There was also considerable testimony in behalf of respondents to the effect that the job was a good one. If the evidence in appellants' behalf were true, they were justified in refusing to allow respondents to proceed with the work in violation of their contract, which is the basis of the present action. The trial court, who saw the witnesses and heard their testimony while giving in their evidence at the trial, and had better opportunities than we possess for judging as to the credibility of individual witnesses, and the weight that should be given to their testimony, found against appellants on this very important feature in the case. Under well-settled rules of law fre-

quently announced by this court, we do not feel warranted in interfering with that finding. See *Washington Dredging, etc., Co. v. Partridge*, 19 Wash. 62, 52 Pac. 623, and authorities cited.

Treating the above finding as a verity for the purposes of this controversy, we are constrained to hold, as a matter of law, that appellants, by wrongfully stopping the work on these buildings, rendered themselves liable to respondents in damages. We are of the opinion that the fact of appellants having given notice to respondents and Huggins to proceed with the work does not affect respondents' right to recover in the case at bar; that the latter, by the acts of J. F. Yoho, had a right to treat the contract as rescinded, and they could not legally be required to go back to work on those structures under the original contract; that J. F. Yoho, being the party at fault, under the findings of the trial court, in causing respondents to quit work, must bear the consequences of his own acts. "Where one of the parties to a contract, either before the time for performance, or in the course of performance, makes performance or further performance by him impossible, the other party is discharged, and may sue at once for the breach." 9 Cyc. 639, and authorities cited. It is admitted that, during the progress of the above work, appellants advanced \$3,687.92 under the contract. The trial court found that, when respondents quit work, \$150 would have completed said buildings, including all necessary materials therefor. We think that, on the respondents' evidence, appellants should have been allowed an additional credit of \$25, making the sum total of \$175 to be deducted from the contract price for labor and material necessary to complete the buildings. Under the testimony, the cost of the erection of eight chimneys should have been deducted from the contract price for the completion of the buildings. The trial court allowed a credit of \$80 for only four chimneys. The estimated value of these chimneys, according to the evidence, at the time respondents quit work, was 70 cents per running foot. The testimony is somewhat ambiguous as to the actual lineal measurement of those chimneys, but, after a careful consideration of the matter, we have concluded that a deduction of \$123.70 must be allowed appellants from the contract price, instead of \$80, as found by the superior court. Deducting these total credits, amounting to \$3,986.12, from \$4,400, the contract price, leaves a balance of \$413.88; and for this amount, together with interest at the legal rate from March 9, 1901, and the costs and attorney's fees allowed by the lower court, we direct judgment to be entered by the lower court. No costs shall be taxed in favor of either respondents or appellants on this appeal. This cause is therefore remanded, with directions to enter judgment in conformity with this opinion.

(9 Idaho, 693)

## STATE v. JONES.

(Supreme Court of Idaho. Feb. 22, 1904.)

CONSTITUTIONAL LAW — LICENSES — DOUBLE TAXATION — TITLE TO ACT — AMENDMENT — SECTION AMENDED PUBLISHED AT LENGTH.

1. Under the provisions of section 2, art. 7, of the Constitution, it is not double taxation to levy a tax on billiard, pool, and other tables according to their value, and at the same time require the proprietors or keepers thereof to pay a license tax under the provisions of section 1645, Rev. St. 1887, as amended.

2. The following title to an act, to wit, "An act to amend section 1645, Revised Statutes [1887] of the state of Idaho, as amended by act approved February 16th, 1899" (Sess. Laws 1903, p. 104), held sufficient, under the provisions of section 16, art. 3, of the Constitution.

3. Held, section 1645, Rev. St. 1887, as amended by act approved March 12, 1903, sufficient, full, and complete, so as to leave no doubt of its meaning and purpose, and is therefore valid. (Syllabus by the Court.)

Appeal from District Court, Washington County; Geo. H. Stewart, Judge.

Action by the state against C. W. Jones to recover a license tax for billiard and pool tables. Judgment for the state, and defendant appeals. Affirmed.

Lot L. Feltham, for appellant. George P. Rhea, Co. Atty., for the State.

SULLIVAN, C. J. This action was brought by the state for the purpose of enforcing the collection of a license tax from appellant for keeping in his saloon and place of business at Weiser, Idaho, one billiard and pool table for the use of the frequenters of said saloon. The case was originally brought in the probate court, and judgment was entered against the appellant. From that court an appeal was taken to the district court, where the case was heard anew, and judgment was entered against the appellant. This appeal is from the judgment, on the judgment roll alone, which roll contains a stipulation of facts upon which the case was tried in the district court. Said stipulation of facts is as follows:

"(1) That at all times referred to in plaintiff's complaint said defendant was the owner and keeper of a saloon in the city of Weiser, Idaho.

"(2) That during all times referred to in said complaint said defendant Jones was the keeper and owner of one billiard table and one pool table, kept and run in connection with said saloon, and that said defendant, as such keeper of said billiard and pool tables, permitted any and all persons at any and all times to play upon said tables with balls and cue.

"(3) That the said defendant at all times referred to in said complaint wholly failed, neglected, and refused to procure a license as provided for by section 1645, Rev. St. 1887, as amended, and who failed to pay for a license as such keeper, and maintaining of said billiard and pool tables so used, and played upon with balls and cue.

"(4) That said defendant still neglects and refuses to take out such license as such keeper and owner of said billiard and pool tables so used, and played upon with balls and cue.

"(5) That this action is brought, on the part of the plaintiff, to enforce the collection of such license.

"(6) That, at the conclusion of any game of billiards or pool played upon said table, any person engaged in said game could, if he so desired, purchase goods of the defendant as a result of the outcome of said game, but, if no goods were purchased, then no charge was made for the use of said table; that, if the goods were purchased, the regular retail price was paid therefor, the same as if no game or games had been played."

The question involved in this case is the constitutionality of an act approved March 12, 1903 (Sess. Laws 1903, p. 104), amending section 1645 of the Revised Statutes of Idaho, relating to licenses upon billiard, pool, and other tables. It is contended by counsel for appellant that said act is unconstitutional, for three reasons: (1) It provides for duplicate or double taxation of property, and is in conflict with sections 2 and 5 of article 7 of the state Constitution; (2) it does not express in its title the subject of the act, and is in conflict with section 16, art. 3, of the state Constitution; (3) that the section as amended is not set forth and published at length, as required by section 18 of article 3 of the Constitution.

There is nothing in appellant's contention that said act provides for double or duplicate taxation. Section 2, art. 7, of the Constitution, declares that the Legislature shall provide such revenue as may be needful (1) by levying a tax, by valuation, on property; (2) by license tax; (3) by a per capita tax. This court held in *State v. Union Central Life Ins. Co.*, 67 Pac. 647, that the license system is a separate and distinct way of raising revenue, independent of the tax upon property. In *State v. Doherty*, 3 Idaho, 390, 29 Pac. 855, this court said: "The constitutional provision in regard to equality and uniformity of taxation has reference solely to taxation, pure and simple, according to the commonly accepted meaning of that term, for the purpose of revenue only. It does not apply to those impositions made under the police power of the state as a means of constraining and regulating business that may be regarded as evil in its effect upon society." In *Burrows on Taxation*, p. 147, it is said that the provision of the Constitution as to equality and uniformity of taxation does not apply to licenses. Also, see *State v. Camp Sing* (Mont.) 44 Pac. 516, 32 L. R. A. 635, 56 Am. St. Rep. 551. It was held by this court in *Stein v. Morrison, Governor, et al.*, 75 Pac. 246, that said section 2 of article 7 of the Constitution recognized three distinct methods of raising revenue, namely, property tax, a license tax, and a per capita tax. The above contention of counsel for appellant that said section 1645,

as amended, provides for duplicate taxation, has no merit. A business may be required to pay a license tax, although the property used in conducting that business is assessed as other property in the state.

The second contention of counsel is that the subject of said act is not expressed in the title thereof, and is in conflict with the provisions of section 16 of article 3 of the Constitution of Idaho. Said section is as follows: "Sec. 16. Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title." The title of the act under consideration is as follows: "An act to amend section 1645 of the Revised Statutes [1887] of Idaho, as amended by act approved February 16, 1899" (Sess. Laws 1903, p. 104). The provisions of said section of the Constitution are found in many of the state constitutions, and those provisions have many times been passed upon by the Supreme Courts of the several states. There is a sharp conflict of opinion as to the proper construction of the provision here under consideration, when applied to amendatory statutes. One line of decisions holds that a title to an amendatory statute is sufficient if it refers to the section of the statute sought to be amended by its proper number, while the other line holds that that is not sufficient; that the subject, purpose, or object of the section as amended must be stated in the title of the amendatory act, the same as in an original act. It was held by the Circuit Court of the United States for the District of North Dakota in the case of *Steele County v. Erskine et al.*, 98 Fed. 215, 39 C. C. A. 173, that the following title to an act was sufficient, to wit: "An act to amend section 10 of chapter 38, Laws of 1887, being section 545 of the Compiled Laws." That court said: "The subject of the act was the amendment of that section, which was accurately and appropriately designated, and the section as amended was set out in full in the act. The title sufficiently designated the subject of the act. It plainly indicated the object and purpose of the act, which is all the Constitution requires. The subject of a statute is one thing, and its detailed provisions quite another. One is the topic; the other its treatment. One is required to be stated in the title; the other not. The provision of the North Dakota Constitution on the subject is identical with that of Nebraska, and the Supreme Court of that state has uniformly held that acts with titles like this, 'An act to amend section 4 of chapter 55 of the Compiled Statutes of Nebraska,' are valid, and that such a title is a sufficient compliance with the requirement of the Constitution." The court there cites as sustaining that title a number of cases from the Supreme Courts of Nebraska, Michigan, Loui-

siana, and Washington. The Supreme Court of Nebraska sustained the following title as valid, to wit: "An act to amend section 4 of chapter 53 of the Compiled Statutes of Nebraska." In *Marston v. Humes* (Wash.) 28 Pac. 520, the court held the following title valid, to wit: "An act relating to pleadings in civil actions and amending sections 76, 77 and 109 of the Code of Washington of 1881." That case expressly overrules *Harlan v. Territory* (Wash.) 13 Pac. 453, where it had been held that the following title, to wit, "An act to amend section 3050, c. 238 of the Code of Washington Territory," was not sufficient to meet the requirements of the organic act, which provided that every law should embrace but one object, and that such object should be expressed in the title. In *Heller v. People* (Colo.) 31 Pac. 773, the Court of Appeals of that state held the following title valid, to wit: "An act to amend chapter 24 of the General Laws of the state of Colorado, entitled 'Criminal Code.'" In *Commonwealth v. Brown* (Va.) 21 S. E. 357, 28 L. R. A. 110, in discussing titles to amendatory acts, the court said: "There is another view which may be urged in support of the sufficiency of the title. It will be observed that it is an amendatory act, and not the original act on the subject. In such case, if the title of the original act is sufficient to embrace the matters covered by the provisions of the act amendatory thereof, it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient. If the title of the original act is sufficient to embrace the matters contained in the amendatory act, whether that of the amendatory act is in itself sufficient is unimportant. *State v. Ranson*, 73 Mo. 78; *St. Louis v. Tefel*, 42 Mo. 590; *Brandon v. State*, 16 Ind. 197; *Morford v. Unger*, 8 Iowa, 82; *State v. Algood*, 87 Tenn. 163 [10 S. W. 310]; and *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214, 224 [49 N. W. 971]." State on the Relation of ex rel. *Mouton v. Read*, Judge, 49 La. Ann. 1535, 22 South. 761, supports the doctrine of the above-cited case. Thus it is shown that it is held by very respectable authority that a title to an amendatory act which amends a section or certain sections of a prior act is sufficient if the title refers to the sections sought to be amended by number. The Legislature of the state of Idaho had the two lines of authorities before it on the question under consideration, and concluded to adopt the rule laid down in the authorities above cited. That being true, this court is not inclined to hold that the Legislature made a mistake in following the rule laid down by said authorities. It must be borne in mind, however, that the subject, object, or purpose of amendments so made must be within the title of the acts that contain the sections so amended. All amendments so made must be germane to or connected with the subject of the act or law which contained the section before such amendments were made. The

title to the act under consideration is sufficient to meet the requirements of the provision of said section of our Constitution which requires the subject of an act to be embraced in the title. To hold otherwise would be to invalidate many of the amendatory acts passed since Idaho became a state, and create much confusion. Reference has been made by counsel to amendments made or attempted by an act approved March 16, 1891 (Sess. Laws 1890-91, p. 237), and by an act approved February 16, 1899 (Sess. Laws 1899, p. 268). It is not necessary to a determination of this case for us to pass upon the constitutionality of said acts of 1891 and 1899, for, if those acts are in fact unconstitutional, that could not affect this case. The reference made in the act under consideration to the act of 1899 could in no manner affect the former. If the acts of 1891 and 1899 were unconstitutional, they in no manner changed said section 1645 as it appears in the Revised Statutes of 1887. Under a well-established rule, this court will not pass upon the constitutionality of a law unless it is absolutely necessary to do so in order to decide the case under consideration.

As to the amendatory act of 1903, it is contended by counsel for appellant that in the enactment of that amendatory section no attempt was made to follow the requirements of said section 18 of article 3 of the Constitution. It is suggested that a mere casual inspection of that act shows that both the subject and the predicate of section 1645 are entirely omitted, and for that reason said section expresses nothing when standing alone. Regardless of that contention, said section, read in connection with the chapter of the Revised Statutes to which it belongs, clearly shows its purpose, and the intent of the Legislature in enacting it—that it is intended to impose a license tax on each proprietor or keeper of a billiard, pool, or bagatelle table, or any other kind of table on which games are played with balls and cue; for each table, \$5 per quarter. Said chapter on licenses clearly indicates from whom such licenses are to be obtained, and to whom the license tax must be paid, and, in connection with said section as amended, establishes a complete plan for the collection of licenses from the proprietors or keepers of billiard, pool, and other tables mentioned in said section 1645. Said provisions of the Constitution do not require the whole chapter of which an amended section is a part to be set forth and published at full length—only the section amended—and, although said amended section could have been made more full and complete, yet there can be no doubt of its meaning and purpose.

We therefore hold that the title to said act of 1903 is sufficient, and that the section as there re-enacted is sufficiently explicit to clearly indicate the purpose of the Legislature enacting it, and that it is a valid and constitutional law.

For the reasons above given, the judgment of the district court is affirmed, with costs in favor of the respondent.

**STOCKSLAGER and AILSHIE, JJ., concur.**

(46 Or. 12)

**STATE v. HOUGHTON.**

(Supreme Court of Oregon. March 14, 1904.)

**LARCENY FROM THE PERSON—INFORMATION—CONVICTION OF ASSAULT—EXCESSIVE PENALTY—CORRECTION OF JUDGMENT.**

1. An information for larceny from the person charged that defendant assaulted the prosecuting witness, and thrust his hand in the latter's pocket with intent to steal, etc. *Held*, that the crime alleged could not have been committed without an assault, which was therefore included in the greater offense.

2. Under B. & C. Comp. § 1772, punishing a simple assault by imprisonment in the county jail or by fine, one convicted thereof could not be condemned to hard labor as well as imprisonment.

3. For the purpose of upholding a judgment improperly condemning defendant to imprisonment "at hard labor," the words quoted cannot be treated as mere surplusage, as they have a distinct meaning, and qualify the judgment rendered.

4. A conviction being regular, appellant is not entitled to a new trial for a material error in the judgment as to the penalty imposed, but he is entitled to a proper judgment, which should be entered pursuant to directions of the Supreme Court, which can remand the cause to the trial court for that purpose.

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Charles Houghton was convicted of larceny from the person, and he appeals. Reversed.

W. T. Hume, for appellant. A. C. Spencer, for the State.

**WOLVERTON, J.** The defendant, having been charged with an attempt to commit the crime of larceny from the person, was convicted upon trial of simple assault, and sentenced to imprisonment in the county jail, "at hard labor," for a period of six months. He complains, first, of the conviction, and, second, of the sentence.

As to the first, he insists that the crime of simple assault is not necessarily included in a charge of an attempt to commit the crime of larceny from the person, and therefore that he was unlawfully convicted. It is difficult to conceive how larceny from the person could be accomplished without an assault. An attempt to commit larceny from the person might or might not be accompanied with an assault, but the difficulty of its inclusion with the larger offense is obviated here, as the information charges that the defendant assaulted the prosecuting witness, and thrust his hand in the witness' pocket with the intent to steal, take, and carry away from his person the money and chattels, if any such he should find. The crime as alleged could not have been committed without at the same time committing an assault upon the person,

and hence the latter, being the lesser offense, was necessarily included in the former.

The second complaint is certainly not without merit. The defendant having been convicted of simple assault, he was punishable only by imprisonment in the county jail or by fine. B. & C. Comp. § 1772. In this case the court went further than the statute permits. It condemned the defendant to hard labor, as well as imprisonment, thereby adding something of material moment to the penalty prescribed by the statute. This was error. Nor can the words "at hard labor" be treated as mere surplusage. They have a distinct meaning, and qualify the judgment rendered. If they are stricken out, we have a different judgment from the one pronounced; and, if they stand as rendered, the judgment is unwarranted. We cannot make the correction here, but we can remand the cause to the trial court for that purpose. *State v. Marple*, 15 Or. 205, 14 Pac. 521. The conviction being regular, the defendant is not entitled to a new trial, but he is entitled to a proper judgment upon the conviction had.

The judgment entered will therefore be reversed, and the cause remanded to the court below, with directions to pass such sentence as the law authorizes.

(44 Or. 47)

**STRINGHAM v. MUTUAL LIFE INS. CO. OF NEW YORK.**

(Supreme Court of Oregon. March 14, 1904.)

**LIFE INSURANCE—APPLICATION—CONSTRUCTION—PAYMENT OF PREMIUM—WAIVER—NOTES—ISSUANCE OF POLICY—DEATH OF APPLICANT.**

1. An application for a life insurance policy stated that the answers were offered as a consideration for the contract, "which I hereby agree to accept, and which shall not take effect until the first premium shall have been paid during my continuance in good health, and the policy shall have been signed by the secretary of the company and issued." A receipt given for a note executed by the applicant recited that the note, "if paid when due, will be in full for the first annual premium, \* \* \* provided a policy is issued on his application made this day." By another clause of the application the soliciting agent, on the payment of the premium, might have furnished the applicant with a binding receipt, signed by the secretary of the company, making the insurance in force from the date of such application, but with the proviso that the application should be approved, "and the policy duly signed by the secretary at the head office of the company, and issued." *Held*, that "issued" meant the signing and execution of the policy at the office of the company, and did not include delivery.

2. Where an application for insurance is susceptible of two constructions, it should be construed most strongly against the insurer.

3. Acceptance of the note of the applicant, and issuance of the policy, subsequent to the applicant's becoming ill, without knowledge by the company of the illness, was not a waiver of the stipulation that the first premium should be paid during the continuance in good health of the applicant, as the contract depended on the application, note, and receipt together.

4. Where a policy of life insurance was issued, but not actually delivered, before the death of the applicant, the rights of the par-



ties were not altered by a payment of the premium by a third person after the applicant's death.

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Action by Maud Marie Stringham against the Mutual Life Insurance Company of New York. From a judgment for plaintiff, defendant appeals. Reversed.

The complaint herein states, in purport, that on July 17, 1901, Leroy Stringham made application to the defendant at Portland, Or., for a policy of insurance upon his life in the sum of \$1,000, payable in the event of his death to his wife, the plaintiff; that the application was accepted by the defendant, and the first annual premium therefor, of about \$30, was paid to and accepted by it, whereby the defendant contracted and agreed to insure and did insure the life of Stringham for the term of one year from July 17th, and agreed to pay to the plaintiff, in the event of his death within the year, the said sum of \$1,000; that Stringham died on July 28th, before the policy was delivered to him, but while the contract of insurance was in full force and effect, as alleged. The answer admits the making of the application and the death of Stringham, but specifically controverts the other allegations of the complaint. For a further answer defendant alleges, in substance: That on the day named Stringham made and signed a certain application to the defendant for a policy of insurance upon his life for \$1,000, payable in the event of his death to his wife, setting out the same by copy. That he gave the application to one W. A. Cummins, a soliciting agent engaged in the business of soliciting life insurance, to be forwarded through Sherwood Gillespy, the general agent of the defendant for the states of Oregon and Washington, whose office was and is at Seattle, Wash., to defendant, at its office at New York City. That at the same time Stringham signed and gave to said Cummins his promissory note, made payable to and indorsed by himself, for the sum of \$29.22, payable 60 days after date, and received from Cummins a receipt, of which the following is a copy: "Amount, \$29.22. Insurance, \$1,000. Portland, Oregon, July 17, 1901. Received from Leroy L. Stringham his note, due sixty days from date, which if paid when due will be in full for the first annual premium for a policy of insurance for \$1,000 on the life of himself on L. 20-20 plan, provided a policy is issued on his application made this day. If policy is not issued, above-described note to be returned to said Leroy L. Stringham. W. A. Cummins." That said application was forwarded through its agent at Seattle, Wash., to the defendant, and received at New York City on July 25, 1901, and approved by it on July 27th, without knowledge of the illness of Stringham, he having been stricken with pneumonia on the 24th; whereupon it caused to be made out and signed

by its secretary a policy of insurance upon the life of Stringham agreeable to the application, and mailed the same to its agent at Seattle, to be by said agent issued to Stringham upon the payment of the first annual premium, provided Stringham was at the time the said policy should be issued in the same condition of good health as at the date of the application. That the policy was received by Gillespy at Seattle on the 2d of August, 1901, and by him forwarded to C. H. Waterman, the company's agent at Portland, Or., to be issued to Stringham upon payment by him of the first annual premium. That the policy was received by Waterman on the 5th of August, but he, having learned of the death of Stringham, refused to issue such policy, but returned it to the company at New York City. That on July 30th, two days after the death of Stringham, the same being unknown to Waterman, one W. P. Dillon, claiming to act on behalf of Stringham, but without authority, being at the same time cognizant of his sickness and death, paid to Waterman the sum of \$29.22, to be applied in payment of the note executed by Stringham and delivered to Cummins, and the same was accordingly received by Waterman, but subsequently, on learning of the death of Stringham, he repaid it to Dillon. The reply admits the making of the application, the giving of the note, and the execution of the receipt by Cummins, its delivery to Stringham, the forwarding of the application to the company at New York, its approval by the company, the making out and signing of the policy of insurance by defendant's secretary agreeable to the application, the mailing of the policy to Gillespy, its receipt in Portland by Waterman, the payment of the premium by Dillon to Waterman and its subsequent return to Dillon, practically as alleged in the answer, but it denies that Stringham became ill on the 24th of July, or that said policy was mailed to Gillespy to be by him issued to Stringham upon the payment of the first annual premium providing Stringham was at the time in good condition of health, or that it was forwarded to Waterman at Portland, Or., to be by him issued upon such payment of premium. For a further reply plaintiff alleges that at the time of making the application it was agreed between the defendant and Stringham that the insurance on his life should not take effect until the first premium should have been paid during his continuance in good health and the policy should have been signed by the secretary of the company and issued, and that Stringham paid to it the said first premium of \$29.22, in accordance with the said agreement, while he was in good health; that at the time of making said application the payment of such premium in money was not required by the company, and the defendant agreed to and did accept Stringham's note for the same, being the note set out in the answer, in full

payment and settlement thereof; that thereafter, on receipt of the application at New York City, the defendant caused the policy to be made out, signed by the secretary, and issued as agreed upon; that said policy was mailed to the agent of the defendant in Portland for delivery to Stringham, but that before delivery could be had Stringham died, which was after the premium had been paid during the good health of Stringham, and that at the time of the death of Stringham the policy of insurance was in full force and effect. Upon this state of the record the defendant moved the court for a judgment upon the pleadings, and that the cause be dismissed, at the cost of plaintiff, which was overruled. The parties then proceeded to trial, and the plaintiff rested after having offered evidence tending to show that Waterman was the resident agent of the defendant for Oregon, and kept an office in Portland; that plaintiff made application to the company for payment of her claim, the receipt of which was acknowledged by it, and payment declined, on the ground that the alleged policy had not been issued during the applicant's continuance in good health, and the stipulation of the parties that Stringham became ill with pneumonia on the 24th of July, 1901, that a physician was called on that day, and that he died on the 28th of July. The defendant thereupon moved for a judgment of nonsuit against the plaintiff. The motion being denied, it was further stipulated that the defendant was not notified of the change in Stringham's condition of health until after his death, and, both parties having rested, the court instructed the jury to return a verdict for plaintiff as demanded, and, judgment having been entered accordingly, the defendant appeals. Among the errors assigned are (1) the overruling of defendant's motion for judgment on the pleadings, (2) the overruling of its motion for judgment of nonsuit, and (3) the direction of a verdict for plaintiff as demanded in the complaint.

O. F. Paxton, for appellant. G. A. Brodie and D. R. Murphy, for respondent.

WOLVERTON, J. (after stating the facts). This action is upon a contract of insurance formulated by the application and its accompanying documents, and the acceptance or approval thereof by the company. While it is alleged that the policy is in full force and effect, that instrument is not made the basis of the action. It is not set out, nor is the effect of its provisions stated in the pleadings, nor was it offered in evidence, or any of its terms or conditions alluded to, for the purpose of controlling the action, or in any manner defining or fixing the rights and liabilities of the parties concerned. The policy was never in fact delivered by the company to the applicant. This is conceded both by the allegations of the complaint and the

reply. Of course, there could be no delivery to him after his death, by which event the correlative rights and obligations of the parties became finally fixed and established. *Thompson v. Travelers' Ins. Co.* (N. D.) 91 N. W. 75. It is said: "The policy of insurance is the final contract between the parties, and the effect of its acceptance is to supersede all preliminary agreements in respect to insurance." 16 Am. & Eng. Enc. Law (2d Ed.) 856. So that the final consummation of the contract of insurance includes both the delivery of the policy and its acceptance by the insured. The applicant has a right to reject the policy if it does not conform to the agreement of the parties for its execution, and, until delivery and acceptance, either expressly or by inference or implication, the contract is not finally executed, although it may be so far assented to as to give a right of action thereon. To determine, therefore, whether plaintiff has a cause of action as alleged, we have but to look to the application which was made for insurance, the note executed in connection therewith, the receipt given by Cummins and accepted by the applicant, and the defendant's subsequent action in reference thereto. The application, by its terms, is made the basis and a part of the proposed contract of insurance, one of the stipulations on the part of Stringham being as follows: "I hereby agree that all the following statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are by me warranted to be true, and are offered to the company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect until the first premium shall have been paid, during my continuance in good health, and the policy shall have been signed by the secretary of the company and issued." The receipt executed and delivered by Cummins to Stringham stipulates, on the other hand, that the note, "If paid when due, will be in full for the first annual premium for a policy of insurance for \$1,000, \* \* \* provided a policy is issued on his application made this day." These instruments must be construed together to arrive at the real agreement and understanding of the contracting parties. By the application it is made a condition of the contract's becoming effective that the first premium shall have been paid during the continuance in good health of the applicant, and the policy shall have been signed by the secretary of the company and issued. If these things have been done and performed, plaintiff's right of action upon the contract of insurance has accrued; otherwise not.

We will dispose first of the controversy relative to the meaning of the term "issued," as employed in the application, it being insisted on the part of the plaintiff that it signifies simply the completion and signing up of the policy by the secretary and its execution at the office of the company, while, upon the

other hand, it is contended that it includes as well the delivery of the policy to the applicant. Among the many cases that have passed under our notice, the term seems to have been used interchangeably to denote either one or the other of these conditions, but we have been cited to no case that attempts to determine as a general rule when an insurance policy is deemed issued. We are impressed that the term has a double application, and its meaning is to be determined by the relation in which it is employed. In the present instance it is obvious that the especial purpose of the stipulation with reference to the payment of the first annual premium, the signing of the policy by the secretary and its issuance, was to fix upon some definite act or acts in the course of the negotiations that should be taken or construed as indicating an acceptance or approval of the application by the company, and thus to conclude the contract so as to make it binding upon the company, and entitle the applicant to his insurance. It is often difficult to determine when an offer has been assented to, and it was to obviate such an embarrassment that the stipulation was introduced into the application. As it relates to the issuance of the policy, the purpose here suggested is fully subserved when the instrument is drafted in complete form, signed by the secretary, and fully executed at the office of the company. A delivery to the applicant is not necessary as an indication of such acceptance, unless the parties should see fit to make it so. By another clause of the application, the soliciting agent on the payment of the premium might have furnished the applicant with a binding receipt, signed by the secretary of the company, making the insurance in force from the date of such application, but with the proviso that the application should be approved, "and the policy duly signed by the secretary at the head office of the company and issued." Although no such receipt was given here, the clause is valuable for construction, and, when the stipulation now being discussed is read in connection with it, there can scarcely be a mistake as to the intentment of the parties, which is that the company should become bound at a time anterior to the final delivery of the policy to and its acceptance by the insured, which time was to be indicated in part by the act of the company in issuing the policy at the head office. We conclude, therefore, that the term "issued" was used as indicative of the completed signing up and execution of the instrument, making it ready for delivery. This construction is suitable and reasonable, although it must be admitted that the term as employed is not without ambiguity. But if it may be said that it is susceptible of two constructions, and there is a doubt as to its true meaning, then it should be construed, as we have construed it, most strongly against the insurer. *Kerr, Ins. § 65; Berryman, 3 Digest Law Ins. § 3012.*

The next inquiry is, was the note taken and accepted in payment of the first annual premium? We are disposed to treat Cummins as the agent of the company, clothed with full authority to take the application, accept the note, and issue the kind of receipt here involved, and thereby bind the company to the same extent as if the dealings were had with a general agent, with full authority in the premises. The form of the documents was evidently authorized by the company, and the authority of Cummins, he having used them, and the company evidently having acted upon them, must be considered ample to make the very kind of use of them for which they were adapted. The receipt shows the condition upon which the note was executed and delivered to Cummins, or, we may say, to the company; that is, that it was in full for the first annual premium, if paid when due, not that it was in present payment of such premium. So that, construing the application and receipt together, they simply mean that, if the note is paid when due, and during the continuance in good health of the applicant, both elements or conditions concurring, then that the premium should be considered as paid, and, if the policy shall have been signed by the secretary and issued meanwhile, the contract of insurance would be fully effectuated, but not until these things shall have been accomplished. It has been firmly settled by this court that the acceptance of a note is not to be considered as taken in discharge or payment of the debt unless it is at the same time so agreed and understood. *Black v. Sippy, 15 Or. 574, 16 Pac. 418; Johnston v. Barrills, 27 Or. 251, 41 Pac. 656, 50 Am. St. Rep. 717; Schreyer v. Turner Flouring Co., 29 Or. 1, 4, 43 Pac. 719; Kiernan v. Kratz, 42 Or. 474, 484, 485, 69 Pac. 1027, 70 Pac. 506.* There is here not only no agreement shown that the note was accepted as payment of the first annual premium, but the receipt negatives the idea, and expressly indicates that it was not to be so taken unless paid when due during the continuance in good health of the applicant. Such is manifestly the contract of the parties, and none other can reasonably be extracted from the negotiations. The character of the contract is not above criticism as in a measure delusive, but, the applicant having deliberately entered into it, he must be presumed to have understood its purport and meaning, and the courts cannot do otherwise than enforce it, unless it was the result of fraud or mistake, which is not claimed for it.

Counsel for plaintiff seem to think that the acceptance by the company of the note of the applicant for the amount of the first premium and the issuance of the policy, although such issuance was subsequent to the time of the applicant's becoming ill with pneumonia, and without knowledge on the part of the company of such illness, was tantamount to a waiver of the condition in the application that the first premium shall have been paid during

the continuance in good health of the applicant, and that the note was therefore received in present payment of the first annual premium, notwithstanding the stipulation contained in the receipt. It is impossible to see how such a result could follow, when, as we have seen, the contract depends upon the application, note, and receipt, construed together, and the acceptance of the application thus formulated, which was to be evidenced by the signing of the policy by the company's secretary and its issuance. The stipulation contained in the application and the receipt showing the conditions upon which the note was given constitute the very terms of the contract consummated by the acceptance on the part of the company, and there could be no waiver of any condition entering into and going to make up the contract. A contract once made may be modified, and provisions favorable to either party may be relaxed. And "it seems to be settled," say the Supreme Court of California, in *Farnum v. Phoenix Insurance Co.*, 83 Cal. 246, 252, 23 Pac. 869, 871, 17 Am. St. Rep. 233, "by a controlling preponderance of authority, that an express provision in a policy of insurance that the company shall not be liable on the policy until the premium be actually paid is waived by the unconditional delivery of the policy to the assured as a completed and executed contract under an express or implied agreement that a credit shall be given for the premium, and that in such case the company is liable for a loss which may occur during the period of the credit"; citing a large array of authorities. The doctrine has the approval, also, of a later case of the same court (*Griffith v. New York Life Ins. Co.*, 36 Pac. 113, 40 Am. St. Rep. 96), and is applicable as prescribing a limitation upon the insurer where the contract of insurance is fully consummated by a completed delivery of the policy under an express or implied agreement for an extension of credit; but such is not the case here. If there had been a delivery of the policy here, and Stringham had accepted it, and the company had then retained his note under such circumstances as to lead him to believe that he had a valid present insurance, there would have been larger grounds for insisting upon a waiver of the condition of payment during the good health of the applicant. There has been no such a delivery of the policy, and no waiver, if any might have ensued by its delivery without further insistence upon payment of the premium, can be invoked. The payment of the premium by Dillon to Waterman, the company's agent at Portland, without the knowledge of Waterman or the company of the fact of Stringham's death, could not alter the case in the least, nor operate as a waiver on the part of the company of any condition that it might otherwise have insisted upon; the rights of the parties, as we have seen, having become fixed by his death.

It follows from these considerations that

the plaintiff has not established her cause of action against the defendant upon the alleged contract of insurance, the premium not having been paid during Stringham's continuance in good health, as contemplated by the agreement of the parties. Passing the error assigned relative to the motion for judgment on the pleadings, we are clear that there was error in directing a verdict for the plaintiff, and that the defendant's motion for judgment of nonsuit should have been granted. The judgment will therefore be reversed, and the cause remanded for such further proceedings as may be deemed proper, not inconsistent with this opinion.

(142 Cal. 306.)

**ERRECA v. MEYER. (L. A. 1,194.)**

(Supreme Court of California. Feb. 20, 1904.)

**ACTION TO RECOVER PERSONAL PROPERTY—JUDGMENT—STATUTE—FINDING.**

1. Under Code Civ. Proc. § 667, providing that, in an action to recover possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof in case delivery cannot be had, a judgment for plaintiff for the value of the property, in which there is no provision for return thereof, is proper, where delivery cannot be had of all the property, though a small portion of it remained in the possession of the defendant.

2. In an action to recover possession of personal property, or the value thereof, a finding of the trial court that defendant never held the property under order of court is conclusive in the Supreme Court.

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Miguel Erreca against Marius Meyer. From a judgment for plaintiff, defendant appeals. Affirmed.

Adcock & Reymert, for appellant. F. O. Daniel and H. C. Head, for respondent.

ANGELLOTTI, J. This is an appeal, on the judgment roll, from a judgment in favor of plaintiff in an action brought by him to recover the possession of certain personal property, to wit, 205 tons of baled straw and 15 tons of loose straw, or the value thereof, in case a delivery of the same could not be had. The amended complaint contained allegations to the effect that plaintiff was on August 28, 1899, and ever since has been, the owner of, and entitled to the possession of, said property; that defendant on or about September 12, 1899, without plaintiff's consent, wrongfully took possession thereof, and has ever since withheld said property from plaintiff's possession, although plaintiff has frequently demanded the return of the same; that at the time it was so taken by defendant it was of the value of \$1,100, but that defendant allowed the same to become damp and damaged to such an extent that it would

¶ 1. See *Replevin*, vol. 42, Cent. Dig. § 424.

not now sell for as much as before, by \$600, but that, except for such damage, it would still be worth \$1,100. The trial court found the allegations of the amended complaint in relation to the ownership and right of possession of plaintiff, and the unlawful taking and retention by defendant, to be true. It further found that at the time of the taking the property was of the value of \$1,100, but that it became damaged while in the possession of defendant, and that after the commencement of this action the defendant sold and disposed of all of said straw, "except a very small amount thereof, not exceeding forty tons, and the portion not sold or disposed of became, and was at the time of the trial, damaged and of little value." It further found that by reason of defendant's having sold and disposed of said straw, and converted the same to his own use, a delivery thereof to plaintiff cannot be had. As conclusions of law, the court found that plaintiff was entitled to judgment for the sum of \$1,100 and costs, and judgment was entered accordingly; there being no provision therein for the return of the property.

Complaint is made that the judgment is not in the alternative form prescribed by section 667, Code Civ. Proc., where it is provided that, in an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof in case a delivery cannot be had, and that if the property has been delivered to the plaintiff, and defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had. It is well settled that under this provision the judgment must ordinarily be in the alternative—for the possession of the property, or its value in case a delivery or return cannot be had. A judgment that is not in the alternative is not, however, void, and whether or not such a judgment is even erroneous must depend upon the facts of the particular case. If, for instance, the plaintiff in such an action has already obtained the possession of the property before judgment, there is no occasion, in the event that he finally prevails, for any judgment for its value, "as the condition is wanting upon which such clause in the judgment is authorized, viz., 'if a delivery cannot be had.'" *Claudius v. Aguirre*, 89 Cal. 501, 504, 26 Pac. 1077, 1078. The same is true as to a judgment in favor of defendant, if the plaintiff has not taken possession of the property before judgment. The defendant has the property, and the condition upon which he can recover its value does not exist. In both of these cases it is well settled that the judgment need not contain any provision for the recovery of the value in case a delivery cannot be had. *Claudius v. Aguirre*, supra; *Caruthers v. Hensley*, 90 Cal. 559, 27 Pac. 411; *Black v. Hilliker*, 130 Cal. 190, 193, 62 Pac. 481. This is for the

reason that such a clause could not, under such circumstances, have any operative effect, or confer any right or protection upon either the plaintiff or defendant, and the failure to include it could not affect the substantial rights of either party. *Claudius v. Aguirre*, supra. For the same reason, a provision for the recovery of the possession of the property is not necessary where it is shown to the trial court that a judgment for its delivery would be necessarily unavailing. This has repeatedly been held by this court, and judgments for the value of the property, without the alternative for its delivery or return, have been affirmed.

In *Brown v. Johnson*, 45 Cal. 76, a judgment for the value, without any provision for the delivery of the property, was upheld. The appeal was on the judgment roll alone, and this court said: "If at the trial of this action [replevin] it had distinctly appeared that the personal property had been hopelessly lost or had been destroyed, so that a judgment for its delivery would be necessarily unavailing, a failure to render judgment for its possession [under section 200 of the practice act] would, at most, be but a technical error or omission, and one for which we would not reverse the judgment. And in support of such judgment, where, as here, the record discloses nothing on the point, we will intend that the facts actually appearing below were such as to warrant its rendition." This case has been frequently cited with approval by this court. In *Burke v. Koch*, 75 Cal. 356, 17 Pac. 228, a judgment was given for the value of the property, found to be \$6,000, without any provision for the return of the property. The trial court found that the defendants had sold and disposed of a large portion of the property sued for. It was held that under these circumstances the court was not bound to find the character or value of the articles which could be returned, or to enter a judgment in the alternative, and the judgment was affirmed. In *Seligman v. Armando*, 94 Cal. 314, 20 Pac. 710, the property had been so intermingled with the goods of defendant that they were not distinguishable, and it was held that it was not necessary that the judgment should be in the alternative form. See, also, *De Thomas v. Withersby*, 61 Cal. 62, 44 Am. Rep. 542. In the case at bar it was found by the trial court that the defendant had disposed of at least nine-elevenths of the property, and that the remaining two-elevenths thereof was damaged and of little value, and that a delivery of the property to plaintiff could not be had. This finding, which, upon the record before us, is, of course, conclusive, brings the case within the rule announced in the cases already cited.

Some of the cases cited by defendant are not in point, and, as was held in *Claudius v. Aguirre*, supra, the decisions of *Berson v. Nunan*, 63 Cal. 550, and *Brichman v. Ross*,

67 Cal. 601, 8 Pac. 316, cannot be regarded as authority for the reversal of this judgment.

The fact that a small portion of the property remains in defendant's possession is immaterial. *Burke v. Koch*, supra; *White-more v. Rupe*, 65 Cal. 237, 3 Pac. 851.

There is nothing in the contention of defendant that he held this property "as a custodian of the court," and that such property while in his possession was in fact in custodia legis. This contention is based upon certain facts, alleged in the answer and established by the findings. The plaintiff, prior to the unlawful taking of the property, commenced an action against the defendant, who was his landlord, for damages done to his grain, straw, etc., by animals of defendant allowed by him to trespass on the leased lands, and for an injunction to prevent further trespasses. In that action a temporary injunction was granted, which injunction was, subsequent to the unlawful taking of the property, and against the opposition of plaintiff, modified. The order of modification dissolved the injunction against defendant, "except as to allowing" the animals to damage or destroy the straw, and directed that "said injunction be modified so as to permit said defendant Marius Meyer to take possession of said rancho, and to graze and cultivate the same, and that said Marius Meyer be required to place said straw in a safe inclosure, and protect the same from injury or destruction by his said sheep or other animals, and house said straw in his sheds or barn until the further order of this court." It is upon the quoted portion of the modification order that defendant relies to support his claim that he held the property here involved under order of court. Assuming that the straw spoken of in the order is the same property involved in this action, it is manifest that the court in that action was not attempting to take possession thereof, or deprive plaintiff of his property, but was simply prescribing the terms upon which Meyer should be allowed to use the land for grazing purposes. The direction was inserted solely for the purpose of protecting plaintiff's property during the time Meyer used the land, and while the property remained thereon, and in no degree purported to authorize Meyer to retain such property. The trial court found that defendant never held the property here involved under said order. This finding entirely disposes of his contention.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

(142 Cal. 292)

PEOPLE v. WHITE. (Cr. 1,078.)

(Supreme Court of California. Feb. 19, 1904.)  
CRIMINAL LAW—ROBBERY—IMPEACHMENT OF  
WITNESS—CONVICTION OF MISDEMEANOR.

1. Under Code Civ. Proc. § 2051, providing that a witness may not be impeached by evi-

dence of particular wrongful acts, except that it may be shown that he has been convicted of a felony, and Pen. Code, § 1102, making this rule applicable to criminal trials, records of former convictions of the accused and his principal witness of misdemeanors are inadmissible in evidence on a trial for robbery.

Department 1. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

John White was convicted of robbery, and appeals. Reversed.

F. W. Allender, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the State.

VAN DYKE, J. The defendant was tried in the county of Los Angeles, and convicted of the crime of robbery, and sentenced to imprisonment in the State Prison at San Quentin for the term of 25 years, from which conviction defendant appeals.

1. The first error assigned by the appellant is that the court permitted improper cross-examination of the defendant. We have examined the points of the cross-examination referred to by counsel, and can see nothing that justifies his contention. The cross-examination seems to be only in response to the examination in chief.

2. It is further contended on behalf of appellant that the court erred in allowing the introduction of records of the police court of Los Angeles for the purpose of impeaching as to the defendant, White, and his principal witness, Fred Medinas. The robbery charged against the defendant was alleged to have been committed on the 18th of June, 1902. The district attorney was permitted by the court, over the objection of the defendant, to introduce in evidence the record from the police court of the city of Los Angeles, in which it was charged that the defendant in July, 1898, committed the crime of battery, for which offense he was fined the sum of \$15, or, in default of the payment of said fine, to be imprisoned in the city jail. The district attorney was also permitted by the court, over the objection of the defendant, to introduce in evidence the records of the police court of said city of Los Angeles of March, 1901, containing a charge against the defendant, John White, of being an idle and dissolute person, in said month of March, for which offense he was imprisoned in the city jail of Los Angeles City for the term of 4 months. These records were offered, as stated by the district attorney, "simply by way of impeachment," and, in overruling defendant's objection, the court stated that they were admitted "merely to attack the credibility of the witness." Fred Medinas was one of the principal witnesses on behalf of the defendant. The district attorney was allowed by the court, over the objection of the defendant, to introduce in evidence, for the purpose of impeaching said witness, a record from the police court of the city of

Los Angeles, under date of December, 1900, in which it appeared that he had been charged and convicted of being an idle, dissolute person, and an associate of thieves, and wandering about the streets at late hours of night, and was sentenced to be imprisoned in the city jail of the city of Los Angeles for the term of 40 days.

It may be, as suggested by the Attorney General, that "a conviction of a felony is not more potent to determine the character of a defendant for truth, honesty, and integrity, or the credibility to be given his testimony, than are several records of his conviction as an idle and dissolute person, the associate of known thieves," etc. But the lawmaking department of the state has decreed that records, except on conviction of a felony, cannot be introduced or used for the purpose of impeachment. "A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity, is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony." Code Civ. Proc. § 2051. This rule is made applicable to criminal trials. Pen. Code, § 1102. In *People v. Schenick*, 65 Cal. 625, 4 Pac. 675, it is said that, where a defendant in a criminal case is under examination as a witness in his own behalf, the fact of his former conviction of a misdemeanor cannot be proved by his oral testimony. The record of conviction is the best evidence, and is indispensable. This case is referred to by the Attorney General, it seems, as authority in support of the ruling of the court below in admitting the records in question here in evidence. In *People v. Carolan*, 71 Cal. 195, 12 Pac. 52, it was said that evidence of this character, for the purpose of impeachment, is limited to convictions of a felony, although it is remarked in the opinion, "If, in any case, a record of conviction of a misdemeanor is admissible for the purpose of discrediting, it should be made to appear that the offense involved moral turpitude or infamy, which was not done in this case," from which it seems to be inferred by the Attorney General that, in a case of a misdemeanor involving moral turpitude, the record could be introduced. But the language of the Code in question clearly limits it to cases where there has been a conviction of felony. In *People v. Warren*, 134 Cal. 202, 66 Pac. 212, it is held that a witness could not be impeached by evidence of particular wrongful acts, under the provision of the Code in question, except he had been convicted of a felony. Citing *People v. Carolan*, supra; *Jones v. Duchow*, 87 Cal. 114, 23 Pac. 371, 25 Pac. 256; *People v. Silva*, 121 Cal. 669, 54 Pac. 146; *People v. Hamblin*, 68 Cal. 103, 8 Pac. 687. The introduction of these records could not fail to have a preju-

dicial effect against the defendant, and they were evidently offered for the purpose of influencing the jury in arriving at their verdict. District attorneys, in their zeal to convict, should not run counter to the plain provisions governing criminal trials. It is the duty of the trial court to see that they do not do so. Nothing is gained by obtaining a conviction at the sacrifice of legal principles. On the contrary, such practice results in much harm, from reversals and retrials, with the consequent delays and additional expense to the county and the state, ending not infrequently in a miscarriage of justice altogether.

For the errors noted in the admission of the police court records in question in this case, the judgment and order must be reversed, and it is so ordered.

We concur: ANGELLOTTI, J.; SHAW, J.

(142 Cal. 299)

CITY OF SANTA ROSA v. BOWER, Mayor.  
(S. F. 3,654.)

(Supreme Court of California. Feb. 19, 1904.)

MUNICIPAL CORPORATIONS—CHARTER—SUBMISSION TO PEOPLE—RATIFICATION—CONSTITUTION—CONSTRUCTION—MAJORITY NECESSARY TO RATIFY.

1. Const. art. 11, § 8, declares that a freeholders' charter shall be submitted to the qualified electors of the city at a general or special election, and that, if a majority of the electors "voting thereat" shall ratify the same, it shall be submitted to the Legislature, etc. At the general election in November, 1902, an amendment to the section was adopted by substituting the word "thereon" for "thereat." The provision of the Constitution relative to submission of amendments for ratification provides that it shall be by a majority of the voters voting "thereon." Held, that the use of the word "thereat" showed that it was requisite to a ratification prior to the amendment that the charter be voted for by a majority of those voting at the election; a majority of those voting on the question as to the charter not being sufficient.

In Banc. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Mandamus by the city of Santa Rosa to compel M. J. Bower, as mayor thereof, to perform the duties required of him with respect to a freeholders' charter alleged to have been adopted by the people of Santa Rosa. From a judgment for defendant, plaintiff appeals. Affirmed.

Marvin T. Vaughan, for appellant. T. J. Geary, for respondent.

SHAW, J. Section 8 of article 11 of the Constitution provides that, when a freeholders' charter has been approved by the Legislature, a copy thereof, "certified by the mayor or chief executive officer, and authenticated by the seal of such city, setting forth the submission of such charter to the electors, and its ratification by them, shall, after the approval of such charter by the Legislature, be made in duplicate, and depos-

ited, one in the office of the Secretary of State, and the other, after being recorded in said recorder's office, shall be deposited in the archives of the city; and thereafter all courts shall take judicial notice of such charter." The present proceeding is an mandamus to compel the defendant, as mayor of the city of Santa Rosa, to perform the act thus required of him by the Constitution with respect to a freeholders' charter alleged to have been adopted by the people of Santa Rosa and approved by the Legislature. A demurrer was sustained to the complaint, and judgment given in favor of the defendant, from which the plaintiff appeals.

It is contended that the charter in question was not legally adopted at the election. The same section of the Constitution provides that after such charter is prepared by the board of freeholders, and duly published, "it shall be submitted to the qualified electors of said city at a general or special election; and if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the Legislature for its approval or rejection as a whole, without power of alteration or amendment." The complaint shows that the charter, after having been prepared by the freeholders and duly published, was submitted to the qualified electors of the city at the general municipal election in April, 1902; that at said election 1,474 votes were cast, but upon the question of the adoption of the charter there were only 1,143 votes, of which 611 were in favor of the charter, and 532 against it. The same facts also appear in the legislative resolution approving the charter. St. 1903, p. 703. The defendant justifies his refusal to certify the charter upon the ground that such a charter cannot be legally ratified unless it receives a majority of the votes of all electors voting at such election, and that a majority of those voting upon the proposition is not sufficient, unless it also constitutes a majority of all the votes cast at said election for any and all purposes. If this proposition is correct, the judgment must be affirmed. The case of *People v. Town of Berkeley*, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838, involved a statutory provision substantially the same as the constitutional provision in question in the case at bar. That case construed the provision of section 3 of the same article of the Constitution, providing that cities and towns heretofore organized or incorporated may become organized under the general laws "when a majority of the electors voting at a general election shall so determine," and it was held to require the favorable vote of a majority of all the electors who voted at the election. There is no substantial distinction between the phrase construed in that case and the one under consideration here. A majority of the electors "voting at a general election" is substantially the same thing as a majority of the qualified electors "voting thereat."

The word "thereat" in section 8, by grammatical construction, refers to the previous phrase, "general or special election," and is exactly the same in meaning as if the sentence had read "if a majority of such qualified electors voting at such election shall ratify the same." So read, the language is identical with that construed in *People v. Berkeley*, supra. The question has been decided by different courts in different ways, and the authorities cannot be reconciled. The case of *City of South Bend v. Lewis* (Ind. Sup.) 37 N. E. 986, presents an elaborate review of all the authorities on the subject, and this conclusion is reached with respect to the particular class to which this case belongs: "Where a question is required to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast 'at such election,' a majority of all the votes cast at the election is meant, and not merely a majority of the votes cast on that particular question." Page 993. This construction of the language of section 8 is strengthened by the fact that at the general election in November, 1902, an amendment to the section was adopted by the people substituting the word "thereon" instead of "thereat"; thus indicating that the people and the Legislature had assumed that the above construction is the proper one, and that they wished to change the same. It is also strengthened by considering other similar provisions of the Constitution. An amendment to the Constitution is adopted if the people approve and ratify the same "by a majority of the qualified electors voting thereon." The distinction between the words "thereon" and "thereat" is very clear. The one means the votes cast upon the proposition in question. The other means the votes cast at the election at which the proposition is submitted.

The case is clearly distinguishable from that of *Howland v. Board of Supervisors*, 109 Cal. 152, 41 Pac. 864, where the constitutional provision relative to the incurring by a county of an indebtedness in excess of the income and revenue of the year provided that such indebtedness could not be incurred "without the consent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose." The mere fact that such question was in that case submitted at a general election did not make the election as to such question any less a special election "held for that purpose," than if the proposition had been submitted by itself at another time, and the assent of two-thirds of the qualified electors voting on the proposition of the indebtedness was held sufficient. For the same reason the case is distinguishable from that of *People v. Town of Sausalito*, 106 Cal. 500, 39 Pac. 937, where by the law the question of incorporation was required to be submitted at an election "to be held for the purpose of determining whether the same shall become incorporated," and



a majority of the votes cast at such election were held to be essential to incorporation. This court in that case intimated, without definitely deciding, that only those votes which were cast on the proposition of incorporation could be considered in determining whether or not the proposition for incorporation had prevailed.

In the case at bar the language of the constitutional provision does not call for an election "for the purpose" of determining the question, but expressly allows the question to be submitted "at a general or special election," and, in terms, requires that, whether submitted at a general or special election, it must receive the assent of a majority of the qualified electors voting at the election. For these reasons, we are of the opinion that the action of the court below in sustaining the demurrer was correct.

The judgment is affirmed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

(142 Cal. 295)

GALBRITH v. LOWE. (L. A. 1,225.)

(Supreme Court of California. Feb. 19, 1904.)

MOTION FOR NEW TRIAL—DISMISSAL—DELAY IN ENROSSING BILL OF EXCEPTIONS—EXCUSE.

1. An order settling a bill of exceptions and directing its engrossment was made April 20th, but did not come to the knowledge of the moving party's attorneys until August 12th, owing to the matter having been taken under advisement. The engrossed bill, consisting of 14½ printed pages, was not presented for the judge's signature till September 27th, on the hearing of a motion to dismiss the motion for a new trial. From July 12th to September 14th the court was not in session, but the judge was frequently at the courthouse, and was always in communication with the clerk. The attorneys for the opposite party gave no notice to the moving party of the order settling and directing the engrossment of the bill. *Held*, that the motion to dismiss the motion for a new trial was properly granted on account of the delay in filing the engrossed bill.

2. Where the record on appeal from the dismissal of a motion for a new trial for delay in filing the engrossed bill of exceptions affirmatively shows that the motion should have been denied on its merits, the order of dismissal will be affirmed.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by David Galbrith against T. S. C. Lowe. From an order granting plaintiff's motion to dismiss the motion of defendant for a new trial, defendant appeals. Affirmed.

Lynn Helm and E. C. Bailey, for appellant. Porter & Sutton and Norman Williams, for respondent.

ANGELLOTTI, J. This is an appeal from an order granting plaintiff's motion to dismiss the motion of defendant for a new trial in the above-entitled action, upon the ground that defendant had not prosecuted his motion with reasonable diligence, in that he, without

good cause, failed to engross and file the bill of exceptions to be used on the hearing of the motion for a period of upward of five months from the time it was settled and ordered engrossed. When the motion to dismiss came on for hearing on September 27, 1901, defendant for the first time tendered the engrossed bill for signature by the judge, and he refused to sign the same.

It appears that although the order settling the bill and directing engrossment thereof was made April 20, 1901, it did not come to the knowledge of defendant's attorneys until August 12, 1901, which was 39 days prior to the giving of the notice of the motion to dismiss. This was due to the fact that when the matter of settlement came before the judge he took the same under advisement, and no notice was given to defendant's attorneys of the order of settlement, which was on April 20, 1901, entered upon the minutes of the court.

Assuming that, the matter of settlement of the bill having been taken under advisement by the judge, lack of knowledge of the action of the judge in relation to the matter would be a sufficient answer to the claim of want of diligence, it still remains true that 39 days remained between the time of the acquiring of knowledge and the time of giving notice of motion to dismiss within which to engross a small bill of exceptions consisting of only 14½ printed pages, as shown by the record on this appeal. It is not and cannot be claimed, in view of the authorities, that the trial court may not dismiss a motion for a new trial for lack of diligence in the prosecution thereof. See *Doon v. Tesh*, 131 Cal. 406, 63 Pac. 764; *Eckstein v. Calderwood*, 27 Cal. 413; *Boggs v. Clark*, 37 Cal. 236.

It is, however, urged that the court erred in granting the motion, in view of the showing made. In this connection, reliance is placed upon the fact that plaintiff's attorneys never gave the attorneys for defendant any notice that the judge had ordered the bill settled and engrossed, and also upon the fact that the "court" was in vacation from July 12, 1901, to September 13, 1901.

These facts, however, possess no particular significance, under the circumstances of this case. There is nothing in our law that requires the adverse party to give the moving party such a notice. The motion for a new trial is an independent proceeding in an action in which the burden of acting is at all times upon the moving party. The adverse party is given permission to serve within a designated time such proposed amendments to the bill or statement as he may desire. If he fail to exercise this privilege, the moving party may present his proposed bill or statement to the judge without notice. It is the moving party who is the actor in the proceeding, and who is seeking the settlement of the bill of exceptions and the determination of the motion for a new trial, and it devolves upon him to proceed with diligence. The or-

der settling the bill, when made, is an order in his favor, and not one in favor of the adverse party, and it is not incumbent on the adverse party to notify him that he has prevailed on his motion for a new trial, to the extent of obtaining a bill of exceptions for use on his motion.

Where amendments have been proposed to a proposed bill, the law, of course, contemplates that the judge shall settle the bill in the presence of the parties, at a designated time (section 650, Code Civ. Proc.), and such is the usual practice. Where this practice is departed from, and the matter of settlement is taken under advisement, it would be preferable to continue the matter to some other designated time, so that the parties may be present when the judge finally acts. But if, for any reason, the judge does take the matter under advisement, thus, for the time, refusing to give the moving party a bill of exceptions, it may be forcibly argued that it would be only the exercise of proper caution on the part of such moving party to keep himself advised of the further action of the judge in the matter. However this may be, it is clear that when the moving party has actual knowledge of the action of the judge he must proceed with the engrossment of his statement and the presentation of his motion.

The fact that the "court" was in vacation to September 13, 1901, could not impede the moving party in the engrossment, and it is not contended that the "judge" was absent. In fact, it affirmatively appears that during the vacation the judge "was frequently at the courthouse, heard the calendars called in other departments, and spent considerable time" in his chambers, and was always in communication with his clerk. There is no question that it was practicable for defendant's attorneys to have had the bill of exceptions engrossed and signed by the judge prior to September 13, 1901, and the motion for a new trial ready to be disposed of at that time.

The power to dismiss a motion for a new trial on the ground that the same has not been prosecuted with due diligence being conceded, the determination of the question as to whether there has been due diligence is one necessarily largely within the discretion of the trial court. *Hopkins v. West*, Pac. R. R. Co., 44 Cal. 389; *Boggs v. Clark*, 37 Cal. 236. In *Warden v. Mendocino County*, 32 Cal. 635, where the order dismissing was reversed, this court said that there was no just pretense for holding otherwise than that the defendant had prosecuted his motion with all the diligence that was reasonable or practicable, and added, "If there was, we should not disturb the order on this account." The showing made by defendant's attorneys in opposition to the motion to dismiss was not such that we can say that the court was guilty of an abuse of its discretion in granting the motion.

It may be added that, so far as we can see, the proposed bill of exceptions on appeal, as engrossed and presented to the judge for sig-

nature, falls utterly to show any ground for a new trial. The action was brought to recover judgment for the balance due on two promissory notes, after the sale of certain bonds pledged as collateral security. Defendant introduced no evidence, and the only alleged error is that relating to the action of the court in denying defendant's motion for a nonsuit, and in denying defendant's motion for judgment. The points made on the motions for nonsuit and judgment were extremely technical, and related almost entirely to the notice and manner of sale of the pledged property. We are satisfied that a sufficient case was made by plaintiff to put defendant to his proof, and that there was no error in denying the motion for a nonsuit or in rendering judgment for plaintiff.

Under such circumstances, we would not reverse the order of the court below, even if we were of the opinion that the judge should have signed the bill and disposed of the motion for a new trial on its merits. The questions presented by the proposed bill were purely questions of law, and, there being nothing in the points made by defendant, his motion for a new trial would necessarily have been eventually denied. To reverse the order of dismissal would therefore not avail defendant, except to the extent of postponing a final disposition of the cause. The order made was, as has been held, in effect an order denying the motion for a new trial (*Yoll v. Hollis*, 60 Cal. 569; *Lang v. Superior Court*, 71 Cal. 491, 12 Pac. 306); and the record on appeal showing affirmatively that the proposed record on the motion for a new trial did not disclose any ground warranting a new trial, the order denying the motion should be affirmed.

The order is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

(142 Cal. 276)

**BANK OF CALIFORNIA v. CITY AND  
COUNTY OF SAN FRANCISCO.**  
(S. F. 3,440.)\*

(Supreme Court of California. Feb. 18, 1904.)

**TAXATION—CORPORATIONS—ASSESSMENT OF  
FRANCHISE—CONSTITUTIONALITY—VALUATION—REVIEW BY COURTS—MODE OF ASCERTAINMENT.**

1. While the right to do a banking business is not a franchise, and belongs to all citizens generally, yet the right to carry on such business through the agency of a corporation is a franchise, dependent on a grant of corporate powers by the state.

2. The franchise of corporate existence, while in a sense the property of the members of the corporation, is available only through the corporation itself, and, if assessable for taxation, must be assessed against the corporation, and not against its members or stockholders.

3. The manner and method of taxing property, including corporate franchises, is, so long as no constitutional right is impaired, a matter entirely within the control of the state.

\*Rehearing denied March 19, 1904. BEATTY, C. J., and McFARLAND and HENSHAW, JJ., dissenting.

4. A state may provide for the taxation of a corporate franchise as property of the corporation.

5. The franchise of being a corporation is a franchise, within the meaning of Const. art. 13, § 1, providing for the taxation of all non-exempt property, and defining "property" as including "moneys, credits, franchises, and all other matters and things capable of private ownership."

6. The method of arriving at the valuation of a corporate franchise for taxation is a matter committed to the determination of the assessor, and, in the absence of fraud, his judgment cannot be reviewed by the courts.

7. The assessor may take into consideration the value of shares of corporate stock, in determining the value of the corporate franchise for taxation.

8. Where the market value of the shares of stock of a corporation exceeded the value of its tangible assets by almost \$3,000,000, the court could not say that an assessment for taxation of its franchise at \$750,000 was unjust, or included such elements as dividend earning power or good will.

9. An assessment for taxation of the corporate franchise of a banking corporation is not a violation of Const. U. S. Amend. 14.

Beatty, C. J., and McFarland, J., dissent.

In Banc. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by the Bank of California against the city and county of San Francisco. From a judgment for defendant, plaintiff appeals. Affirmed.

James M. Allen (John Garber, of counsel), for appellant. Franklin K. Lane and W. I. Brobeck, for respondent.

ANGELLOTTI, J. This action was brought by plaintiff corporation to have an assessment of its franchise for the fiscal year ending June 30, 1901, declared illegal and void, and to recover from defendant \$12,187.76 paid by it, under protest, as taxes thereon. Defendant had judgment in the court below, and plaintiff appeals therefrom, on the judgment roll.

The claim of the plaintiff is that it has never owned, or possessed any franchise whatever, and that the only franchise in any way connected with it is the corporate franchise, or the franchise of being a corporation, which it is claimed is the property of its stockholders, and is not assessable or taxable to said corporation. The assessor of defendant, in addition to assessing the assessable, tangible property of the plaintiff, situate in said city and county, consisting of land, improvements, furniture, library, typewriter, and money, at \$2,311,774, assessed its "franchise" at \$750,000, and the board of equalization of the city and county refused to lower said assessment, or "give plaintiff any relief whatever." The tax on said \$750,000 so assessed on the franchise amounted to \$12,187.76, which was paid under protest.

It appears from the findings of the trial

court that the plaintiff was incorporated in the year 1864, under the provisions of the act providing for the formation of corporations for certain purposes, approved April 14, 1853, and all acts amendatory thereof and supplementary thereto, for the purpose of carrying on the business of banking, and has ever since conducted such business under its articles of incorporation, and that it has never owned, possessed, claimed, or controlled any other rights, powers, privileges, or franchises than such as were acquired or conferred upon it by said articles of incorporation. It further appears that the assessor found that the aggregate value of the tangible property of plaintiff, including non-assessable bonds, and property not assessable in San Francisco, and all property assessable therein, was \$5,156,903.06; that the aggregate market value of all the shares of capital stock issued by plaintiff was \$8,100,000; and that the difference between the aggregate market value of said stock and the value of all tangible property of the corporation, to wit, \$2,943,096.92, was by him ascertained and determined to be the value of the so-called franchise of plaintiff, which he thereupon assessed and valued, for purposes of assessment and taxation, at the sum of \$750,000.

The only franchise acquired under the articles of incorporation—and the findings in this case establish the fact that the corporation has no other franchise—was the right to be and exist as a corporation, with all the powers given by law to corporations, and the right to enjoy the privilege and immunities of a corporation in the conduct of the business of banking. Admittedly, the mere right to do a banking business is not a franchise, in any sense of the word. It belongs to citizens generally, and is a common right, in the same sense that the right to do a grocery or dry goods business is available to all citizens, and no grant from the sovereign is essential to its existence. Any individual, or any number of individuals, may, under such regulations as the state, in the exercise of its police powers, may legally make, engage therein, without any grant from the state. While, however, the right to engage in the business of banking is a common right, available to all citizens, such right can be exercised through the agency of a corporation only by express permission of the state. Corporations, being purely creatures of the law, may be formed only when the state so authorizes, and then only for such purposes as may be authorized by the state. It is universally recognized that the power of creating corporations is one appertaining to sovereignty, and can only be exercised by that branch of the government in which it is legally vested, and that, whatever method may be adopted for their formation, and with whatever liberality the privilege of forming them may be con-

¶ 7. See Taxation, vol. 45, Cent. Dig. § 625.

ferred, every corporation is dependent for its existence upon the permission of the state in which it is created. While our law provides that private corporations may be formed by any five or more persons, a majority of whom are residents of the state, for any purpose for which individuals may lawfully associate themselves, each corporation so created derives its right to exist as a corporation, with all the incidents thereof, for the purpose of doing the business specified in its articles of incorporation, directly from the sovereign power, precisely the same as the corporation that formerly existed in England under special grant from the King, and later under special act of Parliament, or the corporation that in this country exists under special act of the legislative department of any of our states. Whenever a corporation is legally formed, the right to be and exist as such, and, as a corporation, to do the business specified in its articles, whether it be a banking business, grocery business, or the operation of a railroad, or any other business in which individuals may engage without grant from the state, is a grant by the sovereign power—a valuable right, which is generally known as the “corporate franchise.” 2 Morawetz on Corporations, § 922; Spring Valley W. W. v. Schottler, 62 Cal. 69, 106; Horn S. M. Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164; C. P. R. Co. v. California, 162 U. S. 91, 17 Sup. Ct. 35, 41 L. Ed. 362; Southern Gum Co. v. Laylin (Ohio) 64 N. E. 564, 566; State v. Anderson, 90 Wis. 550, 63 N. W. 746; Home Ins. Co. v. New York, 134 U. S. 594, 599, 10 Sup. Ct. 593, 33 L. Ed. 1025; State R. R. Tax Cases, 92 U. S. 575, 23 L. Ed. 663. In the case of Horn S. M. Co. v. New York, supra, the Supreme Court of the United States, speaking of this kind of franchise, said: “Its [the corporation’s] creation is the investing of two or more persons with the capacity to act as a single individual, with a common name, and the privilege of succession in its members, without dissolution, and with a limited individual liability. The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most states, this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation.” This corporate franchise, viz., the franchise to be and exist as a corporation for the purposes specified in the articles of incorporation, appertains to every corporation, for whatever purpose it may be formed; and there is no distinction in this regard between the banking or grocery corporation and the railroad, water, or gas corporation. The right to engage in every such business is open to all citizens, independent of any grant from the sovereign, but it is available to no one to con-

duct any such business through the agency of a corporation without such grant. Certain occupations are, however, of such a nature that various privileges conferrable only by the sovereign power are convenient and in most cases absolutely essential to the successful maintenance of the business to be carried on, whether it be carried on by a corporation or by an individual—such, for instance, as the right to use public highways. Such rights and privileges are also known as franchises, but they constitute a class entirely distinct from and independent of the corporate franchise. Such rights and privileges are, of course, the property of the corporation or individual by whom they have been acquired, and are taxable as such.

As already shown, the corporate franchise is considered as property separate and distinct from the so-called franchises which the corporation may acquire subsequent to its incorporation. The plaintiff claims that, because it has acquired and is exercising no such rights, it has no franchise. The basis of this claim is the contention that this corporate franchise is not a franchise of the corporation, but vests in and belongs to the members of the corporation. In a certain sense, it is true that such a franchise is the property of the members of the corporation. It has been often said that a corporation is itself a franchise belonging to the members of the corporation, and a corporation may hold other franchises as rights or franchises of the corporation. Expressions of this character have been used for the purpose of distinguishing the rights and privileges which the corporation, as a legal being, subsequently acquires and controls, and which, when transferable, may be transferred by the corporation itself, from the franchise of being and existing as a corporation, which is incapable of assignment, and which survives “in the mere fact of corporate existence” after all property capable of assignment has been transferred to others by the corporation. The corporation is, however, nothing other than its stockholders or members, transformed into and existing as one legal being by permission of the state. The incorporators and their associates and successors are the “body politic or corporate by the name stated in the certificate” (Civ. Code, § 296), and, as such body politic or corporate, they hold the right to exist and transact the business specified in the articles. They hold the right in their collective capacity as a corporation, and not severally as persons. They have no rights in regard to the corporate franchise that they can exercise, except through the corporation. It is the corporation, the “body politic or corporate,” the legal creature comprised of the incorporators, their associates and successors, that is invested by the state with life and the power to do. It was said by the Supreme Court of the United States in *Society for Savings v. Coite*, 6 Wall. 594, 606,

18 L. Ed. 897: "Corporate franchises are legal entities vested in the corporation itself as soon as it is in esse. They are not mere naked powers granted to the corporation, but powers coupled with an interest, which vest in the corporation upon the possession of its franchises; and, whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises."

If this corporate franchise is assessable as property, then, that it must be assessed to the corporation, instead of the members or stockholders, is clearly settled in this state by the decision in *People ex rel. Burke v. Badlam*, 57 Cal. 594, where it was held that a stockholder could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate. See, also, section 3608, Pol. Code.

It is not claimed that a corporate franchise may not be taxed by a state, but it is urged that such tax has always been an excise tax, and not a tax on property. An examination of the authorities will disclose the fact that in many cases it has been directly taxed as property. The manner and method, however, are entirely within the control of the state, which is supreme in such matters, so long as no constitutional right is impaired. As already shown, such a franchise is property. Mr. Justice Field, speaking for the Supreme Court of the United States in *Horn S. M. Co. v. New York*, supra, after saying that such a franchise is property, and is subject to separate taxation, said: "The right of the state to thus tax it has been recognized by this court and the state courts in instances without number, \* \* \* and the manner in which its value shall be assessed and the rate \* \* \* are mere matters of legislative discretion, except as controlled by the organic law of the state." The same court said in *Hamilton Co. v. Mass.*, 6 Wall. 632, 638, 18 L. Ed. 904, that "corporate franchises \* \* \* are legal estates, and not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation by virtue of their charter; and the rule is equally well settled that the privileges and franchises of a private corporation, unless exempted in terms which amount to a contract, are as much the legitimate subjects of taxation as any other property of the citizens within the sovereignty of the state." See, also, *Soc. for Sav. v. Coite*, 6 Wall. 594, 606, 18 L. Ed. 897. In *O. P. R. Co. v. California*, 162 U. S. 91, 125, 17 Sup. Ct. 35, 41 L. Ed. 362, the Supreme Court of the United States, speaking of a tax on the state franchise of a railroad corporation, said that if the corporation procured any rights or privileges, otherwise called "franchises," from the state, they were taxable, and the extent of their value was to

be determined by the board of equalization. The court, after saying that, under the laws of California, the plaintiff obtained from the state the right and privilege of corporate capacity and other rights, said that it is not to be denied that such rights and privileges have value, and constitute taxable property. In *State v. Anderson*, 90 Wis. 550, 560, 63 N. W. 748, the Supreme Court of Wisconsin, after saying that the franchises of the Milwaukee Street Railway Company, whether of existence or for the operation of its track, are, beyond dispute, the property of the corporation and assessable as such, said—the method of taxation in that state being upon the valuation of property taxed, and the state not providing for a certain, specific tax on franchises, like an excise rate—that they should be regarded as personal estate for purposes of taxation in the district in which the corporation had its principal place of business, and that the proper officers should fix the value. See cases cited in opinion in that case. Mr. Cooley says in his work on Taxation (page 686, 3d Ed.): "In some states all taxation, as far as possible, is brought to an ad valorem standard. Franchises are property, and in such states may be taxed by a valuation, being estimated for the purpose either separately, or as a part of the aggregate corporate capacity."

The Ohio, Indiana, and Kentucky methods of taxation, upheld by the court (see *State v. Jones*, 51 Ohio St. 492, 37 N. E. 945; *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; *Id.*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; *Same v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960; *Same v. Indiana*, 165 U. S. 255, 17 Sup. Ct. 991, 41 L. Ed. 70), while contemplating the assessment of all the property of certain kinds of corporations, tangible and intangible, as an entirety, necessarily involved therein the inclusion of the corporate franchise as a part of the property of the corporation. See, also, *State R. Co. Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556. The case of *Louisville Tobacco Warehouse Co. v. Com.*, 106 Ky. 185, 49 S. W. 1069, 57 L. R. A. 33, relied on by plaintiff, was decided by a bare majority of the Supreme Court of Kentucky, upon a statute specifically naming many kinds of corporations, including banking corporations, as liable to a property tax on the corporate franchise, and declaring "every other like corporation" liable to the same tax, and also every corporation, company, or association having or exercising any special or exclusive privilege or franchise; and it was simply held that a mere private business corporation, of a kind not specifically named, and having no special or exclusive privilege or franchise, not allowed by law to natural persons, was not intended to be included by the statute. In several cases where it was said that the tax upon a corporate franchise could be sustained only upon the ground that

it was an excise tax, the tax would have been invalid as a property tax solely for the reason that it was, in effect, levied on property exempt from state taxation under the laws of the United States. See *Home Ins. Co. v. New York*, 134 U. S. 594, 597, 10 Sup. Ct. 593, 33 L. Ed. 1025, et seq. The power of a state to impose a tax on the franchise of a corporation in the nature of an excise or duty does not, however, exclude the taxation, in a proper case, by a valuation made by the assessor. *Spring Valley W. W. v. Schottler*, 62 Cal. 69, 112. Under the authorities, there can be no question that a state may provide for the taxation of a corporate franchise as property of the corporation.

It is further contended that a corporate franchise is not a franchise, within the meaning of the provisions of our state Constitution relating to taxation, and that this state has made no provision authorizing an assessment thereof. The question thus presented can hardly be said to be a debatable one, in view of certain decisions of this court rendered shortly after our present state Constitution went into effect, determining the effect of the provisions of such Constitution in the matter of the taxation of property of corporations. The Constitution adopted in 1879, after providing that all property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, declares that the word "property," as used in this connection, includes "moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership." Const. art. 13, § 1. The Legislature thereupon repealed section 3640 of the Political Code, providing for the assessment of shares of stock to the owners thereof, the assessable value thereof to be determined by deducting from the market value of the entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares, and added a new section to that Code (section 3608), in which they declared that shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they represent; that the assessment and taxation of such shares, and also of the corporate property, would be double taxation; that all property belonging to corporations shall be assessed and taxed, but that no assessment shall be made of shares of stock. Amendments to Codes (1881) pp. 56, 59, c. 53. Immediately after the enactment of this legislation, the question of the liability of shares of stock in corporations to assessment to the holders thereof came before this court. It was held that the language of the Constitution clearly forbade double taxation; that the Legislature had the right thereunder to say that all the property of the corporation should be assessed to the corporation, and the same property should not again be assessed for the same

tax; that the "property" of the corporation included its franchise, and everything else evidenced by the certificates of stock; that, while the share of each stockholder was undoubtedly property, it was an interest in the very property held by the corporation, and nothing more; and that when all the property of the corporation, including its franchise, was assessed, which it was to be presumed would be done by the assessor in obedience to the requirements of the law, any further assessment of the shares to the individual stockholders would be double taxation. *People ex rel. Burke v. Badlam*, 57 Cal. 594. This case necessarily involved the question as to the constitutionality of section 3608, Pol. Code, prohibiting the assessment of shares of stock to the holders thereof. Such shares being undoubtedly property, unless they were otherwise assessed the section was clearly unconstitutional, in view of the provision of the Constitution requiring all property to be taxed. According to the decision of the court, they were, under the law, to be otherwise assessed; i. e., everything represented by the certificates was to be assessed to the corporation. See, also, *City and County of San Francisco v. Mackey* (C. C.) 21 Fed. 539.

In the later case of *Spring Valley Waterworks v. Schottler*, 62 Cal. 69, 117, this court, speaking of the repeal of section 3640, Pol. Code, and the enactment of section 3608, Pol. Code, already noticed, after stating that under the scheme provided by section 3640 the whole property of the corporation, including franchise, would have been taxed, by the taxation of the shares to the owner in the manner indicated therein, said that by the repeal of such section, and the enactment of section 3608, it was without doubt, the intention of the Legislature that everything entering into and giving value to the shares should be taxed as property of the corporation. This case involved the question as to the validity of the action of the board of supervisors of San Francisco, sitting as a board of equalization, raising the assessment of the franchise of the plaintiff from \$5,000 to \$5,000,000. It appeared from the record in the case that the supervisors held the difference between the value of the tangible property of the corporation and the aggregate market value of the shares of stock in the company to be the value of the franchise. Practically every objection made to the assessment here involved was made in that case by eminent attorneys representing various corporations, including this plaintiff. The opinion of the court, signed by all of the six justices who participated in the case, overruling each of the objections, has been, so far as the records of this court show, accepted up to this time as a correct exposition of the law of California relative to the taxation of franchises of corporations. While the plaintiff in that case possessed the right to lay down pipes in the streets, alleys,

and ways of a city, and to collect rates for water furnished, which were said to be franchises, it was, in terms, declared by the court that its existence and right to employ its corporate powers is a franchise; and the court said in regard thereto: "We have no doubt that it was the intention of those who framed and ratified the Constitution to place such franchises in the category of property to be taxed. \* \* \* To hold that a private corporation does not own its franchise right, power, and privileges, would be both novel and untenable. \* \* \* The franchise of a corporation is, and can be well defined to be, the right of the corporation to exist and exercise the powers and privileges vested in it by its charter. \* \* \* From the foregoing cases, it would seem that there can be no doubt of the power of a state to tax the franchise at its assessed value." Commenting on the decision in *People ex rel. Burke v. Badlam*, supra, the court said that in that case it was held that the franchise of a corporation of the character of those named in the petition therein, which included a banking company, a gaslight company, a smelting and lead company, and a water company, is taxable property of the corporation. It was further declared that the tax must be according to the valuation made by the officer appointed for that purpose, subject to equalization by the board of equalization. The method of determining the value of the franchises there employed was declared by the court to have been held to be within the powers of the assessor in *San Jose Gas Co. v. January*, 57 Cal. 614, and impliedly approved as a correct mode in *People ex rel. Burke v. Badlam*, supra. See, also, *Spring Valley W. W. v. Barber*, 99 Cal. 36, 33 Pac. 735, 21 L. R. A. 416; *San Jose Gas Co. v. January*, 57 Cal. 614; *London & S. F. Bank v. Block* (C. C.) 117 Fed. 900.

It is sought to distinguish the case at bar from those of *Spring Valley Waterworks v. Schottler*, supra, *Spring Valley Waterworks v. Barber*, supra, and *San Jose Gas Co. v. January*, supra, upon the ground that, in each of the cases cited, other franchises were possessed by the corporations; the waterworks having and exercising the right to lay pipes in the streets, ways, and alleys of the city, and to collect rates for water furnished, and the gas company having and exercising the right to use the streets and lay pipes therein for supplying a city with gas. The distinction is in no way material to the controversy here. As already shown, it was definitely determined in *Spring Valley W. W. v. Schottler*, supra, that, whatever other franchises the water corporation possessed, its existence and right to employ its corporate powers was a franchise, constituting taxable property. Aside from this, however, the other rights possessed by the waterworks and gas company were rights granted by express provisions of the Constitution to every

individual in the state, and to every company incorporated under the laws of the state for the purpose of supplying any municipality and its inhabitants with water or artificial light. Const. art. 11, § 19, and article 14. While the generality of the grant does not deprive such rights of the character of franchises, they have value only so far as the exercise thereof contributes to the value of the capital of the corporation, and are precisely the same in this respect as the exercise of the corporate franchise. As was aptly said of such other rights or franchises by counsel in *Spring Valley W. W. v. Schottler*, no one can sell them, for everybody has them, and no person can gain by the accession of such rights of others.

It is urged that the assessment on the corporate franchise is, in this case, grossly unjust as to amount; that the assessor's method of arriving at such valuation is improper and unjust; and that it includes such elements as dividends or profits, earning power, and good will. The assessed value of the franchise, it will be observed, is a fraction over 25 per cent. of the total value of the intangible property of the corporation, ascertained by a deduction of the value of the tangible property from the market value of the shares of stock.

The value of the franchises of a corporation is not limited by the cost of obtaining them. If it were so limited, such franchises as the right to use the public streets for water pipes or gas pipes for the purpose of supplying a municipality and its inhabitants with water or gas would be valueless and unassessable, for everybody possesses such rights under the terms of our Constitution. It is the exercise of the right that gives the value that our laws require to be taxed. As was said in *San Jose Gas Co. v. January*, 57 Cal. 614, 616: "In a pecuniary sense, the value of franchises may be as various as the objects for which they exist, and the methods by which they are employed, and may change with every moment of time; but that franchises are property, and are to be taxed in some method in proportion to value, is a part of the paramount law of this state." In the same case it was said by the court, speaking of the method employed by the assessor in arriving at the valuation of certain mains: "The duty of making the valuation was cast upon the assessor. The method of arriving at the valuation, the process by which his mind reached the conclusion [in case where, as here, it is not pretended that he acted fraudulently or dishonestly], is matter committed to his determination. \* \* \* If he erred in his judgment, the remedy was by application to the board of equalization, and the courts will not revise the judgment of these officers upon such questions." This appears to be determinative of the contention here made. While the complaint herein alleged fraudulent mo-

tives on the part of the assessor, the allegation was denied, and no finding was made therein, and no point is made as to the failure of the court to make such finding. Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property, viz., \$2,943,096.92, was the value of the franchise, the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and, were we at liberty to review the judgment of the assessor and of the board of equalization upon those matters, we could not say that an assessment of \$750,000 thereon is unjust, or that it includes such elements as dividend or profit earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation. In this connection, it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders—a method of assessment which the state is at liberty to adopt (in fact, bound to adopt), unless such shares are otherwise covered by the assessment of the property of the corporation. It is clear that, if the laws of this state properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property.

Finally, it is urged that the assessment is in violation of the fourteenth amendment of the Constitution of the United States, in that a corporation is thereby compelled to pay a tax of \$12,187.76 for carrying on a "common business—banking—that every one has a right to carry on," while any person or partnership may carry on the same business without paying any tax. If this contention be well founded, it, of course, follows that no tax whatever can be imposed by any state on the corporate franchise of any corporation which is engaged in a business open to all who choose to engage therein. In view of the many decisions of the United States Supreme Court already cited, upholding the taxation by states of corporate franchises, it would appear unnecessary to further discuss this claim. As was said by the learned circuit judge in *London & S. F. Bank, Limited, v. Block* (C. C.) 117 Fed. 900, in upholding an assessment on such a corporate franchise, "The assessment is not \* \* \* upon the business or occupation of a banker, but upon the property of complainant embraced in the unity of the franchise of the corporation to have perpetual succession, to have a common seal, and to act in all its business transactions of a general banking house with those special advantages which are incident to corporate existence." A person or partnership engaged in the same business has no such property.

The judgment of the superior court is affirmed.

We concur: SHAW, J.; VAN DYKE, J.; LORIGAN, J.

McFARLAND, J. (dissenting). I dissent, and at some future time, if other duties permit, will express my views on the question here involved more fully. At present I will say only this:

1. The only assessment actually made was of appellant's "franchise." This attempted assessment was, under any view, void for want of description. If there be any particular property embraced under the general category "franchise" which is assessable, such particular property must be described in some manner sufficient to identify it. The mere word "franchise" is no more descriptive of any particular property than would be the words "an easement," or "a piece of land."

2. It appears, however, that the only franchise of appellant intended to be assessed was its mere franchise to be a corporation. But such a franchise, assuming it to belong to the corporation, and not to the stockholders, is not assessable, because it has no ascertainable value, under the rule prescribed by the state Constitution and the statute for determining assessable value. Const. art. 13, § 1; Pol. Code, § 3617. It cannot be transferred by the owner, nor seized and sold under execution or other process of law, and is not in any way vendible. In this respect it cannot be distinguished from a seat in a stock board, which was held in *Lowenberg v. Greenebaum*, 99 Cal. 162, 33 Pac. 794, 21 L. R. A. 390, 37 Am. St. Rep. 42, not to be property in the sense that it could be seized and sold.

3. The assessor reached the conclusion that this franchise was of the value of \$750,000, at which amount he assessed it, by the process of deducting the total value at which all the tangible property of the appellant had been assessed from the value of all the shares of its capital stock, as shown by sales thereof in the market. This was not fixing the value of the only franchise attempted to be assessed, to wit, the right to be a corporation. It was merely an attempt to assess the good will of the appellant as a business concern, and was an unlawful discrimination against the appellant, and in favor of partnerships, individuals, and all other "persons" whose tangible property alone is assessed, and not the good will of their established business. The value of the franchise to be a corporation is not affected by the fact that the corporation afterwards does a successful or unsuccessful business.

BEATTY, C. J. (dissenting). I agree with Justice McFARLAND that the mere franchise to be a banking corporation is not susceptible of valuation according to the criterion



ion of value established by the statute. Pol. Code, § 3617, subd. 5. It is not transferable or vendible, any more than a broker's seat in the stock and exchange board; and, unless we are prepared to overrule the decision in *San Francisco v. Anderson*, 103 Cal. 70, 36 Pac. 1034, 42 Am. St. Rep. 98, and at the same time to pronounce the Code definition of "value" unconstitutional, I cannot see how the judgment in this case can be affirmed. The invalidity of the assessment of appellant's franchise is to my mind much clearer than that of the broker's seat, for it was made to appear in the case cited that the privileges attaching to a seat in the stock board were of considerable pecuniary value to the member, whereas there is nothing to show that the right to conduct the banking business is of any greater value to a corporation than to a copartnership, and in case of a partnership it is not regarded as having any value whatever. The truth is that when, as in this case, a valuation of a franchise of a banking or trading corporation is made by taking the whole or a part of the difference between the market value of its shares and the value of its tangible assets, such valuation necessarily includes, and is mainly, if not wholly, composed of, the value of the good will of the business, and the franchise has little or nothing to do with it. Whether the good will of a business is subject to taxation, or not, is a question never decided by this court; but, conceding it to be property liable to taxation, I am clear that it should be assessed *eo nomine*, and assessed equally to all persons, natural and artificial. If it be true, as contended by appellant, that good will is never assessed to natural persons, it is an unjust discrimination to assess it to corporations merely because the market price of their shares affords a means of estimating its value. Upon the grounds thus briefly indicated, I dissent from the judgment.

(142 Cal. 248)

GRIBBEN v. YELLOW ASTER MINING & MILLING CO. (L. A. 1,221.)\*

(Supreme Court of California. Feb. 17, 1904.)

MASTER—INJURY TO SERVANT—DEFECTIVE APPLIANCE—NEGLIGENCE—FELLOW SERVANTS.

1. In an action by an employé against his employer for personal injuries received as the result of the breaking of a rope on which plaintiff was descending, with his foot in a loop thereof, to the bottom of a mine shaft, where it appears that ladders were furnished for the purpose of descending, and were near, and there was no reason why plaintiff should not have used them, his injuries are the result of his own negligence.

2. Plaintiff was not relieved from the consequence of his own negligence because his fellow workmen committed similar acts of negligence.

3. In an action by an employé against his employer for personal injuries received as the result of the breaking of a rope on which plaintiff was descending, with his foot in a loop thereof, to the bottom of a mine shaft for the purpose of removing dirt from drifts running out from the shaft, it appeared that the work had been done by plaintiff and his fellow servants by loading the bucket in the drift, and having it hauled by the rope and windlass, instead of putting it in a wheelbarrow, and wheeling it out of the drift to the shaft. There were a wheelbarrow and plank on which to run it, in the shaft, furnished by the employer for the purpose. It also appeared that such use of the rope caused it to become worn by scraping over the gravel and jagged stones on the roof of the drift, which caused it to break with plaintiff's weight. *Held* sufficient to show that the defect in the rope was the result of negligence on the part of plaintiff and his fellow servants.

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Robert Gribben against the Yellow Aster Mining & Milling Company. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed.

Herbert Cutler Brown, for appellant. Hendrick & Knott and Adcock & Reymert, for respondent.

VAN DYKE, J. The action is to recover damages for personal injuries occasioned to the plaintiff by the breaking of a rope by which he was being lowered to the bottom of a shaft while in the employ of the defendant corporation. Verdict and judgment went for the plaintiff in the court below, and defendant appeals from said judgment, and from the order denying a motion for a new trial.

In the specifications on the part of the defendant in its statement on motion for a new trial it is claimed, first, that there is no evidence of negligence on the part of the defendant; that the evidence proved that the accident alleged, which resulted in the injury to the plaintiff, was caused by the negligence of the plaintiff and the negligent acts of the fellow servants engaged with the plaintiff in the same general employment; second, alleged erroneous rulings of the court during the progress of the trial and the introduction of evidence; third, certain instructions given by the court to the jury.

1. The plaintiff testified that he was employed by the defendant on the 28th day of July, 1900, at Randsburg. He said he was sent down to the well to help them down there near what is called Goler, six or seven miles from Randsburg, where the company was doing work laying the foundation for a pump, reservoir, etc. He said he was directed to go down into the gravel pit to take out some gravel to get ready for the concrete for said foundation. It appears there was a shaft about twenty feet in depth, and from the foot of the shaft were drifts in opposite directions some ten feet or more from the foot of the shaft, and the gravel was taken

\*Rehearing denied March 18, 1904.

2. See *Master and Servant*, vol. 24, Cent. Dig. § 747.

from these drifts and hoisted up the shaft by means of a rope and bucket. The drifts were six or seven feet high. He says the way he was lowered, he put his foot in a loop of the rope and was lowered by the men at the windlass at the top of the shaft by allowing the rope to unwind, and on the day in question, while he was being lowered, the rope broke, and he was dropped down and his leg injured, or, as he says, "smashed up." On cross-examination he was asked: "Did any one tell you to go down on that rope? A. They told me to go down and take out gravel. That was the only way to get down there. Q. Did you see any ladders down there? A. No; there was no ladders in the hole. Q. Were there no ladders around the hole? A. I don't know. I didn't look to see whether there was any on top or not." The only other witness on the part of the plaintiff was the physician who treated him, and who testified to the extent of the injuries he received from the fall by the breaking of the rope. The only witnesses on the part of the defendant as to the accident were Robert Smith and Dan McCusker, employes of the defendant with the plaintiff at the time, but who were not in the employ of the defendant at the time of the trial. Smith testified that he had been working for the defendant corporation from the beginning of the May previous, and that the rope on which the plaintiff went down the shaft was there to hoist gravel with. On the cross-examination of this witness, however, it was shown that there were ladders furnished and were at the place, if the employes wanted to use them, for the purpose of going down the shaft. He was asked: "Do you know why the rope broke? A. By wearing against the top of the drift, sir. Q. How was the break? A. Well, it got pretty well wore, and it was pulled right in two the same as you would pull a piece of rope out when it was pretty well wore—right in two. I don't know how long the rope had been used on that windlass. We had been working on the windlass about seven or eight days." McCusker testified on behalf of the defendant that he was working at the place with the plaintiff in July at the time of the accident, and says that "it was a new rope, first-class rope—couldn't be no better rope bought. Everything that come down there was first-class material for that work. It had been used there about three weeks before it broke. Q. What was the cause of the breaking of that rope, if you know? A. From dragging the bucket in on that drift, and dragging and scraping on the roof of the drift as it come in. The roof of the drift was gravel and jagged rocks and sand. The rope was a good rope, only that one place that they dragged it on the roof of that drift. If it had not dragged there it wouldn't have broke. It would have carried up a ton. It was a new rope." He was asked whether there was any other means by which the men could

get down the shaft other than by the rope. "A. Why, there was ladders there within ten feet of them they could have put down if they had wanted to." On cross-examination the witness was asked: "Why do you mention a ladder? Were you told to go down on a ladder? A. Well, the ladders was there for that purpose. Q. How do you know that? A. Why, they were made for that—the foreman of the mine; and I throwed them away there. Q. Were the ladders ever used for that purpose at all? A. Well, they was put down the shaft when he got his leg broke." It appears further that there was a wheelbarrow at the foot of the shaft and a plank running out into the drift for the purpose of bringing the gravel from the end of the drift to the foot of the shaft to be placed in the bucket and hoisted to the top, but the employes, including the plaintiff, hauled the bucket back from the foot of the shaft to the end of the drift and there filled the bucket. Further, on cross-examination, the witness was asked: "Did you examine where the break occurred, whether broken off short, or whether it was one strand broken in one place, and another strand broken in another place? A. It was a long break. Just pulled apart, the way it was sawed off when they had it on the top of the drift. Q. How is that? A. The top of the drift sawed it off, and that was a long—The parting was long, you know; it didn't break off short. Q. Well, now, the edges where it broke in two; were they at all square? A. No, sir; it was not. Q. Well, how is that? A. Because it was wore. It was ragged; some parts of the rope was thinner than others, where it dragged. It wore worse in one place, may be, than it did in another; may be it had a little more friction on it, you know, and it might—Q. Well, your idea, then, is that the reason it broke was because it was worn? A. Worn on—dragging on the top of the roof of that drift. And they pulled the bucket in, as well as they all pulled it in—they every one pulled it in. If the men went and took the gravel out to the main shaft and put it in the bucket and hilt it up in the bucket, it was perfectly safe. Q. That is the way you think it became worn? A. That is the way it broke, and that is the way the accident happened. There is no better rope was ever put in a shaft than that was, and that was the way it was broke. It was their fault." Witness Smith was asked: "Why did you put the gravel into the bucket inside of the drift and drag it out through the drift into the bottom of the shaft by the rope instead of by carrying it out on a wheelbarrow? A. Well, because it was easier to do that way." There was no evidence in conflict with the above.

2. The court in its rulings and instructions followed the plaintiff's theory of the accident, and held substantially that it was quite immaterial whether ladders were furnished for going down the shaft, or whether the rope

became weakened through improper use of it by the plaintiff and other employes. Witness Smith was asked whether the rope was intended to lower people on, to which the plaintiff objected on the ground, among others, that it was incompetent, and the court sustained the objection. The same witness was asked whether they were instructed to take the earth out by putting it in a wheelbarrow and taking it to the foot of the shaft that way, which was objected to by the plaintiff on the ground that it was not competent, relevant, or material. "The Court: What is the object of the question, Mr. Brown? Mr. Brown: The object of the testimony, your honor, is to show that the purpose for which this rope was placed upon the windlass and used was for the purpose of hauling up the gravel from the bottom of the pit or shaft; that, as matter of fact, they used it to drag the gravel out from the drift; that there were other means provided for bringing that gravel from the bottom of the drift out to the point immediately below the windlass. The Court: The objection is sustained." He was again asked: "Were you ever instructed to put the gravel into the bucket inside of the drift and drag it out, in the manner stated, to the bottom of the shaft?" The answer to this question, upon objection of plaintiff, was also ruled out. The questions asked and ruled upon by the court were material under the issues made by the pleadings. It was alleged in the complaint that it was necessary, in order for the plaintiff to get to the bottom of said excavation, that a rope or other like means or appliance should be provided, and that said defendant provided such rope for that purpose, and that said rope so furnished by the defendant was of insufficient strength to sustain the plaintiff's weight, and suddenly broke, and was the cause of the injury complained of. The answer denies that it was necessary, in order for plaintiff to get to the bottom of the shaft, to use a rope or like appliance, and denies that the defendant was grossly or otherwise negligent in any respect in supplying or making use of any rope, or that in consequence of any defect in the rope the injury was caused to the plaintiff, and denies that said rope was not of sufficient strength to serve the purpose for which it was intended to be used, and alleges that if there were any defects or imperfections they were due solely to the act and fault of the plaintiff and other fellow servants.

3. The following is one of the instructions given by the court to the jury: "And if you believe from the evidence that the plaintiff, Robert Gribben, was injured as alleged in the complaint, and that said injury was proximately caused by the defect in the rope furnished by the defendant as alleged in the complaint, then and in that case you will find a verdict for the plaintiff, unless you further believe from the evidence that the plaintiff knew of the defect in the rope, or

unless the defect in the rope was so obvious that the plaintiff must have known of the defect, or that prior to the injuries the plaintiff was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect." So, it will be seen that the court assumes that the only means of going down the shaft was the rope, that it was furnished by the defendant for that purpose, and ignores altogether the question whether, if the rope were worn or weakened, the carelessness or negligence of the plaintiff and his fellow servants caused the same.

Undoubtedly the rule of law is as claimed by the plaintiff, that it is the duty of an employer to furnish his employes reasonably suitable and safe machinery and appliances with which to do the work required of them, and to keep such machinery and appliances in repair and order. It is also a rule of law that an employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the fellow employe. Civ. Code, § 1970. If the employe makes improper use of the instrumentalities furnished by the employer for the work in hand, and injury results to himself therefrom, it is his own fault, and he has himself to blame, and cannot hold the employer responsible. Here the evidence is uncontradicted that ladders were furnished for the men to go down in the shaft. The plaintiff says he did not look to see any ladder, although they were on the ground within ten feet of the windlass. It does not relieve the plaintiff from the consequences of his own fault or negligence because his fellow workmen committed the same fault. The rule in reference to the negligence of the plaintiff and his fellow employes applies also to the use of the rope for hauling the bucket out of the drift at the foot of the shaft. There was a wheelbarrow, and a plank on which to run it, furnished by the employer for the purpose of bringing the gravel from the head of the drift, to be dumped into the bucket at the foot of the shaft. Notwithstanding this fact, the men, the plaintiff included, hauled the bucket to the head of the drift, and when filled, the rope remaining attached, gave the word to hoist, and thus have the bucket dragged back to the foot of the shaft, the rope, as testified, scraping over the gravel and jagged stones on the roof of the drift. The plaintiff having been engaged in mining, as he testified, some 37 years, must have known that this was an improper use to put the rope to.

Further, the answer in substance denies that the rope was provided by the defendant to be used as a means of lowering the employes into the shaft, and there is no suffi-

cient evidence to show that the defendant intended it to be used for that purpose, or for any purpose other than to lower and hoist the bucket. The plaintiff and his fellow employés did, indeed, use it as a means of getting down to the bottom of the shaft, but there is no evidence that defendant was aware of such use, or had ever authorized or intended its application to that purpose, and if said company did not furnish it for such purpose or know it was so used it could not be held liable. The rulings of the court and instruction referred to must necessarily have influenced the jury to the prejudice of the defendant.

The judgment and order denying a new trial are reversed, and the cause remanded.

We concur: SHAW, J.; ANGELLOTTI, J.

(142 Cal. 256)

FOLEY v. MARTIN et al. (S. F. 2,480.)\*  
(Supreme Court of California. Feb. 18, 1904.)  
OFFICERS—LIABILITY FOR ACTS OF DEPUTIES  
—PUNITIVE DAMAGES—RATIFICATION.

1. A sheriff is not liable for punitive damages for the oppressive misconduct of his deputy where he did not authorize or ratify it.

2. A sheriff does not ratify the oppressive misconduct of his deputy, so as to make him liable for punitive damages therefor, by not discharging him, he having no personal knowledge of the transaction till served with the summons, and then not being furnished with any proofs, and having no means of informing himself except by inquiry of his deputies, from whom he learned that they had done nothing except as specifically directed by an order of a justice court.

In Banc. On rehearing. Reversed.

For opinion in department, see 71 Pac. 165.

BEATTY, C. J. A rehearing of this case was ordered after affirmance of the judgment and order appealed from, based upon the opinion rendered in department (71 Pac. 165). This opinion was and is entirely satisfactory to the court, except as to one proposition, and with that exception is readopted.

The damages recovered by respondent were in large part punitive, or vindictive—such damages, that is to say, as are recoverable only under section 3294 of the Civil Code for fraud, oppression, or malice accompanying a tort, and one of the questions presented by the case was whether a sheriff is liable in punitive damages for the oppressive acts of his deputy in attempting service of process in an unlawful manner. It was held by the department that he was liable for the act of his deputy to the same extent as if he had performed the act in person. This conclusion was directly opposed to the decision in *Nixon v. Rauer*, in which the same rule was held to apply in favor of an officer when sued for the tort of his deputy that has become the settled law of this state in actions against a principal or master for the tort of

his agent or servant. That rule is that nothing beyond compensatory damages can be recovered unless the malice or oppression characterizing the injury has been authorized or ratified by the defendant. See *Nixon v. Rauer* (Cal.) 66 Pac. 221, and cases therein cited. We are aware that the reason that case does not appear in our Reports is that there was no argument against the proposition decided, and this because the controversy had been settled by the parties prior to our decision. We do not therefore cite the case as authority, but merely refer to it for the purpose of indicating the principal reason for ordering this rehearing.

It is contended by counsel for respondent that the rule as to the liability of an officer for the malicious acts of his deputy is different from the rule measuring the liability of master or principal, but we cannot discover in any of the cases cited in support of this contention that any such distinction is made or that any reason is suggested for making it. It is true that in one case (*Hazard v. Israel*, 1 Bin. 240, 2 Am. Dec. 438) it was expressly held that, irrespective of authorization or ratification, a sheriff is liable in punitive damages for the oppressive misconduct of his deputy in serving civil process. Several other cases are cited which are perhaps indirectly to the same effect, but they are all, so far as we can discover, decided upon a ground which equally embraces an action against master or principal, and it is certain that none of them suggests a distinction, or any reason for a distinction, which would call for the application of one rule in one case and a different rule in the other case. In fact, there are many more cases in which the strict rule has been applied in actions against principals than in actions against sheriffs. For a reference to these cases, see *Goddard v. Grank Trunk Ry.*, 57 Me. 225, 2 Am. Rep. 39, and the note to 2 *Redfield on Railways*, therein cited. In short, it seems that the strict rule where it obtained was applied indiscriminately against all principals, whether private or official, and it would seem to follow that where the more liberal rule obtains it should be applied with equal impartiality. If an innocent master incurs no penalty for the malice of his servant upon the same principle an innocent officer should not be punished for the malice of his deputy. It is enough that he, the same as any other principal in like case, should be held to make full compensation for the injury actually sustained by the plaintiff.

There is nothing inconsistent with this view in the case cited in the department opinion. *Hirsch v. Rand*, 39 Cal. 315. All that was there decided was a point of practice, which required no consideration of the rule of damages. The court merely held that in an action for false imprisonment caused by the act of a deputy marshal the facts could be proved under a general allegation

\*Rehearing denied March 19, 1904.

that it was caused by the defendant, without alleging specially the official character of the defendant, and the fact that the arrest and imprisonment were caused by his deputy. The principle of the decision was the familiar one, "*Qui facit per alium, facit per se*," which applies to all persons, private as well as official, who act through the agency of others. We conclude that the case of *Nixon v. Rauer*, although not argued by respondent, and for that reason not reported, was correctly decided.

This appeal is not, however, disposed of by holding that a sheriff is exempt from the penalty of vindictive damages where he has not authorized or ratified the oppressive misconduct of his deputy, for here the court has found that the defendant Martin did ratify the acts of his deputies; and the question remains whether this finding is sustained by the evidence.

The defendant testified that he had no personal knowledge whatever of the transaction upon which the suit is founded until served with summons, and there was no evidence to the contrary. But he did not, when sued, discharge his deputies, and they were still serving when the action was tried. There is no doubt that the retention or promotion of an offending agent after knowledge of his misconduct is evidence of ratification, which may be very conclusive, or very slight and insufficient, according to circumstances. If the facts are promptly called to the attention of the principal, and if, with the means of verifying the truth of the charge, he neglects to make due inquiry, and afterwards retains the guilty agent in his employment, or promotes him to a better position, he makes himself particeps criminis, and lays the foundation of an action against himself for punitive damages. But we have been referred to no case which holds him to that measure of liability when his first and only notice of his agent's misconduct was the service of summons in the action.

If such had been the decision in *Bass v. Chicago, etc., Ry. Co.*, 42 Wis. 654, 24 Am. Rep. 437, that case would have stood alone upon the proposition, so far as we have discovered. But even in that case the decision was not rested upon the ground that the defendant had notice by the commencement of the action. The case was one of very gross outrage by a brakeman upon an inoffensive passenger. The conductor of the train was immediately informed of the circumstances by the plaintiff, and by other passengers, and complaint was promptly made to the company, whose attorney, as intimated by the court, instead of trying to ascertain the truth of the transaction, limited his efforts to screening the guilty conductor and brakeman. It was after all this that the action was commenced, and the fact that the guilty agents were retained in their employment after suit was merely mentioned as one circumstance, along with others, tending to

prove ratification; the court holding expressly that notice to the conductor in charge of the train was notice to the corporation of the misconduct of the brakeman.

The present case is very different. The sheriff here had no notice except by the service of summons. He was furnished with no proofs, and had no means of informing himself except by inquiry of his deputies, and what he learned from them was that they had done nothing except what they had been specifically directed to do by an order of the justice's court; an invalid order, it is true, but still a direction upon which they seem to have acted in good faith, and without any wanton or unnecessary violence. Under these circumstances, we think that the mere failure of the sheriff to at once discharge his deputies in advance of an investigation of their conduct, in the mode invited by the plaintiff, ought not to be held a ratification of their unauthorized acts. We think, indeed, that it is a safe and just rule to lay down that if a plaintiff in such a case as this desires to charge a principal with vindictive damages upon the ground of ratification he should make his cause of action complete, before commencing it, by informing the principal of the facts, and giving him an opportunity of redressing the wrong before being forced to defend it. Such was the course pursued in *Avakian v. Noble*, 121 Cal. 216, 53 Pac. 559.

The judgment and order appealed from are reversed.

We concur: VAN DYKE, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.

(142 Cal. 239)

BENNETT v. BEADLE. (S. F. 2,640.)

(Supreme Court of California. Feb. 17, 1904.)  
SHIPS—LIENS FOR CONSTRUCTION—CONSTRUCTION OUT OF STATE.

1. There can be no furnishing of materials in this state for the construction of a ship wholly constructed in another state, within Code Civ. Proc. § 813, giving a lien on vessels for work done or "materials furnished in this state for their construction."

Department 1. Appeal from Superior Court, City and County of San Francisco; Edward A. Belcher, Judge.

Action by Sanford Bennett against A. W. Beadle. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Charles P. Eells, for appellant. Rigby & Rigby and Nathan H. Frank, for respondent.

ANGELLOTTI, J. This action was brought by the assignee of various parties who furnished materials used in the construction and equipment of the steam vessel *Santa Ana* against the owner of said vessel, to have the amount due therefor determined and adjudged a lien upon the vessel, and to have the vessel sold in satisfaction

thereof. Plaintiff had judgment, and defendant duly made a motion for a new trial, which motion was granted by the trial court. This appeal was taken by plaintiff from the order granting defendant's motion for a new trial.

All of the materials for which it is here sought to enforce a lien were furnished by mercantile firms and corporations doing business in the city and county of San Francisco, state of California, to the firm of H. R. Reed & Son, shipbuilders at Coos Bay, in the state of Oregon, to be used by them in the construction of "a vessel" then building at Coos Bay, Or. Said Reed & Son had entered into a contract with defendant, a resident of San Francisco, Cal., to construct for him the hull of a vessel at said Coos Bay for the sum of \$25,280, and to deliver the same to him at the place of building, free from all liens. In pursuance of such contract, Reed & Son constructed the hull of the vessel Santa Ana at said place, and the vessel was finally launched by them at said place, and there delivered to defendant. When so delivered, the contract had not been entirely fulfilled, but defendant completed the hull in Oregon sufficiently to enable him to tow her to San Francisco, and at the time this action was begun he was engaged in putting in her engines and in completing her hull and equipment in San Francisco Bay. The materials in question were ordered by Reed & Son through their agents in San Francisco, and were charged upon the books of the vendors against said Reed & Son, and in some instances against their San Francisco agent. They were packed by the vendors in San Francisco, there marked and labeled, addressed to "H. R. Reed & Son, Coos Bay, Oregon," and by the vendors delivered to steamship companies in San Francisco, to be delivered as addressed. They were so delivered by the steamship companies at Coos Bay, Or., and, having been there received by Reed & Son, were by them there used in the construction and equipment of the hull of the Santa Ana before the launching thereof and the delivery to defendant. The contract between Reed & Son and defendant provided that all of the property in said vessel, as the same progressed in construction, should immediately pass to, and be vested in, defendant. Upon these facts, defendant moved for a nonsuit upon the ground that the evidence failed to show any cause of action against defendant or for a lien against the vessel. This motion was denied, and the ruling of the court denying such motion was assigned as error.

Defendant introduced evidence showing that he did not order or purchase any of said materials, or use any of the same in constructing, repairing, or equipping the vessel in the state of California, and also that he had paid said Reed & Son for the construction of the vessel all but about \$90 of the contract price. The findings of the court

were attacked—especially those to the effect that the materials were furnished or delivered to Reed & Son, at the city and county of San Francisco, for the construction and equipment of said vessel Santa Ana. The only basis of plaintiff's claim against the property of defendant, who was in no way personally liable for the value of the materials sold and delivered to Reed & Son, and of whose interest in the vessel plaintiff's assignors apparently had no knowledge at the time of furnishing the materials, is section 813, Code Civ. Proc., giving a lien on vessels in certain cases. That section provides, among other things, that all steamers, vessels, and boats are liable "for work done or materials furnished in this state for their construction, repair or equipment"; that demands for such causes constitute liens thereon, but that "such liens only continue in force for the period of one year from the time the cause of action accrues." Conceding that the delivery of the materials in San Francisco by plaintiff's assignors to common carriers for Reed & Son, the shipbuilders, was a delivery to the shipbuilders sufficient to bind them personally, it was not the "furnishing" of the materials "for the construction of the vessel" contemplated by the statute. Such a delivery to the shipbuilders could not of itself create a lien, for the materials so furnished might never find their way to the vessel, or be used for the benefit thereof. The theory upon which such a lien is given upon the property of one who is in no way personally liable for the debt is that the services or materials secured thereby have gone into the property, and that those who furnished them have in part created the very property to which the lien attaches. As is claimed by plaintiff's counsel, the subdivision of section 813, Code Civ. Proc., relative to liens on vessels for materials furnished for their construction, and the sections of our law relative to mechanics' liens on buildings and other structures, derive their being and authority from one common source, viz., section 15 of article 20 of the Constitution of this state. That section provides that mechanics and materialmen shall have a lien upon the property "upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished." Section 1183, Code Civ. Proc., providing for liens upon buildings and other structures, declares that "mechanics, material men \* \* \* performing labor upon or furnishing materials to be used in the construction \* \* \* of any building, \* \* \* shall have a lien upon the property upon which they have bestowed labor or furnished materials," etc. It is firmly settled in this state that, although materials may be furnished with the agreement that they are to be used in a specified building, the materialman will have no lien upon that building for the value of any such materials that are not actually used therein. Silvester

v. Coe Q. M. Co., 80 Cal. 510, 22 Pac. 217; Bewick v. Muir, 83 Cal. 368, 23 Pac. 389; Roebling Sons Co. v. Bear Valley Irr. Co., 99 Cal. 488, 34 Pac. 80; Wilson v. Nugent, 125 Cal. 280, 284, 57 Pac. 1008. Unless so used in the building, they are not "furnished upon" the same. The Constitution and the section of the statute last quoted give the materialmen a lien "upon the property upon which they have \* \* \* furnished materials." The Constitution and section 813, Code Civ. Proc., give to the materialman a lien upon the vessel "upon which" he has furnished materials, for, as is claimed by plaintiff, the statutes are undoubtedly in pari materia in this respect, and the words "all \* \* \* vessels \* \* \* are liable for \* \* \* materials furnished \* \* \* for their construction," in the section relative to liens on vessels, mean the same thing as the words "material men \* \* \* furnishing materials \* \* \* shall have a lien upon the property upon which they have \* \* \* furnished materials," in the section relating to liens upon buildings. In the one case, it is the furnishing to the vessel that creates the lien; in the other, it is the furnishing to the building or other structure that creates the lien. If this be true, it is apparent that there cannot be, within the meaning of our statute, any furnishing of materials "in this state" for the construction of a vessel which is wholly constructed in another state, and that materials which are put into vessels in another state cannot be held to have been "furnished in this state for their construction."

Plaintiff, to sustain his claim that the materials were "furnished in this state," relies upon the case of Tibbetts v. Moore, 23 Cal. 208, construing a section of the mechanics' lien statute then in force, providing that the liens created by the act shall be preferred to every other lien which shall have attached upon the property subsequent to the time that the first of the materials were furnished. It was there held, in determining the question as to whether a mortgage or lien for materials was the superior lien, that the first of the materials were furnished, within the meaning of that statute, when they were delivered or ready for delivery at the place where the materialman had agreed to deliver them under the contract, which in that case was some distance from the building. Without questioning the correctness of that decision as to the particular matter there involved, it will be observed that the word "furnished," there construed, was used in relation to a different subject-matter from that here under discussion, viz., the question of priority of liens, which is now embraced in section 1186, Code Civ. Proc., whereby the materialman's lien is preferred to liens attaching subsequent to the time when the materials "are commenced to be furnished." The "furnishing" involved in this case is one which of itself, under the express wording

of the statute, creates the lien; and, as we have seen, such a lien can arise only upon the furnishing upon the building or vessel. Under the construction of the statute contended for by plaintiff, we would be compelled to hold that the Legislature of this state intended to give a lien upon property situate without the limits of the state, for whatever lien is given by the statute attaches immediately upon the furnishing of the materials, and continues in force for only one year after the cause of action accrues, during the whole of which time the vessel may be without the limits of the state. The Legislature has no power to impose a lien upon property situate without the state. Reddy v. Tinkum, 60 Cal. 458, 467. And the statute makes no provision for the subsequent creation of a lien by the act of the vessel coming within the jurisdiction of the state. See, in this connection, Moores v. Lunt, 1 Hun, 650, 652; McDonald v. The Nimbus, 137 Mass. 360. It would seem to be clear, as contended by defendant, that if, by reason of the vessel being in another state, no lien is created when the materials are furnished, there is nothing to enforce when she comes within the jurisdiction.

Construing the subdivision of section 813, Code Civ. Proc., in question, strictly in pari materia with the mechanics' lien law, we are satisfied that it gives a lien for materials furnished to the contractor for the construction of a vessel only when the materials are furnished "to the vessel" in this state. See, in this connection, The Phoenix Iron Co. v. Vessels, 127 N. Y. 206, 211, 27 N. E. 841. This being our conclusion, it is unnecessary to consider the question as to the applicability of the decisions of the federal courts, where it is well settled that the right of a maritime lien depends upon the locality of the vessel at the time the supplies are furnished or the repairs made. See 19 Am. & Eng. Ency. of Law (2d Ed.) p. 1106; The Vigilancia (D. C.) 58 Fed. 698, 700.

The question as to the proper construction of other subdivisions of section 813, Code Civ. Proc., relating to liens for services rendered on board and supplies furnished at the request of owners, masters, agents or consignees," and for nonperformance or malperformance of contracts for transportation made by "owners, masters, agents, or companies," is in no way material to the question here involved.

The order granting a new trial is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

(7 Cal. Unrep. 184)

PEOPLE v. KENNEDY. (Cr. 1,051.)  
(Supreme Court of California. Feb. 15, 1904.)  
HOMICIDE—REVIEW—NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

1. The court properly granted a new trial in a prosecution for murder where the only direct testimony against defendant was that of an ac-

complice, and the corroborating testimony was insufficient to connect him with the commission of the offense so as to justify a conviction, even assuming that the accomplice's testimony, if true, was sufficient for that purpose.

In Banc. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

William B. Kennedy was convicted of murder, and from an order granting a new trial, the people appeal. Affirmed.

U. S. Webb, Atty. Gen., E. B. Power, Lewis F. Byington, Dist. Atty., and I. Harris, Asst. Dist. Atty., for the People. William H. Schooler and A. S. Newburgh, for respondent.

SHAW, J. The defendant was charged with the crime of murder, and upon the trial a verdict was returned finding him guilty of murder of the first degree. Thereupon, on his motion, the court granted a new trial, on the ground, among others, that the only direct testimony against the defendant was that of an accomplice, and that there was no sufficient corroborating testimony to connect him with the commission of the offense. From this order the plaintiff appeals.

Upon an examination of the testimony we are of the opinion that the action of the court was correct. There is scarcely any corroborating evidence tending to connect the defendant with the commission of the crime, and certainly not enough to justify a conviction, even if it be assumed that the testimony of the accomplice, if true, was sufficient for that purpose. From a reading of that testimony we are in grave doubt whether the court should not have granted the motion upon the ground that there was no evidence sufficient to convict.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.; VAN DYKE, J.

(142 Cal. 245)

LIMA v. COUNTY BANK OF SAN LUIS OBISPO et al. (L. A. 1,193.)

(Supreme Court of California. Feb. 17, 1904.)

HOMESTEAD—EVIDENCE—SUFFICIENCY—INSTRUCTION.

1. Where it appears that a property owner at the time of filing a declaration of homestead was, with his family, using the place as a home, and that it was at that time being used for no other purpose, proof of previous use for hotel and other purposes is unavailing to prevent the property being impressed with the character of a homestead.

2. Where the evidence was sufficient as matter of law to impress property in controversy with the character of a homestead, an erroneous instruction regarding the use to which the property could be put without depriving it of its homestead character was not cause for reversal of a judgment based on a finding that the property was a homestead.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by J. P. Lima against the County Bank of San Luis Obispo and others. From a judgment for plaintiff, and an order denying a motion for a new trial, Jose De Souza Brazil appeals. Affirmed.

W. H. Spencer, for appellant. F. A. Dorn and Wm. Shipsey, for respondent.

GRAY, C. This is an action to quiet title. A jury returned a general verdict in favor of plaintiff. The court adopted the verdict, and also found that all the allegations of the complaint were true. The defendant Brazil appeals from the judgment against him and from an order denying his motion for a new trial.

The appellant claimed title to the premises in controversy by virtue of an execution sale and issuance to him of a sheriff's certificate of said sale. The plaintiff was and had been for a long time prior to such sale the owner and occupant of the property, and claimed title as against the execution sale by virtue of a declaration of homestead duly filed prior to the entry of judgment in the action in which the sale was had. The validity of the homestead is questioned by appellant. The sole contention in this behalf is that the declaration did not impress the property with the character of a homestead because the same was used principally for hotel purposes. It appears from the evidence that the property in question is situated in the city of San Luis Obispo, at the southeasterly corner of Higuera and Nipoma streets, and fronts 50 feet on Higuera and 140 feet on Nipoma street. On this lot there is a two-story wooden house, 36 by 50 feet, built in 1877. There are also a cow shed and other small out-houses on the lot. This place had been occupied as the residence and home of the plaintiff and his family since he married his wife and took her there in 1877. His children had all been born there, and his wife had died there. He had had no other home since 1877, and was living in that house with four of his children at the time the declaration was filed. He had previously used the property for purposes additional to that of a residence. At one time he had a small grocery store in one room of the house, at another time he had a saloon in another room, and for all the time previous, except perhaps from early in 1897 to December, 1899, he had kept a few lodgers and boarders in the house and had run it as a hotel. In December, 1899, he had renewed this hotel business, but in May, 1900, before the declaration was filed, he had discontinued the hotel business entirely. On the 17th day of May, 1900, on which day the declaration of homestead was filed, the evidence, without conflict, shows that the place was occupied by the plaintiff and his family as a residence and home and that no other business of any kind was being carried on there. It is beyond question that the property was impressed with the character of a homestead by the



filing of the declaration. *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404, and cases cited.

Appellant complains of an instruction given by the court to the jury as follows: "The use of a building partly or even chiefly for business purposes or the renting of a part of it does not deprive the owner of the benefit of his exemption of the building as a homestead, if the building is and continues to be the bona fide residence of the claimant and his family," etc. Conceding, without deciding, that this instruction might be considered erroneous in a case where it was material, and also conceding, with the same qualification, that this is a case in which the parties were entitled to a jury trial as a matter of right, and that the jury should have received proper instructions, yet we are satisfied that the case should not be reversed on account of the said instruction. The evidence as to the use to which the property was devoted at the time of the filing of the homestead declaration was of such a character that it could be said as a matter of law that the declaration impressed the property with the character of a homestead; and it would not have been out of place, so far as that proposition was concerned, for the court to have advised the jury that their verdict should have been for the plaintiff. Had the verdict been other than it was, the court should have, and no doubt would have, set it aside as contrary to the undisputed evidence to the effect that plaintiff with his family were using the place as a home, and it was being used for no other purpose at the date of the declaration. The instruction, then, could not prejudice the defendant, because, with it or without it, the jury could return no verdict other than for the plaintiff. *Green v. Ophir C. S. & G. M. Co.*, 45 Cal. 522; *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386; *In re Spencer*, 96 Cal. 448, 31 Pac. 453.

We advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

(142 Cal. 268)

#### PEOPLE v. OCHOA. (Cr. 777.)

(Supreme Court of California. Feb. 18, 1904.)

MURDER OF FEMALE—JURORS—CHALLENGE—PRESUMPTION OF MALICE—ADMISSIBILITY OF EVIDENCE—HARMLESS ERROR—INTOXICATION OF DEFENDANT—INSTRUCTION.

1. The fact that a juror, examined on his voir dire in a prosecution for murder, while showing himself entirely unbiased, admits that, without any opinion as to defendant's guilt or innocence, the fact that the murdered person was a woman would weigh with him as tending to show that the killing was malicious, does not render him incompetent to serve, there being no claim of an accidental killing.

2. Where a juror, examined on his voir dire in a prosecution for murder, admits that he has an impression that defendant is guilty, and that until he hears evidence to remove it the impression will remain, but declares that it has generated no prejudice against defendant, and will not prevent him from trying the case fairly, and that he will require full proofs of all the facts before finding a verdict against defendant, he is not shown incompetent to serve.

3. In a prosecution for the murder of a woman who had lived with accused as his wife, accused when testifying was asked by his counsel what was the wife's conduct, and whether she was "straight." An objection was sustained. Accused then testified that they loved each other, and he never had any previous trouble with the woman. *Held*, that sustaining the objection was not ground for reversal.

4. In a prosecution for wife murder, sustaining an objection to a question asked defendant by his attorney as to who supported the family is proper.

5. Where, in a prosecution for wife murder, an objection by the people is sustained to a question asked defendant as to whether his wife stopped at a certain house with his consent, but defendant without further objection fully details the circumstances under which she went there, and the objections and remonstrances on his part, there is no ground for reversal.

6. Where the court gives that portion of an instruction requested in a prosecution for murder, which declares that the drunkenness of defendant is to be considered in determining the degree of the offense, the fact that it strikes out another portion containing the same proposition is not error.

In Banc. Appeal from Superior Court, Kern County; W. M. Conley, Judge.

Francisco Ochoa was convicted of murder in the first degree, and appeals. Affirmed.

E. J. Emmons, Alvin Fay, and Dibble & Dibble, for appellant. U. S. Webb, Atty. Gen., for the People.

BEATTY, C. J. The defendant was convicted of murder in the first degree, and the death penalty imposed. He appeals from the judgment and from an order denying his motion for a new trial.

The facts of the case are few and simple. The defendant had been living for several years with a woman sometimes called Maria and sometimes Escolastica Barera. They were not married, but he testified that by their friends and relatives they were regarded as man and wife. For some reason she left him, and went to live at the house of a woman named Lou Ross, in the town of Bakersfield. He says he tried to persuade her to leave the house of Lou Ross, which he regarded as a place of ill repute, and return to him, but she refused to do so. Afterwards, when he was drinking in a saloon with one of his friends, Lou Ross accosted him; told him that he was a cuckold; that Escolastica was sleeping with a man named Tadeo Olivera; and taunted him with being so little of a man as to submit to the wrong. After this he continued drinking, he says, and does not remember what ensued. What did happen, as shown by the evidence for the

¶ 2. See *Jury*, vol. 31, Cent. Dig. §§ 463, 466.

people, was that some hours later he broke into the house of Lou Ross, where the two women were sleeping, asked where Maria (Escolastica) Barera was, and when he discovered her, cowering under the bed covering, sprang upon her with the words, "Here you are, you bitch!" and shot her. No question is made as to defendant's guilt of the crime of murder, but it is claimed in his behalf that there was a question as to the degree of the crime, and that the court erred in its instructions bearing upon this point, and also in its rulings upon objections to testimony and challenges to jurors.

The evidence upon which counsel contend that the jury, if properly instructed, might have found a verdict of murder in the second degree, was that of the defendant that some years prior to the homicide he had suffered a sunstroke, from the effects of which he had never recovered, and that at the time of the homicide he was deeply intoxicated. As to the intoxication, he was corroborated by other witnesses, but not very decisively. The contention of counsel is that his intoxication, operating upon a brain permanently injured by sunstroke, may well have deprived him of the capacity to form the deliberate purpose to kill essential to the crime of murder in the first degree, and therefore that any error of the court in overruling a challenge to a juror for bias, or in excluding testimony as to the relations between him and deceased prior to the killing, or in instructing the jury as to the purpose for which the evidence of intoxication was admitted, became highly material.

Upon this general statement of the case we proceed to consider the several exceptions to the rulings of the trial court which have been urged in support of the appeal.

1. It is contended that the court erred in denying the challenges for actual bias to the jurors Pierce and Howard. The direct evidence of Pierce given upon his voir dire, and upon which defendant's challenge was based, reads as follows: "I reside three miles west of Bakersfield. Resided there during the month of May, 1899. I was in town frequently. I take the daily papers. I have lived in that home about 11 years. I have an extended acquaintance here in the town. I remember hearing about this alleged offense at the time it happened. The papers at that time had pretty extensive accounts as to what they represented as being the truth. I read them at the time. I do not remember of ever talking with anybody about the case. I do not remember of any one talking in my presence about it. I do not remember at the present time what the accounts were. I did not form any opinion as to the guilt or innocence of the defendant. I have not any opinion now. I have no prejudice in my mind because of the fact that one man has killed another. Q. Now, carrying that still further, Mr. Pierce, is there any prejudice in your mind by reason

of the fact that the party deceased was a woman? Does that raise any prejudice in your mind or bias? A. Well, I don't hardly know how to answer that. It always seems a little hard to kill a woman, naturally. Q. Then if it was proven here by the testimony that the defendant here did kill a woman that very fact of itself, without any further evidence, would create a prejudice and bias as against the defendant, in your mind, would it not? A. Well, of course, just the way I stand now it would naturally, I suppose. Q. And it would take less evidence in that case, Mr. Pierce, to prove malice in this crime that is charged, than it would in the case where the party killed was a man, would it not? A. I believe it would. Q. Then, if the testimony and the information in this case should show and does show that the defendant is charged with having killed a woman, that fact of itself, if the killing is proved, raises a bias and prejudice as against the defendant, in your mind? A. I think it would to that extent. Q. Then it would require less evidence, in other words, for you to form a clear and decided opinion as to the guilt of the defendant where the proof is that he killed a woman than it would where the proof was that he killed a man? A. I think so. I think it would take a little stronger evidence."

Upon this evidence alone the court would have been fully justified in denying the challenge. The juror showed himself to be entirely unbiased, but admitted that as he then stood, i. e., without any opinion as to the guilt or innocence of the defendant, and without evidence upon which to base an opinion, the fact that he had killed a woman, if that fact was proved, would help to convince him that the killing was malicious. There was here no suggestion of an accidental killing, and the whole effect of the juror's testimony was that in case of an intentional killing the fact that a woman is the victim is in itself something added to the ordinary presumption of malice. We suppose that this opinion is shared by every reasonable man, and it is founded upon facts of universal cognizance. Women are weaker than men, less capable of inflicting injury, and the necessity of using force against them is less. What a woman can do will not ordinarily amount to that provocation which is in law sufficient to reduce a homicide to manslaughter or justify a resort to the extreme measure of taking life in self-defense. For these, and for other reasons, the killing of a woman by a man is, in the absence of evidence as to the particulars of the affair, more likely to be without justification, excuse, or mitigation than the killing of a man. Her weakness in comparison to his strength is an item of evidence having a material bearing upon the question of guilt.

But the challenge to the juror was not submitted upon the above-quoted evidence alone. He was further examined by the district at-

torney, and, while he admitted that he would consider the fact that the deceased was a woman, he would consider that fact in connection with all other facts proven in making up his verdict. Upon the whole evidence the court was justified, irrespective of what has been said, in holding the juror free of bias.

The Juror Howard had not discussed the case or heard it discussed, and he had not read the newspaper accounts of the killing, but he had read about the arrest of the defendant. On his voir dire he thus described his state of mind: "I don't think I formed any opinion as to the guilt or innocence of the defendant from what I read at that time. I don't know that I have now any impression or opinion as to his guilt or innocence. I wouldn't without hearing the evidence. If I should be excused for some reason, and should be met on the street and asked the question, 'What do you think about that defendant? Do you think him guilty or not?' I don't think that I would say that I thought he was innocent. Until he was proven innocent I have an impression on my mind that I think he is guilty. Q. And if you went in the box then you would go in with the impression at the present time that he was guilty? A. No; I should require evidence to prove it. I couldn't say that he was guilty. Q. You say that you have an impression that he (is) guilty at the present time? A. I have, without hearing any evidence. Q. And if you should go in the jury box with that state of mind at the present time you would believe him guilty? A. Yes, sir. Q. And it would be necessary for the defendant to furnish some evidence to remove that opinion before your mind would be entirely unbiased, would it not? A. Yes, sir. Q. Would that impression that you have at the present time, if you were in the position of the defendant, would you be willing to be tried by twelve men who felt towards you and your case the same as you now feel toward the defendant and his case? A. Yes, sir. Q. You would go into the box then with the idea that you could lay aside the impression that you have? A. Yes, sir. Q. Will you tell me how it is possible for you to lay aside that impression of his guilt, if you are going to require evidence to remove that, in order to get your mind in an unbiased condition? A. If the evidence proved that he was innocent I would find him innocent. Q. You would require him to prove that though? A. Certainly I would." Upon this evidence the defendant challenged. The people denied the challenge, and the juror was further examined as follows: "Q. Mr. Howard, suppose you were selected as a juror in this case; and the prosecution would show that a woman was killed, and the testimony of some witness would be to the effect that this defendant here killed her, without showing any other circumstance whatever which led up to it, or any of the circumstances at all, just the

mere fact of killing would be sufficient in your mind to find the defendant guilty of murder? A. No, sir; I would require the prosecution to go further, and to prove all the facts in the case. Q. Now, the impression that you have in your mind, or opinion --and you got that from reading the papers I believe? A. No; I don't think I read the papers at all. It was about the hunting of him and the catching. I did not talk with any of the witnesses. Q. This was common street talk that you heard then, was it? A. I didn't pay much attention. Q. Even with the impression that you had in your mind, that wouldn't be sufficient to produce conviction in your mind, would it? A. No, sir. Q. And if the prosecution only went that far, and showed only those two things, in that case, what would your verdict be? A. Not guilty. I would be willing to be tried by twelve men in the same frame of mind toward me and my case if I was being tried as I am toward the defendant in this case. I will disregard the opinion that I have and render a fair and impartial verdict upon the evidence produced upon the trial and the instructions given me by the court. I will require the testimony to convict to come from the plaintiff—from the prosecution. And if the prosecution don't make out a case sufficiently or any more than you have stated I would not require the defendant to go on the stand before I would find a verdict of 'Not guilty.' Mr. Abern: We submit the challenge. The Court: Q. You have no prejudice against the defendant? A. I have not. Q. When you say that you have an impression that he is guilty, do you really mean that you have an impression that he is guilty at the present time. A. No; I don't know that he is guilty. Q. You know that it is the duty of a juror, when he is sworn to try a case, to disregard any impression that he may have? Are you prepared to say now that you can set any impression that you have had aside and enter upon the trial of this case as if you had never heard anything about it? A. Certainly, I say that."

It cannot be said, as matter of law, that the juror was by this evidence conclusively shown to be biased. He did admit that he had an impression that the defendant was guilty, and that until he heard evidence to remove it that impression would remain, but it had generated no prejudice against the defendant, and would not prevent him from trying the case fairly. He was clear to the point that to find a verdict against the defendant he would require full proof by the prosecution. The evidence sustains the ruling of the court. *People v. Wells*, 100 Cal. 227, 34 Pac. 718; *People v. Fredericks*, 106 Cal. 559, 39 Pac. 944; *People v. Owens*, 123 Cal. 487, 56 Pac. 251.

2. The defendant, testifying in his own behalf, stated: "I knew the woman as Maria Barera. She was my woman. We had been living together about nine years. We was

known among our friends and relations as man and wife." He was then asked by his counsel: "Q. During all the time that you have been living together as man and wife what was the conduct of your wife? Was she straight?" The court sustained the objection of the prosecution to this question. Defendant excepting. Defendant then proceeded as follows: "We thought a great deal of each other, and loved each other, or we wouldn't have been living together. I never had any trouble before this night with my wife." The question to which the objection and ruling applied was not very definite, but, supposing it to have meant what counsel contended it meant, it was really answered by what followed: "I never had any trouble," etc. This was equivalent to saying that he had never had occasion to tax her with infidelity. But if the question had not been answered at all it is impossible to see how the defendant was injured. Neither an affirmative nor negative answer would have had any bearing upon the question of express malice—the only question in the case. The same observation applies to the ruling sustaining the objection of the people to the question: "During all that time who was it that supported the family?"

The question was asked the defendant whether his wife stopped at Lou Ross' house by his consent, to which the people's objection was sustained, but the ruling was entirely disregarded by the defendant, who, without further objection, went on and detailed fully the circumstances under which the deceased went to the house of Lou Ross, and the objections and remonstrances on his part. This evidence renders it immaterial whether the ruling was correct or not.

Among the instructions requested by the defendant was the following: "[In this case if the killing was willful (that is, intentional), deliberate, and premeditated it is murder in the first degree, otherwise it is murder in the second degree; and, in determining the degree, any evidence tending to show the mental status of the defendant is a proper subject for the consideration of the jury. The fact that the defendant was drunk does not render the act less criminal, and in that sense is not available as an excuse, but there is nothing in this to exclude it as evidence upon the question as to whether the act was deliberate and premeditated.] Presumptively, every killing is murder, but so far as the degree is concerned no presumption arises from the mere fact of killing, considered separately and apart from the circumstances under which the killing occurred. The question is one of facts, to be determined by the jury from the evidence in the case, and it is not a matter of legal conclusion; and drunkenness, as evidence of a want of premeditation, is not within the rule which excludes it as an excuse. Drunkenness neither excludes the offense nor avoids the punishment which the law inflicts, when the character of the

offense is ascertained and determined, but evidence of drunkenness is admissible with reference solely to the question of premeditation. In case of premeditated murder, the fact of drunkenness is immaterial. A man who is drunk may act with premeditation as well as a sober one, and is equally responsible for the consequences of his act. In murder in the first degree, it is necessary to prove the killing was premeditated, which involves, of course, an inquiry into the state of mind under which the party committed it, and in the prosecution of such an inquiry his condition, as drunk or sober, is proper to be considered. The weight to be given to it is a matter for the jury to determine, and it is sufficient for the court to say to the jury that it should be received with caution, and carefully examined in connection with all the circumstances and evidence in the case." The court in giving this instruction omitted the portion inclosed in brackets. This omission was not error, since the same proposition (that drunkenness is to be considered in determining the degree of murder) is plainly stated in that part of the instruction given.

The judgment and order of the superior court are affirmed.

We concur: McFARLAND, J.; SHAW, J.; ANGELOTTI, J.; VAN DYKE, J.; LORIGAN, J.

(141 Cal. 424)

In re POTTER'S ESTATE. (S. F. 3,526.)  
(Supreme Court of California. Dec. 26, 1903.)  
NUNC PRO TUNC JUDGMENT—AWARDING COSTS.

1. The province of a nunc pro tunc judgment is to supply matters of evidence and to rectify clerical misprisions; and a judgment under Code Civ. Proc. § 1602, dismissing without prejudice a petition under section 1598 in the matter of an estate for specific performance of a contract of sale of land by deceased, which, as intended, makes no award of costs, which, under section 1720, are in the discretion of the court, may not be amended by a nunc pro tunc judgment to award costs.

Department 2. Appeal from Superior Court, Solano County; S. K. Dougherty, Judge.

In the matter of the estate of Charles R. Potter, deceased. From a nunc pro tunc judgment amending a judgment dismissing a petition so as to award costs to the administrator, the petitioners appeal. Modified.

Haskell & Denny and J. T. Campbell, for appellants. Lyman Green and F. A. Meyer, for respondent.

HENSHAW, J. A petition was filed by the appellants in the matter of the estate of the deceased, seeking specific performance of a contract for the sale and conveyance of land made by deceased with them. The proceedings were under sections 1597 and 1598 of the Code of Civil Procedure. The administrator made answer, controverting the alleged

¶ 1. See Judgment, vol. 30, Cent. Dig. § 612.

right to compel the conveyance, and concluded by a prayer that the petitioners take nothing by their petition. After hearing, the court dismissed the petition without prejudice, as contemplated by section 1602 of the Code of Civil Procedure. The decree was entered accordingly. This decree was entered upon the 11th day of June, 1902. Some months thereafter the administrator filed his "notice of a motion for judgment nunc pro tunc," by which he proposed to ask the court to amend its judgment by adding thereto a judgment for costs against the petitioners; stating that the motion would be made upon the ground "that said administrator inadvertently failed on said 11th day of June to ask for said judgment, and upon the ground that said court at any time has the right to enter said judgment." The court did order its judgment amended nunc pro tunc, and taxed the costs against the petitioners in the sum of \$158. From this judgment as amended, they appeal.

Various other orders were made by the court, and a contention arises between the parties as to whether or not these orders are appealable. But without entering into a minute examination and discussion of them, it is sufficient here to say that, giving fullest weight to the action of the trial court in the premises, it amounted to a modification and amendment of its judgment. From the judgment so amended and modified an appeal taken within 60 days will lie. *Estate of Corwin*, 61 Cal. 160; *Stuttmeister v. Superior Court*, 71 Cal. 322, 12 Pac. 270. We are of the opinion that, under section 1720 of the Code of Civil Procedure, it was within the power of the court to have awarded costs upon the determination of this proceeding. It is true that costs follow the final determination or judgment, as an incident thereto; but the petitioners had invoked this proceeding, had failed therein, and the result was a judgment or decree of dismissal. It is also true that that judgment or decree did not finally determine their rights to a conveyance, but it did finally determine their rights in that particular proceeding; and within the discretion of the court, as contemplated by section 1720, the expenses in the contest against the estate which they had invoked could justly have been taxed against them. Upon the other hand, it was equally competent for the court to have ordered each party to the contest to bear and pay his own costs, or, what in law would have been the equivalent, to have made no order whatsoever concerning costs. This last is precisely what the court did. Its decree was silent upon the matter. Moreover, the administrator, in his answer, did not ask for costs. The question thus presented is whether such a judgment so entered may thereafter be amended by the court so as to include costs. This, under the circumstances shown, we think the court had not the power to do. Undoubtedly the ground of motion upon the

part of the administrator afforded no legal reason or legal excuse for the court's action. The fact that a party litigant inadvertently fails to ask for a judgment confers neither power upon the court, nor right upon the litigant, to seek a modification of such judgment as the court may have advisedly given.

There remains the only other question—whether or not the court has, as asserted in the motion, and here argued, the inherent power at any time to enter such a judgment. We think it has not such power. The object of entering judgments and decrees as of some previous date is to supply matters of evidence and to rectify clerical misprisions, but not to enable the court to correct judicial errors. If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy such errors by ordering an amendment nunc pro tunc of a proper judgment. *Freeman on Judgments*, §§ 61, 68; *Morrison v. Dapman*, 3 Cal. 255; *In re Skerrett's Estate*, 80 Cal. 63, 22 Pac. 85; *Leonis v. Leffingwell*, 126 Cal. 372, 58 Pac. 940; *Cowdery v. London*, etc., Bank (Cal.) 73 Pac. 196. The amendment to the judgment in the case at bar is within the limitation and prohibition of this principle. It was the attempt by the court, not to correct a clerical misprision, not to supply omitted evidentiary matter, but at a later date to enter a judgment which originally it had never contemplated entering, but which at the time of giving the original judgment it might have caused to be entered.

The appeal from so much of the judgment as awards costs against appellants is therefore sustained, with directions to the trial court to deny the administrator's application for a modification of the judgment so as to allow him costs, and to strike from the judgment the award of costs against appellants herein.

We concur: LORIGAN, J.; MCFARLAND, J.

(27 Utah, 361)

#### IN RE CAMPBELL'S ESTATE.

(Supreme Court of Utah. March 10, 1904.)

#### WILLS—CONSTRUCTION—BEQUEST—SPECIFIC LEGACY—INTENTION OF TESTATOR.

1. In construing a will, the intention of the testator should guide the court in its decision.

2. Where the intention of a testator in respect to a matter is clearly expressed, any subsequent expression in order to limit it must be clear and intelligent.

3. "Bequeath" is the term generally by which a gift of personalty is made in a will.

4. The word "legacy" means the money or personal property bequeathed by will.

5. A specific legacy is something distinguished from the rest of the testator's estate, and it is sufficient if it can be specified and distinguished from the rest of the testator's estate at the time of his decease.

¶ 1. *Quincy v. Rogers*, 9 Cush. 291.

¶ 2. *Stevenson v. Dawson*, 3 Beav. 548.

6. Rev. St. 1898, § 2802, subd. 1, provides that a legacy of a particular thing specified, and distinguished from all others of the same kind belonging to the testator, is specific. Testator's will directed that certain mines be not sold until his daughter should reach 21 years of age, but that, in case any of the mines were sold before his death, the money received therefrom after his death should be divided and paid over to the beneficiaries in certain proportions. Another clause provided that "the property herein specially bequeathed shall be delivered" when his daughter should reach 21 years of age, and another clause provided that the "bequests" mentioned in the first clause should in no case be paid unless derived from the proceeds of the mines. Held, that moneys paid by the purchaser of one of the mines (the same having been sold before testator's death) should be divided pursuant to the first clause, since the proceeds of the mines were not in existence when the will was made, and the phrase "property herein specifically bequeathed" applied to the property in existence and owned by the testator at the time of his death, and which was specifically bequeathed.

Appeal from District Court, Salt Lake County; W. C. Hall, Judge.

Judicial proceedings in the matter of the estate of Allen G. Campbell, deceased. Petition by Charles Rufus Campbell, praying for the distribution of a certain fund to the beneficiaries under the will of deceased. From a decree ordering distribution in accordance with the prayer, Eleanor Campbell, executrix, appeals. Affirmed.

John G. North and P. L. Williams, for appellant. Sutherland, Van Cott & Allison, for respondent administrator. Andrew Howat, for respondent Charles Rufus Campbell.

BASKIN, C. J. The last will and testament of Allen G. Campbell, a resident of the county of Riverside, Cal., and who died in said county on the 16th day of June, 1902, was duly admitted to probate in the superior court of said county on the 7th day of July, 1902, and Eleanor Campbell, his wife, was on said day, in pursuance of the provisions of the will, appointed executrix. A portion of both the real and personal property to which the will relates being in the state of Utah, a copy of the will and the probate thereof in said county, duly authenticated, were filed; and the will was duly admitted to probate in the district court in and for the county of Salt Lake, state of Utah, on the 11th day of August, 1902, and on the same day William B. Stanley was duly appointed administrator, with the will annexed by said court. The will, after having directed certain groups of mines situated in Utah to be held for sale at specified prices until the testator's daughter Caroline Neil Campbell reached the age of 21 years, or, in case of her death before that time, until she would have arrived at that age, provides, in item 12, that "in case any or all of said properties are sold before my death, then the amount of money paid to me before my death, shall go into my estate, and the same shall not be paid over as the proceeds from the above-mentioned properties herein directed to be

paid over as hereinafter specified and mentioned. The money received after my death from each of the said groups shall be divided and paid over as follows, to wit: Four-sixths of the net proceeds from each group shall be invested in United States government bonds, for the benefit of and to be owned by said three children by my wife Eleanor; one-sixth shall be paid to my said son Charles Rufus, and one-sixth shall be paid to my nephew William B. Stanley, until six hundred thousand dollars have been divided and paid over from the first sales of said properties." The testator sold one of the aforesaid groups for \$128,000, and there was paid to him \$83,494.28. Since his death the balance of the purchase price of said group, \$42,505.72, has been paid to the said William B. Stanley, as administrator, and which he now has in his possession. Charles Rufus Campbell, the son of the testator mentioned in the foregoing provisions of the will, on the 29th day of January, 1903, filed a petition in the district court of Salt Lake county, in which the foregoing facts, among others, were alleged, and prayed for an order directing the \$42,505.72 so paid to the administrator, less the inheritance tax due thereon, to be distributed to the beneficiaries thereof in the proportions directed by the will. The executrix, Eleanor Campbell, in her own behalf, and as guardian of her minor children, answered, denying that under the provisions of the will the said sum of \$42,505.72 was subject to distribution until the said Caroline Neil Campbell became of the age of 21 years, or, in case of her death, until she would have reached that age. William B. Stanley, the administrator, answered, and admitted the allegations of the petition, and joined with the petitioner in praying for the distribution of said sum. A distribution in accordance with the prayer of the petition was granted.

It is provided in item 16 of the will that "the property herein specially bequeathed or devised shall be delivered when my said daughter reaches, or would reach the said age of twenty-one years." It is clear from the provisions of item 12, when considered alone, that it was the intention of the testator that, in case he should sell any or all of said mines, any money paid therefor after his death, as well as the proceeds of all or any of said mines sold after his death, should, upon the receipt thereof, be divided, paid over, and invested as in said item directed. The appellant contends that item 12 is qualified by item 16, and that these two items, when considered together, show that the testator's intention was that no distribution of the proceeds of said mines should be made until his "said daughter reached, or would have reached, the age of twenty-one years." As stated in the opinion of Chief Justice Shaw in *Quincy v. Rogers et al.*, 9 Cush. 291, "The intent of the testator \* \* \* is the polar star which should guide the court

in its decision." Where the intention of the testator in respect to a particular matter is clearly expressed by the terms of the will, "any subsequent expression of intention by the testator must, in order to limit" the prior expression of intention, "be equally clear and intelligible, and indicate an intention to that effect with reasonable certainty." 1 Underhill on Wills, § 358; 29 Am. & Eng. Enc. Law (1st Ed.) 367-369, and cases there cited. This is a well-settled rule. It therefore becomes necessary in determining whether the subsequent provision of the will in question, before quoted, meets the requirements of this rule, to ascertain the character of the bequest or legacy in question.

In common acceptation, "bequest" and "legacy" are synonymous terms, but "bequeath" is the term generally by which a gift of personalty is made in a will, and a legacy is the money or personal property bequeathed. The words "devise," "bequest," and "legacy" are not infrequently used in wills in a sense different from their strict legal meaning. It is stated in the recent work of Page on Wills, § 2, that, "of the verbs used to denote the act of making a will, 'devise' is properly used of realty, and 'bequeath' of personalty. Of the nouns used to name the various forms of gift, 'devise' is used of a gift of realty. 'Legacy' is used of a gift of personalty in general. None of these words have so fixed a legal meaning, however, that a gift will fail because testator does not use the words descriptive of the gift or the act of giving with technical accuracy. A devise is often miscalled a 'bequest,' or 'bequest' is often used to include both realty and personalty, or is used of a gift of money alone. So the verb 'devise' is often used to refer to personalty alone." Subdivision 1, § 1357, of the California Code, approved March 21, 1872 (2 Deering's Code, p. 253), provides, "A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific." Subdivision 1, § 2802, Rev. St. Utah, 1898, is the same as the foregoing. In *Estate of Woodworth*, 31 Cal. 595, it is held that "a specific bequest of personal property is the bequest of a particular thing or money specified and distinguished from all others of the same kind, as of a horse, or money in purse." In *Estate of Apple*, 66 Cal. 437, 6 Pac. 11, the court, in reference to the subdivision of the California Code herein before quoted, said: "Legacies are distinguished and designated according to their nature, as follows: A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific." Mr. Underhill, in volume 1, § 407, states that "a specific legacy is a gift of a particular thing or of money, specified and distinguished from all things, and which at the execution of the will is owned by the testator, as of a horse, or a piece of plate, or of money in purse,

stocks of a corporation, and the like." In *Harper v. Bibb and Falkner*, Ex'rs, 47 Ala. 553, it is said: "A specific legacy is one that can be separated from the body of the estate, and pointed out so as to individualize it and enable it to be delivered to the legatee as a thing sui generis. The testator fixes upon it, as it were, a label by which it may be identified and marked for delivery to the owner, and the title to it, as a separate thing, vests at once on the death of the testator in the legatee. *Innis v. Johnson*, 4 Ves. Jr. 568, 573; *Kirby v. Potter*, Id. 748, and note 'a,' Sumner's Ed. When such individualization is not affected by the language of the will, the legacy can hardly be said to be specific." In *Loring v. Woodward*, 41 N. H. 394, it is said: "A legacy is specific, as has been said, when it is a bequest of a specific article of the testator's personal estate, distinguished from all others of the same kind—as, for instance, of a particular horse, or piece of plate, money in a purse or chest, a particular stock in the public funds, or a bond or other security for money. *Stevenson v. Dawson*, 3 Beav. 349; 1 Rep. Leg. 170; Wms. Ex. 903." In *Stevenson v. Dawson*, 3 Beav. 348, the Master of the Rolls said: "A specific legacy is something distinguished from the rest of the testator's estate, and it is sufficient if it can be specified and distinguished from the rest of the testator's estate at the time of his decease." In 1 Underhill on Wills, § 405, it is stated that "the very essence of a specific legacy is absent in the above example, as the testator does not give articles specifically which may be readily identified as owned by him at the execution of his will."

No bequest or devise of the mines from which the proceeds in question were derived was made, and the only property, having any relation to said proceeds, owned by the testator at the time of his death, was a right of action for the unpaid balance of the purchase price of the mines sold by him in his lifetime; and that chose in action was not specifically bequeathed. Nor does the will contain any specific or general bequest which can be construed to include a chose in action. No distributable proceeds of said mines were in existence at the time the testator died. In view of these facts, and the authorities before cited, and the provisions of the California Code and Utah statutes upon the subject, notwithstanding the will provides in item 9 that the bequests in item 12 shall in no case be paid unless derived from the proceeds of said mines, the bequests or legacies in question are neither general, specific, nor demonstrative, but are sui generis. As the proceeds of the mines mentioned in the will were not in existence when the will was made, and the portion bequeathed could only arise, and as such become property, after the death of the testator, it is neither clear nor probable that he intended that the terms "the property herein specifically be-

queathed or devised" should apply to the proceeds of the mines and limit his previously expressed intention. On the contrary, the reasonable inference from these terms is that they were intended to apply to the property in existence and owned by the testator at the time of his death, and which was specifically bequeathed or devised. We are therefore clearly of the opinion that the contention of the appellant is not tenable.

The judgment of distribution is affirmed, with costs.

**BARTCH and McCARTY, JJ., concur.**

(27 Utah, 350)

**FELKNER et al. v. DOOLY.**

(Supreme Court of Utah. March 9, 1904.)

**TRUSTS—ENFORCEMENT—LIMITATIONS—LACHES—RES JUDICATA.**

1. The duty of a trustee to account for all funds received by him, including the proceeds of a mortgage sale to him of a part of the trust property, having been determined in a prior action, the decision is *res judicata* in a subsequent action against him by other cestuis que trust, in so far as it related to his duty to account to them with respect to the same funds.

2. An express trust never having been fully performed, it is still a subsisting and continuing trust, against which limitations do not run.

3. A trustee could not continue as such in the management of the trust property, and, whenever he made a sale of any part of it, repudiate his trust as to the proceeds of such sale, and thus compel the cestuis que trust to commence an independent action in order to prevent the running of the statute of limitations against the proceeds of each particular sale.

4. Where the matters involved in an action by a part of the cestuis que trust to compel the trustee to account had been constantly before the courts ever since the trust was accepted until shortly before the action was brought, the cestuis que trust, in first one capacity, and then another, demanding an accounting, and the trustee as persistently refusing, the trustee's claim of laches will not be allowed to defeat the action, where the position of the parties has not changed, and the trustee has not been prejudiced by the delay, for which he alone is responsible.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by William H. Felkner and others against John E. Dooly to enforce a trust. From a judgment for defendant, plaintiffs appeal. Reversed.

The facts in this case, so far as material in the determination of the questions raised by this appeal, are as follows:

On the 27th day of February, 1883, W. A. Norton made, executed, and delivered to defendant, John E. Dooly, two promissory notes, of \$10,000 each, and, to secure the payment of these notes, on the same day executed and delivered to Dooly a mortgage on an undivided two-thirds interest in the Charles Dickens mine, the Charles Dickens mill site, water ditch, water right, buildings, reduc-

tion works, and all appurtenances used in connection with said properties. On the — day of —, 1883, the said Norton executed and delivered to W. S. McCornick his promissory note of \$10,000, and, to secure the payment thereof, gave McCornick a mortgage on the other undivided one-third interest in the property mentioned in the mortgage to Dooly, which interest was not included in or covered by the Dooly mortgage. On the 20th day of June, 1884, Norton, by a deed of conveyance, conveyed to Dooly the property mortgaged (the Charles Dickens property), together with certain mining claims, including an undivided one-half interest in a mining claim known as the "Hidden Treasure," in trust, as found by the court, "to convert the said property, real and personal, into money, and out of the proceeds thereof to pay the debts of said Norton, and, if there was a residue, to pay the same to the devisees under the will of the said William A. Norton." Norton made his will at the same time he executed the trust deed. Dooly was named as executor of the will, with the power to take possession of all of Norton's property, and hold the same in trust, and "to turn the same into money, \* \* \* and out of the proceeds \* \* \* to satisfy, pay, and discharge all just debts and liabilities, and the costs \* \* \* of administration, and to distribute and pay over all of the residue of the proceeds to \* \* \* Wilson and Margaret Norton," father and mother of W. A. Norton. At the time the will and trust deed were executed, Norton was stricken with a fatal malady, and was not expected to recover. Dooly accepted the trust, and at once assumed control of his (Norton's) property and business affairs. The property, which consisted mainly of mining property and machinery for the reduction of ores, was all situated in the state (then territory) of Idaho. Norton died July 15, 1884, a little less than a month after the trust deed and will were executed. In the year 1885, proceedings were commenced in Idaho by 17 lien claimants to foreclose their liens on the Charles Dickens property for wages. Dooly was made a party defendant, and he answered in each case, setting up his claim in the property by virtue of his mortgage. These cases were consolidated, and W. S. McCornick was brought in as a party defendant. The case came on for hearing, and on the 15th day of February, 1886, a decree was entered foreclosing the mechanic's lien and the mortgages held by McCornick and defendant Dooly. By this decree a lien was established in favor of Dooly for \$25,610.41, and in favor of McCornick for \$22,368.77. Five of the mechanics' liens, which aggregated \$6,442.40, were given priority over the Dooly lien. A sale was made pursuant to this decree in July, 1886, to R. C. Chambers, who acted as trustee for Dooly and McCornick. The third interest covered by the lien in favor of McCornick was sold for \$24,000, and the two

¶ 1. *Charter Oak v. Gisborne*, 5 Utah, 319, 15 Pac. 253.

¶ 2. See *Limitation of Actions*, vol. 33, Cent. Dig. §§ 498, 499.



thirds interest covered by the Dooly lien for \$28,000. No redemption was made, and on January 22, 1887, the time for redemption having expired, the sheriff who made the sale issued a deed to Chambers, who, at the request of Dooly, transferred the property by deed to John A. Marshall, trustee, and on the same day Dooly received the money for the property, which plaintiffs are now seeking to make him account for. On December 28, 1887, Hamilton and Rohrer, two creditors of William A. Norton, commenced an action in the Third District court of the territory of Utah against John E. Dooly, in which they alleged the same trust in their favor that appellants are now alleging in this action. In that case Dooly answered, setting up the facts hereinbefore stated, and averring that he purchased the property at the sheriff's sale as his own, and "that said purchase was so made that the title to the whole claim might be in one person, and that the interest of said Dooly, individually and as trustee, might be severed; \* \* \* that by virtue of such sale and conveyance said defendant became and was the equitable owner of an undivided two-thirds of said mining claim [referring to the Charles Dickens mine], freed from said trust; that thereafter the same was sold and conveyed by said Chambers, under the authority of the defendant [Dooly]; and that said sum received therefor \* \* \* was not received or even held in trust." This case was tried, and resulted in a decree in favor of defendant Dooly. An appeal was taken to this court, and the judgment of the district court was reversed. *Hamilton v. Dooly*, 15 Utah, 280, 49 Pac. 769. For a more detailed statement of the facts, reference is hereby made to that case. It was stipulated that the evidence taken in that case, in so far as it might be material and competent, might be used in this. The record in *Hamilton v. Dooly* was accordingly added to, and incorporated in, the record of this case; hence we have the records of both cases before us.

On January 16, 1900, plaintiffs, who hold by assignment the claims of a large number of the creditors of W. A. Norton, commenced this action to compel defendant, Dooly, to account for all funds that have come into his hands by virtue of his trust, including the proceeds of the sale of the two-thirds interest in the Charles Dickens property, which they allege are not less than \$150,000, and without delay pay into court whatever balance shall be found upon such accounting to be in his possession, and that a receiver be appointed by the court to take possession of and sell the undivided half interest of the Hidden Treasure mine, held by Dooly by virtue of his trust, and all other property and money that may be found in his hands by virtue of said trust. Defendant answered, and denied that he received \$150,000 for the two-thirds interest in the Charles Dickens property, but admitted that he received there-

for \$59,364.03. He also denied that this money was received or held in trust by him, and denied generally "that he has sufficient funds in his hands, arising from the sale of said property, to pay all or any of the creditors of William A. Norton, deceased, or that he has any funds in his hands, or ever had any funds in his hands, arising from the sale of said property, which were applicable to the payment of the claims of any of said creditors, either in whole or in part." As a further defense, defendant alleged that plaintiffs' cause of action is barred by the provisions of sections 2876 and 2883, and of the provisions of subdivision 4 of section 2877, Rev. St. 1898.

As conclusions of law the court found (1) that appellants had been guilty of laches in not sooner seeking to enforce the trust created by the deed from William A. Norton to John E. Dooly, and that their claims are old and stale; (2) that the cause of action set out in the complaint is barred by subdivision 4, § 2877, Rev. St. 1898; (3) that the cause of action set out in said complaint and in the said cross-complaint is barred by the provisions of section 2883, Rev. St. 1898. Judgment was entered dismissing plaintiffs' complaint, and from that judgment appellants have appealed to this court.

Pierce, Critchlow & Barrette, for appellants. Dickson, Ellis & Ellis and Brown & Henderson, for respondent.

McCARTY, J., after making the foregoing statement of facts, delivered the opinion of the court.

The first question presented by this appeal is, did the sale of the Charles Dickens mine under the foreclosure proceedings, and the purchase of the property by Dooly, terminate his trust as to the two-thirds of the property covered by his mortgage lien? Appellants contend that the sale of the property and its conversion into money did not in any respect change the legal relation of Dooly, as trustee of the property, to the beneficiaries, notwithstanding the fact that he purchased the property at the foreclosure sale with the intention of freeing it from the trust, and later on disposed of it as his own to an English syndicate. On the other hand, respondent contends that he purchased the Charles Dickens property at the sheriff's sale for himself, and not for the benefit of the cestuis que trust, and thereby repudiated his trust as to this particular property, and that thereafter there no longer existed a continuing and subsisting trust as to it, or the money received from the sale thereof to the English syndicate.

The rule is elementary that, when a person accepts a trust, he is bound to perform the duties arising therefrom, and he cannot by his own acts discharge himself wholly or in part from its duties, or escape its responsibilities. 1 Perry on Trusts, 268-274; 1

Beach on Trusts & Trustees, 383. The defendant in this case having accepted the trust created by the deed from Norton to him, and entered upon the management of the trust property, he was legally bound to execute and carry out the trust, unless released by consent of the cestuis que trust, or discharged by order of a court having jurisdiction to act in the matter. The duties required of respondent as trustee were to sell the trust property, and out of the proceeds, first, pay the costs incurred in the management of the trust estate, including a reasonable compensation to the trustee for his services; second, to pay the creditors of W. A. Norton; and then pay the residue, if any, to the heirs of said Norton. We know of no rule of law or equity that would permit respondent to exclude or divert any of the trust property from the trust, and then, by a series of transactions with third parties, and in a circuitous manner, acquire a title in himself to the property so diverted, freed from the burdens of the trust; but, on the contrary, it is well settled that a trustee cannot deal with trust property for his own benefit. 2 Beach on Trusts & Trustees, 520. 1 Perry on Trusts, 195-197; 26 Am. & Eng. Enc. Law, 194, and cases cited in note. If a trustee desires to bid at a sale in order to protect some interest he may have in the property, he must make application to the court, and give the beneficiaries under the trust an opportunity to be heard; and on investigation the court may, under such restrictions as it may deem necessary to protect the interests of the cestui que trust, permit the trustee, if it appears his application is made in good faith, to bid on and buy in the property. When a sale of trust property has thus been made to a trustee, and it appears that it has not been conducted with fairness to all parties, but has been so managed as to inure to the benefit of the trustee, to the injury of the beneficiaries, they (the beneficiaries) may appeal to the court; and, upon investigation, if it be found that the sale is tainted with fraud, or that any undue advantage has been taken by the trustee, the court can refuse to confirm the sale, and thereby remedy the wrong. If, however, the trustee, in making the sale, acted in good faith, having a proper regard for the welfare of the beneficiaries of the trust, as well as his own interest, he would obtain an indefeasible title to the property purchased. Scholle v. Scholle, 101 N. Y. 167, 4 N. E. 334. This procedure, however, was not followed by respondent when he purchased the two-thirds interest in the Charles Dickens property covered by his mortgage lien. He bought this two-thirds for \$28,000, which was only 16% per cent. more than the one-third covered by the McCormick lien sold for; both sales being made at the same time to R. C. Chambers, Dooly's agent. It also appears from the record that some two or three thousand dollars of the trust fund was used in making the purchase.

These questions were before this court in the case of Hamilton v. Dooly, 15 Utah, 280, 49 Pac. 769. In that case this same trust fund was involved, it being the subject-matter of litigation in the suit; and this court held, in an elaborate and carefully prepared opinion, that the purchase of the property by respondent at the sheriff's sale did not divert it from the trust, or in any respect change his (respondent's) relation, as trustee of the property, to the cestuis que trust. In that opinion, Mr. Justice Bartch, speaking for the court, said: "When the defendant [Dooly] accepted the trust under the conveyance from Norton, he at once became charged with the duty of managing and disposing of the property in a careful and prudent manner for the benefit of the cestuis que trust. The property became a trust fund, and could not be diverted from the objects of the trust. His duty in relation thereto was imperative, and the fiduciary relation which thereafter existed between him and his beneficiaries made it impossible for him to lawfully gain any peculiar advantage or benefit to himself out of the trust estate. Under such a trust the trustee is absolutely prohibited from speculating with the trust funds; and if he does, and loses, the loss is his, and, if he gain, the gain belongs to the cestuis que trust. \* \* \* A person in such a situation cannot be permitted to act up to the time of the sale, obtain all the information useful to him, and then shake off his character as trustee, and become an unconditional purchaser of the property." And on page 305 this court again declared: "A mortgagee who is also a trustee is bound to fulfill his trust with the same fidelity as if he were not a creditor. Nor could the defendant act as trustee up to the time of the sale, then disrobe himself of his fiduciary character, and, with the information obtained while in the trust relation, gain an advantage to himself. \* \* \* As mortgagee, his rights were in no way impaired by the sale. His situation was just the same after as before. He still had the right to payment out of the property, but he had no right to speculate with the trust fund, and therefore it was his duty to account to the cestuis que trust for the profits of the sale to the syndicate." The decision in that case, so far as it deals with and defines the character and nature of the fund under consideration, and holds that it is respondent's duty to account to the cestuis que trust for all funds received by him as trustee, including the proceeds of the sale of the Charles Dickens property, is *res adjudicata*. Therefore a further discussion of these questions is unnecessary, as we reaffirm the doctrine announced and the conclusions reached in that case. That decision ought to have terminated the litigation over the trust fund, except as to the accounting, for the rights, duties, and liabilities of the respondent respecting his stewardship of the trust fund

were, in a general way, clearly defined and pointed out.

The grounds mainly relied upon by respondent to defeat a recovery in this case are the statute of limitations and laches. Respondent insists that when he purchased the two-thirds interest in the Charles Dickens property at the sheriff's sale, as his own, he thereby repudiated his trust as to this particular property, and the statute of limitations commenced to run in his favor, and that the action is barred. Appellants contend that, this being an express trust, and never having been closed and respondent freed from his duties as trustee, the statute of limitations cannot be invoked. So far as shown by the record, respondent has never accounted for the trust funds which have come into his possession by virtue of his trust. The trust having never been closed or fully performed, it is still a subsisting and continuing trust, against which the statute of limitations does not run. The property mentioned in the trust deed and in the will was taken by respondent under the same trust, and he could not continue as trustee in the management of the property, and, whenever he made a sale of any part of it, repudiate his trust as to the proceeds of such sale, and thus compel the cestui que trust to commence an independent action in order to prevent the running of the statute of limitations against the proceeds of each particular sale. *Charter Oak v. Gisborne*, 5 Utah, 319, 15 Pac. 253; *2 Lewin on Trusts*, 863; *2 Perry on Trusts*, 863; *Allen's Adm'r v. Wooley's Ex'rs*, 2 N. J. Eq. 209; *Eastman v. Davis* (Vt.) 35 Atl. 73.

The junior counsel (law firm) for respondent in this case appeared for the plaintiffs in the case of *Hamilton v. Dooly*, supra, in which, as hereinbefore stated, precisely the same subject-matter and the same facts and questions of law were presented as are now involved in this suit, and, after making a detailed and minute statement of the facts in that case, in their printed argument, declared that "there never was a plainer case in the world where a trustee, taking money of the trust fund, bought in property for the benefit of the trust fund, and must be held to account for whatever there may be in it." And again they say: "The statute of limitations does not bar a trust established, as between a cestui que trust and his trustee." It necessarily follows that if *Dooly*, in that case, was legally bound to account for the proceeds of the Charles Dickens property, he is in the case now under consideration. His relations, duties, and obligations to the plaintiffs in this case are the same as they were to *Hamilton* and *Rohrer*—no greater, no less. The plaintiffs rely for a recovery upon the identical facts produced in the case of *Hamilton v. Dooly*, supra, and upon the same principles of law invoked therein, and upon which the case was determined and disposed of.

The case of *Hamilton v. Dooly*, supra, was decided July 29, 1897. On March 7, 1899, W. J. Barrette, the administrator with the will annexed of the estate of W. A. Norton, commenced an action in the Third Judicial District court of this state against *Dooly*, as trustee (respondent herein), to compel him to account for the trust funds received by him. Respondent interposed a demurrer, which was sustained by the trial court. An appeal was taken to this court, and the judgment of the lower court was affirmed; this court holding that an administrator could not sue in behalf of the cestui que trust. The opinion was announced and handed down December 13, 1899. *Barrette v. Dooly*, 21 Utah, 81, 59 Pac. 718. This action was commenced January 16, 1900. In fact, the record shows that the matters involved have been constantly before the courts of Idaho and of this state ever since *Dooly* accepted the trust; the cestui que trust, in first one capacity, and then another, demanding an accounting, and *Dooly* as persistently refusing. Under these circumstances, we do not think plaintiffs have shown such laches as will defeat their action, especially in view of the fact that the position or relations of the parties have not changed, and that respondent has not been prejudiced by the delay, for which he alone is responsible.

After a careful review of the entire record, including the records of the former cases, we are of the opinion, and so hold, that the findings of the trial court, so far as they are inconsistent with the views herein expressed, are erroneous, and not supported by the evidence.

The case is reversed and remanded, with directions to the trial court to set aside the judgment entered, and proceed in accordance with this opinion. Costs of this appeal to be taxed against respondent.

BASKIN, C. J., and BARTCH, J., concur.

(27 Utah, 368)

STATE v. DAVIS et al.

(Supreme Court of Utah. March 10, 1904.)

BAIL—BOND—ACTION ON BOND—COMPLAINT—SUFFICIENCY.

1. Under the express provisions of Sess. Laws 1901, p. 70, c. 69, the district court has authority to direct the district attorney to institute an action on a forfeited bail bond.

2. Rev. St. 1898, § 4686, requires that a bail bond must be returned to the clerk of the court at which the defendant is required to appear, but does not require it to be filed. *Held*, that a complaint in an action on a bail bond was not insufficient because it failed to allege the filing of the bond.

3. "Bail" is substantially defined as meaning "to set at liberty a person arrested or imprisoned, on security being taken for his appearance," etc.

4. Where, in an action on a bail bond, the bond, which was made a part of the complaint, recited that "defendant having been admitted to

¶ 2. See *Bail*, vol. 5, Cent. Dig. § 391.

bail," etc., and it was alleged that, immediately after execution of the bond, defendant left the state, the complaint, as against a general demurrer, sufficiently alleged that the defendant was released on the bond.

5. Pen. Code, c. 27, contained in Rev. St. 1898, which was adopted by Sess. Laws 1899, c. 7, § 1, is entitled "Abortion," and imposes a punishment on any one who causes the miscarriage of a pregnant woman, unless necessary to preserve life. *Held*, that a contention in an action on a bail bond given by one charged with abortion that no such crime was known to the law of the state was without merit.

Appeal from District Court, Cache County; C. H. Hart, Judge.

Action by the state of Utah against D. H. Davis and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

J. C. Walters, for appellants. M. A. Breden, Atty. Gen., and W. R. White, Dep. Atty. Gen., for the State.

**BASKIN, C. J.** This is an action upon a bail bond executed by the defendants. A general demurrer having been interposed to the complaint and overruled, judgment was rendered against the defendants.

The first objection to the complaint is that the order of the district court directing the district attorney to institute said action was beyond the power of the court, and is therefore void. Such authority is expressly conferred by section 1 of the act relating to district attorneys, approved March 14, 1901 (Sess. Laws 1901, p. 70, c. 69).

The second objection is that it is not alleged that the bail bond was ever filed in the district court. The appellants contend that such filing of the bond is required under the provisions of section 4686, Rev. St. 1898. That section requires that all undertakings of bail must be returned to the clerk of the court at which the defendant is required to appear, but does not require that they must be filed. As the only requirement of the statute is that the undertaking of bail must be returned to the clerk of the court, an allegation that it was filed would perhaps sufficiently allege its return, yet that allegation is not absolutely necessary in the statement of the cause of action.

The third objection is that there is no allegation that the defendant was released from custody upon the execution of the bond. It is alleged that "the defendant, immediately after the execution of the bond, left the state for parts unknown, as a fugitive from justice." The following recital occurs in the bond, which was, as an exhibit, attached to and made a part of the complaint, viz.: The defendant "having been admitted to bail in the sum of \$500.00: Now, therefore," etc. "Bail," is defined in Black's Law Dictionary, as follows: "To set at liberty a person arrested or imprisoned, on security being taken for his appearance," etc. The definition of the term by other authors is substantially the same.

The recital "having been admitted to bail," in connection with the allegation that immediately after the execution of the bail bond the defendant left the state, while not as explicit and direct an allegation as the defendant was released upon the bond as is desirable in pleading, is sufficient, as against a general demurrer.

The fourth and last objection is that the bond recites that the crime with which the defendant was charged is abortion, and that no such crime is known to the laws of this state. In support of this contention, the following statement is made in appellants' brief, to wit: "It is true that the title of chapter 27 of the penal Code is 'Abortion,' but the word does not occur in the text of either of the two subsequent sections, and it is unnecessary to add that the title 'Abortion' is no part of the section. That word, it is evident, was inserted by the Code commissioners in the compilation, and is their language alone, and not that of the lawmaking body which passed the section." The Penal Code referred to is contained in the Revised Statutes of 1898, which, as prepared, compiled, and printed by the Code commissioners, was approved, legalized, and adopted by chapter 7, § 1, of the Session Laws of 1899. Chapter 27, referred to, appears in said statutes in the following form:

#### "Chapter 27. Abortion."

"4226. Administering Drugs, etc.—Using Instruments. Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State Prison not less than two nor more than ten years.

"4227. Woman Producing Miscarriage on Self—Penalty. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to an operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the State Prison not less than one nor more than five years."

The foregoing constitutes the whole chapter. This chapter makes abortion a definite crime, and, when a miscarriage is attempted or caused in the manner mentioned in said sections, except when necessary to preserve life, the definite crime of abortion, under this statute, is committed. This being so, the contention that no such crime as abortion is known to the laws of this state is without foundation.

The judgment is affirmed, with costs.

BARTCH and McCARTY, JJ., concur.

(30 Mont. 87)

**GEBO v. CLARKE FORK COAL MIN. CO.**  
et al.

(Supreme Court of Montana. March 11, 1904.)

**PUBLIC LAWS—FRAUD IN OBTAINING PATENT  
—PATENTEE AS TRUSTEE—PLEADING.**

1. A complaint, to hold the patentee of public land a trustee thereof for plaintiff, alleging merely that plaintiff made application to purchase it as coal land, filing a declaratory statement in the land office, and went into possession and improved it; that defendant caused a forged relinquishment of plaintiff's rights to be filed in the land office, of which she did not know till five months after expiration of the time within which she might have made proof and payment; and that defendant then purchased the land, and a patent was issued to him—does not state a cause of action; it not showing that plaintiff did not also make a voluntary relinquishment, by failure to prosecute work on the land, or to make, or offer to make, seasonable proof and payment.

Appeal from District Court, Carbon County; Frank Henry, Judge.

Action by Ella D. Gebo against the Clarke Fork Coal Mining Company and another. Judgment for defendants. Plaintiff appeals. Affirmed.

This is a suit in equity, the object of which is to have the defendants (respondents here) declared to be trustees and to hold certain coal lands in trust for the use and benefit of the plaintiff (appellant here). The amended complaint alleges that on May 24, 1897, George Gebo and Ella D. Gebo in good faith made a joint application to purchase 319 acres of the public coal lands of the United States under the provisions of section 2348, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1440]; that an affidavit and declaratory statement were duly filed in the proper land office as required by law, and the rules and regulations of the Interior Department respecting the sale of coal lands; that applicants paid the filing fee, and received a receipt from the receiver of the United States land office, to which was appended a notice that applicants' filing would expire on May 20, 1898. The complaint contains averments showing that plaintiff was a citizen of the United States, possessed of the requisite qualifications to enter coal lands, but nothing whatever is said as to the qualification of her co-applicant. The complaint also alleges that plaintiff went into possession of the land, and opened a coal mine thereon, and otherwise improved the property. It is then alleged that on August 31, 1897, a false and fraudulent writing purporting to have been signed and verified by appellant, and by the terms of which George Gebo and plaintiff relinquished to the United States all their right, title, and interest in and to the land described in their application, was filed in the land office; that such false and forged relinquishment was procured and filed by and on behalf of S. W. Gebo, W. C. Strohm, and Frederick H. Davis, to enable Alfred Thomas and F. B. Burchmore to enter and purchase said land for the use and benefit

of Gebo, Strohm, and Davis, and that, immediately after the filing of said forged relinquishment, Thomas and Burchmore did purchase the land in controversy; that thereafter, in December, 1897, they (Thomas and Burchmore) sold their interests to Davis and Strohm; that afterwards Strohm sold his interest to Davis, and Davis on September 20, 1898, sold the property to the Clarke Fork Coal Mining Company, taking a mortgage on the entire property to secure the purchase price, \$100,000; that a patent from the United States was duly issued to Thomas and Burchmore; that of the fraudulent acts mentioned all purchasers subsequent to Thomas and Burchmore had actual knowledge; that the mining company is insolvent; that on June 14, 1899, appellant made a written offer to pay to the mining company \$3,190.20, being one-half of the original purchase price of the property from the United States, and demanded that the company convey to her an undivided one-half interest therein; that, by reason of the fraudulent acts mentioned, the plaintiff was prevented from procuring from the United States legal title to the land in controversy. The complaint then alleges: "(18) The plaintiff first had knowledge of the fraudulent acts herein alleged on or about the 1st of November, 1898." The prayer of the complaint is that the company be declared to be a trustee for the use and benefit of the plaintiff to the extent of a one-half interest in the property; that it be compelled to convey to her such interest; that it be compelled to account to her for the rents, issues, and profits; that the defendant Davis be required to release his mortgage on said one-half interest; and that plaintiff have judgment for such sum as may be found due on an accounting, and for her costs. To this complaint defendants interposed a general demurrer, which was sustained by the court; and, plaintiff failing to plead further, judgment for costs was entered in favor of defendants, from which plaintiff appealed.

C. L. Merrill, for appellant. Jno. A. Luce, for respondents.

HOLLOWAY, J. (after stating the facts). The demurrer challenges the jurisdiction of the court, and the sufficiency of the allegations of the complaint to state a cause of action; but, as the last ground of the demurrer only is contended for by the respondents in this court, our examination is confined to that inquiry.

Appellant argues at length that this character of action is maintainable, and this is readily conceded by respondents, so that the only inquiry before us is, does the complaint state facts sufficient to constitute a cause of action, or bring the plaintiff within the rule applicable to such actions?

The rule is that if, as a matter of fact, the government was imposed upon, and by fraud

or mistake issued a patent to some other person, when in truth the plaintiff was entitled to it, then, upon a proper showing, a court of equity will decree the patentee to be a trustee, and to hold the land in trust for the use and benefit of the party really entitled to it. *Meyendorf v. Frohner*, 3 Mont. 282. But what is a proper showing? The very foundation of the rule is that the patent was issued to another when plaintiff was justly entitled to it. Then the complaint must show such facts as that it will appear therefrom that she has connected herself with the original source of title in the government, and that her rights are injuriously affected by the existence of the outstanding patent. She must show such equities in herself as will control the legal title in the defendants' hands. *Power v. Sla*, 24 Mont. 243, 61 Pac. 468. The filing of the so-called declaratory statement does not even withdraw the land from entry, but any number of filings may be made upon the same land successively. The only effect of the filing of such declaratory statements is to give to the applicants, in the order of their filings, preference rights to purchase the land, and that only for a period of 14 months from the date of filing. In other words, such filing only initiates a right, which may be lost by relinquishment, by failure to prosecute work on the land in good faith, or by failure to make proof and payment within the 14 months; and, in order to make out a cause of action, plaintiff must show, first, that she did not voluntarily relinquish her right so initiated, and, second, that she did in good faith prosecute work upon the land, and, within the time allowed by law, did make proof and payment for the land, or at least offer to do so. She must show affirmatively that upon her part she did, or offered to do, all that was necessary to be done in order to secure the patent, and upon the doing of which patent should have issued to her (*Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61); and these in addition to the facts necessary to be shown in order to entitle her to make the filing in the first instance. If, as a matter of fact, plaintiff had known of the filing of the so-called forged relinquishment before the expiration of the 14 months, she might with some show of reason claim that it was unnecessary for her to offer to make proof or tender payment, upon the theory that the law will not require the doing of a vain thing; but, on the contrary, she shows affirmatively that she did not know of the existence of such relinquishment until more than 5 months after the expiration of the time within which she might have made proof and payment, and yet there is no allegation in the complaint that within the 14 months, or at all, she ever made any offer to prove up on the land or pay for it. The reason for the necessity of this allegation is apparent, for, if there was another valid filing made upon the same land subsequent to the

plaintiff's, and prior to the expiration of such period—and there is no allegation that there was not—and such subsequent applicant had in good faith complied with the law, plaintiff's right to patent would have ceased absolutely on May 20, 1898, and thereafter she would have been a stranger to the title (section 2350, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1441]), and unable to maintain this action at all. The complaint must negative the fact of plaintiff's voluntary relinquishment of her filing on the land. It is not enough to show an initiation of a valid claim, but she must show a valid, subsisting claim during the time allowed by law for finally merging such claim into patent. The mere allegation that a fraudulent relinquishment was filed by certain parties is not an allegation that plaintiff herself never voluntarily relinquished her claim. It is not enough for her to show that the patent should not have been issued to Thomas and Burchmore. *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428. She must show affirmatively that it was the filing of the so-called fraudulent relinquishment alone which deceived or misled the officials of the government, if they were deceived or misled, who otherwise would have received her proof and payment for the land, and issued to her the patent therefor. *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570. And the reason for this rule is manifest, for the execution and delivery of the patent to Thomas and Burchmore were the final acts of the officials of the government in the transfer of its title to the land, and, as those acts could lawfully be performed only after certain steps had been taken, the patent itself is in the nature of an official declaration by that branch of the government to which the disposition of the public lands is intrusted that all the requirements preliminary to its issue have been complied with. *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875. In the absence of any showing to the contrary, the presumption will be indulged that the officials of the Land Department had before them sufficient proof to justify the issuing of the patent to Thomas and Burchmore. *Lee v. Johnson*, supra.

Numerous other infirmities in the complaint have been pointed out, but the foregoing considerations are sufficient to demonstrate its insufficiency, and the correctness of the trial court's ruling.

The judgment is affirmed. Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

(30 Mont. 83)

INDEPENDENT PUB. CO. v. LEWIS AND CLARKE COUNTY.

(Supreme Court of Montana. March 11, 1904.)  
COUNTIES — EXPENSES OF PROSECUTIONS — BRIEFS ON APPEAL — LIABILITY OF COUNTY.

1. Const. art. 8, § 27, provides that criminal charges must be preferred in the name of the

state and prosecuted by its authority. Pol. Code, § 4450, imposes on the county attorney the duty of conducting prosecutions on behalf of the state, expenses incurred by him in such cases being, by section 4681, subd. 3, a county charge. By section 460 the Attorney General is given supervisory power over the county attorney, and in certain cases must assist any county attorney in performing his duties, and must also appear in the Supreme Court to prosecute and defend causes to which the state is a party. By section 4190 a county has only such powers as are expressly provided by law or necessarily implied from those expressed. *Held* that, after a criminal case has been appealed to the Supreme Court, the duties of the county attorney therein and his power to contract expenses for the county cease, and the duty of the Attorney General begins, and, there being no Code provision authorizing it, he has no power to contract on behalf of the county, and the county has no power lawfully to pay, expenses incurred in printing briefs filed on behalf of the state in the appeal.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Action by the Independent Publishing Company against the county of Lewis and Clarke. From a judgment for defendant, plaintiff appeals. Affirmed.

F. W. Muttler, for appellant. Lincoln Working, for respondent.

BRANTLY, C. J. A rule of this court requires briefs to be printed. Rule 10, 57 Pac. vii. In the case of *State v. Brown* (heretofore determined) 29 Mont. —, 74 Pac. 366, a brief was printed by the appellant herein at the request of the Attorney General. The prosecution having arisen in Lewis and Clarke county, the appellant presented its bill to the board of county commissioners of that county for allowance and payment. The board rejected it as not being a county charge. Thereupon an appeal was taken to the district court. Pol. Code, § 4288. In that court the parties filed an agreed statement of facts in substance as follows: The brief, which is the basis of the claim of appellant herein, was ordered by the Attorney General of the state of Montana for use of the Supreme Court in the case of *State of Montana, Respondent, v. Wilton G. Brown, Appellant*, which was from a judgment of conviction in a criminal prosecution in the district court of Lewis and Clarke county, Mont., and said brief was ordered on behalf of the state, and filed in the Supreme Court in accordance with the rule of the court requiring the same. The district court thereupon rendered judgment thereon in favor of the county; hence this appeal.

The sole question for determination is this: Is a county liable for the expense of printing briefs filed on behalf of the state in this court in criminal cases arising within such county, when ordered by the Attorney General? All criminal charges must be preferred in the name of the state and prosecuted by its authority. Const. art. 8, § 27. The county attorney is the public prosecutor, and it is his duty, among others, to attend the district

court and conduct on behalf of the state all prosecutions for public offenses. Pol. Code, § 4450. All expenses necessarily incurred by him in such cases arising in the county are a county charge. Pol. Code, § 4681, subd. 3. The Attorney General is given supervisory power over him in all matters pertaining to his official duties, and when the public service requires it, or he is requested by the Governor to do so, he must assist the county attorney of any county in the performance of his duties. Id. § 460. When the emergency arises calling him to the assistance of the county attorney, he necessarily has the authority to do anything that the inferior officer may do, or, if the circumstances require it, undo what has already been done. *State v. Dist. Court*, 22 Mont. 25, 55 Pac. 916. The connection of the county attorney with a criminal prosecution, however, ceases for the time being when it is removed to this court by appeal, and such connection is not renewed again unless the cause is remanded to the district court for further proceedings. The Attorney General must appear in this court and prosecute or defend all causes to which the state is a party (Pol. Code, § 460), and this duty is exclusively his. So long as the cause is pending in the district court, all expenses are proper charges against the county. This includes fees and mileage of officers, when they are allowed, and of witnesses and jurors. Included also is the expense of keeping the defendant when in custody. Pol. Code, § 4681. A county is one of the civil divisions of the state for political and judicial purposes, created by the sovereign power of the state of its own will, without the consent of the people who inhabit it. 7 Am. & Eng. Enc. Law (2d Ed.) 900. It is quasi corporate in character, but has only such powers as are expressly provided by law or are necessarily implied by those expressed. Pol. Code, § 4190; *State v. Coad*, 23 Mont. 131, 57 Pac. 1092. The extent of its duties and the burdens of expense to be borne by it are to be measured by the same limitations. So far as the expenses of criminal prosecutions are necessarily incurred by the county attorney, he is by law the agent of the county. When his duties in that regard cease on removal of a cause to this court, his power to contract expense also ceases.

If the Attorney General, then, has power to contract expense bills for which the county is chargeable, his authority must be found in the enumeration of his powers and duties, or else in the enumeration of matters which are proper charges against the county, and the burdens of government cast upon it under the statute. A careful examination of all the provisions of the law upon this subject does not disclose anywhere that the counties are chargeable with any expense touching a criminal prosecution after its removal to this court. Nor is there among the powers of the Attorney General with reference to such prosecutions mention of any authority to

charge any expense to a particular county. While he may supervise and assist the county attorney during the pendency of the prosecution in the district court, there is no longer anything to supervise, nor any inferior officer to assist, after the cause is removed to this court. It is then in his exclusive control; and in the absence of express authority, or authority necessarily implied, he may not charge the county with any expense incurred by him. Section 4681, *supra*, has reference only to the powers of the county attorney in this particular, and although in the supervision of the county attorney in that official's duties, or in giving such assistance as he may render in the performance of them, the Attorney General might incur expense for which the county is chargeable, such power does not appertain to the performance of his duties at the capital. Moreover, a board of commissioners may not assume and pay charges which the law does not impose upon the particular county. There was, therefore, with reference to the bill in controversy, no power to contract for the county, nor power in the county lawfully to pay. Hence the district court was correct in holding that the bill in question is not a county charge, no matter whether the Attorney General presumed to contract for the county or not, and its judgment must, for this reason, be affirmed.

Much was said in the argument of counsel touching the question whether the bill is a proper charge against the state, payable out of the appropriation made for office and traveling expenses of the Attorney General. This question is not before us, and is not decided. Judgment affirmed.

Affirmed.

HOLLOWAY, J., concurs.

MILBURN, J. I concur. The state prosecutes and should pay all expense bills incurred by it, unless there be special provision of law charging them, or part of them, to the county in which the prosecution originates. The county must pay what the law expressly says shall be paid by it, and no more. There is not any statute requiring the county to pay bills incurred by the state on appeal.

(30 Mont. 93)

STATE ex rel. COBBAN v. DISTRICT COURT OF SECOND JUDICIAL DIST. OF SILVER BOW COUNTY et al.

(Supreme Court of Montana. March 14, 1904.)

APPEAL FROM JUSTICE'S COURT.

1. The only appeal from a justice's court provided for being from a judgment, which Code Civ. Proc. § 1760, authorizes within 30 days after the judgment, an appeal from a judgment of a justice, and his subsequent order refusing to open the default, taken more than 30 days after the judgment, gives the district court no jurisdiction.

Writ of review on the relation of Kate L. Cobban against the district court of the Second Judicial District, in and for Silver Bow county, and William Clancy, judge thereof. Orders annulled.

Jas. E. Murray, for relator. Jno. F. Davies, for respondents.

BRANTLY, C. J. Application for writ of review. On November 6, 1903, an action was brought in the justice's court of South Butte township, Silver Bow county, by Kate L. Cobban against one Gust Vogel, to recover from him the possession of certain premises in the city of Butte, and damages for the use and occupancy thereof. Summons was issued and returned, showing due service on the defendant. On November 13th, the appearance day, on motion of plaintiff, the default of the defendant was duly entered; he having failed to appear within the hour allowed by statute after the time named in the summons. Evidence was then introduced and judgment entered in favor of plaintiff, as prayed for in the complaint. On November 18th the defendant served upon counsel for the plaintiff, and filed with the justice, a notice that he would on November 23d move the court to set aside the judgment. At the time appointed the parties appeared. In support of the motion, counsel for defendant filed an affidavit of the defendant, stating that he had not been served with summons in the action, and therefore had no notice of its pendency. The hearing was then continued until December 15th. The plaintiff having in the meantime filed an affidavit of the officer who served the summons contradicting the statements in the affidavit of the defendant, the justice denied the motion. On December 24th the defendant served and filed his notice of appeal to the district court from the judgment and the order, and, having given the undertaking required to effectuate the appeal, procured a transcript of the proceedings to be filed in the district court. On February 20, 1904, the motion to set aside the default and judgment was submitted to the district court. At the same time the defendant submitted a verified answer, setting forth his defense and an affidavit of merits. These papers were intended to supplement the showing made in the justice's court. Upon consideration an order was made sustaining the motion, and the defendant was permitted to file the answer. On February 27th the plaintiff submitted a motion to dismiss the appeal on the grounds, among others, that the court had no jurisdiction of the action, in that the appeal from the judgment had not been taken within the time provided by the statute after the rendition thereof, and that no appeal lies from such an order. The motion was denied. Thereupon this application was made to have annulled the two orders mentioned.



The question for decision is, was the cause removed to the district court in conformity with the provision of the statute applicable, so as to confer jurisdiction? The right of appeal, though guarantied under the Constitution (article 8, § 23), may be exercised only in obedience to the statutory regulations applicable. These regulations are found in sections 1760 to 1764 of the Code of Civil Procedure. Section 1760 declares that an appeal may be taken from a judgment within 30 days after the rendition thereof by filing a notice and serving it on the adverse party or his attorney. The district court is without power to entertain the appeal, except to dismiss it, unless taken within the 30 days, and unless, further, it is effectuated under sections 1763 and 1764. When these steps have been taken by the appellant, the justice must, upon payment of his fee, perform the duties enjoined upon him by section 1762. Upon the perfection of the appeal the court has jurisdiction of the cause, and may grant the relief authorized by section 1761. This section has to do only with the extent of the relief which may be granted by the district court. *State ex rel. Shanahan v. Lindsay*, 22 Mont. 398, 56 Pac. 827. It does not, in terms, nor by implication, allow an appeal to the district court from an order made in the justice's court, either before or after judgment. The only appeal provided for is an appeal from the judgment (section 1760). Thereupon, under the terms of section 1761, the district court may grant such relief as is therein provided, and no more.

There being no appeal allowed from the order refusing to set aside the default and judgment in the justice's court, and the appeal from the judgment having been perfected after the lapse of 30 days from the rendition thereof, the district court was without jurisdiction to entertain it or to make any order in the cause. The result is that the two orders complained of were in excess of jurisdiction, and must be annulled. The district court should have sustained the motion to dismiss the appeal on the ground of want of jurisdiction.

The orders complained of are annulled.

MILBURN and HOLLOWAY, JJ., concur.

(34 Wash. 331)

WELEVER et ux. v. ADVANCE SHINGLE CO.

(Supreme Court of Washington. March 14, 1904.)

WRITTEN CONTRACTS — EXPLANATION — ORAL EVIDENCE — LICENSE TO CUT TIMBER — INTEREST IN LAND — NEW TRIAL — INSUFFICIENCY OF EVIDENCE — TRIAL COURT'S DISCRETION — REVIEW.

1. Though a bill of sale of a shingle mill was by its terms complete in itself, oral evidence was admissible to show that at the time of the negotiations the seller agreed that the timber on the land on which the mill stood should pass

with the mill, such evidence not contradicting or varying the terms of the bill.

2. An attempted sale of standing timber by parol, when acted on, amounts to a license, and when cut the timber is the property of the licensee.

3. Where one represents to another that he is the owner of standing timber, and gives him a license to cut it, and he does so, the seller is estopped to assert that he did not have title.

4. Under 2 Ballinger's Ann. Codes & St. § 5071, making insufficiency of the evidence to justify the verdict a ground for a new trial, a new trial may be granted for insufficiency of the evidence, though there is some evidence to support the verdict.

5. Under 2 Ballinger's Ann. Codes & St. § 5071, giving the trial court authority to grant a new trial for insufficiency of the evidence to justify the verdict, on appeal, the discretion of the court in granting a new trial will not be reviewed, further than to determine whether it had been abused.

Appeal from Superior Court, Snohomish County; John C. Denney, Judge.

Action by Charles P. Welever and wife against the Advance Shingle Company. Judgment in favor of plaintiffs, and from an order granting a new trial they appeal. Affirmed.

McMurchie & Bundy and A. M. Abel, for appellants. G. M. Emory and McGuinness & Miller, for respondent.

HADLEY, J. Appellants brought this action to recover damages from respondent for alleged wrongful cutting of timber upon appellants' lands, and for the value thereof. Respondent answered, setting up facts under which it claims to have been the owner of the timber, with license to remove it from the land. A trial was had before a jury, and a verdict was returned in favor of appellants for the sum of \$600. Respondent moved for a new trial, and the same was granted on the ground, as stated in the court's order; that the evidence was insufficient to justify the verdict, and that it is against the law. This appeal is from said order, and it is assigned that the court erred in setting aside the verdict and in granting a new trial.

For a time prior to December 3, 1900, appellant Charles P. Welever owned, jointly with others, a certain shingle mill, which was located upon the tract of land whereon stood this timber which is in dispute. On that date he executed a written bill of sale to M. J. McGuinness for all of his interest in and to the shingle mill, including, by special mention, the machinery, dry kiln, and all buildings connected with the mill. McGuinness was the transferee, in trust only, for certain others who were the real purchasers, and who caused the transfer to be so made and held until they could incorporate the respondent company. Said purchasers afterwards became incorporators of the respondent company, and the said interest was then transferred to it. In said bill of sale no mention is made of any transfer of tim-

¶ 2. See *Logs and Logging*, vol. 33, Cent. Dig. §§ 9, 13, 14.

ber, but it is claimed by respondent, and there is considerable evidence to the effect, that said appellant took the mill purchasers over the land, showed them the timber, and urged, as an inducement for the purchase of the mill, that the timber would be transferred to the purchasers. There is also evidence that said appellant represented to the purchasers that he and his associates were the owners of the timber; that it was agreed throughout the negotiations that the timber should pass to the purchasers; and that, but for such representations and agreement, the purchasers would not have bought the mill. There is also evidence that when the purchase was made the purchasers assumed and agreed to pay certain obligations of Welever and his associates, among which was a balance due from the latter to their own vendor for the purchase price of this timber, and that respondent did pay said sum to the former owner of the timber on account of said obligation of Welever and his associates.

Appellants urge that, inasmuch as no mention is made of the timber in the written bill of sale, it was therefore improper to admit any testimony bearing upon that subject, for the reason that its effect was to contradict and vary the terms of the written instrument. If appellants' position is correct, it follows that the court should not have considered any of that evidence in passing upon the motion for a new trial. We believe the evidence admitted in this case does not come within the classification of parol evidence which contradicts or varies the terms of a written instrument. It is true, the bill of sale is complete in itself, but that fact is not inconsistent with the parties having entered into a verbal agreement at the time of the execution of the writing touching a subject not embraced in the writing. "Again, the parties to a written agreement which is complete in itself may at the time of its execution or previously have entered into a collateral parol agreement concerning some matter on which the instrument is silent, and the rule does not preclude the proof of such collateral agreement, provided no attempt is made to vary or contradict the writing." 21 Am. & Eng. Enc. of Law (2d Ed.) 1004. The decisions of many states are cited in support of the above. "The written contract (Exhibit A) does not refer to the matter of the sale of the old machine, and the evidence as to the rescission of that sale falls within the familiar rule that parol evidence is admissible to prove an oral agreement relating to a different subject-matter from that covered by the written contract, although both contracts may be parts of the same transaction." *Lynch v. Curfman*, 65 Minn. 170, 174, 68 N. W. 5.

Appellants, however, make the further contention that, granting the contract to have been as respondent insists, it was nevertheless void under the statute of frauds, in so far as there was an attempt by parol to sell

the timber. It is conceded that there is conflict of authority upon this subject, it being held in some states that a sale of growing trees is not a sale of an interest in lands, and that it may be made by parol, while a contrary doctrine prevails in other states. However, even where it is held that a sale of growing trees is a sale of an interest in lands which must be transferred by deed, it is also held that an attempted sale by parol, when acted upon, amounts to a license to cut and remove the timber, and that when so cut it becomes the property of the licensee. *Pierrepont v. Barnard*, 6 N. Y. 279; *White v. King*, 87 Mich. 107, 49 N. W. 518; *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467; 1 Washburn on Real Property (5th Ed.) 15. The evidence admitted in the case at bar was not only to the effect that the parol license existed, but also that it was executed by the cutting and removal of the timber. It was therefore competent evidence under the above rule, and if true, then, under the representations, appellants are now estopped to claim as against the purchasers and respondent, as successor in interest, that the license was not given, or that they were not at the time actual owners of the timber, with full power to sell it.

For the foregoing reasons, we shall consider the criticised evidence for the purposes for which it was introduced. Inasmuch as there was conflict in the evidence, it becomes a question to what extent this court will review the action of the trial court in granting a new trial. Appellants urge that it is the province of the jury to pass upon the evidence, and that it is error to grant a new trial for insufficiency thereof when there is any evidence to support the verdict. If the evidence heretofore mentioned was true, then the verdict was wrong, and the new trial should have been granted. "Insufficiency of the evidence to justify the verdict" is, by statute, expressly made a ground for new trial. Section 5071, 2 Ballinger's Ann. Codes & St. The statute does not say that such ground shall not be considered when there may be some evidence in support of the verdict. Evidently the exercise of discretion is lodged with the trial court, who hears and observes the witnesses, and who is therefore able, from much experience, to estimate the value of the testimony. It would divest the trial court of the right to exercise what is often a "wholesome discretion," if it should be held that a new trial should not be granted for insufficiency of evidence when there is any evidence whatever to support the verdict. The appellate court should therefore not review the discretion of the trial court in such a case, further than to determine whether the proper discretion in the premises has been abused. *Trumbull v. Jackman*, 9 Wash. 524, 37 Pac. 680; *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907; *Corbett v. Harrington*, 14 Wash. 197, 44 Pac. 132; *McBroom, etc., Co. v. Gandy*, 18 Wash. 79, 50 Pac. 572; *O'Rourke*

v. Jones, 22 Wash. 629, 61 Pac. 709; Latimer v. Black, 24 Wash. 231, 64 Pac. 176; Hughes v. Dexter Horton Co., 26 Wash. 110, 68 Pac. 109. In several of the above cases it is held that when there is a substantial conflict in the evidence this court will not hold that the discretion of the trial court is abused by the granting of a new trial. Within the rule above discussed, there is nothing in this record to show that the lower court abused its discretion in granting the new trial.

The judgment is therefore affirmed.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

(34 Wash. 283)

**McDONALD v. McDONALD.**

(Supreme Court of Washington. March 12, 1904.)

**DIVORCE—VACATING DECREE—FRAUD.**

1. Though a decree for divorce may be vacated where, in case of service by publication, plaintiff, by fraudulently giving a wrong address for defendant, prevents her receiving actual knowledge of pendency of the suit in time to defend it, yet, defendant having obtained actual knowledge of the suit a month before the decree was rendered, notwithstanding the wrong address, vacation of the decree may be denied for her negligence in not making inquiry, whereby she would have found that the decree had not been entered.

Appeal from Superior Court, Spokane County; Geo. W. Belt, Judge.

Proceeding by Adelaide B. McDonald against Dennis McDonald to vacate a decree of divorce. Vacation denied, and petitioner appeals. Affirmed.

Adolph Munter, for appellant. Wm. Sherman Dawson and Graves & Graves, for respondent.

**HADLEY, J.** The respondent procured a decree of divorce against appellant. Appellant being a nonresident of the state, service of summons was made by publication. The service was regular upon its face, default was entered for want of appearance, and decree rendered. The decree was entered in February, 1902. In August of the same year this proceeding was begun for the purpose of procuring a vacation of the decree of divorce. Vacation of the decree was denied, and this appeal is from the order of denial.

Respondent moves to dismiss the appeal and to affirm the judgment on the ground that the statutory provisions relating to the vacation of judgments are not applicable to decrees of divorce, for the reason that such are expressly excepted by statute. This court has so held in *Metier v. Metier*, 73 Pac. 535. That decision was based upon the provisions of section 4880, 2 Ballinger's Ann. Codes & St. The statutory exception which is there pointed out, and the manifest and wholesome reasons for it which are there discussed, need not be repeated here. It was

observed in that opinion, however, that such a decree may be lawfully vacated when entered without jurisdiction, "and perhaps where it is the result of fraud practiced on the court or the other spouse." Appellant, in effect, charges respondent with practicing such fraud, in that she avers that he knew her proper post-office address, but that he intentionally stated in his affidavit a wrong name for her post office, and caused the copy of the complaint and summons to be mailed to such wrong address, whereby she claims she was deprived of actual knowledge of the pendency of the suit, and did not receive such knowledge in time to defend the action. We appreciate the force of respondent's argument that to hold that a decree of divorce may be vacated even for such fraud may in some instances lead to the same unfortunate complications which are suggested in the case above cited as furnishing the reasons for the statutory rule excepting divorce decrees from vacation. It is quite possible for a decree of divorce regular upon its face to be procured by the practice of such fraud, and after the expiration of six months, as permitted by law in this state, the party thus apparently regularly divorced may marry an innocent person. Again, if at any time within a year from the date of the decree, under the statute governing vacations, the wronged party in the divorce proceeding may petition for the vacation of the decree it follows not only that such an aforesaid innocent person may have contracted an unlawful marriage, but the legitimacy of children may also become involved. It is impossible, however, to avoid suffering for the innocent in all cases. Such is true when a bigamous marriage occurs without even a prior attempt at divorce procedure. It would seem to be violative of fundamental principles to hold that a divorce decree fraudulently procured may not be timely assailed by the innocent party to the proceedings. Such a one is the first sufferer to whom it would seem the law should afford first relief. The motion to dismiss the appeal is therefore denied.

Appellant by this proceeding asks the vacation of the decree of divorce, and that she be permitted to file an answer and defend in the original action. The court ordered the dismissal of the proceeding, and recited in the order that the petition is not sustained by the evidence, and that appellant has made out no cause for the vacation of the judgment. She assigns that the court erred in so holding. The ground relied upon for the vacation is that respondent knew that appellant's post-office address was Odessa, Mo., and made affidavit for the purposes of a publication summons that her address was Columbus, Mo.; that he mailed the copies of summons and complaint to her at the latter place, by which she was prevented from receiving them; and that she knew nothing of the pendency of the action until the latter

part of January, 1902, when she understood the decree had already been entered. The decree was, however, not entered until February 28, 1902. Thus the petition shows actual knowledge of the existence of the suit for one month before the entry of the decree. The statute (section 4877, 2 Ballinger's Ann. Codes & St.) provides the manner of serving publication summons. It does not require that the defendant shall actually receive a copy of the summons and complaint, in order to effect a valid service. It only requires that copies shall be mailed to the defendant's residence if it is known to the plaintiff. When, therefore, a plaintiff sincerely believes that he knows the defendant's residence, and, with such an honest belief, mails the copies to such place, the defendant is not entitled to have the service held invalid on the mere ground that his residence is elsewhere, and that he did not receive the papers. We are not disposed to say that the trial court should have found from the evidence in this case that respondent did not act from an honest belief in the matter of the mailing of the publication summons. The parties had been separated for about 24 years. Appellant continued to reside in the state of Missouri, where the two formerly resided together. Respondent meantime had resided in the farther West, at Butte, Mont., and elsewhere. The evidence shows that Odessa and Columbus, Mo., are in the same locality, and that during a portion of the time appellant has resided upon a farm not distant from either place. The farm is about five miles from Columbus, and the latter was the post-office address for the occupants of the farm when respondent left that country. Odessa was not then in existence. While it is true that respondent had learned of its existence, and had written a letter to his son there, at appellant's request, yet we do not think it can be conclusively said from the evidence that he knew said place to be appellant's post-office address. If he had deliberately intended to deceive in the matter, it seems more probable that he would have named some place remote from appellant, rather than one so near her. Moreover, the evidence shows that appellant did receive actual notice of the pendency of the action. Whether she received the letter containing the summons and complaint which was addressed to her at Columbus, or not, she did in any event receive notice from some source in time to have made at least an effort to defend before the judgment was entered. Her application for leave to defend was not filed for several months after the judgment. If she knew of the action in time to defend before judgment, then the pendency of the action was not, as she contends, so concealed from her by fraud that she was deprived of the opportunity of making a defense she otherwise would have made. The trial court did not enter any specific findings, but, to support its order, it must have found that

the weight of the testimony was with respondent in the above particulars. We are unwilling to say that it is otherwise, and, since the weight of the evidence is not clearly against the court's findings and decision, we shall not interfere therewith. *Furth v. Kraft*, 25 Wash. 590, 66 Pac. 47. Where the vacation of a judgment involves the exercise of discretion, this court has said it will not interfere therewith unless the discretion has been abused. *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 184; *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182. This proceeding, it is true, is based upon alleged fraud; and, if it were clear that appellant was injured as the direct result thereof, there would seem to be no room for discretion, but she should be relieved as a matter of right. Inasmuch, however, as it appears that she received actual knowledge of the pendency of the action, it became a question whether her alleged injury was due to her own neglect. It was therefore at least a matter of discretion with the court as to what weight should be attached to the fact of actual knowledge, under the circumstances.

The judgment is affirmed.

MOUNT, ANDERS, and DUNBAR, JJ.,  
concur.

(34 Wash. 323)

CLARK et al. v. ELTINGE et ux.

(Supreme Court of Washington. March 14, 1904.)

HUSBAND AND WIFE—DEBTS OF HUSBAND—LIABILITY OF WIFE—FOREIGN LAWS—PLEADING—COMPLIANCE—PRIMA FACIE CASE—NOTES—SECURITY—APPLICATION—BURDEN OF PROOF.

1. Civ. Code Mont. § 227, exempts the separate property of a wife from all debts of the husband, unless contracted for necessities for herself and children, but declares that such exemption shall extend only to such property of the wife as shall be mentioned in an inventory as previously provided. Section 221 requires the wife to file a full and complete inventory of her separate property and have the same recorded, and section 222 declares that the filing of such inventory shall constitute notice and be prima facie evidence of the wife's title. *Held*, in an action against a husband and wife in Washington on a note given in Montana, by the husband alone, for the price of a lot on which he and his wife resided, that the burden was on her to show that such lot was not a necessary under such statute, as construed by the courts of Montana, and that she had filed the inventory required, in order to rebut the presumption, arising under the laws of Washington, that certain of her property was liable, as community property, for such debt.

2. In an action on a note, allegations that it was secured by a mortgage on land in another state, and that the mortgage had been foreclosed, were surplusage.

3. Where an action on a note executed in Montana was brought in Washington, and defendant claimed nonliability on the ground that the note was secured by mortgage, and that under the Montana law the mortgage must have been foreclosed and the proceeds applied on the debt before an action could be maintained on the note, plaintiff was not required, in order to

establish a prima facie case, to prove that the mortgage had been foreclosed and the proceeds so applied, the burden of proving such facts being on defendant.

Appeal from Superior Court, Spokane County; Geo. W. Belt, Judge.

Action by William A. Clark and another against Charles S. Eltinge and wife. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

B. C. Mosby, for appellants. W. T. Stoll and B. B. Adams, for respondents.

HADLEY, J. This cause was once before appealed to this court. For the decision upon that appeal, see *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736. Reference is hereby made to that opinion for a statement of the case, without the necessity of repetition here. The judgment was reversed, and the cause remanded for a new trial. Upon the return of the cause to the superior court the defendants filed amended answers, in which they pleaded certain laws of Montana which it is claimed provide that an action shall not be brought in that state upon a promissory note, when the same is secured by mortgage, until the mortgage has been foreclosed and the value of the security applied upon the note. Certain other Montana statutes were also pleaded as defining the property relations of husband and wife in that state, and which it is claimed determine that the wife sued in this action is not liable. The amended answers also allege that the note sued upon is secured by mortgage upon real estate in Silver Bow county, Mont., and that the mortgage has never been foreclosed. The reply admits the allegations as to the Montana laws, and also the allegation as to the execution of the mortgage, but denies the averment that the mortgage has not been foreclosed. Under the issues amended as aforesaid, the cause again came on for trial before the court and a jury. The plaintiffs made proof as to ownership of the note, balance claimed to be due, and as to the marriage relation of the defendant. The note was then introduced in evidence, and the plaintiffs rested. The defendant Josephine D. Eltinge then moved for an instructed verdict in her favor, on the ground that her liability must be measured by the laws of Montana, and that under those laws, as pleaded in her answer and admitted by the reply, she is not liable. The court sustained the motion. The defendant Charles S. Eltinge thereupon moved for a directed verdict in his favor, on the ground that the evidence was insufficient to justify a verdict against him. This motion was also granted, the cause was taken from the jury, and judgment entered in favor of each defendant that plaintiffs shall take nothing by the action, and that defendants shall recover costs. The plaintiffs have appealed.

It is first assigned that the court erred in sustaining the motion to take the case from

the jury as to respondent Josephine D. Eltinge. It is urged by said respondent that, as she did not sign the note, she is not liable under the laws of Montana, the place where the contract was made. In the former opinion in this case, we said that Mrs. Eltinge is a proper party for the purpose of having it determined whether the judgment, should one be obtained, can be executed as a judgment for a community debt, or whether it can be executed only as a judgment for the separate debt of the husband. Under the doctrine established in this state, if the debt is a community obligation it may be enforced against both the real and personal property of the community, and if it is the separate debt of the husband it may be enforced against the community personal property. The wife is therefore a proper party in order that the relations of her property interests to the debt may be determined in the action. She now admits that she is a proper party for that purpose, but urges that under the Montana law her property interests can in no event become liable in this action. It must, however, be presumed from the start that certain of her property interests are liable, for such is the presumption under our community property law. If she would remove that presumption, she must plead and prove a Montana law, or other necessary facts, which show that she is not liable. She has pleaded a Montana statute, and it is admitted as pleaded. In order, however, to remove the presumption of any liability against her, the Montana law must upon its face, and of itself, show want of any liability in the premises, or she must prove the necessary facts which bring her within non-liability. The statute pleaded, being admitted, stands, of course, as proved. Does it of itself, and without further proof, show that Mrs. Eltinge's property interests are free from liability in this cause? It does disclose that in Montana the system of community ownership of property does not exist; but it at the same time shows certain liabilities arising from the existence of the marriage relation. A section of what is alleged to be a part of the Montana Civil Code is pleaded, as follows:

"Sec. 227. The separate property of the wife shall be exempt from all debts and liabilities of the husband, unless for necessary articles procured for the use and benefit of herself and her children under the age of 18 years, but such exemption shall extend only to such property of such wife as shall be mentioned in an inventory thereof, as provided in Secs. 221 and 222. And in no case shall any of the separate property of the wife be liable for the debts of the husband, unless such property is in the sole and exclusive possession of the husband and then only to such persons as deal with the husband in good faith on the credit of such property, without knowledge or notice that the property belongs to the wife. But the sep-

arate property of the wife is liable for her own debts, contracted before or after marriage."

Sections 221 and 222, referred to in the above-quoted section, are also set out in the pleading, as follows:

"Sec. 221. A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the same manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the county clerk of the county in which the parties reside.

"Sec. 222. The filing of an inventory in the clerk's office is notice and prima facie evidence of the title of the wife."

An inspection of the above sections shows that said respondent's pleading sets up laws which recognize her liability for the husband's debt under certain conditions. The evidence shows that the money borrowed upon the note in suit was used to buy a lot and build a house thereon, and that respondents occupied it as their home. Whether that fact brings this debt within the classification of the husband's liabilities for which the wife's separate property is not exempt, we apprehend must depend upon the construction placed upon the statute by the courts of Montana, and resort must be had to such construction as a fact to determine the force of the statute when applied to the facts here. It will be observed that section 227, *supra*, provides that the wife's separate property shall not be exempt for the husband's liabilities for necessary articles procured for the use and benefit of herself and her children. Whether a home shall be classified as such a necessary thing, not being clear by the statute itself, may possibly be made clear by evidence of statutory construction in a similar case in Montana. It will also be observed that, under the statute, the failure of the wife to file an inventory renders her personal property liable for the husband's debts. The presumption with which we started, that a liability of the wife exists in this case, is therefore not removed by the mere pleading and admission of the statute. Proof of the necessary conditions which exempt her from liability under that statute must be made. We think it properly devolves upon the respondent, who seeks to avoid the presumption against her, to make that proof. We therefore believe the court erred in granting the motion to take the case from the jury as to said respondent.

It is next assigned that the court erred in sustaining the challenge to the sufficiency of the evidence as to respondent Charles S. Eltinge, and in withdrawing the case from the jury as to him. The theory of the court seems to have been that because the complaint contains allegations that the note was secured by mortgage, and that the same had been foreclosed, it therefore devolved upon

the plaintiffs to introduce proof that the mortgage had been foreclosed and the proceeds of the security applied upon the note. The action was a simple one upon a promissory note, it being alleged that a certain amount had been paid, and judgment is demanded for the balance. Such an action is competent under our law, regardless of the fact that a mortgage may secure the note. The allegations with regard to the mortgage and its foreclosure are clearly immaterial and surplusage. We said in this case before: "While the complaint contains much immaterial matter, it is plain that the purpose, and the sole purpose, of the allegations concerning the mortgage, is to show the source of certain of the credits given upon the note." It was further said in that opinion, at page 222, 29 Wash., and page 738, 69 Pac.: "The action itself was a simple one. In order to put the respondents upon the defense, it was enough for the appellants to allege and prove the making and delivery of the note, their ownership of it, the fact that the respondents were husband and wife, and that the debt was a community debt under the laws of this state. Whether the note had been paid in whole or in part, or whether there were other legal reasons why the appellants could not recover, were matters of defense, which the respondents must allege and prove in order to avail themselves of them. It did not devolve upon the appellants to negative such defenses in advance of their assertion." We think the above language makes it clear, as the law of this case, that when appellants had introduced their evidence, the nature of which conforms to the suggestions of this court, they were entitled to go to the jury. It was plainly stated that when such proof was made then, if there were other legal reasons why recovery could not be had, they were matters of defense which respondents must allege and prove. Respondents are making the defense that resort must be had to the law of Montana to determine whether appellants may recover in this action. As a part of the defense, they claim that under that law the mortgage must have been foreclosed, and the proceeds of the security applied upon the debt, before this action can be maintained. They allege that this has not been done. It is their duty to prove it if they wish to avail themselves of it. As we said on the other appeal, they cannot require appellants to negative their defenses in advance of their assertion. The record discloses that, when appellants' counsel learned that it was the court's view that, because the complaint alleged foreclosure of the mortgage, it became the duty of the appellants to prove that fact, he sought leave of the court to open up the case and make the proof upon that subject, which he stated was at hand. The request was, however, denied. Granting that the court in its discretion might have declined to open up the case, yet we think it had pre-

viously erred in holding that appellants should have made further proof before their case could go to the jury. Discussion of authorities seems unnecessary, since the law of the case in the above particular was once declared by this court, and is therefore binding upon all concerned. *Wilkes v. Davies*, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103.

For the foregoing reasons, we think the court erred in refusing to grant a new trial. The judgment is reversed, and the cause remanded with instructions to the lower court to grant a new trial.

FULLERTON, C. J., and MOUNT, ANDERS, and DUNBAR, JJ., concur.

(34 Wash. 315)

**MALLOY v. BENWAY.**

(Supreme Court of Washington. March 14, 1904.)

**ACTION TO RECOVER LAND — COMPLAINT — TRANSACTION BETWEEN HUSBAND AND WIFE — GOOD FAITH — DELIVERY OF ASSIGNMENT — EVIDENCE.**

1. Ballinger's Ann. Codes & St. § 4580, providing that, where any question as to the good faith of a transaction between husband and wife arises, the burden of proof is on the party asserting the good faith, does not require a complaint based in part on transfers between husband and wife to allege good faith with respect to them.

2. General averments in a pleading are controlled by specific allegations of fact therein.

3. Under the rule of code pleading that allegations are to be liberally construed, with a view to substantial justice, whatever is necessarily implied in or is reasonably to be inferred from an allegation is to be taken as if directly averred.

4. Plaintiff in an action to recover possession of land, claiming under an assignment of a lease, does not prove a delivery thereof to him prior to the bringing of the action necessary for a recovery (his title and right of possession being denied) by the introduction in evidence by him or his attorney of the assignment; the only evidence on the question of such delivery being the testimony of plaintiff's attorney, who in the sale of the lease represented B., from whom plaintiff bought, and who testified that it had not been delivered to plaintiff, but had been held by him for the back payment, which had not yet been made; he having acted as agent between B. and plaintiff.

Appeal from Superior Court, Spokane County; William E. Richardson, Judge.

Action by J. F. Malloy against J. B. Benway. Judgment for plaintiff, and defendant appeals. Reversed.

John A. Peacock, for appellant. Scott & Rosslow, for respondent.

**PER CURIAM.** This is an action brought by plaintiff, J. F. Malloy, against J. B. Benway, defendant, in the superior court of Spokane county, for the recovery of the possession of certain real estate, described as lot 8 in block 68 in school section 16, township 25 north, of range 43 E., W. M., in said county, and the improvements thereon, including a five-room frame dwelling house;

also damages for wrongfully withholding possession of such property from plaintiff, and for other relief. The cause was tried before the court and a jury. A verdict was rendered in favor of plaintiff, awarding possession of the property to him, and \$10 damages. Defendant made and filed his motion for a new trial, which was denied by the trial court. Judgment was entered on the verdict in favor of plaintiff, and defendant appeals to this court.

The complaint alleges that the state of Washington is, and was at the times therein mentioned, the owner of the above-described land; that on June 1, 1897, the state leased in writing unto J. B. Benway this tract of land for the period of five years; "that during the term of lease, to wit, on or about February 2, 1901, said J. B. Benway conveyed, transferred, and assigned in writing said lease to one Maggie Benway, his wife, together with all his interest, community or otherwise, therein, and on or about the same time conveyed in writing all that certain five-roomed frame dwelling house, together with all other improvements on said lot 8, to said Maggie Benway, conveying said premises and all his community interest therein to said Maggie Benway, to have as her sole and separate property; that afterwards, to wit, on or about the 9th day of December, 1901, said Maggie Benway sold, transferred, and conveyed in writing all her right, title, and interest in said lot and improvements thereon to plaintiff herein." The complaint further alleges that, by reason of the foregoing premises, plaintiff is the owner of all of said property, and is entitled to the possession thereof; that plaintiff (respondent) duly demanded possession of said property of appellant, which was refused. Appellant, Benway, demurred to the complaint, which was overruled, and exception taken. An answer was then filed in the cause. In the first paragraph thereof occurs the following averment: "That defendant denies each and every allegation, matter, and thing in plaintiff's complaint set forth and alleged, not hereinafter admitted." The answer then in express language admits the allegations of paragraphs 1 and 2 of the complaint pertaining to the ownership by the state of this real estate, and the lease thereof to appellant. This answer also sets up an affirmative defense, alleging, in substance, that the land and property in question was and is the community holding of appellant, J. B. Benway, and his wife, Maggie Benway; that the purported transfers thereof were without consideration, and were fraudulently obtained by the wife from the husband; that the instruments purporting to convey such property were placed in the hands of one Scott in escrow, not to be delivered by him to Mrs. Benway until appellant should so direct; that appellant has been at all times, and is, in possession of such property, occupying the same with his children as a

home; and that any transfer taken by respondent from said Maggie Benway is and was taken with full knowledge and notice of appellant's rights in the premises. This defense further alleges that respondent never gave any consideration for said property; that he is not the real party in interest, but is prosecuting said action for the benefit of Maggie Benway. Respondent, by his reply, denies each and all the allegations of new matter set up in the above answer, except that J. B. and Maggie Benway are husband and wife.

Appellant's first and second assignments of error practically present the same question: Does the complaint state facts sufficient to constitute a cause of action? Appellant's counsel argues that it was necessary to allege in the complaint that the written instruments described therein as having passed between J. B. Benway and his wife, under which respondent claims title and right of possession to the property in question, were executed in good faith. 1 Ballinger's Ann. Codes & St. § 4580, is cited in support of such contention. This section provides: "In every case where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith." Applying the provisions of this section to the allegations in the above complaint, it would seem that, until some question was raised as to the good faith of the transfers between the two spouses, it was unnecessary for the respondent to take the initiative and allege good faith with reference to the transaction; that respondent was not required to anticipate an issue which might never be tendered. Moreover, we think that it is a safe general rule to assume that parties in their dealings are actuated by proper motives; that therefore good faith with regard to such dealings will be presumed until the contrary is alleged or made to appear. The complaint is not objectional, therefore, because it fails to allege that the transfers or instruments that passed between Mr. and Mrs. Benway were made in good faith. We think the complaint sufficient in other respects. General averments are always controlled by the specific allegations of fact in a pleading. Phillips on Code Plead. § 346; State v. Wenzel, 77 Ind. 428; State ex rel. MacKenzie v. Casteel, 110 Ind. 187, 11 N. E. 219. It is also a general rule under the Code of Procedure that the allegations of a pleading are to be liberally construed, with a view to substantial justice between the parties. "Under favor of this rule, whatever is necessarily implied in, or is reasonably to be inferred from, an allegation, is to be taken as if directly averred." Phillips, Code Plead. § 352, and citations. In view of these liberal rules of interpretation, we think that the allegations of the complaint show

sufficiently, as a matter of pleading, that the right of possession in and to the property which is the subject of this action became vested in respondent.

It is next contended that the court below erred in denying appellant's motion for a nonsuit at the trial. This seems to us to be the pivotal question in the present controversy. We shall assume for the purposes of this appeal, without intending to decide the question, that the testimony in respondent's behalf at the trial showed that whatever title, estate, and interest appellant had in the above realty and improvements vested in his wife, Maggie Benway; that the same became her sole and separate property by virtue of the two written instruments dated February 2, 1901, as stated in the complaint. Respondent at the trial attempted to make title to, and show right of possession to, this land and property, under a written assignment of the above lease, the consideration named therein being \$10, and a bill of sale of the house and improvements for the consideration of \$340. These instruments are dated December 9, 1901, and are signed and acknowledged by Maggie Benway. The respondent is named in the assignment of the lease as assignee, and in the bill of sale as vendee. The two instruments comprise all the property described in the complaint, and were introduced and received in evidence over appellant's objections, and are designated in the record as plaintiff's Exhibits A and B. On cross-examination respondent testified in answer to questions propounded to him as follows: "Q. Mr. Malloy, under what circumstances did you purchase this property? A. Why, the same as any other. Q. What did you pay for it? Mr. Scott: Objection. Irrelevant, incompetent, and immaterial; not proper cross-examination. (Overruled. Exception.) A. \$350. Q. Who did you pay that to? A. I paid \$50 to Mr. Scott. Q. Owe the balance? A. I am to pay Mr. Scott when I get possession. Q. Mr. Scott has agreed to get possession before being paid any more money? A. Yes, sir. Q. Did you have any conversation with Mrs. Benway? A. I didn't know her at all; had never seen her. \* \* \* Q. Now, Mr. Malloy, isn't it a fact that this property has not as yet, as a matter of fact, been sold to you? A. Well, I say it has. I paid my fifty dollars, and expect to pay the rest, and I expect to get it. Q. Otherwise it would belong to who? A. To Mrs. Benway. But I expect to get that property." It further appears from the testimony in respondent's behalf that written notice was duly served upon appellant to surrender possession of this property to respondent in the month of December, 1901, after the date of the above instruments under which respondent claims title and right of possession in and to this property, and that appellant refused to comply with such request. Mr. A. W. D. Scott, one of respondent's attorneys in this



cause, who represented Mrs. Benway in this transaction, testified in his direct examination in the following manner: "Q. I will ask you to examine plaintiff's Exhibits A and B, and ask you to state whether you know anything with regard to the delivery of these deeds or instruments to Mr. Malloy, the plaintiff? A. These have not been delivered to Mr. Malloy, but have been held by me for the back payment that has not yet been made, as I was acting as agent between Mrs. Benway and Mr. Malloy." This was substantially all the evidence produced at the trial bearing on the questions of delivery of these instruments under which the respondent claims title and right of possession of this realty, together with the improvements thereon, and which constituted respondent's interest therein at the time of the commencement of the present action.

We think that the denial contained in appellant's answer puts in issue the material allegations of the complaint pertaining to the title and right of possession of this property. See *Tullis v. Shannon*, 3 Wash. 716, 29 Pac. 449. As a general principle of law, the possession of a completed written instrument, such as a deed, bill of sale, or an assignment by a grantee, vendee, or assignee, is prima facie evidence of the delivery of such instrument. Such presumption may, however, be overcome by competent proof. Here we have positive testimony in respondent's behalf that these instruments, Exhibits A and B, were not delivered to respondent. The legal effect of this testimony above noted was that the title and right of possession to this property should not vest in respondent until the payment of the balance of the purchase money therefor. Under the allegations of the complaint, as a part of respondent's case, it was just as necessary for him to show a proper delivery of these instruments, as that they were signed by Mrs. Benway. The proof in that respect seems to be wholly wanting. The record shows that this action was begun at or about January 18, 1902, and was not tried in the superior court till March 13, 1902. We think that neither the trial court nor the jury was warranted in assuming, in the light of the testimony, that, simply because respondent or his attorneys introduced these instruments in evidence at the time of the trial, it therefore logically followed that they had been delivered to respondent prior to the bringing of this action. The respondent must recover, if at all, on the strength of his own title in and to this property at the time of the commencement of this action, and not on the weakness of appellant's title therein. *Humphries v. Sorenson* (Wash.) 74 Pac. 690. Section 5508, 2 Ballinger's Ann. Codes & St., provides with reference to actions similar to the case at bar as follows: "The plaintiff in such action shall set forth in his complaint the nature of his estate, claim, or title to the property, and the defendant may set up a

legal or equitable defense to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had." The respondent has failed, in his proofs, to bring this case within the purview of this section. His right to recover in the present action under the allegations of his complaint is based upon, and is to be measured by the terms and conditions of, Exhibits A and B, his evidences of title or right of possession of the above premises. He failed to prove at the trial that they were delivered to him. Besides, whatever evidence there was as to that feature of the transaction, it tended to show that title and right of possession in this property remained in Mrs. Benway till the payment of the balance of the purchase money. This is not a case of variance between the pleadings and the evidence, but one of failure of proof on the issues tendered by the complaint as to the complete execution of these written instruments, on which issues respondent had the affirmative at the trial, and failed to sustain his contentions in that behalf. We are therefore of the opinion that the trial court erred in denying appellant's motion for a nonsuit. Having reached this conclusion, it is unnecessary for us to consider the other assignments of error.

The judgment of the superior court is reversed, and the case remanded, with directions to dismiss the action at respondent's costs.

(34 Wash. 250)

WELSH v. CALLVERT et al., Land Com'rs.  
(Supreme Court of Washington. March 11, 1904.)

PUBLIC LANDS—CONVEYANCE BY STATE—COLLATERAL ATTACK.

1. Lands having been sold and conveyed by the state as second-class tide lands, a claim by a subsequent applicant to purchase a portion thereof as oyster lands that the deed did not include the lands applied for was a collateral attack on the deed, which could not be made, and the application was properly rejected by the Board of State Land Commissioners.

Appeal from Superior Court, Skagit County; George A. Joiner, Judge.

Application by Martin C. Welsh to S. A. Callvert and others, constituting the Board of State Land Commissioners, to purchase certain lands. The application was rejected, and the applicant appealed to the superior court, and from a judgment affirming the decision of the board the applicant appeals. Affirmed.

John T. Welsh and Martin C. Welsh, for appellant. W. B. Stratton, E. W. Ross, and C. C. Dalton, for respondents.

HADLEY, J. Appellant applied to the Commissioner of Public Lands of the state of Washington to purchase certain lands in

Skagit county, and which the application describes as oyster lands. The application was rejected by the Board of State Land Commissioners for the reason that the same lands had been theretofore sold and conveyed by the state to John Cryderman. The lands were sold to said Cryderman as second-class tide lands. The appellant appealed from the decision of said board to the superior court of Skagit county. That court affirmed the decision of the board, and this appeal is from the judgment of the superior court.

Appellant contends that the lands are oyster lands, and not tide lands, and we are referred to Sess. Laws 1897, p. 230, c. 89, § 4, subd. 2, for the legislative definition of tide lands; the same being as follows: "Tide Lands. All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, except in front of cities where harbor lines have been established or may hereafter be established, where such tide lands shall be those lying between the line of ordinary high tide and the inner harbor line, and excepting oyster lands." It is insisted that the above definition of what shall be known as tide lands specially excepts oyster lands from such classification; that said act of 1897, by section 39 thereof, classifies tide and shore lands into what are known as tide lands of the first class and second class; and that, by reason of the exception of oyster lands from the general definition of tide lands, they are a class to themselves, not belonging to either class of tide lands, and cannot be sold as such. It is insisted by appellant that even the application of Cryderman to purchase these lands states that they are suitable for the cultivation of oysters. A copy of the application is before us. It appears to have been prepared upon a printed form whereon blank spaces were left to be filled. The following is included in the application: " \* \* \* That said land is ——— suitable for the cultivation of oysters. \* \* \* " It will be observed that the blank space was evidently left in the first instance to be filled with some word negating the oyster character of the land when such is the fact. That it was not so filled in this instance, respondents argue, was due to mere oversight, inasmuch as the application repeatedly refers to the lands as tide lands, and specifically designates them, and asks to purchase them as tide lands of the second class. But, in any event, whether the failure to fill the blank was an oversight or not, it nowhere appears in this record that the Board of State Land Commissioners did not find as a fact that the lands were not suitable for the cultivation of oysters, and that they were second-class tide lands. A deed conveying these lands was executed and delivered by the state to Cryderman in consideration of \$473.65 paid by the latter. Appellant does not, as we understand him, contend that the deed is absolutely void, but that it conveys only second-class tide lands

within the described area, and does not convey oyster lands therein. He therefore reasons that the oyster lands within the area are still open for sale and conveyance. The deed purports to convey "all tide lands of the second class owned by the state of Washington situate in front of, adjacent to or abutting upon that portion of the government meander line described as follows." Then follows a description of the meander line, making a total in all of 94.73 chains. The price fixed by law for second-class tide lands is \$5 per lineal chain, and the amount of consideration named in the deed shows that exactly that sum was paid, based upon the number of chains above mentioned. It is evident, therefore, that both grantor and grantee in the deed understood that all lands in front of the described meander line were second-class tide lands, and were conveyed by the deed. The state was the owner of all the lands within the area, and they were for sale. For reasons already stated, the deed itself shows that the state's officials found that the lands were all tide lands of the second class, and that they were sold and conveyed as such. We therefore think it cannot be urged in a collateral attack, such as this one, that the deed did not convey all that was intended. Although appellant disclaims an attack upon the deed, and admits that it conveys all tide lands of the second class within the specified area, yet his claim that it does not convey all the lands within the area which the parties evidently intended to convey is an attack upon it. The deed, having been made by the state, and purporting to convey a portion of its public lands, is analogous to a patent issued by the United States for a portion of the public domain, and is governed by similar legal principles. The state has created a Land Department, with administrative and executive functions similar to the Land Department of the general government. That department is authorized to supervise the proceedings by which title is sought to be obtained to any portion of the state's public lands. Having supervised such proceedings in a given case, and having caused the deed of the state to issue, it becomes in effect the patent of the state, and cannot, under the rules established as to federal land patents, be collaterally attacked. In this connection the language of Mr. Justice Field in *Smelting Co. v. Kemp*, 104 U. S. 636, 640, 641, 26 L. Ed. 875, is particularly pertinent. Because of its weight and direct applicability here, we quote at length: "That the provisions may be properly carried out, a Land Department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration.

and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law." Again, in the same opinion, when speaking of the presumptions attending patents for lands, the learned justice said: "Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale." So in the case at bar the lands all belonged to the state, and, being for sale, under the law the land department had jurisdiction to act and execute a conveyance. In *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226, the same principle is discussed. Speaking of the land department and its functions, the court remarked, as found at page 451 of said volume, page 392, 1 Sup. Ct., 27 L. Ed. 226: "Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions." At page 454, 106 U. S., page 395, 1 Sup. Ct., 27 L. Ed. 226, the same opinion, speaking of a patent issued by the government, says: "It cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves. Their power over the land is ended when the patent is issued and placed on the records of the department. This can be accomplished only by regular judicial proceedings, taken in the name of the government for that special purpose." In *French v. Fyan*, 93 U. S. 169, 23 L. Ed. 812, a question somewhat similar to the one

at bar was involved. A patent had been issued for swamp and overflowed land. Testimony was offered to show that it was not such land. The following appears in the opinion at page 172, 93 U. S., 23 L. Ed. 812: " \* \* \* And we are of opinion that, in this action at law, it would be a departure from sound principle, and contrary to well-considered judgments in this court, and in others of high authority, to permit the validity of the patent to the state to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey." The following cases cited are in harmony with the principles above discussed, and support the view that the decision of the Land Department is conclusive on the courts when a patent issued in pursuance of such decision is collaterally attacked: *Ferry v. Street*, 4 Utah, 521, 7 Pac. 712, 11 Pac. 571; *Palmer v. Boorn*, 80 Mo. 99; *Biddle Boggs v. Merced M. Co.*, 14 Cal. 279; *McKinney v. Bode*, 33 Minn. 450, 23 N. W. 851; *Baker v. Newland*, 25 Kan. 25; *State ex rel. Marsh v. Bd. St. Land Com'rs*, 7 Wyo. 478, 53 Pac. 292. As we have seen, under the authority of *Steel v. Smelting Co.*, supra, a patent cannot be vacated or limited by the officers themselves. It can only be accomplished by judicial proceedings taken in the name of the government for that special purpose. By analogy, we think the rule applies here.

The judgment is affirmed.

MOUNT, ANDERS, and DUNBAR, JJ., concur.

(34 Wash. 336)

#### HINDLE v. HOLCOMB.

(Supreme Court of Washington. March 15, 1904.)

PRINCIPAL AND AGENT—FRAUD BY AGENT—SETTLEMENT—PLEADING—GENERAL DEMURRER—EVIDENCE—ADMISSIBILITY.

1. Where the complaint separately states two causes of action, if either statement contains facts sufficient to constitute a cause of action the complaint is good as against a general demurrer directed to it as a whole.

2. Where a principal, relying on his agent's representations as to the least sum for which land could be bought, paid him that sum, but the agent purchased the land for him for a less sum, the principal may recover the difference between the two amounts.

3. Where, on settlement with an agent, a principal paid him a sum before notice of the agent's fraud in the transaction, concerning which the settlement is made, he may sue to recover such sum without first suing and obtaining a rescission of the settlement.

4. Where a principal entered into a contract whereby, "in consideration of the services heretofore rendered and hereafter to be rendered,"

¶ 2. See *Principal and Agent*, vol. 40, Cent. Dig. § 147.

the agent was to receive one-half the profits he should make out of the venture, where there was fraud by the agent in the prior services referred to the principal is entitled to recover so much of the amount paid the agent under the contract as was in remuneration for the prior services.

5. Plaintiff's testimony that a contract with defendant had been agreed to 10 days prior to the time it was reduced to writing was admissible to explain an apparent discrepancy in his testimony concerning dates testified to by him.

6. Conversations leading up to a written contract, which was not in dispute, were not admissible in evidence.

7. Where an agent defrauded his principal, for whom he purchased land, by representing that the price was greater than it actually was, in an action by the principal to recover the excess evidence of the value of the land was inadmissible.

8. Though a trial judge might properly have raised an objection to insinuating questions on his own motion, it was not error for him to omit to do so till objections had been made by counsel.

9. Where the evidence is conflicting, the verdict will not be disturbed on appeal.

10. Where defendant took a contract on land for the sole purpose of selling it to plaintiff, and did not intend to buy it unless he could sell it to plaintiff, and falsely represented to plaintiff that another owned the land, and procured plaintiff to employ him as agent to purchase it, and plaintiff, acting in ignorance of any contract by defendant, employed him to purchase the land, it is immaterial to the plaintiff's right of recovery of an amount paid by him in excess of what the defendant paid whether the defendant contracted for the land before or after plaintiff agreed to purchase it.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by N. W. Hindle against Augustus H. Holcomb. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Sweeney, French & Steiner, for appellant. Wright & Kelleher, for respondent.

FULLERTON, C. J. The respondent (plaintiff below) brought this action to recover of the appellant sums aggregating \$1,290, alleged to have been obtained from him by the appellant by means of false and fraudulent representations. The complaint contained two causes of action. In the first it was alleged that the respondent employed the appellant as his agent to purchase for him certain real property situated in the city of Seattle at the lowest price for which it could be obtained; that the appellant, while acting as such agent, falsely and fraudulently represented and stated that the lowest price for which the real property could be obtained was the sum of \$4,500, and that the respondent, relying on such statement, and believing the same to be true, placed in the hands of the appellant the sum of \$4,500 with which to purchase the property; that the appellant thereafter did purchase the same for and on behalf of the respondent, but paid therefor only the sum of \$3,750, converting to his own use \$750, the difference between the price actually paid for the property and the sum he represented to the respondent that the same would cost, concealing that fact

from respondent. For a second cause of action the respondent repeated the allegations of his first cause of action, and then alleged that, while in ignorance of the deceit practiced upon him, he entered into a written contract with the appellant by the terms of which the appellant agreed to take charge of the property, supervise the work of having the same cleared and made ready for cultivation, and perform certain other services connected therewith, and that in "consideration of the services heretofore rendered and hereafter to be rendered" the respondent agreed to turn over to the appellant one-half the profits he should make out of the venture. It is then alleged that prior to the discovery by the appellant of the fraud originally practiced upon him the parties settled their rights growing out of the contract by the terms of which settlement the respondent agreed to pay and did pay the appellant the sum of \$540 in full of his supposed rights under the contract mentioned. The prayer of the complaint is that the respondent have judgment for the sum of \$750 on the first cause of action and \$540 on the second cause. A general demurrer was interposed to the complaint, which being overruled an answer was filed admitting the making of the contract set out in the second cause of action and the subsequent mutual settlement between the parties of their rights thereunder, and denying generally all the other allegations of the complaint. A trial was subsequently had before the court and a jury, resulting in a verdict and judgment for the respondent in the sum of \$900. This appeal is from that judgment.

It is first contended that the court erred in overruling the demurrer to the complaint. This demurrer, it will be noticed, was directed to the complaint as a whole, while the complaint was made up of two causes of action separately stated. The rule in such cases is that, if either of these statements contain facts sufficient to constitute a cause of action, the complaint is good as against a general demurrer directed to it as a whole. *Chevre v. Mechanics' Mill & Lumber Co.*, 4 Wash. 721, 31 Pac. 24. The facts set forth in the first cause of action are abundantly sufficient to sustain a recovery had thereon. Under all authority a principal may recover from his agent moneys obtained from him by the agent through false and fraudulent representations by which the principal is deceived. This cause of action states a transaction of that kind, and, being in itself sufficient, it is sufficient to sustain the complaint against the general demurrer, even though the second cause of action might have been susceptible thereto.

On the trial, however, the appellant objected to the introduction of evidence in support of the second cause of action, and assigns as error the overruling of that objection. In support of this it is first said that the complaint itself shows a settlement of

all the transactions between the parties, and that the respondent cannot recover moneys paid pursuant to that settlement without suing and obtaining a rescission thereof; and, second, that if it be conceded that there was fraud in the purchase of the property, such fraud would not deprive the appellant of his right to compensation for services rendered in another and separate transaction. With reference to the first contention, it is sufficient to say that the allegation is that the subsequent contract was entered into in part as a settlement of supposed rights growing out of the first, and that the settlement thereunder was made by the respondent while in ignorance of the fraud and deceit that had been practiced upon him in the first transaction. In so far as the fraud practiced in the first transaction entered into the second, the latter was void as to the respondent, and he was at liberty to ignore it, and bring an action to recover any money he had paid them in settlement of supposed rights growing out of the first transaction, the same as if it had never been entered into. Contracts entered into through or induced by fraud are nullities in so far as the party affected by the fraud is concerned, and may be treated by him as such. As to the second objection, it will be remembered that the second contract was made in consideration of services rendered prior to the execution of the contract as well as services thereafter to be rendered. It was intended in part as a payment for the appellant's services in purchasing the land. If it were a fact that the appellant perpetrated a fraud upon the respondent in making that purchase, he was entitled to no compensation for his services in that behalf, and, if the appellant paid him for the same in ignorance of the fraud, he could recover the amount paid in this form of action. But because he claimed more in his complaint than he was perhaps justly entitled to did not require the court to exclude evidence offered to prove the unobjectionable part. To object on the trial to the introduction of any evidence is not the way to reach defects in pleadings of this character, and the trial judge did not err in so ruling.

The appellant next complains that the court erred in refusing to strike out the testimony of the appellant to the effect that the contract set out in the second cause of action was agreed to some 10 days prior to the time it was reduced to writing and bore date. But there was nothing objectionable in this. The fact was material only in so far as it tended to explain an apparent discrepancy in the testimony of the witness concerning certain dates testified to by him, and for that purpose it was clearly admissible.

Nor did the court err in refusing to permit the appellant to testify to conversations had with respondent which culminated in the written agreement. The writing contained in

the agreement was not in dispute, and could not be disputed under the issues as made by the pleadings; hence what was said by the parties in making the agreement was not material. Neither were such conversations admissible as tending to contradict the respondent's statements that the written contract was agreed to verbally some 10 days prior to the time it was reduced to writing. The witness was permitted to testify when the negotiations leading up to the agreement were commenced and concluded, and his statements in that regard could not have been strengthened by reciting the conversations.

Neither was it error to refuse to permit the appellant to testify to the value of the land purchased. If it be conceded that the respondent did make a good bargain, that fact would be no justification of the appellant's conduct if it be true that he committed the acts charged against him by the complaint; and evidence of the value of the land was therefore immaterial.

The next objection in regard to the conduct of the trial seems not to be supported by the record. It is complained that the court permitted counsel for the respondent in his cross-examination of appellant to ask him insinuating questions, but the record shows that the court rebuked counsel for so doing as soon as objection was made thereto, and that the offense was not repeated. The trial judge might properly have raised the objection himself when the objectionable question was first propounded, but it was not error for him to omit to do so.

It is next said that the respondent failed to sustain the allegations of his complaint by a preponderance of the evidence, and that the trial court erred in refusing to grant the appellant's motion for a new trial based on that ground. While the respondent's evidence on many of the material points necessary to be established in order to warrant a recovery was flatly contradicted by the appellant, and on some of them there was not much, if any, corroborating evidence, still this fact did not require the trial court, nor does it require this court, to decide as a matter of law that the evidence did not preponderate in favor of the respondent. Which way the evidence preponderated depended on the credibility of the witnesses, and was a question for the jury and the trial court; and, as the jury and trial court determined it in favor of the respondent, we cannot, in the exercise of our lawful powers, disturb their conclusions.

Lastly, the appellant contends that the court erred in refusing to give certain instructions requested by him and in giving a certain other on its own motion. As to the requested instructions, all that was pertinent in them was given in the general charge of the court; not in the language of the request, but in substance, and this, we have repeatedly held, is a sufficient compliance

with a request to instruct. The instruction given of which complaint is made was as follows: "You are instructed in this action that if you find from the evidence that the defendant, Holcomb, took a contract on the land in question for the sole purpose of selling the same to Hindle, and had no intention of buying the land unless he could sell it to Hindle, and that thereafter, in furtherance of such purpose, the defendant falsely represented to plaintiff that Mrs. Webster, or some person other than himself, owned the land, and thereby procured the plaintiff to employ him as agent for the purchase of the land, and that the plaintiff, acting in ignorance of any contract or adverse claim on the part of defendant, employed defendant as his agent to purchase the land, and defendant falsely held himself out to the plaintiff as acting in the interest of the plaintiff and of purchasing the land in the plaintiff's behalf for the lowest price for which it could be obtained from Mrs. Webster, or some other person, and that plaintiff thereby was thrown off his guard, and caused to rely upon the defendant to protect him, then it is immaterial whether or not the defendant Holcomb contracted for it before or after Hindle came to him and agreed to purchase it." It is argued that this instruction is contradictory of what had been previously given the jury, and is directly the reverse of the law on the question therein stated. In our opinion, however, it is not subject to either contention. The court did instruct the jury that if the appellant was the owner of the property, either in fee or by a legal contract of purchase, at the time the respondent employed him to purchase it, the respondent could not recover in this form of action, no matter what representations were made by the appellant. But this is not contradictory of the instruction complained of. The court there was distinguishing between actual and feigned ownership.

On the whole we think there was no substantial error in the record, and the judgment will stand affirmed.

HADLEY, ANDERS, MOUNT, and DUNBAR, JJ., concur.

(34 Wash. 276)

JEFFERSON COUNTY v. TRUMBULL et al.

(Supreme Court of Washington. March 11, 1904.)

TAXATION—DELINQUENCY CERTIFICATES—SUFFICIENCY—STATUTES—COMBINING CERTIFICATES IN BOOK—EQUITABLE POWERS OF COURT.

1. An objection that the summons in tax foreclosure proceedings based on delinquency certificates issued to the county, was insufficient, in that it did not purport to give notice to the owners of the land, and did not purport to state the names of the owners or to whom the lands were assessed, was untenable, the summons having stated the name of the reputed owner, and that the lands were assessed to him; Pierce's Code,

§ 8694 (Sess. Laws 1901, pp. 385, 386, § 3), providing that, for the purpose of foreclosure, reputed owners shall be treated as the owners.

2. On trial de novo the Supreme Court will not reverse for erroneous admission of evidence, if there is competent evidence to sustain the verdict.

3. Where tax foreclosure was sought against a large number of lots, and the delinquency certificates bound in volumes were introduced in evidence, they were not incompetent because of the fact that the county did not point out in the first instance the volume and page containing the certificates relied on.

4. An objection that the books were incompetent, and that no foundation for their introduction had been made, was not sufficient to render it error for the court not to require the books and pages to be designated.

5. A county treasurer had authority to certify to tax delinquency certificates, though they were issued at a date prior to the commencement of his term of office.

6. Sess. Laws 1897, pp. 182, 183, c. 71, § 98, designated no particular time for the issuance of tax delinquency certificates to the county. Laws 1899, p. 297, § 15, provided they should be issued four years from delinquency; and Laws 1901, p. 385, § 3, fixed the time at five years from delinquency. Delinquency certificates, introduced in an action for tax foreclosure, showed that they were issued after the proper date, and though one date was named as the date of issuance, and a subsequent one as the date of signing, they were both made at a time when certificates could properly issue. The certificates were bound in a book which contained on the back a certificate of the county treasurer that the book contained delinquency certificates for the taxes for certain years, and that they were issued "on or about January 31, 1898," and at the top of each page was "Certificate of Delinquency issued to Jefferson County," and on each page also appeared the description of the property, name of owner, nature of assessment, valuation, etc., and the books were marked as filed with the clerk of the superior court. *Held*, that the certificates were sufficient, and were competent evidence in the action for foreclosure.

7. While the plan of issuing delinquency certificates to the county in book form was first specifically mentioned in Sess. Laws 1899, p. 297, § 15, the issuance of them in such form prior thereto would not be deemed unauthorized.

8. Pierce's Code, § 8697 (Laws 1899, p. 299, § 18, and Laws 1897, pp. 184, 185, c. 71, § 103), provides that the court in tax proceedings may vacate and set aside the certificate, or make such other order as equity may render just, and authorizes the making of amendments, and the correction of errors, by taxing officers, to the extent that they may be supplied and made to conform to law by the court. *Held*, that in tax foreclosure proceedings based on delinquency certificates issued to the county, complaints made against the tax proceedings are to be allowed to prevail only when defendants have been injured, and the matter complained of is incurable by any judgment that can be entered.

Appeal from Superior Court, Jefferson County; George C. Hatch, Judge.

Action by Jefferson county against John Trumbull and others to foreclose tax liens. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Trumbull & Trumbull, for appellants. J. M. Ralston and A. W. Buddress, for respondents.

HADLEY, J. This is a tax foreclosure proceeding whereby the county of Jefferson

seeks to foreclose as to certain taxes, the action being based upon alleged delinquency certificates issued to said county. The appellants alleged, by way of answer and objections, that they are the joint owners of certain lots and tracts of real estate involved in the application for judgment; that no certificates of delinquency were ever issued to the county as against their property; and that no taxes were ever assessed or levied against said property for the year 1895, or any previous year included in the application. A trial was had, and judgment of foreclosure rendered. This appeal brings the judgment here for review as to these appellants.

It is first assigned that the court erred in overruling appellants' motion on special appearance to quash the process in the action. The motion is urged upon the following alleged grounds: (1) That the summons does not purport to give notice to the owners of the land, in that it neither purports to state the names of the owners nor to whom the lands were assessed, but simply purports to notify the reputed owners; (2) that it does not appear from the summons when the certificates of delinquency were issued by the county treasurer to the county; (3) that the summons does not inform the defendants against what lands it is sought to foreclose the lien for taxes. Referring to the first point mentioned, the summons does state that the name of the reputed owner precedes the description of the land, and that the lands were assessed to such reputed owner. That makes it sufficiently clear that the names, where known, are those which appear upon the treasurer's rolls as the owners of the property. Under the present statute it is expressly declared that, for the purposes of foreclosure, such shall be considered and treated as the owners, and that if upon the treasurer's rolls it appears that the owner is unknown, then the proceedings shall be against the property as belonging to an unknown owner. *Pierce's Code*, § 8694 (*Sess. Laws 1901*, pp. 385, 386, § 3). The above statute controlled the remedy when this summons was published. The second point urged under the motion to quash seems to be answered by the summons itself, which expressly states that the certificates of delinquency were issued to Jefferson county on January 31, 1898, and we are unable to see force in the third point, as the descriptions of the property are stated in the summons, and it seems to us that it is made clear to the defendants in the action what lands are sought to be subjected to the lien for taxes by the foreclosure. We think the court did not err in denying the motion to quash.

Several alleged errors are assigned that certain immaterial and incompetent evidence was introduced over objection. But this court has often said that it will, on trial de novo, consider only what it deems to be competent evidence, and will not reverse a

judgment if there is sufficient competent testimony to support it.

It is assigned that the court erred in admitting in evidence, over objection, respondent's Exhibits A to G, inclusive. These exhibits comprise seven large bound books, which were offered and received in evidence as certificates of delinquency. It is first urged that the books were offered in a mass, and that no particular volume, page, or entry was pointed out. Doubtless a demand for such particularization, if made in the court below, would have been granted. It certainly would have been a reasonable request for the convenience of court and counsel. The certificate books, however, related to much other property in which appellants do not claim to be interested. Foreclosure in the same action was sought against many hundreds of other lots and tracts, and if, when the books were offered in evidence, these appellants desired to have pointed out the books and pages which related to their property, they should have made such a request. The mere fact that respondent did not point them out in the first instance, if in truth they existed, did not render the evidence incompetent. The only objection made was that the books were incompetent, and that no foundation for their introduction had been laid. This objection did not reach the point above suggested, and, unless it had been brought to the attention of the court below, we shall not hold that the court erred in not requiring the books and pages to be designated at the time they were received in evidence.

The objection that the books were not competent, however, raises the most serious question in this case. The certificate attached to the back of each book, with variation as to the number of the volume referred to, is as follows: "State of Washington, County of Jefferson—ss: I, T. J. Tanner, Treasurer of Jefferson County, State of Washington, do hereby certify that this book number 1 is one of seven volumes, which said seven volumes contain the original Certificates of Delinquency or Delinquent Tax Certificates, which said Certificates of Delinquency were duly issued by the Treasurer of Jefferson County, State of Washington, on or about January 31st, A. D. 1898, to said Jefferson County, for taxes duly levied and delinquent upon the real property described in said Certificates of Delinquency and in each and all of said seven volumes containing said Certificates of Delinquency, as aforesaid, for taxes due to said Jefferson County and including all other taxes payable to said Jefferson County for the years 1891, 1892, 1893, 1894, and 1895, as shown by this volume and each and all of said seven volumes. And I do hereby further certify that said seven volumes, as aforesaid, of which this is one contain all the Certificates of Delinquency issued by said Treasurer of Jefferson County to said Jefferson County, as hereinbefore set forth and that

each and all of said volumes numbered one, two, three, four, five, six and seven are the Certificates of Delinquency issued by the Treasurer of Jefferson County, Washington, as hereinbefore set forth to said Jefferson County, for taxes due and delinquent upon the property described in said Certificates of Delinquency and payable to said Jefferson County, for the year A. D. 1895 and prior years. Dated this 24th day of October, A. D. 1901. T. J. Tanner, Treasurer of Jefferson County, Washington. [Seal.] It is urged that the county treasurer, who certified to the above, certified that the book certificates were issued at a date prior to the time he entered upon the duties of his office. He was, however, county treasurer, and, if the certificate was a proper one for that officer as such to make, he had as much power to make it as his predecessor. Under section 98, c. 71, pp. 182, 183, Sess. Laws 1897, which was in force when these certificates might have been first issued, no particular time is designated for issuing the certificate to the county. It is only necessary that the property shall remain on the assessment rolls, and that no certificate of delinquency may have been sold to individuals. In the next amended statute upon this subject (section 15, p. 297, Sess. Laws 1899), no specific time is mentioned, except that the certificates to the county shall not issue until after four years from the date of delinquency; and in the next (Sess. Laws 1901, p. 385, § 3), the time is merely fixed at five years after delinquency. Thus no time is mandatorily fixed for issuing the certificates. It is directly provided that they shall issue after certain dates, but it is not stated that it shall be done immediately. They were issued in this instance after the proper date, and by an officer competent to issue them. While it is true one date is named as the date of issuance and a subsequent one as the date of signing, yet since either date was at a time when certificates to the county could be properly issued, and since they are signed by a competent official, we think they became competent as evidence. In addition to what was contained in the so-called "certificate" set out above, each page of the books contained other matter showing manifestly that the books were intended to be and were prepared as certificates of delinquency issued to the county. At the top of each page is the following: "Certificate of delinquency issued to Jefferson County, Washington." Upon each page also appears the description of the property, name of owner when known, year of assessment, valuation, amount of tax, and over the final column is the following: "Amount of County's Certificate." The books are also marked as filed with the clerk of the superior court of Jefferson county December 30, 1901, which was prior to the application for judgment and issuance of summons in this action.

It is urged that the law at the time these taxes became delinquent did not authorize

the issuance of these certificates to the county in book form. It is true that plan was first specifically mentioned in the amendment of 1899, supra, but it does not follow that the act of 1897, supra, intended that a separate slip of paper, called a "certificate," should be issued by the county to itself for each of the thousands of delinquent lots and tracts of lands. Such a course would in some instances have been so burdensome as to have been impracticable. In the absence of such an intention expressly stated in the act of 1897, we think it may well be concluded that the act of 1899 merely declared specifically what was before the real intention of the Legislature in that regard.

Appellants offered no evidence, but, after respondent rested, moved for judgment in their favor, on the ground that respondent had failed to prove a case by competent evidence. The motion was overruled, and the court made findings which it is claimed are not sustained by evidence. We think there was sufficient evidence to sustain the findings, and appellants did not show that they were in any way injured. Respondent argues that this is a proceeding in equity, that the court sitting in equity will regard that done which ought to have been done, and that all necessary amendments touching the seeming irregularities were made. Appellants, upon the other hand, insist that this is not a proceeding in equity, but is a special proceeding under the statute, not governed by equitable principles, and that each step outlined in the statute must be strictly pursued. While, perhaps, it may more properly be called a statutory proceeding, yet the statute (section 8697, Pierce's Code; section 18, p. 299, Laws 1899; and section 103, c. 71, pp. 184, 185, Laws 1897) provides that the court may vacate and set aside the certificate, or make such other order as in law and equity may be just. Thus the equitable powers of the court in the premises are recognized by the statute, and the same section also specifically authorizes the making of amendments and the correction of errors of the taxing officers, even to the extent that these may be "supplied and made to conform to law by the court." In *Smith v. Newell* (Wash.) 73 Pac. 369, this court broadly interpreted the above statute, as we believe it was intended, in the interest of all concerned. The court said: "This provision of the statute, it seems to us, was intended to enable the courts to correct just such omissions as were made by the treasurer in this instance. It was intended to put it in the power of the court, on the hearing of a tax foreclosure suit, to render judgment as the evident justice of the case required. That is, it was intended that the courts should inquire into the merits of complaints made against tax proceedings, and allow them to prevail only when the matter complained of operated to the injury of the complaining party, and is incurable by any judgment that can be entered in the foreclosure proceed-



ings." We think the above language is particularly applicable here. No injury is shown to have resulted to appellants.

Objection is made in this court to the form of the decree, but we are unable to see that appellants are injured by its terms. Counsel upon both sides have prepared elaborate briefs, and have cited many authorities to support their respective arguments. A review of them all is impracticable, and we believe it unnecessary to further extend the discussion of the case.

The judgment is affirmed.

MOUNT, ANDERS, and DUNBAR, JJ.,  
concur.

(24 Wash. 228)

### TIMM v. TIMM.

(Supreme Court of Washington. March 8, 1904.)

#### ATTORNEYS—AUTHORITY—COMPROMISE—RATIFICATION—APPEAL—FAILURE TO PRINT FINDINGS.

1. An appeal will not be dismissed for failure to print in appellant's opening brief the findings of fact on which errors are assigned, where they are printed in appellant's reply brief.

2. Where a wife authorized her attorney to settle property rights involved in a divorce suit commenced by her husband on a basis of equal division of the property, and thereafter urged the attorney to get the matter settled as soon as possible, he had no authority under 2 Ballinger's Ann. Codes & St. § 4766, authorizing attorneys to receive money claimed by the client, to accept \$250 in full for the wife's rights in property worth \$3,000.

3. Pending a divorce suit, the wife's attorney, without authority, made a compromise of the property rights involved, receiving the husband's notes, on payment of which he sent the wife money orders for the proceeds. These she deposited in court, and by order of court they were delivered to her substituted attorney, cashed, and part of the proceeds used to pay such attorney's fees and suit money, pursuant to a former order of court, with which plaintiff had not complied. The remainder of the money remained in the custody of the court. *Held* that, by accepting the proceeds of the money orders under order of court, defendant was not precluded from thereafter asserting her property rights and disregarding the alleged compromise.

Appeal from Superior Court, Adams County; Geo. W. Belt, Judge.

Action by Ludwig Timm against Susan Timm. From a judgment for defendant for divorce, but providing that plaintiff hold as his separate property all the property owned by plaintiff and defendant as community property, defendant appeals. Reversed.

O. R. Holcomb, for appellant. Merritt & Merritt, for respondent.

PER CURIAM. Plaintiff, Ludwig Timm, instituted an action for divorce in the superior court of Adams county against defendant, Susan Timm, his wife, on the grounds of desertion and abandonment. Defendant answered by denying the material averments in the complaint, and setting up an affirmative defense alleging cruel and inhuman

treatment on the part of plaintiff towards herself. The plaintiff filed a reply denying the material allegations of the affirmative defense. On the 10th day of September, 1900, the cause came on for trial in the lower court. Judgment was given for plaintiff dissolving the bonds of matrimony theretofore existing between the parties to this controversy. On the 7th day of March, 1901, the trial court made an order vacating this judgment for divorce, and ordered, further, that plaintiff, Ludwig Timm, pay to the clerk of the court for the benefit of Susan Timm, defendant, on or before March 21, 1901, \$37 for suit money, and \$75 to O. R. Holcomb, Esq., her then attorney, as counsel fees. On the 10th day of April, 1901, the plaintiff having failed to comply with the order of the court regarding the payments of these sums of money, the superior court ordered that the plaintiff show cause on or before May 27, 1901, why he should not be punished for contempt. On October 5, 1901, defendant, by her attorney, Mr. Holcomb, deposited in the registry of the court three money orders, payable to order of Susan Timm, aggregating \$220.85, accompanied with notice to plaintiff and his attorneys that defendant refused to accept same in accordance with any settlement made by plaintiff and defendant's former attorney, W. W. Zent, and that said attorney Holcomb claimed a lien for his fees on such deposit. On the 17th day of October, 1901, the plaintiff's attorneys served upon Mr. Holcomb a notice in writing disclaiming any interest in such postal money orders, and further stating in such notice that "said plaintiff hereby further notifies defendant and her attorney that no objection is or will be made to any order the court may see fit to make with regard to said moneys by reason of the fact, hereinbefore stated, that said plaintiff has and claims no right or interest in and to said moneys." On October 28, 1901, the lower court ordered "that the clerk of said court deliver to defendant's attorney, O. R. Holcomb, the said three postal money orders, aggregating the sum of \$220.85; that, upon the same being cashed, the said defendant's attorney retain the sum of \$75 heretofore ordered to be paid as attorney's fee, and the further sum of \$37 suit money, for the benefit of the defendant, and that the remainder of said sum, to wit, \$108.35, be deposited with the clerk of the court, and retained by him pending the final determination of said suit."

The cause came on for trial on November 18, 1901. The lower court found, among other things, that the allegations of cruelty and inhuman conduct contained in defendant's affirmative defense were true. "(5) That on the — day of January, 1901, and during the pendency of this action, plaintiff and defendant made a full and final settlement of all of their property rights, both community and personal, and plaintiff executed his promissory note for the sum of two hundred fifty

dollars (\$250), that being the sum agreed upon in said settlement to be paid to defendant by plaintiff as her share and interest in and to the property of plaintiff and defendant, and that at the time said note became due plaintiff paid, settled, and satisfied said note, with the interest thereon in full, and defendant received, accepted, and retained said money so paid upon said note." Conclusions of law were stated upon such findings as follows: "(1) That defendant is entitled to a decree of divorce severing the bonds of matrimony existing between plaintiff and defendant; (2) that plaintiff is entitled to all of the property, both real and personal, of every kind and description, belonging to plaintiff and defendant, either as community or separate property; (3) that defendant is entitled to recover her costs and disbursements in this action."

Defendant excepted to said fifth finding of fact and the second conclusion of law. Judgment was entered in the action on the findings in accordance with these conclusions of law, that part of the judgment relating to the property rights of the parties being as follows: "That plaintiff have and hold in his own right and as his separate property, against any and every claim of defendant, all of the property of every kind and description, both real and personal, owned by plaintiff and defendant as community property, or by plaintiff as his separate property, to have and to hold the same forever as against any claim of defendant." From this portion of the judgment this appeal is taken. The appellant assigns that the trial court erred in making finding of fact No. 5 and conclusion of law No. 2, above noted, and in rendering that part of the judgment from which an appeal has been taken in this cause.

The respondent moves to dismiss the appeal herein because appellant failed to print in her opening brief the findings of fact upon which errors are assigned in this court. The appellant thereafter caused to be printed in her reply brief all the findings, the conclusions of law, and final judgment. She therefore comes within the purview of the decision heretofore enunciated by this court in *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421. The motion to dismiss the appeal is therefore denied.

The testimony in this record shows that the parties to this controversy intermarried in 1869, in the state of Minnesota; that they have raised a family of four children, all of whom are grown. The testimony in appellant's behalf amply sustains her allegations of cruelty on the part of respondent. It appears that she was a hard-working woman, and was about 54 years old at the time of the trial; that she helped respondent, during the period of their marriage, accumulate real and personal property, prior to the bringing of this action, of the value of more than \$3,000. Respondent contends that the payment of the \$250 designated in the findings

was paid in pursuance of an agreement entered into between him and Mr. W. W. Zent, appellant's first attorney in the case at bar. In support of such contention the following written instrument was offered and received in evidence at the trial: "Ritzville, Washington, Jan. 21, 1901. Received of Ludwig Timm a note due October 15, 1901, for \$250.00, same being in full settlement of all claims of Susan Timm, his former wife, against said L. Timm, this receipt to take effect if said Ludwig Timm shall deliver to W. W. Zent two notes one for \$150.00, signed by Mr. Ulm and William Snyder, and one for \$80.00, signed by L. H. Jones, as collateral security, and if said notes are not delivered this receipt shall not take effect until said note by said Timm is fully paid. W. W. Zent, Atty. for Mrs. Susan Timm." Mr. Zent subsequently collected the principal and interest on this \$250 note, amounting to \$270.85, and on October 2, 1901, wrote Mrs. Timm as follows regarding this collection: "October 2nd, 1901. Mrs. Susan Timm, Paha, Wash.—Madam: Enclosed herewith I hand you \$220.85 same being the proceeds from Mr. Timm's note for your part of his property as per our settlement of January 21, 1901, and interest to date less my fees. Yours very truly, W. W. Zent." This is the same \$220.85 represented in the postal orders above mentioned in the proceedings of the trial court. Respondent testified in regard to this alleged settlement in the following language in his direct examination: "Had a settlement of all our property last winter, about January. Mr. Zent, her attorney, and I had the settlement. Mr. Zent told me to pay him \$250, and he would settle everything for her. I had no money, so I gave him two notes (describing them), for a little more than \$250, due last October. Mr. Zent took them, and agreed to cash them or collect them. They were paid. Mr. Zent took the money. I guess he paid it to her [defendant]." Mr. Zent testified at the trial that "while Mrs. Timm was at some place in Idaho she wrote me a time or two, urging me to get the matter fixed up or settled." On cross-examination witness said that Mrs. Timm had always given him to understand that she ought to have half of the property, but she told me to get it settled; that after witness had notified Mrs. Timm of the settlement she came to his office, and told him she was not satisfied; that witness "looked for Mrs. Timm's letter from Idaho, just before coming over to court, and could not find it." The appellant testified: "I never authorized Mr. Zent to settle for me with Timm, only for half the property. \* \* \* I never told Mr. Zent to settle with Mr. Timm, but always told him to get it settled by the court as soon as possible. \* \* \* I never wrote to Mr. Zent from Idaho telling him to go ahead and settle the best way he could."

In view of the facts appearing in this rec-

ord, we think that attorney Zent acted without authority in making the alleged compromise between the parties to this action; that whether he supposed he was acting for the best interests of his client in that behalf is an immaterial matter in the consideration of this controversy. The statute (2 Ballinger's Ann. Codes & St. § 4766) conferred upon the attorney no such authority. In *Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568, the court held that the agreement of an attorney "to surrender or compromise any substantial right of his client is beyond the scope of his employment, and is not binding without express authority. His duty is to maintain, not to sacrifice, his client's cause." See, also, *Richardson Drug Co. v. Dunagan*, 8 Colo. App. 318, 46 Pac. 227, and authorities cited.

We now approach the most serious question in the cause. Did defendant ratify this compromise made between Mr. Zent and the respondent, Ludwig Timm, by cashing the postal money orders and receiving the proceeds thereof? At the time of the deposit of this money in the registry of the trial court Mr. Timm had not complied with the order made a number of months prior thereto, requiring him to pay \$37 suit money and the attorney's fee of \$75. A part of the proceeds of these orders were applied towards discharging these two items of suit money and attorney's fees; the balance of \$108.85 remained in the custody of the court for further disposition. It is a general principle of law that subsequent ratification with full knowledge of the facts is equivalent to precedent authority. It is also a rule of law of general application that when a party has received anything valuable in pursuance of a contract made between him and another party the party electing to rescind must place or offer to place the other party in statu quo by a restoration of the consideration received. This rule of law was enunciated by this court in *Seattle National Bank v. Powles* (Wash.) 73 Pac. 887, which was an action at law on a bank check, and in which the defense was a legal one, based on an alleged rescission. This rule regarding restoration of consideration is greatly relaxed in equitable suits and proceedings, as contradistinguished from the enforcement of strictly legal rights and remedies. This distinction, however, has not always been definitely observed by elementary writers and in the decisions of the courts. *Clapp v. Greenlee*, 100 Iowa, 586, 69 N. W. 1049; 18 Ency. Pl. & Pr. 837; *Ludington v. Patton*, 111 Wis. 245, 86 N. W. 571. This alleged settlement arose after the institution of the action for divorce. The court, having jurisdiction over the whole subject-matter and the parties, can do complete equity between them. *Ludington v. Patton*, supra. In 2 *Bishop on Marriage, Divorce & Separation*, § 702, the learned author uses the following language: "It is not per se a violation of the law's policy, therefore is not necessarily nugatory,

for the parties to a divorce suit to enter into an agreement as to what alimony shall be allowed, how their property shall be divided, and the like, on the rendition of a decree for dissolution or separation. But if the contract is of a sort to stimulate the divorce, to discourage any defense, or in any way to impose upon the court, it will be void; for example, it will be void if so framed as to have effect only on condition that a divorce is granted without alimony. Hence practically, and almost and sometimes quite as matter of law, an agreement of this sort should be laid before the judge, when, to an extent not readily definable, it will be ill if he dissents, and good if he approves." The laws of the state of Iowa relating to the contracts of married women are very liberal in the matter of the removal of all common-law disabilities pertaining to such agreements. The Supreme Court of that state in *Martin v. Martin*, 65 Iowa, 255, 21 N. W. 595, held, with reference thereto, that contracts made between husband and wife, prior to an action for divorce, with regard to temporary or permanent alimony on the dissolution of the marriage relation, will be recognized. In the case last cited the court uses the following language: "The courts, however, will in every case scrutinize the transaction very closely, and the contract will not be enforced unless it appears to have been fairly entered into, and to be reasonably just and fair to the wife." We see no just reason why this equitable rule should not be applied to such agreements made during the pendency of divorce suits as well as to such contracts made in contemplation thereof. Furthermore, under our statutory provisions (*Pierce's Code*, § 4637; *Ballinger's Ann. Codes & St.* § 5723), these proceedings with reference to the adjustment of the property rights between the spouses are regulated and determined by action of the court in that regard, and not by agreement between the parties. The courts will not lend themselves to anything that will encourage or facilitate divorces, by being too ready to recognize and enforce contracts between husband and wife, adjusting their property rights, either before such proceedings are instituted or during their pendency.

Applying these principles to the case at bar, we think that the trial court erred in sustaining the alleged compromise between the parties; that in cashing the above postal money orders and obtaining their proceeds appellant is not precluded or estopped from asserting her property rights herein. We are of the opinion that under the showing made in this record the appellant is entitled to an equitable division of the property existing at the time this action was begun, in accordance with the provisions of the statute; that appellant should account to respondent out of her share of such division for the deposit of \$108.85 and \$50 attorney's fee received by Mr. Zent, with legal interest on such sums

respectively, from the time of the payment of the \$250 note. These parties on the further hearing of this matter should be allowed, if they or either of them shall see fit, to submit additional testimony as to their respective property rights.

That portion of the judgment appealed from is therefore reversed, and the case remanded to the superior court, with directions to proceed as indicated in this opinion; the costs of this appeal to be taxed against respondent.

(44 Or. 477)

### HALL v. ABRAHAM.\*

(Supreme Court of Oregon. March 21, 1904.)

#### MINES—OPTION—LICENSE—RIGHTS OF LICENSEE—CONSTRUCTION.

1. An option to purchase mining lands, with privilege of prospecting and mining ore, is a license coupled with an interest.

2. The licensee in such license having gone into possession and made expenditures, the license is irrevocable, and he is entitled to exclusive possession during the life of the agreement, and has during such time an interest in the realty and ores produced.

3. The owner of a mining property gave defendant an option to purchase, with privilege of prospecting and mining ore; and it was agreed that all ore found which might be susceptible of milling should be sold by the owner of the property, and the net proceeds applied on the purchase price. In case of failure to purchase, all payments were to be forfeited. Held that, in computing the net proceeds, the cost of mining the ore should be deducted.

4. The cost of mining should be deducted in computing the net proceeds, though the question arose in an action by the owner of the property to recover ores sold by the licensee.

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by James Hall against Albert Abraham. From a judgment for plaintiff, defendant appeals. Reversed.

O. P. Coshaw and Albert Abraham, for appellant. F. W. Benson and A. M. Crawford, for respondent.

**WOLVERTON, J.** This is an action to recover the possession of 20 tons of gold-bearing ore. The rights of the parties depend in most part upon the proper interpretation of a certain agreement entered into November 14, 1901, between the plaintiff, James Hall, on the one part, and G. W. Johnson and H. H. McCarthy, on the other, whereby the former gave to the latter an option to purchase certain premises, specifically described, with the privilege, under designated conditions, of prospecting and mining thereon. The defendant claims through Johnson and McCarthy. The ore was taken from a mine situate upon the premises, through a tunnel entering from the Continental mine, and was sorted as mined, and that portion of it fit for milling and shipping put into sacks and stored in bins on the latter mine. That which is in controver-

sy was ready for shipment about May 20, 1902, and the evidence tends to show that the defendant requested plaintiff to sell it, which he refused to do, and that about the 8th of October following the defendant removed it from the place where stored preparatory to hauling it to Myrtle Creek, a railroad station, whereupon this action was instituted to recover possession thereof. It may be added that the ore was subsequently conveyed by defendant to the station, shipped to the Selby Smelting & Lead Company at San Francisco, and milled.

Among other things, the trial court instructed the jury that, in determining the value of the ore, they should not deduct the cost of mining, but should consider the charges for sacking, hauling, freighting, and smelting, which amounts should be deducted from the gross value of the ore at the place where taken, and that the remainder would be the measure of recovery, in case the property could not be found. An exception was saved to this instruction, and the error assigned in pursuance thereof presents the only question that need be considered. The same question was raised by an attempt to show the cost of mining the ore and taking it from the mine, which was not permitted.

The agreement in question may be technically characterized as a license coupled with an interest, with an option to purchase; the licensees having gone into possession, performed labor, and made expenditures in pursuance thereof, thereby rendering it irrevocable. *Stinson v. Hardy*, 27 Or. 584, 41 Pac. 116; *Clarno v. Grayson*, 30 Or. 111, 46 Pac. 426. For brevity of expression, we shall refer to the parties as licensor and licensees. The licensees, having entered, are entitled to the exclusive right of possession during the continuance in force of the agreement. They have an interest in both the realty and the ores produced from the mine, and cannot be divested of either without their consent, except by virtue of the provisions of the agreement itself. By one clause in the agreement it is provided that, if the licensees enter into possession, they shall perform a definite amount of work upon the mine, namely, 730 shifts, on or before the expiration of the contract; a shift being a day's work of 10 hours for one man. By other provisions, they are to forfeit all right, interest, and title to the premises, as well as all sums of money paid, all improvements made, and all work and labor performed thereon, if they fail to pay the full stipulated contract price within one year from the date of the agreement; time being made the essence of the contract. These stipulations are all clearly for the benefit of the owner, as well as designed to insure a substantial exploration and development of the property. It is further provided that all ore, mineral, bullion, and concentrates found on the premises during the term of the lease which may be milled and shipped (that is, which are susceptible of being

\* 2. See *Mines and Minerals*, vol. 34, Cent. Dig. § 213.

\* Rehearing denied April 23, 1904.

milled and shipped) shall be sold by Hall, and the net proceeds thereof applied on the purchase price. This was evidently for the benefit of the licensees, and the pivotal or cardinal inquiry is, what was intended by the use of the expression "net proceeds"? The possession of all ore when taken from the mine was in the licensees, and it was their right to retain it until the agreement was at an end, except such as was fit for milling, to which the licensor was entitled for the purpose of selling it. In fact, he was not only entitled to such possession for that purpose, but it was his duty to dispose of the ore within a reasonable time after it was produced, and apply the net proceeds to the purchase price of the property, as required by the stipulation. He had no right to the possession of the ore except for that purpose, and he could not refuse to perform the agreement in this respect until the option expired, and then claim a forfeiture because the entire consideration named was not otherwise paid.

It was manifestly within the expectation of the parties that such a quality of ore would be discovered and taken from the mine as would afford a ready source of profit, and it was intended that the licensees should have the benefit of this to aid them in their purchase. Their labor and outlay would be required to produce it, and, should such expenditures not be deducted from the gross receipts, it is plain that the net profits or proceeds would be larger; but if, on the other hand, they should be deducted, the net profits would be less. In either event, however, the licensor would be fully protected, and that whether the purchase was completed or not. So, if the labor and outlay were not deducted, the larger would be the amount to apply on the purchase price, and the smaller the final payment to be made to complete the purchase; but, if they were to be deducted, the reverse would be true, and the amount of the forfeiture would be less or greater accordingly as they should or should not be deducted. Forfeiture is not favored in equity, and the law is not so callous and indurated as to require it unless it is exacted by clear and indubitable intentment. As we have seen, the licensor has stipulated for the doing of a large amount of work upon the premises to insure practical development and exploration of the mine, and has protected himself against depletion thereof. In view of this, can it now be said that it was the intentment of the parties that the licensees should contribute more to the benefit of the licensor, as would probably be the case, if their labor and means were in no sense to become a factor in determining the net proceeds of the milling ore? We have no precedent to guide us, except as we find some cases promulgating an analogous principle. Where a party is suing for damages to his mine, and the defendant is a trespasser through inadvertence, he would be compelled to pay only the

value of the ore as it was in the mine, and would be entitled to limit his recovery, first, by the value of what is taken; and, second, by the cost of mining and extraction, tramming and hoisting to the surface, or hoisting to the pit's mouth, which would be the value of the ore to the party suing if he were engaged in mining himself, and compelled to stand the expense of producing it. 2 Lindley, Mines, § 868. This should be confined to the actual cost of digging or quarrying the particular ore from the particular vein in which it is found, exclusive of the work of running levels, drifts, crosscuts, or explorations, development, or improvement, in discovering or reaching the vein. *St. Clair v. Cash Gold Mining & Milling Co.* (Colo. App.) 47 Pac. 466. The case of *Colorado Cent. Consol. Min. Co. v. Turck*, 70 Fed. 294, 17 C. C. A. 128, involving an action to recover damages for wrongfully extracting silver-bearing ore, is illustrative of the principle. There the trial court instructed the jury, in substance, that the measure of the plaintiff's recovery, provided the defendant was not a willful trespasser, was the value of the ore taken out of the vein, deducting the cost and expense of breaking it and bringing it to the surface or mouth of the mine, with the further injunction that where ore has been broken and taken out by lessees of the defendant company, and the latter has received only a royalty on the ore, the royalty so received might properly be taken to represent the net profit that had been realized by the defendant, which instruction was approved by the court of appeals. In further support of the doctrine, see *Waters v. Stevenson*, 13 Nev. 157, 29 Am. Rep. 293; *Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803, 52 Am. St. Rep. 605; *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617; *Ege v. Kille*, 84 Pa. 333; *Austin v. Huntsville Coal & Mining Co.*, 72 Mo. 535, 37 Am. Rep. 446. The principle being applicable when the damages are the result of trespass occurring innocently, through mistake, but without right, how much more appropriate and suitable would be its adaptation where the property is taken out under a license or positive agreement of the parties concerned! By arriving at the damages sustained under the rule announced, the mine owner is protected, and at the same time the producer does not lose his labor and expense of mining the product, which is fair to all. It is so here. The parties, presumably contracting in view of the law upon the subject, intended to provide against damage to the mine by way of depriving it of its milling ore, and at the same time to protect the licensees against the loss of their labor and expense in mining and producing the ore, which, as we have seen, consists in the labor and expense of digging the ore from the vein and bringing it to the surface. This would mark the damage to the mine owner, or the net profits, were the ore sold at the tunnel's mouth. If, however, it is to

be shipped and reduced, and the gold and other precious metals extracted, then the expense of sacking, freighting, and milling should likewise be deducted from the gross sum produced, and the balance would indicate the net profits or net proceeds; the two expressions being synonymous, we may say, in the light in which the latter is employed in the agreement under consideration. Nor do we think the form of action has any particular bearing upon the subject. During the continuation in force of the contract, the interest of the plaintiff in the ore was special, and he could only demand its possession for the purpose of selling the same and retaining the net proceeds. The cost of producing it from the vein or lode must be accounted for to the licensees, or, in this instance, to the defendant, who succeeds them; the contract defining and fixing the amount of his recovery. The recovery, therefore, should be the same, whether the action be upon the contract for damages, or in the present form for the specific property that the plaintiff has stipulated should be retained by him after sale.

It follows that the trial court erred in the refusal to admit the testimony offered for the purpose of showing the cost of mining the ore from the ledge, and in instructing the jury that they should not deduct such cost from the gross proceeds in arriving at the net proceeds of the milling ore. In view of these considerations, the judgment of the trial court will be reversed, and the cause remanded for such further proceedings as may seem proper, not inconsistent with this opinion.

(44 Or. 483)

COAST LAND CO. v. OREGON PAC. COLONIZATION CO. et al.

(Supreme Court of Oregon. March 21, 1904.)

PROCESS—SERVICE—CORPORATIONS—MANAGING AGENTS—MOTIONS TO SET ASIDE—DILIGENCE.

1. Under B. & O. Comp. § 55, providing for service of summons on the "president or other head of the corporation, secretary, cashier, or managing agent," a return showing service on the "vice president and managing agent" was sufficient, where the person served was in fact the managing agent, although he had ceased to be vice president.

2. Evidence held to show that a person on whom service of summons against a corporation was had was the state agent and representative of the corporation.

3. Whether the state agent of a corporation, on whom service of summons was made, was its "managing agent" within B. & O. Comp. § 55, providing for service on corporations, or not, service having been made on him, it was the duty of the corporation to promptly move to set it aside if invalid; and where, with knowledge of the service and decree, it entered into an arrangement with the plaintiff in the suit for the postponement of execution thereon, and the arrangement of differences in litigation, it could not, four months after the decree, and after issuance of execution and advertisement for sale, first move to vacate the decree and quash the return of service for technical insufficiency.

Appeal from Circuit Court, Benton County; J. W. Hamilton, Judge.

Action by the Coast Land & Live Stock Company against the Oregon Pacific Colonization Company and others. From an order overruling a motion to set aside a decree and to quash a return of summons, defendants appeal. Affirmed.

E. C. Bronaugh and George F. Martin, for appellants. J. K. Weatherford, for respondent.

BEAN, J. This is an appeal from an order overruling a motion to set aside a decree and to quash a return on a summons. The plaintiff is an Oregon corporation, with its principal office at Albany, and the defendant is a Minnesota corporation. On June 11, 1902, S. F. Cook obtained from the plaintiff and the Oregon Agricultural Company an option in the name of F. A. Brown for the purchase of about 55,000 acres of land in Benton, Polk, and Lincoln counties at the rate of \$1.75 an acre. By the terms of the agreement Brown was to pay \$1,000 cash and \$5,000 within 60 days, upon the payment of which the land was to be deeded to him, the grantors taking notes for the deferred payments, secured by a mortgage on the property. On July 3d Brown assigned his option to George H. Selover, of Minneapolis, Minn., and on July 28th Selover and S. H. Bates, of Minnesota, and Cook organized the defendant corporation, for the purpose of taking over the Brown option and handling and disposing of the property, it being agreed that Cook should receive one-fourth of the profits of the venture. As appears from the articles of incorporation, the only parties composing the company were Selover, Cook, and Bates, who occupied the offices of president, vice president, and secretary and treasurer, respectively, which offices they were to hold for one year, or until the next annual meeting of the corporation, which was scheduled to be held in Minneapolis in the following January. In August, 1902, the defendant complied with the terms of the option, paid the balance of the first payment therein stipulated, and the plaintiff and its associate company deeded to it the land as agreed upon; the plaintiff taking notes of the defendant and Selover and Cook for the deferred payments secured by a mortgage on the property. Default was made in the payment of these notes when due, and on March 11, 1903, the plaintiff commenced a suit in the circuit court for Benton county to foreclose the mortgage, making service on Cook in that county, who is stated in the return of the sheriff to be the "vice president and managing agent" of the defendant corporation. No appearance was made for the defendant, and on March 23d a judgment and decree was taken against it by default. On July 8, 1903, after execution had been issued and the property advertised for sale, the defendant, without any showing of merits, ap-

peared specially, and moved to set aside the decree and to quash the return on the ground that Cook was not at the time the service was made on him either vice president or managing agent of the defendant. This motion was denied, and defendant appeals.

From the minutes of the annual meeting of the defendant corporation and of its board of directors it appears that prior to the commencement of this suit Cook's term as director and vice president had expired, and his successor had been elected and qualified, so that he was not the vice president at the time the summons was served upon him. This is, however, immaterial, if he was in fact the managing agent of the defendant. The statute provides that summons shall be served upon a private corporation by delivering a copy thereof, together with a copy of the complaint, "to the president or other head of the corporation, secretary, cashier or managing agent." B. & C. Comp. § 55. Under this statute and the proceedings had in this case substantially two questions are presented for decision: (1) Whether Cook was the managing agent of the defendant, within the meaning of the statute, at the time the summons was served upon him; and (2) whether the defendant was guilty of such laches or delay in moving against the service as will bar the relief sought.

The contention for the defendant is that Cook was not an officer or agent of the company, and had no connection therewith except as a stockholder, and therefore the service was void. For the plaintiff it is contended that Cook was in fact the managing agent of the defendant in Oregon, but, if he was not, the defendant's conduct and laches has been such as to prevent it from objecting to the service or questioning the validity of the decree based thereon. Numerous ex parte affidavits have been filed in support of the contentions of the respective parties. These affidavits are lengthy, in many respects conflicting, and afford unsatisfactory evidence upon which to determine a disputed question of fact. We shall not attempt to note their contents in detail, but shall state generally our conclusions. Some important and material facts in the case, however, are either undisputed or so clearly shown as to be beyond controversy. The defendant was organized for the sole purpose of taking title to and disposing of the land described in the option obtained by Cook from the plaintiff, and it had no other business. Selover, Bates, and Cook composed the corporation, the two former residing in Minnesota and the latter in Oregon. At the time the company was organized and the land purchased it was understood that Cook should act as the defendant's agent in Oregon for the sale of the land, and from the organization of the company up to the time of the service of the summons he was endeavoring to effect a sale of the property. Bates and Selover say in their affidavits that it was the understanding

that Cook was to act as the agent only in case defendant should conclude to open an office in Portland and sell its land by retail; that in October, 1902, Cook was advised by them that the company had decided not to sell its land at retail, and would not open an office at Portland, and that he was not to have anything further to do with the company except as its vice president and director. In this regard, however, they are contradicted by Cook, who says that, as a part of the consideration for the transfer to the defendant of the option previously secured by him, it was agreed that he should have an undivided one-fourth interest in all the profits arising from the sale of the land, and should be the general manager of the company's business in Oregon; that immediately thereafter, as such manager, he went into possession of the land purchased from the plaintiff, and has ever since acted in that capacity; that he has never been notified of any change in the management or of his relation to the company. Mr. Stone, the president of the plaintiff, Mr. Hogan, its secretary, Mr. Davis, one of its directors, and Mr. Weatherford, its attorney, say that Selover, Bates, and Cook were all present and participated in the negotiations for the sale of the land by the plaintiff to the defendant; that it was then stated and represented by them that Cook was to be the general manager of the defendant in Oregon, and to have charge of and sell its land. Mr. Stone says that thereafter he (Cook) "seemed to be the general manager in handling the lands and looking after them, and has been continuously up to the present time handling said lands so far as any person has been looking after them." Mr. Weatherford says that "both George H. Selover and Silas H. Bates informed me that Mr. S. F. Cook was to be the active manager in making sales of said lands. This they informed us before they purchased it and after the purchase was made, and the said S. F. Cook was on the ground and went into possession and handling the lands, and continued in said capacity until long after service was made of the summons herein referred to, without any change being made, so far as I could discover; and as I understand he is still in possession, and that no notice was ever given of any change in the officers of said company or in the management thereof." Mr. Hogan says that at the time and during the negotiations for the purchase of the land by the defendant Selover frequently stated that Cook was to be the manager and agent for the defendant in Oregon; "that to my personal knowledge the said S. F. Cook has since that time and at various and divers times been in Benton and Lincoln counties, showing said lands to prospective purchasers; and that on the date of the service of summons in the above-entitled suit the said S. F. Cook was in Corvallis, returning from one of such trips." J. D. Wilcox, the agent of the Oregon Agricul-

tural Company, testifies that he was frequently informed by Selover and Bates that Cook was to be the general manager of the defendant, and that he had never heard of his being removed, or any change made in the management, until the affidavits were filed in support of the motion to set aside the decree. These affidavits are in some respects contradicted by Selover and Bates, but the weight of the testimony is so strongly in favor of the plaintiff that we think it must be taken as a fact in the case that Cook was the agent of the defendant in Oregon at the time of the service of the summons, and its general representative here. This conclusion is supported by the fact that about a month before the commencement of the suit Selover, the president of the company, was advised by Mr. Weatherford that he had been instructed to commence foreclosure proceedings, and would proceed to do so at once, unless the defendant would accept certain propositions for settlement made by the plaintiff, which it refused; that about the time the suit was commenced, Bates, the secretary and treasurer of the defendant, came from Minnesota to Oregon as its representative for the purpose of adjusting its affairs with the plaintiff. He arrived in Albany about the 11th of March—the day on which the suit was commenced and the summons was served—and remained until the last of the month or the first of April. During that time he frequently called upon and had numerous interviews with the attorney and the officers of the plaintiff company, and was informed by them and knew that the suit had been commenced, that service had been made upon Cook as the agent of the defendant, and was advised before he left Albany that a decree of foreclosure had been rendered, based on such service. He never at any time stated or intimated to the officers or agents of plaintiff or its attorney that Cook was not the agent or representative of the defendant. On the contrary, after the rendition of the decree, and after he had knowledge of that fact, he entered into negotiations with the plaintiff for a settlement, and obtained from it an agreement to delay execution on the decree in order to give the defendant time to consider a proposition of settlement made by plaintiff, or to dispose of the land and pay the judgment. Mr. Bates admits that he was in Albany during the dates referred to, and that he had conferences with the officers and attorney of the plaintiff, and he knew that the suit had been commenced; but denies that he knew that service had been made upon Cook, or that a decree of foreclosure had been entered. He is, however, contradicted by the positive affidavits of five or six reputable citizens, and, if they are to be believed, his memory is at fault.

Under these circumstances the motion to set the decree aside and to quash the return was properly denied. No showing of merits

is made by the defendant, and no claim that it has any defense to the suit. Its motion is based solely on the ground that Cook was not an officer or agent of the company upon whom valid service could be made. Whether he was technically a managing agent within the meaning of the statute providing for the service of summons on private corporations, he was its agent and representative in Oregon, looking after and attending to its property and business in this state, and, if the service upon him was not valid, it was the defendant's duty to have promptly moved against it, and not have waited until after the decree had been rendered, and the property advertised for sale. It is the duty of a party against whom a judgment has been wrongfully rendered to exercise reasonable diligence, after knowledge thereof, in procuring its vacation, and his inexcusable laches and delay will preclude him from obtaining the relief sought. In such case the party making the application is required to act in good faith and with reasonable diligence. If he has knowingly acquiesced in the judgment, or been guilty of unreasonable delay in seeking his remedy, relief will be denied him. 1 Black, Judgments, § 313; McQuillan v. Hunter, 1 Phila. 50; McCormick v. Hogan, 48 Md. 404. As to what laches and delay will preclude a party from moving to vacate a judgment must be determined upon the particular facts of each case. No general rule can be or has been laid down on the subject. Now, it appears that Bates knew of the service on Cook, and, without objecting thereto, or raising any question as to the validity of the decree, negotiated with the plaintiff for an adjustment of the differences between it and the defendant, on the assumption that the service was good and the decree valid. He thereby necessarily induced the plaintiff to rest secure on the belief of its officers and attorney, caused by the representations of himself and Selover, that Cook was in fact the agent and representative in Oregon of the defendant. If Cook was not an agent at the time the service was made, it was the plain duty of Bates, under the circumstances, to have disclosed that fact to the plaintiff, and, if he had done so, it would have been able to have made service upon him, and thereby unquestionably have obtained jurisdiction. He, however, made no objection to the service or the validity of the decree, but, on the other hand, entered into an arrangement with the plaintiff for the postponement of the issuing of an execution on the decree. The defendant having thus recognized and acquiesced in the regularity of the service and the validity of the decree, it was too late for it to move four months thereafter to vacate the decree and quash the return on a mere technical insufficiency of service.

The decree of the court below will be affirmed, and it is so ordered.



(45 Or. 110)

## STATE v. HOUGHTON.

(Supreme Court of Oregon. March 21, 1904.)

CRIMINAL LAW — ROBBERY — INCLUDED OFFENSES — PRIOR CONVICTION — REVERSAL — RETRIAL — MANDATE — FILING — OBJECTIONS — WAIVER — JURY — METHOD OF DRAWING — WITNESSES — IMPEACHMENT — REBUTTAL — COMPETENCY — TRIAL JUDGE.

1. Where, after the reversal of a conviction, defendant went to trial a second time without objection that the mandate had not been issued or filed, and did not raise such objection below, it was waived.

2. The issuing and filing of the mandate in the trial court after reversal of a conviction on appeal and the entry of such mandate in the journal, as required by B. & C. Comp. §§ 1487, 1488, is not a prerequisite to the attachment of the jurisdiction of the trial court to retry the defendant.

3. B. & C. Comp. § 976, provides, in effect, that in all counties except M. county 31 jurors shall be drawn and summoned for each term of the circuit court, from which number the grand and trial jurors for the term shall be selected, and that in M. county a larger number may be drawn and summoned when so ordered. Section 986 declares that if for any reason the requisite number of jurors do not attend, or when a part of them have been discharged, the court may order an additional number drawn to fill up the regular panel. *Held*, that where jurors had been impaneled to try another case in M. county at the same time defendant's trial was begun, and the names of the jurors remaining in the box were insufficient to complete the jury for defendant's case, it was proper for the court to order the names of the jurors excused from service on the jury previously drawn restored to the box and drawn to complete the second jury.

4. Where, in a prosecution for robbery, defendant proved by the official reporter that the testimony of the prosecuting witness in a former trial on an important point was inconsistent with his testimony in a case then pending, evidence of other witnesses that there was no inconsistency in the testimony of such witness, but that it was the same in both trials, was admissible.

5. Under B. & C. Comp. § 856, providing that the judge may be called as a witness by either party, in which case the judge, in his discretion, may order the trial suspended and to take place before another judge or to proceed before him, a trial judge was a competent witness in a criminal case to testify that there was no inconsistency between the testimony of a witness on the trial in question and that given by him on a prior trial.

6. Where defendant was indicted for robbery, and a conviction of assault with intent to rob was reversed on appeal, defendant could not object for the first time, by motion for a new trial, that he could not again be placed on trial for robbery.

Appeal from Circuit Court, Multnomah County; A. L. Frazer, Judge.

Charles Houghton was convicted of robbery, and he appeals. Affirmed.

See 71 Pac. 982.

W. T. Hume, for appellant. A. C. Spencer, Dep. Dist. Atty., for the State.

BEAN, J. The defendant was tried in December, 1902, on an information charging him with the crime of robbery, and convicted of "assault with intent to rob." Upon appeal the judgment was reversed and a new

trial ordered. *State v. Houghton*, 43 Or. 125, 71 Pac. 982. He was again tried on the same information, found "guilty as charged," and sentenced to a term in the penitentiary. From this judgment he also appeals.

After the appeal had been taken, it was discovered that the judgment of this court directing a new trial had not been remitted to the court below prior to the second trial, and it is now insisted that the trial court was therefore without jurisdiction. No objection was made to the retrial on the ground that the mandate had not been issued or filed, and the trial court's attention was not called to the omission. It seems to have been assumed by all parties that the mandate had been regularly issued and duly entered, and the defendant states that such was the fact in an affidavit made by him in support of a motion for a new trial. Having thus proceeded to trial without objection, the defendant must be held to have waived the filing of the mandate. 13 Enc. Pl. & Pr. 837; *Becker v. Becker*, 50 Iowa, 139; *Foster v. Jordan*, 54 Miss. 509; *Benzinger Township Road*, 135 Pa. 176, 19 Atl. 942. The formal issuing and filing of the mandate was not necessary to the jurisdiction of the trial court or its authority to retry the case. Further proceedings therein, except, perhaps, for special purposes, were suspended pending the appeal. But when the cause was reversed, a new trial ordered, and the appeal finally disposed of, the court below was thereby given authority to proceed with a retrial. The statute requires a certified copy of the judgment of this court on the reversal of a cause, to be remitted to the clerk of the court below (B. & C. Comp. § 1487), and by him entered in the journals (*Id.* § 1488). This is the official mode of communicating information of the reversal to the court below, and without a compliance therewith it could not proceed against an objection of the defendant. But it is the judgment reversing the cause and ordering a new trial which gives the trial court authority to proceed, and not the certified copy of such judgment required to be remitted to the clerk of the court below. The latter is but the official evidence, and its production may be waived by the parties, and if, after the reversal, they proceed to trial without objection, they will be held to have made the waiver.

The next point urged is that the jury was improperly drawn and impaneled. It appears that before the case was called for trial some of the jurors on the regular panel had been drawn to serve on a jury in another department of the court, and their names were not then in the jury box. The names remaining in the box were exhausted before the jury in this case was completed, and the court ordered that the names of certain of the persons who had previously been drawn to serve as jurors in the other department, but who in the meantime had been ex-

cused, be again put into the box, and from these the jury was completed. The defendant objected to the jurors thus drawn sitting in the case because their names were not in the box at the time the drawing began, and also objected to the entire jury because the names of all the jurors were not in the box at that time. But there was no irregularity or impropriety in the procedure adopted. The statute provides, in effect, that in all the counties of the state except Multnomah 31 jurors shall be drawn and summoned for each term of the circuit court, from which number the grand and trial juries for the term shall be selected. In Multnomah a larger number of jurors may be drawn and summoned when so ordered. B. & C. Comp. § 976. When for any reason the required number of jurors do not attend, or when a part of them have been discharged, the court has the power to order an additional number drawn to fill up the regular panel. Id. § 986. The object of the statute is that there may be a sufficient number of jurors in attendance on the circuit courts in all the counties of the state other than Multnomah for a grand jury and two trial juries, and in Multnomah a sufficient number to dispose of the business of the several departments of the court properly and expeditiously. In the counties outside Multnomah the law contemplates that a jury may be drawn and impaneled although another may at the same time be deliberating upon a verdict, and in Multnomah more than one jury trial may be in progress at the same time. A litigant is entitled to have the jury for the trial of his cause impaneled from the entire panel in attendance upon the court when it can be done. If, however, a jury previously drawn is engaged in a trial or deliberating upon a verdict, it is, of course, impracticable to have the members thereof impaneled in another case; but when they are discharged or excused from further attendance their names should be immediately restored to the jury box, and may be used in completing a jury that has already been commenced. A failure so to restore the names of the excused jurors would probably be a good ground for discharging a jury otherwise impaneled. *People v. Edwards*, 101 Cal. 543, 36 Pac. 7.

For the purpose of impeaching the prosecuting witness, the defendant, after laying the proper foundation, sought to show by the official reporter of the court that his testimony on the former trial on an important point was inconsistent with that given in the case then pending. The state was thereupon permitted in rebuttal, over defendant's objection and exception, to call the bailiff of the court and the presiding judge, to show that there was no inconsistency in the testimony of the prosecuting witness, but that it was the same on both trials. Objection is made to the competency of this testimony under the rule of many courts that, where an attempt is made to impeach a witness

by proving that he has made statements out of court inconsistent with his sworn testimony, it is not competent, for the purpose of sustaining him, to prove that at other times he has made statements out of court consistent with his testimony. 10 Enc. Pl. & Pr. 329; 1 Thomp. Trials, § 573; *Wharton, Cr. Ev.* (9th Ed.) § 492. The evidence offered and admitted, however, was not for the purpose of proving that the prosecuting witness had at some other time than that referred to in the impeaching question made statements consistent with his sworn testimony, but it was with the view of showing that there was no inconsistency in his testimony on the two trials, and that the witness called to impeach him was mistaken. For that purpose it was competent. *State v. Mims*, 36 Or. 315, 61 Pac. 888.

Special emphasis is placed upon the objection made to the trial judge testifying in the case. In the absence of a statute making him competent as a witness, the weight of authority seems to be opposed to the admission of such testimony. 3 Rice, Ev. § 196; *Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117; *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349; *Rogers v. State*, 60 Ark. 76, 29 S. W. 894, 31 L. R. A. 465, 46 Am. St. Rep. 154. The position and influence of the trial judge, the weight his testimony would necessarily have with the jury in case of a conflict with some other witness, and many other reasons which readily suggest themselves to the legal mind point to the conclusion that his testimony would, as said by Mr. Justice Dunbar in *Maitland v. Zanga*, supra, "lead to embarrassment, and would have a tendency to lower the standard of courts and bring them into contempt." But, whatever our conclusion might be if the question were a judicial one, the statute provides that the judge may be called as a witness by either party, and in such case it has vested in him the discretion of ordering the trial postponed or suspended, and to take place before another judge, or to proceed before him. B. & C. Comp. § 856. There was, therefore, no error, under the statute, in the judge's testifying in the case at bar.

The defendant was convicted on the former trial of an assault with intent to rob, which was deemed a lesser degree of the crime of robbery charged in the information. It is now contended that such verdict and judgment constituted an acquittal of the crime of robbery, and, under the *Steeves Case*, 29 Or. 85, 43 Pac. 947, was a bar to a retrial of the defendant for that crime. This question was not made in the court below except by a motion for a new trial. Some of the courts hold that, where a defendant is convicted of a lesser crime than that charged in the indictment, and thereby acquitted of the greater, and a new trial is awarded, if he desires to rely upon the former judgment as a bar to the greater offense he must plead it, and, unless he does so, he may be legally

tried and convicted as charged. *People v. Bennett*, 114 Cal. 56, 45 Pac. 1013; *Jordan v. State*, 81 Ala. 20, 1 South. 577. The authorities, however, are not in harmony on this point; some of them holding that the court will take judicial knowledge of the former proceedings in the case even when they are not pleaded. *Robinson v. State*, 21 Tex. App. 160, 17 S. W. 632; *State v. Martin*, 30 Wis. 218, 11 Am. Rep. 567. All are agreed, however, that the defense of a former acquittal or conviction is a matter personal to the defendant, and one which he must make at the trial, and that it cannot be raised by a motion for a new trial. *Wharton, Cr. Pl. & Pr.* 477; 1 *Bish. New Cr. Proc.* §§ 806, 813; 9 *Enc. Pl. & Pr.* 631; *State v. Childers*, 32 Or. 119, 49 Pac. 801. As no such defense was made on the trial, the defendant must be deemed to have waived the right to rely upon a defense of a former acquittal, assuming that it could successfully have been made under the record in this case.

The judgment is affirmed.

(44 Or. 318)

**HIBBARD v. HENDERSON et al.\***

(Supreme Court of Oregon. March 21, 1904.)

**BANKRUPTCY—FRAUD IN OBTAINING DISCHARGE—RIGHTS OF CREDITORS.**

1. Under Bankr. Act July 1, 1898, c. 541, § 70, cl. "e," 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452], conferring on a trustee in bankruptcy the right to avoid any transfer by the bankrupt of his property which any creditor might have avoided, and to recover the property so transferred, or its value, a judgment creditor of the bankrupt, after his discharge, cannot levy on and sell the bankrupt's property because of fraud in securing the discharge.

Appeal from Circuit Court, Multnomah County; J. B. Cleland, Judge.

Action by George L. Hibbard against Sarah J. Henderson and others. From a decree for plaintiff, defendants appeal. Affirmed.

This is a suit to enjoin the sale of real property on execution. It is alleged in the complaint that plaintiff, being indebted to the Union Banking Company, an insolvent corporation, in the sum of \$662.57, its assignee, F. Hacheny, recovered judgment against him therefor; that thereafter, and in conformity with the provisions of an act of Congress of July 1, 1898, plaintiff filed in the United States District Court for the District of Oregon his petition in bankruptcy, together with a schedule of his assets and liabilities, showing his indebtedness to such assignee, and, having been duly adjudged a bankrupt, a trustee was appointed, who took charge of and settled his estate, and on October 12, 1898, plaintiff was duly discharged in bankruptcy; that during the administration such assignee was notified of all the bankruptcy proceedings, but after such discharge he assigned the judgment to the defendant Sarah J. Henderson, who caused an execution to be issued thereon, in pursuance of which the

defendant William Frazier, the then sheriff of Multnomah county, levied on and threatened to sell, thereby clouding the title to, certain lots and blocks in Hibbard's Addition to East Portland, a deed to which the plaintiff secured July 12, 1901. The answer denied the material allegations of the complaint, and, for a separate defense, averred that on July 24, 1894, plaintiff was the owner in fee and in possession of the real property in question, at which time, without any consideration therefor, and with intent to hinder, delay, and defraud his creditors, he executed a deed thereof to C. C. Hibbard, who took the title thereto with knowledge thereof; that the judgment secured by Hacheny was based on a promissory note executed prior to such conveyance; that during the pendency of the bankruptcy proceedings plaintiff was the true owner of the premises, and his pretended discharge was secured by falsely representing that he had surrendered to his creditors all his property that was not exempt from execution; that he did not give up the real estate described in the complaint, but concealed it so that the fraud was not discovered within two years from such discharge, and, with the exercise of due diligence, could not have been ascertained within that time; and that the United States District Court was deceived and misled by such devices, and would not have granted the discharge, except for such concealment. A demurrer to the separate answer on the ground that it did not state facts sufficient to constitute a defense having been sustained, a trial was had on the remaining issues, resulting in a decree enjoining the sale of the real property, and the defendants appeal.

L. E. Latourette, for appellants. G. G. Gammons, for respondent.

MOORE, C. J. (after stating the facts). The question brought up for review is whether a judgment creditor of a bankrupt can, after the latter's discharge, levy on and sell his property because of the fraud practiced in securing such release. Congress is authorized to establish uniform laws on the subject of bankruptcies throughout the United States. Const. U. S. art. 1, § 8. And in exercising the power thus conferred, the federal courts have been clothed with exclusive jurisdiction of all proceedings in bankruptcy, as distinguished from independent actions at law or suits in equity. *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. Section 17 of the act of Congress of July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], provides, in effect, that a discharge in bankruptcy shall release the bankrupt from all provable debts, except (1) taxes; (2) judgments in actions for fraud; (3) claims that have not been duly scheduled in time for proof and allowance; or (4) debts created by fraud or defalcations while acting in a fiduciary capacity. The debts so except-

\*Rehearing denied April 23, 1904.

ed may be recovered in an action instituted for that purpose against the bankrupt after his discharge. 5 Cyc. 404. Thus in *Columbia Bank v. Birkett* (Sup.) 73 N. Y. Supp. 704, a voluntary bankrupt scheduled a note in the name of the payee, knowing at the time that it had been discounted; and, the bank to which the note was assigned having no notice or actual knowledge of the proceedings, it was held that the discharge afforded no immunity to the bankrupt, who was liable in an action instituted to recover on the note. To the same effect, see *Sutherland v. Lasher* (Sup.) 84 N. Y. Supp. 56; *Santa Rosa Bank v. White* (Cal.) 73 Pac. 577. In *Schreck v. Hanlon* (Neb.) 92 N. W. 625, it was held that the trustee in bankruptcy might maintain a suit to set aside a conveyance made by the bankrupt at any time within two years after the estate was closed, provided the suit was not barred by the laws of the state at the time the petition in bankruptcy was filed; the court saying: "As the trustee alone could maintain an action to reach property fraudulently conveyed by the bankrupt, we are clearly of the opinion that the statute of limitation was not a defense available to the defendants, as by section 11 of the bankrupt act (U. S. Comp. St. 1901, p. 3426) the trustee has two years in which to commence the action." See, also, *Sheldon v. Parker* (Neb.) 92 N. W. 923. In *Barnes Mfg. Co. v. Norden* (N. J. Sup.) 51 Atl. 454, it was held that, after a debtor had secured a discharge in bankruptcy, his creditor could not use a judgment not exempt from the operation of a discharge in bankruptcy under section 17 of the United States bankrupt act of July 1, 1898, to set aside as fraudulent a conveyance made by the debtor of his property; the court saying: "The company further insists that, because of its bill in equity, and the allegations there made, it has obtained a right outside of the bankrupt act, which should be enforced for its benefit, and cannot be enforced except by itself. But section 70, cl. 'e,' 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452], of the bankrupt act, answers this contention by providing that the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, etc. This provision is inconsistent with the continuance in the creditor of the right to avoid the transfer and avail himself of the property, and prevents his exercise of the right by transferring it to the trustee." In *Falco v. Kaupisch Creamery Co.*, 42 Or. 422, 70 Pac. 286, it was held that the trustee in bankruptcy, under the act of Congress of July 1, 1898, was the only person who could sue to recover unpaid stock subscriptions from the stockholders of an Oregon corporation. In *Bilafsky v. Abraham*, 183 Mass. 401, 67 N. E. 318, it was held by the Supreme Court of Massachusetts that, after the expiration of two years from the settlement of a bank-

rupt's estate, the administration might be reopened on petition showing that certain solvent claims had not been collected by the trustee, who was authorized to maintain an action in the state court to recover such claims, which were not barred by section 11 of the bankruptcy act of July 1, 1898, providing that suits shall not be brought by or against a bankrupt's trustee subsequent to two years after the estate has been closed. This latter case is cited to show that, notwithstanding more than two years have elapsed since plaintiff secured his discharge in bankruptcy, if the release from his indebtedness was procured by the practice of fraud, which usually vitiates all proceedings, it would appear that the assignee of the judgment is not wholly remediless, but that, by moving in the District Court of the District of Oregon to reopen the administration of the bankrupt's estate, a trustee could be appointed, who would be authorized to maintain a suit to determine the bona fides of plaintiff's conveyance of the lots and blocks in question to C. C. Hibbard.

Whether the federal court would follow the rule so announced in Massachusetts, it is not necessary to inquire, but, believing, as we do, that the defendants cannot interpose the defense relied on, no error was committed in sustaining the demurrer, or in rendering the decree complained of, which is affirmed.

(44 Or. 462)

#### NORTH PACIFIC LUMBER CO. v. SPORE et al.

(Supreme Court of Oregon. March 21, 1904.)

PARTNERSHIP—QUESTION FOR JURY—BUILDING CONTRACT—SUBLETTING—STATUTE—CONSTRUCTION—TRIAL—EVIDENCE—SUFFICIENCY—ADMISSIBILITY—INSTRUCTIONS—JUDGMENT—ERROR.

1. Where there is any evidence tending to establish the material allegations of the complaint, the court should submit the question to the jury, as against a motion for an involuntary nonsuit.

2. Under Rev. St. U. S. § 3737 [U. S. Comp. St. 1901, p. 2507], providing that no public contract shall be transferred by the party to whom the contract is given to any other party, and that such transfer shall cause an annulment of the contract, so far as the United States is concerned, the formation of a partnership by persons holding a contract with the government for the erection of public buildings does not necessarily effect an annulment of the contract.

3. Where a contract is fairly open to two constructions, by one of which it would be lawful, and the other unlawful, the former must be adopted.

4. Where, in an action to enforce payment of the debt due from an alleged partnership, it appears that some of the defendants were not held out to plaintiff as members of the firm with which plaintiff dealt, the liability of those that were not held out as partners rests on the intention of all the alleged partners to form a partnership.

5. Where an objection to a question is interposed after it has been answered by the witness, but no motion is made to strike out the answer, the sustaining of the objection does not exclude the answer from the jury.

6. Evidence in an action to enforce payment of a debt due from an alleged partnership examined, and held sufficient to require the submission to the jury of the question of the intention of defendants to form a partnership.

7. Where, in an action to recover a debt due from an alleged firm for material furnished for the erection of certain buildings, testimony was introduced without objection as to the method adopted by defendants of depositing and withdrawing money received on account of the contract under which defendants were requiring the use of the materials, checks issued to plaintiffs by certain of the defendants, and countersigned by other defendants, in payment of materials furnished in the erection of the building, are admissible.

8. In an action to recover a debt due from an alleged firm on account of material furnished for the erection of certain buildings for the United States government under a contract providing, in accordance with the statute, that the contract should not be sublet, but which nevertheless had been attempted to be transferred by the contractors to the other defendants, whereby the contractors sought to avert liability, letters addressed to all the defendants, demanding payment for materials furnished and sent to the government's representative for delivery, were admissible to show payment thereafter, from which the jury might have inferred that the contractors had some interest in the contract for the purchase of the material.

9. In an action to recover a debt due from an alleged firm for material furnished for the erection of certain buildings for the United States government under a contract providing that the contract could not be sublet, but which nevertheless had been attempted to be transferred by the contractors to the other defendants, whereby the contractors sought to avert liability, the admission of a letter from the government's representative to the plaintiffs in reply to a letter from plaintiff to him, inclosing for delivery a letter addressed to all the defendants, demanding payment of them for material furnished, was not prejudicial to the contractors, though the government's representative stated therein that those defendants to whom the contractors had sought to transfer the contract were employes of the contractors, in which he was only confirming the statement made to him by one of the contractors.

10. Where a member of the firm of contractors used language to a member of another firm which led and was intended to lead it to believe that they were to share as partners in the contract, and the partnership did so believe, and acted thereon, the contractors are bound by the agreement, whether they intended finally to be bound by it or not.

11. The liability of partners for debts of the firm is joint.

12. Where a debt was sought to be recovered in an action against four defendants, two only of whom were served with process, and the action was on the theory that defendants were partners, in accordance with which the jury found, it is error to render judgment against those only that were served, and not against all, under B. & C. Comp. § 61, providing that when, in an action against two or more defendants, the summons is served on one or more, but not on all, of them, the plaintiff may, if the action be against defendants jointly indebted on a contract, proceed against the defendants served, unless the court otherwise direct, and, if he recovers judgment, it may be entered against all the defendants thus jointly indebted, so far as it may be enforced against the joint property of all, and the separate property of the defendants served.

Appeal from Circuit Court, Multnomah County; A. L. Frazer, Judge.

Action by the North Pacific Lumber Company against Cornelius L. Spore and others. From a judgment for plaintiff, part of the defendants appeal. Reversed.

This is an action to recover the value of certain building material. It is alleged in the complaint, in effect, that, at all the times mentioned therein, plaintiff was a corporation; that the defendants, Cornelius L. Spore, Henry O. Robinson, Andrew M. Hansen, and Herman D. Landon, formed partnerships as Spore & Robinson and Hansen & Landon, respectively, and were also partners and jointly interested in the purchase and use of building material; that between August 12, 1901, and August 1, 1902, plaintiff sold and delivered to them, at their request, timber and lumber of the agreed value of \$5,982.49, which sum they promised to discharge, but had paid thereon only \$4,400, leaving due \$1,582.49, for which judgment was demanded. The defendants Hansen & Landon made no appearance, but Spore & Robinson filed an answer in the nature of a plea in abatement, in which it was stated that they never were partners with Hansen & Landon, or jointly interested with them in the transaction of any business. The reply denied the allegations of new matter in the answer, and a trial, being had, resulted in a verdict for plaintiff, upon which a judgment was rendered to the effect that Spore & Robinson, in the purchase and use of the material in question, were partners with Hansen & Landon. Spore & Robinson having refused further to plead or answer, judgment was rendered against them only, in their firm name and individually, for the sum demanded, and they appeal.

A. F. Flegel and W. T. Muir, for appellants. Thomas N. Strong, for respondent.

MOORE, O. J. (after stating the facts). It is contended by appellants' counsel that no testimony was given at the trial tending to prove the existence of a partnership between Spore & Robinson and Hansen & Landon, and, this being so, the court erred in denying their motion for a judgment of nonsuit.

A motion for an involuntary judgment of nonsuit admits, as a matter of law, the truth of all the testimony given upon a material issue of the complaint, and also every fair and legitimate inference of fact deducible therefrom, but denies that a consideration thereof authorizes the jury to find a verdict for the plaintiff. *Brown v. Oregon Lumber Co.*, 24 Or. 315, 33 Pac. 557. In *Perkins v. McCullough*, 36 Or. 146, 59 Pac. 182, it is said: "The rule is well settled in this state that if there be any evidence, however slight, fairly susceptible of an inference or presumption tending to establish a material allegation of the complaint, it is the duty

¶ 12. See *Partnership*, vol. 38, Cent. Dig. §§ 436, 437.

of the court to deny the motion for a judgment of nonsuit, and submit the question involved to the jury for determination."

The testimony shows that the defendants Spore & Robinson entered into a contract with the United States, agreeing, in consideration of \$92,789.40, to furnish the material and erect at Ft. Columbia, Wash., certain buildings, for which they were monthly to receive 80 per cent. of the estimated value of the work as it progressed, and the remainder when the structures were completed. On July 12, 1901, the defendants Hansen & Landon entered into a contract with Spore & Robinson, whereby they agreed to furnish the material and erect the buildings for \$10,000 less than the original price. Spore & Robinson were to receive the money as it was paid, discharge all bills incurred on account of the work, retain such a percentage of \$10,000 as the monthly payments bore to the contract price, and pay the remainder to Hansen & Landon. The work under the contract was begun July 13, 1901, by Hansen & Landon, who employed Robinson as superintendent. They also ordered from plaintiff a quantity of lumber and timber, which was shipped to Ft. Columbia and used in erecting the buildings, the account therefor being charged to them. After expending their own money in carrying out the agreement, Hansen & Landon found it difficult to continue the work without more means, to secure which they borrowed from the London & San Francisco Bank of Portland, Or., \$10,000, giving their promissory note therefor, which was also signed by Spore & Robinson and by F. E. Beach. As collateral security, Hansen & Landon assigned to the bank promissory notes for the sum of \$6,000, secured by a mortgage, and the money borrowed was placed to the credit of Spore & Robinson, who, in paying for material used and labor employed in the construction of the buildings, drew checks, which were countersigned by Hansen & Landon. As the monthly payments were made, Spore & Robinson, without appropriating any part thereof, deposited the money in that bank and drew it out in the manner indicated, but near the completion of the work, having received a payment of about \$22,000, they refused to deposit it in the London & San Francisco Bank, left the \$10,000 note and an overdraft of about \$60 unpaid, and declined to pay plaintiff's bill and other expenses incurred in the construction of the building, amounting to about \$5,500, though they promised to pay these claims if Hansen & Landon would procure for them a statement thereof, which they furnished. The defendant Herman Landon, as plaintiff's witness, testified that about October 1, 1901, Capt. Goodale, the quartermaster in charge of construction at Ft. Columbia, notified him that the original contract could not be sublet, which information he communicated to Spore & Robinson, whereupon it was understood that he and his part-

ner should assist in putting up the buildings, and Spore & Robinson would make it right with them; that they continued operations until July, 1902, when, having learned that their contract was invalid, because prohibited by the United States statute, they notified Spore & Robinson that they would quit work unless some definite arrangement were made, whereupon Robinson told them that, if they would continue the construction of the buildings, the profits would be divided, and they proceeded with the work. The witness, referring to the statement that Spore & Robinson would make it right with them, was asked: "Who were you talking with in this conversation?" and replied: "Spore & Robinson—Mr. Robinson principally." He also says that the agreement was that the two firms should jointly go ahead with the work, and there should be a fair division of the profits. On cross-examination he was asked: "Who had actual charge of the job?" and answered: "It was practically all four men—three men. Mr. Spore was on the ground. We consulted each other; talked matters over. We went mutually right along up to the final annulling of the contract in July." Landon's attention having been called to the objections made by Capt. Goodale, he was asked: "Speaking of these former times when the government would not recognize your contract, what conversation, if any, did you have with Spore & Robinson then?" and replied: "We informed them of the fact, and told them we were working under difficulties, and we wished to be released. Q. What did they say? A. To proceed with the work, and they would do what was right about the matter; they could not expect us to proceed under such circumstances under the contract. Q. When was this? A. At several different times during the progress of the work, prior to July 5, 1902." On cross-examination, Landon, having testified that the contract with Spore & Robinson was revoked in July, 1902, was asked: "It was annulled before that time?" and answered: "It was a kind of mutual understanding we were to go ahead with the job, then we would not be bound by the contract. \* \* \* Q. Do you mean to say the contract was annulled before that time? A. Yes, sir; we expected we would not be held by it. We were to go ahead and complete the job, and they would do whatever was right in the matter." Landon's testimony is corroborated in most particulars by that of the defendant Hansen, who said that Spore & Robinson told them "to go ahead, and we would do this work mutually. Q. When was it? A. Some time after we began; six months after the job was started. Q. They repeated to you at that time you would all do the work mutually. A. Yes, sir. Q. Did that take the place of the former agreement? A. It did. It was our understanding that took the place of the written agreement at that time; we had already consented." Elsewhere in the examination, in

referring to what Robinson said about doing the work mutually, he was asked: "What did he say, if anything, about the division of the profits or anything of that kind?" and answered: "He said he would do whatever was right. There was nothing said as to the amount, or anything of that kind. He said, 'We will divide up,' or they would do what was right with us." Capt. George L. Goodale, U. S. A., who, as quartermaster, had charge of the construction of the buildings at Ft. Columbia, testified that in July, 1901, he notified Hansen that Spore & Robinson could not sublet their contract; that about 60 days thereafter, having heard that Hansen & Landon claimed some interest in the contract, he was told by Robinson that there was no truth in the rumor, and about January, 1902, having again heard that Hansen & Landon were interested in the work, he notified Spore & Robinson, and was informed by each that the contract had not been sublet. In detailing the latter interview, the witness testified as follows: "I said, 'Are Hansen & Landon nothing but employes of yours?' Mr. Robinson said, 'Yes.'" E. T. Williams, manager of the plaintiff corporation, testified that, having given Spore & Robinson a statement that the lumber and timber necessary to construct the buildings in question would be furnished at a certain value, Hansen & Landon inquired if they could secure material at the same price, and, having received an affirmative answer, they ordered, and plaintiff shipped and billed to them, about \$6,000 worth of lumber and timber; receiving in part payment thereof checks signed by Spore & Robinson, and countersigned by Hansen & Landon. On cross-examination, in answer to the question whether or not, in making such sales, plaintiff relied upon the credit of Spore & Robinson for payment, he said: "We were relying on the credit of whoever was doing the work. If Spore & Robinson had an interest in getting the money that was being paid out by the government, we relied upon them for the money; we relied upon the people doing the work." G. H. Strout, plaintiff's bookkeeper, testified that, after shipping some of the material to Hansen & Landon, Spore called upon him and made some changes in, and additions to, the original order. The attention of this witness having been called to the material supplied by plaintiff after Hansen & Landon's contract is claimed to have been finally annulled, he was asked: "What proportion in value would you say was furnished after the 5th day of July?" and answered: "I could not tell without looking it up. My recollection is that it is more in amount than the balance due the company at the present time. That would be my best recollection." Landon also testified that after that time plaintiff furnished for the buildings at Ft. Columbia a large quantity of flooring and finishing lumber.

The foregoing is a fair summary of the

testimony given by the plaintiff's witnesses when the motion for a judgment of nonsuit was interposed, and it remains to be seen whether or not it was sufficient to be submitted to the jury, as tending to prove that Spore & Robinson and Hansen & Landon were partners in the purchase, receipt, and use of the material, as alleged in the complaint.

Congress, in prescribing certain restrictions in relation to the performance of public contracts, enacted, *inter alia*, the following: "No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States." Rev. St. U. S. § 3737 [U. S. Comp. St. 1901, p. 2507]. It will be remembered that the contract entered into between the government and Spore & Robinson contained a clause in conformity with this provision. The testimony does not disclose that Hansen & Landon had seen the contract or knew that it contained such limitation, but it shows that the first intimation they had that Spore & Robinson could not sublet the work was when so informed by Capt. Goodale. The contract having, in effect, been transferred, the government was authorized to annul it; and, this being so, the jury had the right to infer that it was to the advantage of Spore & Robinson, when they ascertained this fact, to make some arrangement with Hansen & Landon whereby the respective interests of each could be preserved. Landon testified that when it was discovered that the firm of which he was a member could not construct the buildings in their own names, it was mutually agreed that they should assist in the work, and that Spore & Robinson would make it right with them.

The relation existing between partners is of such a confidential kind that an addition to the number of persons constituting the firm cannot be made without the express or implied assent of all the members. 22 Am. & Eng. Ency. Law (2d Ed.) 157; Collyer's Law of Partnership (6th Ed.) § 6; Parsons, Partnership (4th Ed.) § 9. The rule is universal that, as between the members of a firm, no partnership can be formed without an intention to enter into that relation. *Klosterman v. Hayes*, 17 Or. 325, 20 Pac. 426; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; *Hanthorn v. Quinn*, 42 Or. 1, 69 Pac. 817. In *Willis v. Crawford*, 38 Or. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904, in denying a petition for a rehearing, it was said: "The plaintiff knew whether it was their intention to form a partnership, and, if such intention existed, it was his duty so to testify; and, having failed in this respect, we are compelled to overrule



the petition." The appellants' counsel, relying on the language quoted, insist that it is applicable to the case at bar, and decisive of the question, for, Landon's attention having been called to the subsequent agreements, which it is claimed modified the original contract entered into with Spore & Robinson, he was asked: "Did you consider that created a partnership between yourselves and Spore & Robinson?" and replied: "I do not know that it was exactly a partnership. I would not know how to express myself. The way I understood it, we would go ahead and complete the contract, and we would receive some kind of consideration for our services." In the case to which attention is called, the parties were lawyers of learning and experience, and each knew what was necessary to constitute a contract of partnership. In the case at bar, however, Landon, so far as can be inferred from the bill of exceptions, was only a mechanic; and, while he and Hansen were partners, and he probably had a general knowledge of what constituted that relation, he may not have known the legal requirements therefor, and hence the rule applied in the case relied upon is not suitable to the facts herein.

Hansen & Landon not having been held out to plaintiff as members of the firm of Spore & Robinson, the liability of the latter in such case must rest upon the intention of all the defendants to form a partnership. Story on Partnership, § 49. In the light of these rules, the testimony will be reviewed to determine whether or not it tended to show such intention. Landon, on direct examination, having testified that, in his conversations with Robinson, no definite compensation had been agreed upon, was asked: "Your agreement was, the two firms should jointly go ahead with the work, and there should be a fair division of the profits?" and answered: "Yes, sir. Q. Tell the jury" — Here the witness was interrupted by appellants' counsel, who objected to the question on the ground that it was misleading and immaterial, which objection was sustained. It must be assumed that the objection was intended to apply to the preceding question, but, as no motion was made to strike it out, the answer thereto went to the jury, as tending to prove the basis of the modified agreement. On cross-examination, in referring to what Robinson said, the witness was asked: "He did not say whether he would divide up the profits or losses?" and answered: "He left that impression. We had no other impression until after they had taken the money out." Though this answer is not responsive to the inquiry, the jury might reasonably have inferred therefrom a promise on Robinson's part to divide the profits and losses. Though the participation of profits and the apportionment of losses incident to the transaction of any business do not necessarily constitute a partnership (*Hanthorn v. Quinn*, 42 Or. 1, 69 Pac. 817), we think plain-

tiff's testimony, if believed by the jury, unquestionably tended to show an intention on the part of Robinson to enter into that relation with Hansen & Landon.

It will be remembered that Landon testified that about October 1, 1901, when Spore & Robinson promised to make it right with them if they would assist in putting up the buildings, the conversation was had with "Spore & Robinson—Mr. Robinson principally." This witness, in speaking of who had actual charge of the work, said: "It was practically all four men—three men. Mr. Spore was on the ground. We consulted each other." He further said that Spore generally attended to the ordering of material. Strout also says that Spore made changes in and additions to Hansen & Landon's order for material. Capt. Goodale testified that Spore told him the contract entered into between the government and Spore & Robinson had not been sublet.

In *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940, a partnership having been formed for the performance of a contract which one of the members secured from the government, it was held that the creation of the firm for the purpose specified was not prohibited by the Revised Statutes of the United States. Mr. Justice Woods, speaking for the court, in deciding the case, says: "Nor are the articles of partnership forbidden by section 3737 [U. S. Comp. St. 1901, p. 2507]. They do not transfer the contract, or any interest therein, to the plaintiffs, and cannot fairly be construed to do so. But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to, and not in violation of, section 3737; and, if they can be construed consistently with the prohibitions of the section, they should be so construed, for it is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful, and the other unlawful, the former must be adopted." Spore & Robinson's assignment of their interest to Hansen & Landon being liable to annul the government contract, but a partnership created for its performance being legal, the jury, from Spore's declaration to Capt. Goodale that the contract had not been sublet, had a right to infer that he consented to the formation of a partnership between Spore & Robinson and Hansen & Landon. So, too, Landon's statements that the conversation about October 1, 1901, was with "Spore & Robinson—Mr. Robinson principally"; that "Spore was on the ground. We consulted each other"; and that "Spore generally attended to the ordering of materials"—tend to create an inference that Spore intended to form a partnership with Hansen & Landon in the construction of the buildings for the government. Hansen testified that an agreement was entered into with Spore & Robinson about January 1, 1902, mutually to do the work, which took the place



of the prior contract, and thereafter Robinson had more authority, but continued to receive wages for his labor as superintendent until July, 1902, when their contract was wholly revoked. Landon testified that the agreement entered into with Spore & Robinson was annulled prior to July, 1902.

We think the testimony and the inferences of fact reasonably deducible therefrom, though very slight, tend to show that Spore & Robinson each intended to enter into a partnership with Hansen & Landon to construct the buildings at Ft. Columbia. Whether or not the evidence was sufficient to show such a community of interest as to make each of the defendants a principal, and also an agent for his associates, authorizing each to make contracts, manage the business, and dispose of the property, and, in case of the death of one of the members the settlement of the joint effects would devolve upon the survivors, thereby conclusively establishing the existence of a partnership (*Hanthorn v. Quinn*, 42 Or. 1, 69 Pac. 817), were solely questions for the jury, and not within the province of this court to review in an action at law (*Brown v. Oregon Lumber Co.*, 24 Or. 313, 33 Pac. 557). "A case," says Shattuck, J., in *Tippin v. Ward*, 5 Or. 450, in passing on this question, "should be submitted to the jury, unless there is an entire lack of evidence tending to maintain the issues on behalf of the plaintiff, or unless, upon the whole case made by the plaintiff himself, it appears beyond doubt that the plaintiff has no right to recover."

The plaintiff's manager having testified that, as its agent, he relied upon the persons doing the work, and it appearing that the value of the material sold and delivered by plaintiff after July, 1902, when it is claimed the contract was wholly annulled, was greater than the sum sought to be recovered in this action, no error, in our opinion, was committed in denying the motion for a judgment of nonsuit, or in refusing to instruct the jury to find for the appellants. *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309.

It is maintained by appellants' counsel that the court erred in admitting in evidence, over their objection and exception, checks issued by Spore & Robinson, and countersigned by Hansen & Landon. Testimony was introduced, without objection, tending to show the method adopted of depositing and withdrawing the money received on account of the contract, and, as these checks confirmed such testimony, no error was committed in admitting them in evidence.

It is also contended by appellants' counsel that the court erred in admitting in evidence, over their objection and exception, the following correspondence: A letter written January 30, 1902, by the manager of the plaintiff corporation to Capt. Goodale, requesting him to deliver an inclosed letter addressed to Spore & Robinson and Hansen &

Landon, stating that plaintiff had furnished the lumber for the buildings at Ft. Columbia; that he had written them several times without receiving any reply; and inquiring if the contract had been completed, and what percentage of the price had been paid thereon; the letter inclosed with the one addressed to Capt. Goodale containing a statement of account showing a balance of \$4,638.18 due plaintiff; another letter, so inclosed, to the effect that the account was past due, and suggesting that an early remittance would be very much appreciated; and also a letter from Capt. Goodale, written to plaintiff's manager, acknowledging the receipt of the letter addressed to him, stating he had forwarded the inclosed letters to Ft. Columbia, Wash., to Spore & Robinson, who were the contractors, and Hansen & Landon, their employes, and regretting that he could not furnish the information desired as to the payments made on account of the contract. It is deemed necessary to give the substance of a letter written January 31, 1902, by Capt. Goodale to Spore & Robinson, in which he states that he transmitted a copy of a letter received from the North Pacific Lumber Company, together with a letter inclosed, intimating that there was apparently a question with that corporation as to whom the lumber in question was sold, saying: "It is not understood at this office why such doubt or question should exist. You will please explain. Your attention is called to the provision in your bond relating to prompt, full payments to all parties furnishing material for work under Government contract." An objection was interposed to the admission of the latter letter, but no ruling appears to have been made thereon, nor exception reserved. The letter written by Capt. Goodale to Spore & Robinson was addressed to them as contractors. It is admitted that they had the contract for the construction of the buildings, and this note and the others tend to show that after they were sent to Spore & Robinson a payment was made to plaintiff on account of the lumber sold, from which the jury might have inferred that they had at least some interest in the contract. The letter written by Capt. Goodale to the manager of the North Pacific Lumber Company only confirms the statement made by Robinson to him, and, although the communication could not have been of much importance, its admission was not, in our opinion, prejudicial.

It is insisted by appellants' counsel that the court erred in instructing the jury as follows: "If you should find under the evidence that Spore & Robinson used language to Hansen & Landon which led them, and was intended to lead Hansen & Landon, to believe that they were to share as partners in this business, and Hansen & Landon did so believe, then Spore & Robinson would be bound by that agreement, as every man is bound by the construction of an agreement

which he intended the other party should put upon it, whether they themselves intended finally to be bound by it or not. If, at the time these parties had this conversation which it is claimed they had with Hansen & Landon, they intended Hansen & Landon should believe they were to be recognized as partners and should share in the profits of the enterprise, and Hansen & Landon did believe it, and acted upon that belief, then they were partners." We think this part of the charge was pertinent, and that no error was committed in giving it.

The judgment complained of was rendered against Spore & Robinson only, and in this we think there was error. The action was tried on the theory that Hansen & Landon were also partners with them. This created a joint liability. *Poppleton v. Jones*, 42 Or. 24, 69 Pac. 919. And a joint judgment should have been rendered against the entire partnership. *B. & C. Comp. § 61*; *Fisk v. Henarnie*, 14 Or. 29, 13 Pac. 193; *Wilson v. Blakeslee*, 16 Or. 43, 16 Pac. 872; *Thomas v. Barnes*, 34 Or. 416, 56 Pac. 73.

The judgment will therefore be set aside, and the cause remanded, with instructions to enter a judgment against the entire firm.

(142 Cal. 342)

**MOORE v. TUOHY. (Sac. 1,028.)**

(Supreme Court of California. Feb. 29, 1904.)

**VENDOR AND PURCHASER — SPECIFIC PERFORMANCE — CONDITIONS — NONPERFORMANCE BY VENDEE—EXCUSES.**

1. Where a contract for the sale of land to plaintiff's decedent provided that time was of the essence, and required deceased to perform various personal services, etc., within the time prescribed, before defendant should be under any obligation to convey the land, and before any steps had been taken by deceased to perform such acts defendant repudiated the contract, and at the time suit was brought for specific performance deceased had not performed such acts, and could not perform them within the time prescribed, plaintiff could not enforce specific performance, though the failure to perform resulted from defendant's breach of the contract.

Department 1. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Percy Moore, as administrator of A. D. Moore, deceased, against John Tuohy. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

See 65 Pac. 1107.

Miller & Hannah and Van Ness & Redman, for appellant. Bradley & Farnsworth and G. W. Zartman, for respondent.

**VAN DYKE, J.** The action is to compel the specific performance of a contract. The contract is appended to the complaint and made a part of it. It is quite lengthy, covering over 17 pages of the printed transcript on appeal, bears date August 12, 1897, and relates to a large tract of land, about 2,140 acres, in Tulare county. Among other things, the agreement recites that on a certain desig-

nated portion of the land there is a basin of water which has been excavated about 125 feet long and 70 feet wide, and that a cut or trench has been excavated for about 400 feet northerly from said basin in order to develop water; that Tuohy is desirous that more water be developed by further work in said cut for the irrigation of certain lands or such as are fit for citrus culture, and Moore agrees to begin within 30 days, and finish before August 1, 1898, the work of extending said cut towards Rocky Hill at least 1,500 feet from said basin, and to deepen the cut by 200 feet, and make the cut 16 feet wide on top and 2 feet deeper from the surface of the ground than the average depth of the present cut, and, like the present cut, the lowermost portion shall be a channel about 30 inches wide, dug out with picks. Moore also agrees that he will put a certain ditch on said lands in good repair, or construct a new one to reach said lands within 60 days from signing the contract, and also agrees to place an engine at the basin with power enough to pump 25 feet in height all water required for irrigation, and he further agrees to construct a bridge for wagons across said cut or trench, and either to make an aqueduct to carry the water of a certain creek which crosses the line of said cut, or to make a new channel for said creek to Lewis creek on the north side of said basin, the right of way for the new channel to be 35 feet in width; and during the six years after the date of the contract Tuohy agrees to sell to Moore, on certain named terms, such lands as Moore may select, in lots of 20 acres and up, from certain lands lying below the line of the flume or ditch Moore proposes to construct from said basin to said land, and into which he (Moore) agrees that he will pump water to a height equal to 25 feet when measured from a plane 5 feet below the ordinary surface of the water in said basin. The deeds are to be executed on the performance of certain named conditions, the payment of specified amounts of money at different times, final payment extending over a period of 10 years, and, among other things, requiring the payment of taxes and assessments by Moore. It is further provided in case Moore, who proposes to sell to colonists, shall sell any of the land for more than \$100 an acre, Moore agrees to pay Tuohy one-third of such excess, and he also agrees that he will plant out at once orange trees on the greater part of a tract of 100 acres, which he will at once locate and take on the rental plan, and will proceed to extend said cut at once, and within a time fixed to sink at least one well. It is further agreed that, if by the work to be done no more water shall be found than sufficient to irrigate the 100 acres first taken by Moore and the present orchard of Tuohy, Moore has the right to stop further development for water, and is to have the water there now, and what may be de-

veloped by extending said cut 1,500 feet, on paying Tuohy \$40 an acre for said 100 acres, and furnishing Tuohy water in a certain way to irrigate his present orchard. Said Moore further agrees that, if the water now existing with that developed by extending the cut 1,500 feet is more than sufficient to irrigate said 100 acres, then he will, as he finds sale for the lands he has a right to purchase, continue to develop more water by extending said cut, or by sinking wells during the next six years for which he has the right to lease or purchase lands. At the end of six years, if the water exceeds the amount required by Moore, Tuohy may use the same on paying to Moore the proportion of the cost of pumping and maintenance of flume or ditch, or his proportion only of the cost of pumping in a certain event. It is further agreed that when Moore sells land to any colonist that at least one-half of such land shall be planted to citrus trees during the first year after such sale is made, and also that, if extending the cut 1,500 feet develops more water than sufficient to irrigate the 100 acres first taken by Moore and Tuohy's orchard, on the basis of one miner's inch to two and a half acres, said Moore shall take such further amount of land from Tuohy as this additional water will irrigate, and, having sold the same as low as \$100 an acre, Moore shall take from Tuohy another 20 acres, or more if he sees fit, and proceed to develop more water from the same by extending the cut, and in this way shall go on developing water and taking land. Moore may desist from extending the cut after extending it 1,500 feet from the basin, and may desist from developing water generally, with the understanding that in such case after November 1, 1896, he shall lose his right to purchase or rent any more lands from said Tuohy than those he has taken up till that time, and it is recited that time is of the essence of the agreement.

It is alleged in the complaint as a reason why the action was not brought earlier than upon August 19, 1897, and before default on the part of the plaintiff, as to any of the conditions or provisions of said agreement, and while plaintiff was engaged in carrying out the same on his part, defendant notified plaintiff that he could not and would not perform any of the conditions or provisions thereof on his part, and has never since retracted said notice, but has at all times since failed and refused to comply with any of said conditions or provisions, and has refused to permit plaintiff and has not allowed plaintiff to go upon said land for the purpose of complying with any of the conditions or provisions of said agreement on his part. It is further alleged in the complaint that on September 13, 1897, defendant herein commenced in the superior court of Tulare county an action against the plaintiff herein for the rescission and annulling of said agreement, and that said action has at all times since been

and is now pending; that a judgment was rendered in favor of the plaintiff in said action, the defendant herein, by the said superior court on July 14, 1899, and thereupon the defendant therein, plaintiff herein, took an appeal to the Supreme Court, and thereafter, and upon August 3, 1901, the judgment of the superior court was reversed and set aside by said Supreme Court; that the plaintiff has at all times been and is now able, willing, and anxious to fully carry out all the terms and conditions of said agreement on his part, of which defendant had full knowledge and notice, and, but for said action so instituted by defendant, the plaintiff would have promptly commenced an action against defendant for the specific performance of said agreement. The original complaint united with the action for specific performance a cause of action for damages in the sum of \$20,000, as alleged to be resulting from defendant's wrongful acts, whereby plaintiff was prevented from complying with the terms of the agreement in question. The amended complaint omits the portion of the original complaint in reference to damages, so that the present action, as already stated, is one for specific performance of the agreement in question only. The demurrer to the amended complaint having been sustained, and the plaintiff declining to further amend, judgment was entered in favor of defendant, from which judgment plaintiff appeals.

It seems to be the theory on the part of the plaintiff that because the defendant failed in his action to rescind the contract in question, and as he refuses to permit the plaintiff to proceed thereunder, and practically has repudiated the contract, that, therefore, plaintiff has a right to have said contract specifically performed. This, however, does not follow. One party to a contract may refuse to carry it out, and thereby cause damage to the other party, still the nature of the contract and the conditions may be such that the contract cannot be specifically enforced. "Neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance." Civ. Code, § 3386. "If for any cause, even arising after the contract is concluded, it becomes wholly impossible for the plaintiff to perform any part of the contract on his part, he cannot, as a matter of course, enforce a performance against the defendant." Pomeroy on Specific Performance of Contracts, § 337. It will be seen by the terms of this contract in question that time was a very important element entering into it. It contemplated the reclaiming or preparing of land for the growth of citrus fruit, and the performance of many acts on the part of the plaintiff requiring his personal

services. These acts and services have not been performed, and could not, at the beginning of this action, be performed within the time as contemplated and required by the contract. The plaintiff states that the reason he did not enter upon the performance of the contract on his part was that the defendant repudiated the same and refused to carry it out. Nevertheless the defendant is not required to convey any portion of the land in question until certain acts are performed on the part of the plaintiff in reference to the developing and conducting of water upon certain portions of the land, and otherwise fitting it for the production of citrus fruit. There is no allegation or pretense that the plaintiff had performed any part of the contract on his part at the time of bringing the action in question. In fact, from his very statement of the case he could not have done so. The defendant, within less than a month, having repudiated the contract, and refused to carry it out on his part, as alleged, may have caused the plaintiff damages, as was stated in the original complaint herein filed, and for which he may have a right of action. But an action for specific performance cannot be maintained unless the plaintiff has performed or can be compelled to perform on his part. An examination of the agreement will show that there are many covenants therein to be performed by both Moore and Tuohy, the doing of which is likely to create disputes and disagreements, and that there are many rights which both Moore and Tuohy are to have upon certain conditions and the happening of certain events, all of which are dependent upon questions of fact in order to determine such rights and the extent thereof, and in order to ascertain whether or not such covenants have been performed.

In *Stanton v. Singleton*, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334, it is said: "A contract expressed in very general terms might not be void for uncertainty, and might be the basis of an action for damages for its breach, while it would be entirely too loose and inexact to warrant a decree for specific performance. \* \* \* A court will not undertake to frame a decree of specific performance where it involves a continuous and long series of acts of supervision, requiring special knowledge and skill, and repeated examinations and new directions." In *Fargo v. Railroad Co.* (Sup.) 23 N. Y. Supp. 360, it is said: "The general rule is not to decree a specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction." *Pomeroy on Contracts*, § 150, says: "A greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is to be the basis of an action at law for dam-

ages. An action at law is founded upon mere nonperformance by a defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of nonperformance is not enough. Its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms. They must be exactly ascertained before their performance can be enforced." Further on the same author (section 312), after citing a multitude of authorities to sustain the text, says: "Finally, contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction, with the exercise of special knowledge, skill, or judgment in such oversight—such as agreements to repair or to build, to construct works, to build or to carry on railways, mines, quarries, and other analogous undertakings—are not, as a general rule, specifically enforced."

The cases cited and relied upon by appellant do not sustain his position here. In *Hall v. Center*, 40 Cal. 63, it appears that Hall entered into possession under a lease of certain premises, which lease contained the privilege of purchasing at \$1,750, on or about the expiration of the term. Hall performed all the conditions on his part, and during the term "made valuable improvements thereon, to wit, of the value of \$8,500." Before the term expired he endeavored to avail himself of the privilege of purchasing the premises reserved to him in the lease, and with this in view he made a tender of the purchase price in due time and form, and demanded a conveyance. In that case there was nothing to be done on the part of the plaintiff other than the payment of the money agreed upon and which was tendered. *Ballard v. Carr*, 48 Cal. 74, was an agreement to convey a certain tract of land for professional services of one Hartman as attorney in procuring a decree of final confirmation of a tract of land, including the portion to be conveyed. The defense was that, in the absence of Hartman, Carr employed Patterson on a motion before the district court, but the court says in its opinion: "He continued thereafter to recognize Hartman as his attorney, and availed himself of his services. This must be regarded as a waiver of full performance of the contract on the part of Hartman." But the court adds that the plaintiff, assignee of Hartman, "having appealed to a court of equity to enforce the performance of the contract on the part of the defendant, must himself do equity, and must submit to such terms as a court of equity would impose. Compensation must be allowed to the defendant for the services of Patterson, and it must be made an equitable lien in favor of the de-

fendant upon the land to which the plaintiff is entitled under the contract. The amount of the compensation is the value of the services rendered by Patterson. The defendant will be permitted to amend his answer, if he so elects, on the return of the cause." In that case it will be seen the services were fully performed, although partly by another attorney. In *Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. 149, it is simply held that a contract for the sale of real estate at the option of the vendee only, upon his election and notice and tender of the sum agreed to be paid, may be specifically enforced, and the refusal of the vendor to accept the purchase money will not destroy the mutuality, though the vendee upon such refusal could thereupon withdraw his election. The case at bar is altogether different from those relied upon by the appellant, and they furnish no authority in support of the present action.

The amended complaint failed to state a cause of action for a specific performance, and the demurrer to the same was properly sustained. Judgment affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(142 Cal. 341)

PEOPLE v. UNG TING BOW. (Cr. 1,067.)

(Supreme Court of California. Feb. 29, 1904.)

MURDER—INFORMATION—LANGUAGE OF STATUTE—DELIBERATION—PREMEDITATION.

1. Where an information for murder in the first degree was drawn in the language of Pen. Code, § 187, declaring that murder is the unlawful killing of a human being with malice aforethought, it was not objectionable for failure to charge that the killing was "deliberate and premeditated."

In Banc. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Ung Ting Bow was convicted of murder, and he appeals. Affirmed.

R. J. Hudson, J. F. Pryor, and C. W. Talbot, for appellant. U. S. Webb, Atty. Gen., and L. B. Wilson, for the People.

LORIGAN, J. Defendant was convicted of murder in the first degree, and sentenced to be executed. He appeals from the judgment, and the point made is that the information does not charge murder in the first degree, because it does not allege that the killing was "deliberate and premeditated." This objection has been heretofore directly determined adversely to appellant's contention by this court. The information under which defendant was convicted is drawn in the language of section 187 of the Penal Code, declaring that "murder is the unlawful killing of a human being with malice aforethought." It is said in *People v. De la Cour Soto*, 63 Cal. 166: "Murder, thus defined, includes murder in the first degree and murder in the second degree. It has many times been decided by this court

that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case included both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence." To the same effect is *People v. Hyndman*, 99 Cal. 3, 33 Pac. 782. This is the only point made in the case, and, it being without merit, the judgment of the lower court is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

(142 Cal. 313)

OPPENHEIMER v. CLUNIE. (S. F. 3,530.)\*

(Supreme Court of California. Feb. 23, 1904.)

RESCISSION OF LEASE—FRAUDULENT REPRESENTATIONS—ACQUIESCENCE—HEARSAY—REPORT OF GRAND JURY.

1. A lessee of a theater will be held to have acquiesced in the lease after knowledge of the facts, and so not entitled to rescind it for fraudulent representations of the lessor that the exits and stairways were sufficiently large and in the proper places for emptying the theater, he having taken possession and used it a season before attempting to rescind.

2. The report of a grand jury as to the unsafe condition of a theater is hearsay, and not admissible in an action to rescind a lease of the theater.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by S. C. Oppenheimer against Thomas J. Clunie. Judgment for plaintiff. Defendant appeals. Reversed.

E. A. Bridgeford and Burrell G. White, for appellant. H. I. Kowalsky and Weil & Lippitt, for respondent.

COOPER, C. Plaintiff had judgment. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order.

On the 31st day of October, 1900, the defendant, by a written lease, let to the plaintiff the premises known as the Clunie Opera House, in the city of Sacramento, for the term of five years from and after the 1st day of December, 1900, at the rental of \$550 per month, payable monthly in advance. Plaintiff entered into possession of the premises and paid the rent each month, as provided for in the lease, up to the latter part of April, 1901, at which time he claims to have rescinded the lease. He commenced this action January 10, 1902, for the purpose of having the lease delivered up and canceled, to recover judgment for \$3,000 and interest, being the amount deposited with defendant as security for the rent to become due, and for \$2,000 claimed as damages. It is alleged in the complaint that defendant falsely and fraudulently, and with intent to

\* See *Homicide*, vol. 26, Cent. Dig. § 200.

\*Rehearing denied March 24, 1904, BEATTY, C. J., dissenting.

deceive plaintiff, represented that the premises "were in good condition and repair and safe and suitable for assembling large numbers of people," and that plaintiff believed the said representations so made to him, and relied thereon, and had no knowledge of the facts at the time of entering into said lease. It is further alleged that at the time the lease was executed the premises were unsafe, and unfitted for the convening of any considerable number of people. The respects wherein the premises were unsafe are alleged as follows: "That the exits and stairways were at all times herein mentioned not sufficiently large or in the proper places, and these matters were adverted to in the report of the grand jury of the county of Sacramento of May 13, 1899."

It is earnestly claimed that the complaint does not state facts sufficient to show that plaintiff is entitled to the relief prayed for, or any relief, and that, therefore, defendant's demurrer should have been sustained. It certainly does not make a very strong case for the cancellation of the lease, but as the facts were all brought out in evidence we have concluded to dispose of the case upon the merits without passing upon the demurrer. The court found the facts as stated in the record sustaining the allegations of the complaint. It is claimed by defendant that the evidence does not sustain the findings, and that the plaintiff cannot maintain this action to rescind, because he did not rescind promptly, but acquiesced in and ratified the lease after full knowledge of all the facts.

We are of opinion that defendant is correct on both propositions. Plaintiff was engaged in the business of conducting and managing theaters and opera houses. He testified that, at the time he took the lease, Todd, defendant's agent, told him that "it was the intention of General Clunie to put in a cement basement down there, and told me that otherwise the house was in very good condition, and we negotiated the lease." Plaintiff entered into possession of the premises on December 1, 1900. He was personally present and examined the theater on the 3d day of December. The witness Todd, who was the agent of defendant and whose testimony is not disputed, testified as to the examination made on this occasion by plaintiff as follows: "Q. It was within a day or two that he came up? A. Yes, sir. Q. Did he make any examination of the theater? A. I don't know that we particularly did. Q. Tell what you did. A. I cannot remember just now, but I think we went over it. He wanted to see what he had leased, and we went through the house to that extent, and he said, 'This has got to be considerably overhauled,' both down and up stairs, and had to be carpeted. Q. What do you mean by overhauled? A. Had to be cleaned up. He said it was very dirty—the former lessee had kept it very badly. Of course, we had shows right along following each other, night

after night, for weeks. Q. Did you do anything about looking at the carpet? A. Yes; he and I went down and picked out a carpet." This witness further testified that before entering into the written lease, as part of the negotiations, he talked over with plaintiff as to improvements to be made, and at the time made a memorandum on an envelope of what was to be done, which memorandum witness took from his pocket while testifying, and said: "He [Oppenheimer] said the stage there was too small, and that the fly-gallery and the gridirons where the ropes go up to draw the machinery clear to the top of the flies— The fly-gallery is about 22 to 25 feet up; the gridiron is at the very top, where you draw the scenery out of the way. I agreed then, after having consulted General Clunie about it, to raise this gridiron, and he did do it. \* \* \* He [Oppenheimer] was to give General Clunie notice when he could put the carpenters there to do it, and he wanted General Clunie to do a whole lot of things." This testimony is not denied by plaintiff, but corroborated by a letter to Todd evidently written about the 1st of May, 1901, although not dated. In this letter plaintiff said: "Would ask General Clunie to wait a few days for May rent. There is no performance between May 29th and July 1st, when improvements can be made."

Plaintiff was present at the theater several times in December, 1900. In January, 1901, he deposited the \$3,000 in lieu of a bond he was to give defendant as security. In February, 1901, he had telegraphic communication with his partner, Friedlander, in which he declined to have Friedlander as a partner in the business. He paid the rent monthly till May 1st, while all the time in the possession of the premises. The lease reserved to defendant the advertising curtain privilege. On May 26th, after the claim of rescission, plaintiff wrote to defendant's agent offering defendant \$500 for the curtain privilege. Later he wrote offering \$1,000, which offer defendant accepted. Plaintiff testified that during all the time after he took possession of the premises one White was his agent and manager. He was then asked: "Q. Mr. White had full means of knowing the condition of the premises? A. Mr. White was in Sacramento. I presume he knew it; I don't know."

The court found "that the gallery and balcony of said premises were unsafe, and the exits were so placed as not to allow of the safe discharge of people in case of a panic, and that the stairways at the emergency exits of the lower floor were rotten." This finding is broader than the allegations of the complaint, but, disregarding this, the defects as found relate to matters which were seen, or could easily have been seen, by plaintiff or his agent if they had used ordinary diligence. The location of the exits, and the size thereof, were patent to any one.

That a man engaged in the theater business would take possession of premises, overhaul them, have the galleries repaired in certain respects, and get new carpets for the entire theater and keep possession for five months during the heavy business season, and not discover the location and size of the exits from the gallery, may be true, but it is difficult to believe it. A man of ordinary business intelligence and prudence would know these facts as soon as he viewed the premises. The exits and stairways were open to view, and we must presume that plaintiff saw them when he took possession of the theater. While courts grant relief on the ground of fraud in clear cases, it is not the ordinary rule. Generally parties must rely upon their own judgment and investigate before making contracts. To allow a party to lease premises, take possession of them, use them during the busy season, and pay rent under the lease, and then rescind the lease on the ground of fraud in its inception, would require a much clearer case than that presented by this record. If such rule were applied in this case, it would have to be applied in other cases of like character. It would be impossible for a landlord to know at what particular time or period a tenant might elect to rescind the lease. Such rule would make contracts rest on a very uncertain basis. It is much better that courts should not undertake to act as guardians of competent parties, but compel them to stand by the terms of their contracts.

It was said by the late Judge Temple (and approved by this court) in *Colton v. Stanford*, 82 Cal. 398, 23 Pac. 28, 16 Am. St. Rep. 137: "The power to cancel a contract is a most extraordinary power. It is one which should be exercised with great caution—nay, I may say, with great reluctance—unless in a clear case. A too free use of this power would render all business uncertain, and, as has been said, make the length of the chancellor's foot the measure of individual rights. The greatest liberty of making contracts is essential to the interests of the country. In general, the parties must look out for themselves."

It is stated in *Southern Development Co. v. Silva*, 125 U. S. 250, 8 Sup. Ct. 881, 31 L. Ed. 678, that, in order to justify a court of equity in setting aside a contract on the ground of fraudulent representations, the complainant must show by clear and decisive proof: "First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; fourthly, that it was made with intent that it should be acted on; fifthly, that it was acted on by complainant to his damage; and, sixthly, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

This court said in *Colton v. Stanford*, 82 Cal. 399, 23 Pac. 28, 16 Am. St. Rep. 137: "A misrepresentation as the basis of rescission must be material, but it can be material only when it is of such a character that if it had not been made the contract would not have been entered into. The misrepresentation, it is true, need not be the sole cause of the contract, but it must be of such nature, weight, and force that the court can say, 'Without it the contract would not have been made.'"

If we apply the above rules to the facts of this case, we cannot say that without the representations plaintiff would not have made the contract of lease. There is no allegation as to the actual rental value, nor that the rental value was not, at the time the action was commenced, more than plaintiff was paying under the lease. The complaint does allege that the premises were unsafe, and unfitted for convening any considerable number of people, and unsuited for giving theatrical performances. If so, plaintiff is presumed to have known of such condition when he took possession of the premises and examined them. The rule is thus stated by Pomeroy in his work on Equity Jurisprudence (section 893): "If after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled." And again the same author says (section 894): "If, in a contract of sale or leasing, representations are made by the vendor concerning some incidents, qualities, or attributes of the subject-matter which are open and visible, so that the falsity of the statement is patent to an ordinary observer, and it is made to appear that the purchaser at, or shortly before, the concluding of the contract, had seen the thing itself which constitutes the subject-matter, then a knowledge of the facts is chargeable upon such party; he is assumed to have made the agreement knowingly, and cannot allege that he was misled by the false representations."

It is a fundamental rule in courts of equity that a party desiring to rescind must do so promptly. Our Code provides (Civ. Code,

§ 1601): "He must rescind promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind." And the authorities are all to the same effect. *Bailey v. Fox*, 78 Cal. 396, 20 Pac. 868; *Barfield v. Price*, 40 Cal. 535; *Gamble v. Tripp*, 99 Cal. 223, 33 Pac. 851; *Marten v. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107; *Pomeroy*, Eq. Jur. § 897.

The learned author last cited says: "The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligation by a rescission or a refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations."

It is said in *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798: "Where a party desires a rescission on the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he is silent, and continues to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract as if the mistake or fraud had not occurred."

So in *Commissioners v. Younger*, 29 Cal. 177, the court said: "A court of equity will not relieve a party from a contract on account of misrepresentation when no confidential relation exists between the parties, and where, the means and sources of knowledge being equally accessible and open to both, the party complaining has no right to place reliance upon the statement of the other; for the law aids the vigilant, not the idle, and will not undertake the care of persons who will not, with the means at hand, take care of themselves."

In this case the plaintiff knew, or had the means of knowing, the condition of the exits and stairways when he took possession of the property. At every performance given in the theater he must have known whether or not the exits were sufficient to allow the gallery to be emptied in proper time. He must have given many performances each month. If he did not by the use of his eyes, and the constant experience of using the property for the purposes for which it was leased, discover the alleged defects until the latter part of April, 1901, he cannot now call for the aid of the court in this form of action to relieve him from his gross negligence. He will not be allowed to affirm the contract during the winter months and dis-

affirm it when the dull season begins. He claims to have notified plaintiff the middle or latter part of April of his intention to rescind. He must have changed his mind, because we find him afterwards writing to ask defendant to wait a few days for the May rent, and the latter part of May he offered \$1,000 to defendant for the curtain privilege. He was then trying to sell the lease or make some disposition of it to one Barton. In his letter to Todd he said: "I have decided, in order to close this matter at once, to offer \$1,000 for that curtain privilege. Kindly let me know, as I would like to phone to Barton to come up, and also send a check for last month's rent and close the deal."

It is evident that in the latter part of May, when this letter was written, the plaintiff was not adhering to his attempted rescission. He was treating the lease as valid. If he could make money by keeping it as a valid lease, he evidently then intended to do so. If he could not, he desired to rescind. He will not be allowed to blow hot and cold at the same time. If plaintiff rescinded the lease in April, 1901, he afterwards waived any such attempted rescission by his conduct in saying he intended to pay rent, and agreeing to pay \$1,000 for the curtain privilege. The curtain privilege would have been no use to him if his lease was gone. If he had no lease in the latter part of May, it could not matter to him as to the right to curtain advertisements let by defendant to others.

The lower court seems to have placed considerable reliance upon a report of the grand jury of Sacramento county made in May, 1899, by which report attention was called to the unsafe condition of the theater. The report was hearsay and was not admissible for any purpose. We know of no law, and none has been called to our attention, by which a grand jury has jurisdiction over private property. It was of no more force than if made by any other body of men in their private capacity.

If what has been said is correct, the judgment and order should be reversed.

We concur: CHIPMAN, C.; HAYNES, C.

For the reasons given in the foregoing opinion, the judgment and order are reversed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

(142 Cal. 303)

ANGLO-CALIFORNIAN BANK, Limited, v. CERF et al. (L. A. 1,181.)\*

(Supreme Court of California. Feb. 20, 1904.)  
MORTGAGE FORECLOSURE—SALE OF SEPARATE PARCELS—VALIDITY—REDEMPTION.

1. Though Code Civ. Proc. § 694, provides that in foreclosing a mortgage, where the sale is of real property consisting of several known

\*Rehearing denied March 21, 1904.

¶ 1. See *Mortgages*, vol. 35, Cent. Dig. § 1515.



lots, they must be sold separately, where such lots are offered separately, and there is no bid, the property may then be sold as a whole.

2. Where several parcels are to be sold on the foreclosure of a mortgage, the sheriff, having failed to obtain any offer for the separate parcels, is not required, in the absence of a request therefor, to offer the property in combinations of parcels before offering it as a whole.

3. Where a sale of property on foreclosure of a mortgage is legally made, it will not be set aside because, to redeem any of the property, the mortgagor must redeem all.

4. Where a judgment of foreclosure of a mortgage did not specify the character of money for which the property should be sold, the sheriff's notice of sale for "gold coin of the United States" was not such a departure from the terms of the judgment as to require the setting aside of the sale.

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the Anglo-Californian Bank, Limited, against Moses Cerf and another. From an order denying the motion of defendant Ernest Cerf to set aside a sale of real property, he appeals. Affirmed.

J. J. Burt, Venable & Goodchild, and Marcel E. Cerf, for appellant. Jesse W. Lillenthal and W. H. Spencer, for respondent.

ANGELLOTTI, J. This is an appeal from an order of the superior court of San Luis Obispo county denying the motion of appellant, one of the defendants in this action, to set aside a sale of real property made by the sheriff to the plaintiff, under an order of sale issued out of said court upon a judgment rendered therein for the foreclosure of two mortgages held by plaintiff as security for an indebtedness due it from defendant Moses Cerf.

The sheriff made the sale on the 21st day of April, 1900, and appellant, on October 20, 1900, gave notice that he would make this motion on October 27, 1900, specifying various grounds, the principal one being that the sale was irregular in that "the said sale was of real property consisting of several known lots or parcels not contiguous and widely separated from each other, and that the said lots and parcels were not sold separately, as is required by law, but in one mass, and as a whole." The judgment did not contain directions as to the order in which the property should be sold. The record fails to show how the property was described in the mortgages, but it appears therefrom that in the judgment, order of sale, notice of sale, and return of sale, the land was described by 19 separate descriptions. Seven of these descriptions included various legal subdivisions of country farming and grazing lands in township 30 S., range 15 E. of Mt. Diablo meridian, lying contiguous to one another; nine included various legal subdivisions of the same character of lands in township 27 S., ranges 10 and 11 E. of Mt. Diablo meridian, not all of which were con-

tiguous to one another; and three included lots in the town or city of San Luis Obispo. It appears from the evidence that the sheriff first offered the property for sale by the 19 separate descriptions, and received no bid for any of said lots or parcels of land, and that he then offered all of the property in one parcel, whereupon plaintiff became the purchaser for the sum of \$27,000, which, after the deduction of costs, left a deficiency of \$1,986.74 due on the judgment. It further appeared that one of the attorneys for the appellant was present at the sale, and made no suggestion as to the method of sale.

The statute requires that where the sale is of real property, "consisting of several known lots or parcels, they must be sold separately." Section 694, Code Civ. Proc. It is admitted that a sale of separate parcels en masse, in disregard of the requirements of the statute, is not void, but only voidable, and subject to be set aside on timely application; and, further, that a sale en masse is not forbidden where the parcels cannot be separately sold. It was said in *Marston v. White*, 91 Cal. 37, 27 Pac. 588: "But while the rule declared by the Code as above is controlling and should be strictly followed, still it cannot be held to apply where each distinct parcel is first offered for sale separately and no bids are received. In such case, the property may then be offered and sold as a whole, and the sale will be upheld, unless other reasons appear for setting it aside." See, also, *Connick v. Hill*, 127 Cal. 162, 59 Pac. 832; *Hibernia Sav. & Loan Society v. Behnke*, 121 Cal. 339, 53 Pac. 812; *Freeman on Executions*, § 296. The theory of appellant is, however, that there were here only three different pieces or parcels of land, widely separated from each other and not contiguous, and that the sheriff should have offered each of the three lots separately. The only evidence introduced by appellant to show that there were, in fact, only three parcels of land, was the affidavit of Moses Cerf, wherein it is said that the property "consisted of three different pieces or parcels of land widely separated from each other and not contiguous." The affiant carefully abstained from saying that the property consisted of three "known" lots or parcels, and, so far as appears from the affidavit, the division by him into three parcels was purely arbitrary (except so far as the general location of the property was concerned), and without regard to its occupation and use. The affidavit of Victor H. Woods related solely to the general location of the property. The affidavit of Cerf affirmatively shows that one of the so-called parcels consisted of "several town lots in the city of San Luis Obispo, upon which is a brick building used for stores, and an opera house, and several wooden warehouses," indicating several known lots or parcels. It does not appear from the affidavit that the various legal subdivisions of country farming and grazing lands in ei-

ther of the so-called parcels were so occupied as to be united into one tract. The descriptions show that those in township 30 are contiguous, and could be so united as to form one irregularly shaped tract, but that those in township 27 could not be so united. So far as appears, the country land consisted entirely of various legal subdivisions of unoccupied land. Clearly, it cannot be said that it was made to appear that the property sold consisted of only 3 known parcels of land, or that it did not, in fact, consist of 19 distinct parcels as described in the judgment. The real contention of appellant in this behalf would then seem to be that the sheriff, having failed to obtain any offer for the separate parcels, should have offered the property, in combinations of parcels, placing the town property in one offer, the property in township 30 in another, and the property in township 27 in the third. Considering the difference in character of the property, and the fact that these three lots of property were situated at a considerable distance from one another, such combinations might have been appropriate, but the mandate of the statute did not require them to be made by the sheriff, in the absence of a request by some party interested, unless they constituted separate "known parcels," which, as we have already seen, has not been made to appear. In fact, the descriptions themselves demonstrate that there were more than three separate and distinct parcels of land. "When a party comes into court and asks to set aside a sale, the burden is upon him to show such an irregularity or material departure from the statute as will justify the court in setting it aside." *Connick v. Hill*, 127 Cal. 165, 59 Pac. 833. It cannot be said, from the showing here made, that the conditions which would authorize the sale of all of the property together did not exist.

Inadequacy of price was not one of the grounds for the setting aside of the sale, specified in the notice of motion, and, as has been said, is not sufficient ground upon which to annul a sale, particularly under our practice, when a judgment debtor is allowed to redeem. *Connick v. Hill*, supra. The showing as to value at the time of the sale was so weak as to be practically no showing at all. In this connection it may be stated that there is no intimation that a larger sum could have been obtained for the property if the land had been sold in the manner now suggested by appellant, or that any injury resulted to the defendants from the method pursued.

If the sale was legally made, there is, of course, nothing in appellant's contention that the sale should be set aside simply because, in order to redeem any of the property, he must redeem all.

The judgment did not specify the character of money for which the property should be sold, but the sheriff noticed it for sale to the highest bidder for "gold coin of the Unit-

ed States," and so sold it. It is claimed that this was such a departure from the terms of the judgment as to require the setting aside of the sale. We are unable to see how, under the conditions existing in this country, the departure was at all material, or how, by any possibility, it "could have imposed a burden which the judgment and the law did not authorize." No such burden is pointed out by appellant.

It is urged that the description of the property to be sold was indefinite, uncertain, and imperfect. The description in the notice was precisely the same as that contained in the judgment. We have examined these descriptions, and, so far as the record shows, they cannot be said to fail to sufficiently identify the land to be sold.

It is said that it appears that the sheriff, when offering the land in 19 separate parcels, failed to refer to the reservation of certain portions excepted from the effect of the decree. We are unable to so construe his return of sale, and find nothing in the record to indicate that he did as claimed.

The order is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

(142 Cal. 335)

PEOPLE v. KELSO. (Cr. No. 1,070.)

(Supreme Court of California. Feb. 24, 1904.)

BURGLARY—LOCUS DELICTI—PLEADING AND PROOF.

1. An information alleged the commission of the burglary by entry of the "house, room, apartment," etc., of Q., "being known and designated as room No. 32 of the building situated at No. 406 S. street" in a certain city. *Held*, that the description of the place of the burglary was sufficient without the number of the room, so that it was unnecessary to prove such number.

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. J. Lennon, Judge.

Joseph L. Kelso was convicted of burglary, and appeals. Affirmed.

Fuller & Chappel, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Dep. Atty. Gen., Lewis F. Byington, Dist. Atty., and L. B. Wilson, for the People.

McFARLAND, J. The defendant was convicted of burglary, and appeals from the judgment and from an order denying his motion for a new trial.

The only point made by appellant which calls for special notice is that there was a failure of the prosecution to prove the alleged locus delicti. This point rests upon the fact that it is averred in the information that the alleged offense was committed by burglariously, etc., entering the "house, room, apartment, tenement, shop, warehouse, store, and building of one M. B. Quigg, being known and designated as room No. 32 of that certain building situated at

No. 406 Sutter street, in the city and county of San Francisco," and that there was no evidence that the premises of Miss Quigg were designated as "room No. 32." This contention is not maintainable. The information contained a sufficiently full description of the place where the burglary was alleged to have been committed, independent of the phrase giving to it a certain number. It gave the name of the street and the number of the house thereon in which Miss Quigg had her apartments, which were shown by the evidence to have been used as a millinery establishment, and alleged that the burglary was committed in the "room, apartment, tenement, shop," etc., of the said Miss Quigg in said house on Sutter street; and the evidence was that it was committed, if at all, at said place so described. It is impossible that the mere neglect of the prosecution to prove the unnecessary averment of the number of her apartments could have deprived appellant of any of his rights, or prevented him from having a fair trial.

The point that in other respects the evidence was not sufficient to warrant the conviction of appellant is not tenable. No doubt, a plausible argument might have been made to the jury against the sufficiency of the evidence to justify a verdict of guilty, but there certainly was such evidence tending to show appellant's guilt as put the question of his guilt or innocence clearly within the judgment of the jury.

The order and judgment appealed from are affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.

(142 Cal. 322)

ROSE et al. v. MESMER et al. (L. A. 1,192).\*

(Supreme Court of California. Feb. 23, 1904.)

WATER RIGHTS AND IRRIGATION—PARTITION—PRIORITY—ADVERSE USER—EVIDENCE—ESTOPPEL—FINDINGS—CONSISTENCY—REGULARITY—APPEAL.

1. In determining the sufficiency of evidence to support findings, it must be construed favorably to support the findings.

2. On partition among co-tenants of a tract of land to which pertained riparian rights to water for irrigation the land was classified, each co-tenant receiving a proportionate share of each class, and the prior right to all the water needed for irrigation was attached to the first-class land, each owner of such land being given, not a certain amount of water, but a share of the water in proportion to his share of the land. *Held* that, though some of the allotments of first-class land did not abut on the stream, the effect of the partition was merely to cut off the land not classified as first class from participation in the riparian rights formerly appertaining to the entire tract, but that it did not change the water right from a riparian right to a right appurtenant.

3. In a suit for partition of land to which attached riparian rights to water for irrigation it was unnecessary to mention such rights in the complaint, as they were part of the land.

4. Where land, having riparian rights to water for irrigation attached, was partitioned, no division of water being made, the right to water remained in the nature of a right in common, so that use of it by an owner of land entitled to share in its use could not be considered hostile to the rights of other owners, unless characterized by much greater manifestations of hostile intent and more serious detriment than would be necessary if the hostile claimant had no common right.

5. A riparian owner may go on land of another further up the stream, and, with such other's consent, there divert water for use on his riparian land without thereby necessarily exercising any other than his riparian right; the question of whether such act is or is not to be considered an attempt to make an appropriation of water independent of his riparian rights being governed by the circumstances.

6. Where land to which appertained riparian rights for irrigation was partitioned, no division of the riparian rights being made, no owner of a portion of the land after partition was entitled to the full flow of the stream through his land, but only to so much of the water as was reasonably necessary for use.

7. Where it was claimed that a right to water for irrigation had been acquired by adverse user, a finding that the water was used on a certain area of land, but not going to the amount used, was immaterial.

8. Land to which riparian irrigation rights pertained was partitioned by being classified, the first-class land being given a prior right to water necessary for irrigation of such lands. There was often more than was necessary for this purpose. In a suit in which owners of third-class land claimed to have acquired a right to water to irrigate their land by adverse use, the court found that such owners believed that they had acquired such right, and also found that their use of water was in recognition of the rights of the owners of first-class lands. *Held*, that the findings were not inconsistent, it being presumable that the first finding meant that the owners of third-class lands merely believed they had a right to the use of surplus water not needed on first-class land.

9. Regarding the claim of the owners of third-class land as extending only to surplus water no estoppel was raised against owners of first-class lands.

10. Land having irrigation rights appertaining thereto was partitioned by being classified, land of the first class being given prior right to water for irrigation. At the time of partition certain owners of parts of the land had obtained by deed from an upper riparian proprietor the right to construct a ditch across his land to convey water to their lands, and after partition used the ditch to convey water to their first-class lands, and at times to their third-class lands. Eventually they claimed to have acquired by adverse use a right as against other owners of first-class lands to use water on their third-class lands. *Held*, that the use of water through the ditch, under the deed, was not necessarily adverse.

11. Proof of ancient use of a right does not give rise to a conclusive presumption of a grant where the use is not adverse or continuous, and prior rights of other parties are continually recognized.

12. On appeal merely from an order denying a motion for a new trial, the terms of the decree cannot be questioned.

13. On appeal merely from an order denying a motion for a new trial, the question of the correctness of a conclusion of law cannot be raised.

14. Where the findings of the trial court were in five separate volumes, each of which was in the judgment roll, each identified by the signature of the clerk showing filing of the

\*Rehearing denied March 24, 1904.

same, and the language at the end of each volume and the beginning of the next showed they were one continuous document, the failure of the judge to sign any but the last volume was not error.

15. On appeal in a case involving numerous issues, and consuming much time and involving great expense in trial, a new trial of all the issues will not be ordered because a finding on a single issue of minor importance is found unsupported by the evidence.

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Anderson Rose and others against Louis Mesmer and others. There was a decree for plaintiffs, and from an order denying a motion for a new trial Jose Antonio Machado and others, defendants, appeal. Reversed in part.

See 66 Pac. 594.

Lee & Scott and Graves, O'Melveny & Shankland, for appellants. Clarence A. Miller, M. J. McGarry, Jos. L. Murphy, J. Wiseman MacDonald, and R. H. P. Variel, for respondents.

SHAW, J. This is an appeal by 17 defendants from an order denying their motion for a new trial. It is claimed that the findings are in many particulars unsupported by the evidence. The parties are very numerous, and the issues exceedingly complicated, so that it is impossible, without unduly extending this opinion, to give anything like a complete statement of the various features of the case.

The object of the suit was to determine the respective rights of all the parties to the waters of Ballona creek, in Los Angeles county, and to enjoin certain defendants from using more of the water than their just proportion. The plaintiffs and certain of the defendants, including those who appeal, each owned parcels of land which are a part of a Mexican grant known as "Rancho La Ballona." This ranch contains about 14,000 acres of land bordering on the Pacific Ocean, and extending from the ocean up the creek on each side thereof for a distance of several miles. The other parties own land further up the creek, and abutting thereon, or on affluents thereof, and comprising Mexican land grants known respectively as "Rincon de los Bueyes," "Las Cienegas," and "La Cienega o' Paso de la Tijera," the Los Bueyes being next above La Ballona, and the other two adjoining Los Bueyes, and further up the stream. The controversy on this appeal is in regard to the rights of those parties only who own portions of Rancho la Ballona. In the year 1863 an action entitled "Young et al. v. Machado et al.," for the partition of the Ballona ranch, was begun in the district court of Los Angeles county. At and before that time certain persons owning undivided interests in the Ballona ranch, and having possession of separate parcels thereof, had made a dam in the creek at a point

on the Los Bueyes ranch above the line of the Ballona ranch, and had built a ditch leading from the dam to the tracts in their possession, by means whereof they conducted the water of the creek from the dam to the land they occupied in the Ballona ranch. These persons were the predecessors in interest of the appellants herein. The final decree in the partition suit was made in 1868. In the meantime, on November 7, 1867, these predecessors of appellants obtained from Francisco Higuerra, then the owner of the Los Bueyes ranch, a deed granting the right to take out water on his land and conduct it over his land through the ditch to the Ballona ranch lands occupied by the grantees. The referees' report, and the decree confirming the same in the partition suit, divided the land into four classes, designated, respectively, first-class irrigable land, comprising 1,473 acres; second, land susceptible of cultivation without irrigation, and so lying as to be irrigable if there were water enough in the creek, herein designated as second-class land, comprising 1,581 acres; third, pasture land; and, fourth, tide, swamp, and drifting sand hill land. It attached the right to all the water of the creek, so far as needed therefor, to the first-class lands, and set off to each tenant in common a portion of the first-class land in severalty, with its due proportion of the water of the creek, in lieu of his previous undivided interest in such first-class land. The second, third, and fourth class lands are also divided in like manner. The decree made no division of the water among the owners of the first-class land, but declared that each owned a share of the water in proportion to his interest in the land. The language is not expressly as above given, but this is the effect of the judgment. Nothing is said in the decree or report concerning the ditch above mentioned, nor was there any mention of the creek, or of any water rights therein, in the complaint or elsewhere in the record, except in the report of the referee and in the final decree. It appears from the evidence that at that time there were several ditches in use by which water of the creek was diverted and used to irrigate portions of the ranch.

The ditch mentioned in the grant from Higuerra was and still is known as the "upper ditch," and, with some changes in route and in the point of diversion, it has been maintained and used, as occasion required, ever since the year 1866. It was so located that by means of it the water of the creek could be used for the irrigation of some portions of the third-class or pasture land owned by appellants and their predecessors after the partition. These parties used the ditch to carry water from the point of diversion in the Los Bueyes ranch down to their first-class lands in the Ballona ranch, and in connection with the use of the water on those lands they have also from time to time, ever

since the construction of the ditch, used the water for irrigating portions of their third-class land. The appellants now claim that this use of the water on third-class lands has been continuous, or as nearly so as the demands for irrigation required, and adverse to the rights of all the other owners of first-class lands under the partition decree, so that by reason of this use they now have a prescriptive right to the use on their third-class land, which is superior to the common right of the other owners of first-class lands to the waters of the creek. The respondents claim that this use on third-class lands has not been continuous, nor attended by all the other elements and characteristics which, under the circumstances, would be necessary to constitute an adverse use of that description of property, and that it is not adverse to their rights to use the water on both first-class lands and second-class lands. The finding was against the appellants on this proposition, and this finding is the principal one challenged as lacking support in the evidence.

Upon an examination of the record we are of the opinion that, so far as first-class lands are concerned, this finding is sustained by sufficient evidence. There is much evidence to the contrary, it is true. A conflict of evidence usually occurs in cases of this character, and in such cases it is the province of the trial court to determine the truth of the matter. This court is obliged to give to the evidence the construction most favorable to the support of the findings. It would serve no useful purpose to review the evidence in detail. It covers many pages of the transcript, and it is sufficient to say that there is enough evidence to justify the finding of the court on this point. There are some general propositions which may be stated for the purpose of explaining our construction of the evidence.

The original owners of the Ballona ranch held riparian rights in Ballona creek extending to the entire area of the ranch. When thereafter their ownership became divided among many persons having undivided interests in common each held an undivided interest in the riparian right in proportion to his interest in the land. The effect of the decree in partition was to detach the riparian right from all of the land except that designated therein as first-class irrigable land and that described above as second-class land, and to give to the owners of first-class land exclusive use of the water thereon in preference to the use upon the second-class land. This, however, did not change the character of the water right belonging to such land from a riparian right to a right appurtenant. And this is the case notwithstanding the fact that many of the allotments of first-class lands did not abut upon the stream. Its effect was merely to cut off the other lands of the ranch from a participation in the riparian rights theretofore appertaining to the

entire ranch. A judgment in partition is a mere severance of the unity of possession and community of interest, and does not in any other respect affect the character of the title or estate, unless it expressly so declares. *Christy v. S. V. W. W.*, 68 Cal. 75, 8 Pac. 849; *Wade v. Deray*, 50 Cal. 380. This right, like other riparian rights, was in strict, technical language "parcel of the land," and not a right appurtenant. This distinction, however, is not important except in the interpretation of the findings and decree in this case, which, as is manifest from the context, used the word "appurtenant" as the equivalent of "riparian" in speaking of the right to use water of the creek on the lands of the Ballona ranch. It was not necessary to mention or describe in the complaint in the partition suit the water rights in the creek. Being parcel of the land itself, the description of the land included the water. The same would have been true if the water right had been merely a right appurtenant.

The decree in *Young v. Machado* did not attempt to make any division of the water among the respective owners of first-class land, nor to designate the times or manner of its use. After the partition, as before, the right to the stream, or to the water while it remained in the stream, was in the nature of a right in common, so that, as in the case of other tenancies in common, the use by the owner of a proportional right could not be justly considered as hostile to the common right of the others, unless it was characterized by much greater manifestations of hostile intent and more serious detriment than would be necessary if the hostile claimant had no part in the common right or use. The parties to whom the water was allotted for use on the first-class lands did not divide the stream into small parts so as to give each landowner a continuous flow of his proportional part. It was diverted by some three or four ditches, including the upper ditch, with headgates or dams located at different places, and each serving different tracts, and it was divided upon the plan of giving to each owner the use of all the water of the ditch leading to his tract, or of a sufficient quantity thereof to make a practicable "irrigating head," for a certain number of days or hours in each month or other fixed period.

The grant by Higuerra of the right to take out water and conduct it over his land by means of the existing ditch to the land below contains nothing in its terms inconsistent with the theory that the grantees were intending by that means to secure only a more convenient and effectual use of the water as riparian owners. A riparian owner may, for the more convenient use of the water on his riparian land, go upon the land of another further up the stream with the consent of such landowner, and there divert the water for use upon land below, or he may raise it to the surface of his land by

pumps or other artificial means. In either case his act in so doing is not necessarily different from the exercise of his right as a riparian owner, and such a diversion above his land may or may not be considered as an attempt to make an appropriation of the water independent of the riparian right, according to the circumstances that appear with respect to the particular case.

It is apparent from the evidence in the case that there was a general understanding and custom among all the owners of water in the creek in question that their rights to the creek should be made available by diverting the entire stream and dividing it among the different owners of land, and that all or any part of the water could be diverted and used by any one when not required by the others. No one has ever claimed that he had a right to have the stream run down through his land irrespective of any use he desired to make of it for the irrigation thereof, nor objected to any one using the water when he did not want it himself. A riparian owner, under the circumstances of scarcity such as here existed, and in view of the prevailing understanding and custom, would have no right, as against other owners in common of the same land and of a part of the same water right, to insist on the full flow of the stream over his land for the mere pleasure of looking at it as a feature of the landscape. His right would be limited to so much of the water as should be reasonably necessary for use on his riparian land. It further appears that the flow of water in the creek was variable, according to the time of the year and the amount of the seasonal rainfall, so that in some periods of each ordinary year there was abundance of water for all claimants, not only those of the first-class lands, but of any others who wanted to use the water upon other lands, and it is apparent from the evidence that all the parties considered that when this was the case every person was at liberty to take such water as he wished or needed, whether it was upon first-class lands or upon other lands.

The court below evidently considered all of these circumstances as affecting the evidence and explaining the character of the acts and diversions made by the appellants which are now claimed to have been adverse, and, upon a consideration of all of the evidence, reached the conclusion, which we think was justified, that there was not an adverse use of the water upon the third-class lands for a sufficient length of time to create a right by prescription.

The appellants complain that several subordinate findings are not sustained by the evidence. One of these is that the court found that the water used by appellants through this upper ditch was applied only to the irrigation of a certain described area of land, which, it is claimed, is much less than that which the evidence shows. We think

there was evidence to show that the water was used upon a larger area of the third-class land than that described; but, as the use of the water was not adverse, and this finding does not go to the amount used, it is clearly immaterial.

There is a finding that the appellants believed that by reason of the Higuerra deed and their use of the water through the ditch therein mentioned they had acquired a valid right to the use of sufficient water to irrigate the third-class lands irrigable from the upper ditch, and it is further found that their use of the water in this manner was accompanied by express recognition and admission to the full extent of the rights of the plaintiffs and other defendants owning first-class irrigable lands to the use of the water in preference to the use of the appellants. It is claimed by the appellants that these two findings are inconsistent. This, however, is not necessarily the case. It appears, as above stated, that at many times there was an excess of water above the amount necessary, and that at such times there was a general consent that it might be taken by others for use upon other than first-class lands. It must be presumed, therefore, that the court meant by this finding to state that the appellants believed they had a right to the use of whatever surplus of water there might be after the wants of the first-class lands were supplied. This also explains the action of the court below in finding that there was no estoppel. If the claim of the appellants was only to the surplus, it is clear that there could be no estoppel raised against those who were entitled to the first right.

The case of *Fogarty v. Fogarty*, 129 Cal. 46, 61 Pac. 570, is cited in support of the proposition that the use of the water by the appellants under the Higuerra deed was necessarily adverse, and that, therefore, the finding that it was not adverse is contrary to the evidence. The expressions in the *Fogarty* Case were made with reference to the use of water under an agreement made between the plaintiff and defendant in that case, which provided for the use of water in pursuance of the agreement, and under those circumstances it was said: "It must be conclusively presumed that the subsequent user of the right agreed upon was under the agreement, and therefore adverse." Under the circumstances there considered this may be a correct statement of the law, but it is not correct when it is applied to a case where an adverse right is asserted against a third person by reason of a deed to the claimant not executed by the third person, but by other persons not in privity with him. The use would be adverse as to the grantor, but not necessarily so as to the third person.

The appellants also invoke the proposition that proof of ancient use of a right gives rise to a conclusive presumption of a grant. This may be true as an abstract proposition

of law, where there is proof of ancient and unquestioned use without other explanation, and the use has continued for a great many years, but it has no necessary application to the case in hand. Here, while there had been a use for many years, it was explained by evidence to the effect that it was not adverse, and that the prior rights of other parties were continually recognized, and, further, that the use had not been continuous, but had been interrupted from time to time.

There is a clause in the decree enjoining the appellants from the further use of this upper ditch, and this, it is claimed, is erroneous. So far as the rights of owners of first-class irrigable lands are concerned this is an objection which is not available to the appellants upon this appeal. There was an attempt to appeal from the judgment, but it proved ineffectual, and was dismissed upon motion. In the absence of an appeal from the judgment, the terms of the decree cannot be questioned. With respect to the rights of owners of second-class lands there are some other considerations in this connection to be hereafter stated in this opinion.

The appellants also complain of a conclusion of law to the effect that the owners of first-class land have a right to enter upon the lands of other owners for the purpose of securing their rights to the water, evidently meaning that they have a right to enter for the purpose of making such repairs to the ditches as may be necessary. This also is a question which cannot be raised upon this appeal.

Another objection is that the findings are in five separate volumes, only one of which is signed by the judge, and this latter, it is claimed, constitutes the only findings that can be considered. Waiving the proposition that this point could only be raised upon a direct appeal from the judgment, it is sufficient to say that all these volumes of the findings are in the judgment roll, that each volume is identified by the signature of the clerk showing the filing of the same, that the connection of the language at the end of each volume and the beginning of the next is such as to make it clear that they were intended as one continuous document, so that, while we cannot commend this method, we cannot characterize it as error.

A further complaint is made of a finding of the court to the effect that rights of owners of second-class lands to the water of the creek under the partition decree of 1868 were superior and paramount to any right of the appellants to use the water through this upper ditch or otherwise for the irrigation of their third-class lands. The effect of the decree in the partition suit was to assign the water for the use of the first-class lands in preference to all others, and the surplus, if there should be any, to the second-class lands, in preference to the other lands of the ranch; so that, at the time the decree was rendered there could be no question but

that the right of the owners of the second-class lands was superior to that of the owners of third-class lands in the waters of the creek. But, although the evidence is sufficient to show that the appellants in their use of the water through this upper ditch upon their third-class lands recognized the superior right of the owners of first-class lands to the waters of the creek, and therefore that such use by appellants was not adverse, yet we cannot hold it sufficient to show that they at any time considered or admitted that their rights were subject to the rights of the owners of the second-class lands. Nor does it appear that the owners of second-class lands ever claimed the water for use on lands of that class, or, at all events, that many of them ever did. This class of land, under the decree, had no right to water except when there was enough water in the creek after the first-class lands were supplied. The evidence shows that water was seldom used upon any of it, while it is clear that it was generally used upon the third-class lands of appellants. We think this portion of the finding was unsupported by the evidence at least as to the whole of the second-class lands. It does not appear to be of very much importance, because it is practically certain that in ordinary seasons there will be no surplus of water, during the dry season, over that required for the first-class lands. But during other portions of the year, and during seasons of unusual rainfall, the right to the surplus after the first-class lands are supplied may be a valuable one. It is not necessary, however, because of this error, that a new trial of all the issues should be granted. The trial appears to have consumed a number of weeks, and to have required a great deal of expense, and to have been devoted almost entirely to other issues. It will be sufficient to order a new trial of the issue only as to the adverse use of the appellants with respect to claimants of water for the irrigation of the second-class lands alone, leaving the finding and decree to stand in all other respects, except as far as it may be necessary to modify them for the purposes of the new trial. If, upon a second trial of this issue, the courts should conclude that the appellants have acquired prescriptive rights paramount to those of the owners of second-class lands, the decree restraining the use of the upper ditch must be modified so as to give them a right to use the ditch at such times as there may appear to be water which they have the right to use.

It is therefore ordered that the order denying a new trial be modified to this extent only, to wit: That a new trial be granted solely upon the issue whether the appellants' rights to the water of Ballona creek for use upon their third-class or "pasture" lands, as designated in the partition suit, is or is not superior, by reason of continuous adverse use, to that of any party hereto to

the water thereof for use upon lands in said partition suit classed as second-class land, and whether or not the appellants may not maintain the "upper ditch" to carry water to their third-class land, when such water is available, as against the rights of owners, for use upon such second-class lands, and that part of the decree which adjudges that the rights of appellants to water for third-class land is subject to the rights of other parties for use upon second-class land is vacated. The decree so far as it enjoins further use of the "upper ditch" as against the right of second-class lands is suspended until further action by the court below in pursuance of this mandate. In all other respects the order stands affirmed and the decree unaffected.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

(9 Idaho, 764)

#### DAVIS v. ELMORE COUNTY.

(Supreme Court of Idaho. March 1, 1904.)  
COUNTY COMMISSIONERS—APPEAL FROM ORDER—MOTION TO DISMISS—UNDERTAKING.

1. An appellant from an order of a board of county commissioners must file an undertaking on appeal as required by statute, when the appeal is not taken for the purpose of protecting the interests of the county and people. If he does not do so, his appeal is ineffectual for any purpose, and will be dismissed on motion.

(Syllabus by the Court.)

Appeal from District Court, Elmore County; Littleton Price, Judge.

Application by William H. Davis for an allowance of a claim against Elmore county. From an order of the board of county commissioners, refusing to allow the claim, plaintiff appeals. Affirmed.

E. M. Wolfe, for appellant. W. C. Howie, for respondent.

SULLIVAN, C. J. This is an appeal from the judgment of the district court of Elmore county on an appeal from an order of the board of county commissioners disallowing appellant's claims for services as road contractor for Road District No. 4 of said county for the quarters ending April 1 and July 1, 1903. A motion is made by counsel for respondent to dismiss the appeal on three several grounds, the second of which is that no undertaking on appeal was filed as required by the statute in such cases. It is contended by counsel for appellant that under the provisions of section 1777, and acts amendatory thereof, of the Revised Statutes of 1887 (section 1609, Ann. Code 1901), no undertaking is required to be given by the appellant in this case. That part of said section referring to the point in controversy is as follows: "When the appeal is made for the purpose of protecting the interests of the county and of the people, no requirement

shall be made of the appellant for security of costs, except that when the district judge shall be of the opinion that such appeal is not made in good faith," etc. It is contended that this court construed said provision in the case of *Ravenscraft v. The Board of County Commissioners*, 5 Idaho, 178, 47 Pac. 942, in accordance with the view above expressed by counsel for appellant. That was an appeal by a taxpayer to protect the interests of the people, and comes clearly within the provisions of said section above quoted, while the case at bar is an appeal by a private person, to protect his own interests, from an order disallowing his personal claims. This appeal was not taken "for the purpose of protecting the interests of the county and of the people," but was for the purpose of protecting appellant's individual rights. The provisions of said section are too plain to require construction, and do not exempt the appellant from filing an undertaking for costs on appeal. He having failed to file such undertaking, the motion to dismiss must be granted, and it is so ordered. Costs of the appeal are awarded to the respondent.

STOCKSLAGER and AILSHIE, JJ., concur.

(32 Colo. 371)

#### McCROSKEY et al. v. MILLS.

(Supreme Court of Colorado. March 7, 1904.)  
ACTION TO QUIET TITLE—SUFFICIENCY OF DEFENDANT'S PLEADINGS—DEFENDANT'S REPLY—REVIEW OF MOTION TO STRIKE—PLAINTIFF'S INTEREST IN PREMISES—ESTOPPEL TO CLAIM—HARMLESS ERROR—GROUND FOR REVERSAL.

1. Where, in an action to quiet title, brought under Mills' Ann. Code, c. 22, which does not prescribe what the answer shall contain, both defendant's answer and cross-complaint state facts showing that his title is superior to plaintiff's, the fact that he does not allege that he is entitled to possession, and has not set up the character of his estate, is not a fatal defect.

2. Where, in an action to quiet title, defendant seeks to recover possession, his answer and cross-complaint, setting up facts from which it appears that he is the owner and entitled to possession, which plaintiff wrongfully withholds from him, are sufficient, though he does not plead that he is entitled to possession in the exact formula prescribed by the Code.

3. Where in an action to quiet title an affirmative defense in defendant's answer, and also his cross-complaint, set up title in him and constitute a complete defense to plaintiff's claim, the fact that defendant's denials are insufficient does not entitle plaintiff to judgment on the pleadings.

4. Where no exception is taken to the denial of a motion to strike a reply by defendant to plaintiff's reply, the ruling is not open to review, and defendant's reply will be treated as a pleading in the action.

5. In an action to quiet title, it appeared that on the premises, which stood in the name of plaintiff's brother, defendant had certain mortgages, which were foreclosed, and a sheriff's deed issued to him. Plaintiff and his brother were in partnership, and plaintiff claimed that the premises were firm property. Plaintiff knew of the execution of the mortgages, and that the money was advanced to his brother,

¶ 1. See Counties, vol. 13, Cent. Dig. § 78.



and that the firm had the benefit of the advances. Prior to the execution of the mortgages, plaintiff told defendant that he had no interest in the premises, on which account it would not be necessary for him to join in the notes. Plaintiff knew of the foreclosure proceedings, but never indicated to defendant that he had any interest in the property until the present action was commenced. After the foreclosure sale was had, but before deed was issued, plaintiff endeavored to lease part of the premises from defendant. *Held*, that plaintiff was estopped from claiming any interest in the property.

6. Where a party establishes by competent testimony his right to the subject-matter in controversy, entitling him to the relief granted, and the other party fails to establish any right to such subject-matter whatever, he cannot complain of errors which did not prejudice him in his attempt to establish his alleged right.

Appeal from District Court, Teller County; John T. Shumate, Judge.

Action by Solon McCroskey and others against H. A. Mills. Judgment for defendant, and plaintiffs appeal. Affirmed.

Geo. Salisbury, for appellants. Lunt, Brooks & Willcox, for appellee.

GABBERT, C. J. Appellants brought an action against appellee to quiet title to real estate. From a judgment that plaintiffs take nothing by their action, and that defendant do have and recover from them the possession of the premises in controversy, the plaintiffs appeal. The complaint was the usual one filed in actions to quiet title, except the allegation that Fremont L. and Solon McCroskey had formed a partnership, which had never been dissolved. The defendant answered, (1) denying or admitting certain allegations of the complaint; (2) pleaded facts from which it appeared that he had obtained title from and through Fremont L. McCroskey, and was entitled to the possession of the premises in dispute; and, (3) by what he denominated a "cross-complaint," alleged practically the same facts as stated in the second defense, and, in addition, charged the plaintiffs with fraud and conspiracy in obtaining possession, and also charged that the judgment in the suit for an accounting brought by Solon McCroskey against Fremont L. McCroskey was secured by the fraud of the former. To the second defense and cross-complaint the plaintiffs replied, denying certain allegations, and averred that Solon McCroskey took possession in the name of McCroskey Bros. because the firm had an equitable title to the premises, in that the property was bought with the funds of the copartnership; that defendant had notice of this fact—and then attacked the transactions and proceedings by which the defendant claimed to have deraigned title from Fremont L. McCroskey. To this pleading the defendant replied, setting up facts which he claimed estopped the plaintiffs from attacking the transactions between defendant and Fremont L. McCroskey, as well as the proceedings based thereon, whereby defendant acquired title, through Fremont L. McCroskey, to the premises in dispute. Plaintiffs moved to strike

this reply. The motion was denied, but plaintiffs took no exception to the ruling. They also moved for judgment on the pleadings, which was denied.

In the brief filed by plaintiffs the first point made is that no pleading filed by the defendant stated facts sufficient to constitute a defense. This contention is based upon the ground that defendant has not alleged that he is entitled to the possession of the premises, and has not set up the character of his estate. This is an action to quiet title, evidently brought by plaintiffs under the provisions of chapter 22, Mills' Ann. Code. The Code does not prescribe what an answer in an action to quiet title shall contain. If, in an action of that character, the defendant asserts title, he is only required to set up the title under which he claims. *Weston v. Estey*, 22 Colo. 334, 45 Pac. 367; *Wall v. Magness*, 17 Colo. 476, 30 Pac. 56. Both the answer and the cross-complaint state facts from which it appears that the title of defendant is superior to that of plaintiffs, so that the defendant, under previous decisions of this court, pleaded a good defense to the action instituted by the plaintiffs. The Code provisions to which counsel for plaintiffs refer, and by virtue of which they contend the defendant should have stated that he was entitled to the possession of the premises, are found in the chapter relating to actions in ejectment. If, however, it could be successfully claimed that because the defendant, in this instance, sought to recover the possession of the premises, he should have pleaded that he was entitled to such possession, the requirements of the Code to which counsel refer are fully satisfied. It is not necessary to follow the exact formula which the Code prescribes. When facts are stated as the defendant has in his answer and cross-complaint, from which it appears that he is the owner and entitled to the possession of the premises, and that the plaintiffs wrongfully withhold such possession from him, there is a sufficient compliance with the Code provision on the subject.

It is next contended that the court erred in failing to sustain the motion of plaintiffs for judgment on the pleadings. This motion was based upon the ground that the denials were insufficient, or, in effect, amounted to an admission of the averments of the complaint. Had it not been for the second defense and cross-complaint, the motion might have been well taken, but these defenses set up title in the defendant, and each constitutes a complete defense to plaintiffs' claim, irrespective of the denials. If defendant established these facts, then he was entitled to a judgment giving him the relief demanded, so that the trial court was clearly right in denying the motion.

Respecting the contention of counsel for plaintiffs that their motion to strike the reply of defendant to their reply to the answer setting up title in defendant should have been

sustained, it is sufficient to say that no exception was taken to the ruling denying the motion, and the question sought to be raised is not open to review. For the purposes of this case, that reply must be treated as a pleading in the action.

The remaining questions argued by counsel for plaintiffs will not be taken up in detail, as they can best be disposed of by a brief, general review of the cause upon its merits. The property, so far as the McCroskeys are concerned, always stood in the name of Fremont L. McCroskey. The theory of plaintiffs was that this property had been purchased with funds belonging to the firm of McCroskey Bros., the members of which were Solon and Fremont L. McCroskey; that defendant had notice of this fact; that the transactions between Fremont L. McCroskey and the defendant which finally culminated in the latter securing title were fraudulent and without consideration; and that, as a member of the firm, Solon McCroskey was the owner and entitled to the possession of the premises. The claim of defendant was that Fremont L. McCroskey owned these premises; that he made and delivered certain mortgages to him; that these mortgages had been foreclosed, and a sheriff's deed issued in pursuance of such foreclosure, by virtue of which title was vested in the defendant; that the money secured by these mortgages had been advanced to Fremont L. McCroskey, and by him used, in part, at least, in the discharge of obligations against the firm of McCroskey Bros.; that Solon McCroskey had knowledge of that fact, and had solicited the loan to be made, evidenced by the first mortgage, and, prior to the execution and delivery of these mortgages, had stated to the defendant that he had no interest in such premises whatever. The testimony discloses that these mortgages were foreclosed, and a sheriff's deed issued; that Solon McCroskey knew of the execution of the mortgages, and that the money was advanced to his brother Fremont L. McCroskey, and that the firm had the benefit of these advances; that he stated to defendant prior to the execution of the mortgages that he had no interest in the premises, and gave that as a reason why it was not necessary for him to join in the execution of the notes secured by the first mortgage. He knew of the foreclosure proceedings, and never, from the time the mortgages were executed, down to the date of the commencement of this action, by word or deed, indicated to the defendant that he had any interest in the property; and that, after the foreclosure proceedings were commenced, and before the sale thereunder had ripened into a deed, he endeavored to make an arrangement with the defendant to lease him part of these premises. There is no testimony whatever to establish the issues tendered by plaintiffs, that defendant ever had notice that Solon McCroskey claimed an interest in the premises until after the issuance of the sher-

iff's deed, or that the transactions between defendant and Fremont L. McCroskey were fraudulent in the slightest degree, or that there was any conspiracy between these parties with respect to the judgment of foreclosure. On the contrary, the evidence shows conclusively that the transactions were in good faith, that defendant actually advanced the money represented by the notes secured by the mortgages, and that the firm had the benefit of the major portion of such advances. There may be some testimony to the effect that the property was purchased with funds of the firm, but that is wholly immaterial, in view of the fact that defendant had no knowledge that the premises were so purchased, and that Solon McCroskey, by his own statements, silence, and acquiescence, is estopped from now raising the question that he ever had any interest in the premises as claimed. From the testimony as a whole, the trial court was certainly justified in finding the issues in favor of the defendant. In fact, we may say, after having carefully examined the record, that, so far as the merits of the controversy between the parties are concerned, the trial judge could not have entered any judgment different from what he did. Solon McCroskey established no rights to the premises; neither did his coplaintiffs; while the testimony shows conclusively that, as against them, the defendant is the owner and entitled to the possession of such premises. In brief, the facts estopped the plaintiffs from asserting any claim to the premises as against the defendant. *Herman on Estoppel*, §§ 917-929; *Thompson v. Sanborn*, 11 N. H. 201, 35 Am. Dec. 490.

The errors complained of by plaintiffs, and not specifically noticed, are therefore immaterial, for they were not prejudiced thereby. Where one party to an action establishes by competent testimony such right to the subject-matter of controversy as to entitle him to the relief granted, and the other party fails to establish any right to such subject-matter whatever, he will not be heard to complain of errors which did not prejudice him in his attempts to establish his alleged rights.

The judgment of the district court is affirmed. Affirmed.

(32 Colo. 250)

DRAKE et al. v. JUSTICE GOLD MIN. CO.  
(Supreme Court of Colorado. March 7, 1904.)

GENERAL VERDICT—SPECIAL FINDINGS—CONTRADICTORY FINDINGS—APPEAL—MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT.

1. The objection that a general verdict is inconsistent with special findings cannot be raised on appeal, where there has been no motion for judgment notwithstanding the verdict, a motion for a new trial not being sufficient to raise the question.

2. Where part of the special findings support the general verdict, and the other special find-

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1387.

ings, though contradictory, do not show that the jury misunderstood the issues, the general verdict will be sustained.

Error to District Court, Gilpin County; Allison H. De France, Judge.

Action by Lester Eugene Drake and others against the Justice Gold Mining Company. From a judgment in favor of defendant, plaintiffs bring error. Affirmed.

Teller & Dorsey and H. M. Orahood, for plaintiffs in error. Thomas, Bryant & Lee, for defendant in error.

CAMPBELL, C. J. The controversy here is between the owners of the Washington and Justice lode claims, situate in Gilpin county, as to the ownership of ore bodies of a vein under the surface and within the exterior boundaries of the Washington lode extended downward vertically. The claim of each party is based upon ownership of the apex. The cause was tried before a jury, and the court, upon request, submitted, and the jury answered, three interrogatories, and also returned what the parties call a "general verdict in favor of the defendant," on which judgment for it was entered by the court. The plaintiffs in error claim that the answers to these three interrogatories were in their favor, and are so inconsistent with the general verdict that, under section 199 of our Civil Code, so providing, the special findings of fact in such circumstances must control the general verdict.

Where a special finding of fact, inconsistent with the general verdict, is so irreconcilable therewith as to be incapable of removal by any evidence admissible under the general issues, the general verdict cannot stand, and judgment entered upon it is improper. Every presumption and intentment, however, is to be indulged in favor of a general verdict, and in ascertaining whether such inconsistency exists recourse may not be had to the evidence actually adduced at the trial, but may be to the issues as made by the pleadings; and if, by any possible competent evidence that might be produced thereunder, the apparent inconsistency can be overcome, it may be disregarded, and the general verdict permitted to stand. But, in the view we take of the case, it is not necessary, for two reasons, to decide whether there is such an inconsistency as the plaintiffs in error assert.

1. We do not so hold, but for the purpose of the present opinion we assume, with both parties, that the verdict returned is a general verdict, and, with plaintiffs in error, that it is in such irreconcilable conflict with the three special findings of fact to which they allude as to have made it the duty of the trial court to disregard the general verdict and enter judgment upon the special findings, had action of the court been seasonably and properly invoked. Such an inconsistency may be waived by the party against

whom it operates, or he may, in the appropriate way, complain of it. If, however, a party desires to have heard in an appellate tribunal his objection to the entering of a judgment on a general verdict which is inconsistent with special findings, he must first call the attention of the lower court thereto by a motion for judgment upon the special findings notwithstanding the general verdict. A motion for a new trial does not save the point. Here plaintiffs in error neglected to move for judgment on the findings, and therefore they may not, on this review, for the first time be heard as to the alleged inconsistency. 2 Thompson on Trials, § 2696. Many cases in Indiana, where such questions seem to have arisen more frequently than in any other state, expressly hold that such a motion is a necessary condition precedent to the right to be heard in an appellate tribunal. Bartlett v. Pittsburgh, etc., Ry. Co., 94 Ind. 281; Anderson et al. v. Hubble, 93 Ind. 570, 47 Am. Rep. 394; Brickley v. Weghorn et al., 71 Ind. 497; Adamson v. Rose, 30 Ind. 380. Additional authorities are collected in 20 Enc. Pl. & Pr. 375.

2. The foregoing is upon the assumption that only three interrogatories were answered by the jury, and all of them were in favor of plaintiffs, and inconsistent with the general verdict returned for defendant. The record, however, discloses that three other interrogatories submitted by the court were answered by the jury clearly and distinctly in favor of the defendant, and they support in every particular the general verdict. These six answers, taken together, do not show that the jury so misunderstood the issues, or were in any way so confused, as to make a new trial necessary. Such being the case, the doctrine seems to be well settled that contradictory and inconsistent special findings destroy each other, and the general verdict stands. Ind., etc., Gas Co. v. McMath, 26 Ind. App. 154, 57 N. E. 593, 59 N. E. 287; Midland Steel Co. v. Daugherty, 26 Ind. App. 272, 59 N. E. 211; 2 Thompson on Trials, § 2692. For additional authorities see 20 Enc. Pl. & Pr. 354, 364, et seq. Tourtelotte v. Brown, 1 Colo. App. 408, 29 Pac. 130, is not in point here. That was not a case where the general verdict was set aside because inconsistent with a special finding, though in the opinion section 199 is referred to, but probably that part of it requiring the jury to find upon any question stated to them in writing was in the mind of the court. The point decided was that it was error to enter judgment upon a general verdict in favor of defendant when the jury failed to find (saying that they could not agree as to it) upon a certain question, which, in the opinion of the court, had to be answered before the jury could agree upon any verdict in the case. Clearly that is not the question for decision here.

The judgment must be affirmed, and it is so ordered. Affirmed.

(32 Colo. 250)

**PEOPLE ex rel. COLORADO BAR ASS'N v. TAYLOR.**(Supreme Court of Colorado. March 7, 1904.)  
**ATTORNEYS — DISBARMENT — UNPROFESSIONAL CONDUCT—DIVORCE—ADVERTISING.**

1. Advertising as a divorce lawyer through the public press and otherwise is ground for disbarment.

Original proceedings in disbarment by the state, on the relation of the Colorado Bar Association, against Frank B. Taylor. On rule to show cause. Rule absolute.

Ralph E. Stevens, for relator. C. H. Pierce, for respondent.

**PER CURIAM.** The respondent is charged with unprofessional conduct in advertising through the public press and otherwise as a divorce lawyer. In his answer he admits so advertising, and relator now moves for judgment on the pleadings. The questions presented for our consideration on the motion are fully discussed and determined in the case of *People ex rel. Attorney General v. MacCabe*, 18 Colo. 186, 32 Pac. 280, 19 L. R. A. 231, 36 Am. St. Rep. 270. The advertisements which respondent admits he caused to be published are as reprehensible, mischievous, as detrimental to good morals, and as libelous upon the courts of justice of this state, as those considered in the case above referred to. The reasons why an attorney guilty of such conduct should be disbarred are fully set out in that case, and it is therefore unnecessary to rediscuss that question.

The motion is sustained, the rule heretofore issued on respondent to show cause why he should not be disbarred is made absolute, and his name stricken from the roll of attorneys.

(32 Colo. 261)

**SMITH v. PEOPLE.**

(Supreme Court of Colorado. March 7, 1904.)

**INTOXICATING LIQUORS—CRIMINAL LAW—PERJURY—PLEA OF GUILTY—SENTENCE—TESTIMONY IN AGGRAVATION AND MITIGATION.**

1. The title of Sess. Laws 1901, p. 159, c. 65, "An act prescribing a penalty for the sale of malt, vinous or spirituous liquors in counties outside of incorporated towns and cities, without having a license therefor, making the sale unlawful, and repealing all acts in conflict herewith," clearly expresses the subject-matter of the statute, so that the act is valid.

2. An information alleging that perjury was committed "in the district court of San Miguel county, Colorado," charged with sufficient certainty before what court the alleged false oath was taken.

3. In an information for perjury, it was not necessary to state the name of the clerk of the court by whom the oath was alleged to have been administered.

4. Under Mills' Ann. St. § 1463, providing that where a defendant has pleaded guilty, and the court possesses any discretion as to the extent of the punishment, the court shall examine witnesses as to aggravation and mitigation of the offense; and section 1270, fixing the pun-

ishment for perjury at imprisonment for not less than 1 year nor more than 14 years—a sentence imposed without taking such testimony must be reversed, though the perjury charged was committed in the presence of the judge imposing the sentence.

Gabbert, C. J., dissenting.

Error to District Court, San Miguel County; Theron Stevens, Judge.

Charles A. Smith was convicted of perjury, and brings error. Reversed.

John H. Murphy and L. E. Kenworthy, for plaintiff in error. N. C. Miller, Atty. Gen., and I. B. Melville, Asst. Atty. Gen., for the People.

**STERILE, J.** The information charges Charles A. Smith, the defendant below, with the crime of perjury. The offense is alleged to have been committed at a trial held on the 6th day of June, 1902, in the "district court of San Miguel county, Colorado." Smith was tried for an alleged violation of chapter 65, p. 159, of the Laws of 1901, and was a witness in his own behalf. The law of 1901 prohibits the sale of liquors without a license from the board of county commissioners, and the information charged Smith with the violation of that statute by the sale of liquor to one Albertini. It is charged that Smith willfully and corruptly testified falsely, in response to interrogatories, that to the best of his knowledge there was not in the building occupied by him, during the months of April and May, 1902, any barrels, casks, or bottles containing malt, spirituous, or vinous liquors for sale, and that he was not aware of ever having kept any malt, vinous, or spirituous liquor in the back room of his store building in San Miguel county; that these matters were material to the issue being tried; and that, in so testifying, Smith committed willful and corrupt perjury.

The information charging perjury was filed June 9, 1902. On December 1st Smith withdrew his plea of not guilty, and pleaded guilty. On December 13th the defendant was sentenced to a term in the penitentiary of not less than three and not more than five years. The record contains the following: "And witnesses being present for the purpose of giving testimony to the court for the court to thereby determine as to the aggravation and mitigation of the offense to which said defendant has plead guilty, and the court thereupon orally stating that all of the facts upon which the charge of perjury in this case was based were within the knowledge of the judge of this court, and that the testimony upon which said charge was based was given by said defendant, in a case tried in this court, at a time when the present presiding judge thereof presided, and which testimony was given within the hearing of said judge of this court, the court thereupon said that it was not necessary to examine as to the aggravation and mitigation of these offenses, and therefore no testimony was introduced."

¶ 3. See Perjury, vol. 39, Cent. Dig. § 78.

The title of the act under which Smith was first prosecuted is as follows: "An Act prescribing a penalty for the sale of malt, vinous or spirituous liquors in counties outside of incorporated towns and cities, without having a license therefor, making the same unlawful, and repealing all acts in conflict herewith." Sess. Laws 1901, p. 159, c. 65. The record is brought here, and we are asked to set aside the judgment and sentence because the court did not take testimony concerning the aggravation and mitigation of the offense; because the subject-matter of the statute which was the basis of the original judicial proceeding was not clearly expressed in the title of said statute; because the information sets forth the crime of perjury as having been committed in the "district court of San Miguel county, Colorado," which said described court is a court unknown to the Constitution and statutes of Colorado; because the matters concerning which the plaintiff in error was alleged to have sworn falsely were not material to any issue in the proceedings in said information set forth; and because the information does not set forth the name of the clerk by whom the oath was administered to said Smith.

We shall consider at length only the first objection, for the reason that we are of opinion that the statute under which the defendant was first prosecuted is valid, and that the subject-matter thereof is clearly expressed in its title; that the designation of the court in which the perjury is alleged to have been committed as "the district court of San Miguel county, Colorado," charged with sufficient certainty before what court the alleged false oath was taken, that being a common description of the district courts in the statutes; and because we are of opinion that it was not necessary to state the name of the "duly authorized clerk of said court" by whom the oath is alleged to have been administered, and that the testimony alleged to have been given was clearly material to the issue then being tried.

The first objection, that the court erred in passing sentence upon the plea of guilty without examining witnesses as to the aggravation and mitigation of the offense, is more serious, and, in our opinion, requires us to remand the defendant for resentencing. The statute (section 1463, Mills' Ann. St.) provides that, in all cases where the defendant has pleaded guilty, and the court possesses any discretion as to the extent of the punishment, "it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense." Upon a conviction of perjury, section 1270, Mills' Ann. St., provides that the defendant shall be punished by confinement in the penitentiary for a term not less than 1 year nor more than 14 years. The court possessed discretion as to the extent of the punishment, and should have examined witnesses. The statute requiring the examination of witnesses

was passed upon by this court in *Arrano v. The People*, 24 Colo. 233, 49 Pac. 271, and the court held the provisions of the statute to be mandatory, and that, unless the fact that the witnesses were examined affirmatively appears in the record, the sentence is invalid. The closing paragraph of the opinion is as follows: "We think, therefore, that the record must affirmatively show all steps which were essential to sustain the sentence; and, the record before us falling to show that the court examined witnesses as required by statute, but in effect negatively showing that this was not done, the plaintiffs in error were sentenced in a manner not sanctioned by law, and such sentence is invalid. We do not regard the other objections as well taken; but for the reasons given, the judgment must be reversed, and the cause remanded for resentencing, after the examination of witnesses as provided by statute." The record here affirmatively shows that the court did not examine witnesses as to the aggravation and mitigation of the offense, but declined to do so, for the reason, as stated orally, that all the facts upon which the charge of perjury was based were within the knowledge of the court; that the testimony upon which said charge was based was given by said defendant in a case tried in that court at a time when the presiding judge thereof presided, and which testimony was given within the hearing of said judge. The perjury was committed in the month of June, 1902; the defendant was sentenced at a subsequent term of court, and in the month of December, 1902; and it is altogether probable that all the facts testified to in the former trial were not in the mind of the judge at the time of the sentence. Facts favorable to the defendant may have been forgotten, and facts in aggravation of the offense may have been retained. If the court had heard testimony the same day, but in another case, we should decide that the statute had not been complied with. The statute is held to be mandatory, and it can be complied with only by the taking of testimony subsequent to the plea of guilty.

The Attorney General says that we should not impute to the Legislature that it intends the doing of a foolish or useless thing; that, when it appears that the judge has within his own knowledge facts upon which the charge is based, it is idle to require him to again take testimony. And, as illustrative of this argument, he asks if it would be logical to require the taking of testimony in a case where a new trial had been granted because of some technical error, and the defendant had, before proceeding to the second trial, pleaded guilty. The decision in the *Arrano Case*, holding this statute to be mandatory, was rendered in the year 1897. There have been several sessions of the Legislature since that time, but no limitation has been placed upon it, and we must presume that

the Legislature did not desire to change the law, but that it accepted the decision as a correct interpretation of its will. The record states that the judge heard the testimony of the defendant at a former trial, that the charge of perjury is based upon the said testimony, and that because he had heard the testimony of the defendant it was not necessary to hear testimony as to the aggravation or mitigation of the offense. The refusal to hear testimony is not based upon the fact that he had heard the testimony of other witnesses, but solely upon the fact that he had heard the testimony of the defendant. The record does not state that the court at another time heard testimony as to the aggravation or mitigation of the charge of perjury, but says that upon another occasion, in another cause, he heard the testimony of the defendant, and that upon the testimony of the defendant was based the charge of perjury. If the recitals in this record can be held to meet the requirements of the statute, then, whenever the record states that the facts upon which the charge is based are within the knowledge of the judge, the statute has been observed. Aggravation is defined to be: "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity, or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." Black's Law Dictionary. "Mitigating circumstances are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." *Id.* In the case used by the Attorney General to illustrate his argument, some matters in aggravation and mitigation of the offense might be shown; but, even in that case, the mitigating circumstances which are usually shown as appealing to the fairness and mercy of the judge could not be shown, because wholly irrelevant. In the case at bar, the circumstances in aggravation or mitigation of the charge of perjury would not likely be shown in the trial of a defendant charged with selling liquor without a license.

The Legislature made it the duty of the judge to examine witnesses as to the aggravation and mitigation of the offense, as a protection to society as well as to the defendant. The character of the defendant, his habits, his social standing, his intelligence, his motive for the commission of the offense, are all subjects pertinent to the inquiry required by the statute as to the aggravation or mitigation of the offense. One of the defendant's most substantial rights is that of cross-examination of the witnesses. If the judge may refuse to hear testimony upon the ground that the facts are within his own knowledge, this right is lost to the defendant. The case of *Arrano v. The People* is decisive of this case, and we must therefore reverse the judgment.

The judgment is reversed, and the cause remanded with directions to the court to re-sentence the defendant upon the plea of guilty heretofore entered, after the taking of testimony as to the aggravation and mitigation of the offense, as required by statute. Reversed and remanded.

GABBERT, C. J. (dissenting). The purpose of the statute was to require the court, on a plea of guilty being entered, to take testimony bearing on the circumstances under which the crime was committed, so that discretion and intelligent judgment might be exercised in pronouncing the punishment which should be inflicted. Such seems to have been the view expressed in the *Arrano* Case. In taking testimony on such plea, the court would not be justified in receiving evidence different from that which would be admissible in a trial on a plea of not guilty, because, in my judgment, testimony as to the aggravation and mitigation of the offense should be confined to those matters which would be relevant at a trial. The extent to which the court should hear testimony on a plea of guilty must, in a great measure, be discretionary. It appears from the record that the judge pronouncing sentence presided at the trial of the cause in which the perjury was committed. It must therefore be presumed he had that degree of knowledge touching the circumstances under which the crime was committed which the statute contemplates, in the absence of an affirmative showing that testimony was offered and refused bearing on matters regarding which the judge was not advised, and which it would have been his duty to consider. In my opinion, the conclusion of my associates is wrong, because it is based upon the erroneous assumption that the trial judge, on a plea of guilty, must hear testimony different from that which would be relevant and competent at a trial.

I dissent from the judgment announced.

(32 Colo. 278)

FIELD v. TANNER et al.

(Supreme Court of Colorado. March 7, 1904.)

MINING CLAIM—FORFEITURE—ASSESSMENT—ENLISTMENT OF OWNER—TENANT IN COMMON—LOCATION CERTIFICATE—HARMLESS ERROR.

1. In an action to recover possession of a mineral claim, any error in the court's ruling that the plaintiff had not shown any right of possession based on occupancy was harmless, and was waived by plaintiff's producing proof of valid statutory locations giving him the right of possession.

2. Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1428], provides that for failure to do the required annual assessment work on unpatented lode mining claims they become liable to forfeiture and relocation, but, if the original owner resumes work on the claim thereafter before location thereon by another, his rights are revived. Act July 2, 1898, c. 563, 30 U. S. Stat. 651 [U. S. Comp. St. 1901, p. 1428], §§ 1, 2, provide that the foregoing section shall not

apply to volunteers in the army or navy in the war with Spain, and that those desiring to take advantage of the act shall file a notice of their enlistment, and desire to hold the claim under the act, in the clerk's office where the location certificate is recorded. *Held*, that the filing of such a notice is equivalent to actual performance of the assessment work, so as to revive the claimant's rights, forfeited by failure to do the assessment work for the preceding year, where no one else had located there in the meantime.

3. Where defendants wrongfully held possession of a mining claim adversely to plaintiff, who had made a prior location thereon, and prevented him from performing the required assessment work thereon, they cannot set up his failure to do the work to support their title as against him.

4. In an action to recover real property one tenant in common may recover possession of the entire tract as against all except his cotenants.

5. Evidence *held* to show that defendants had not sunk a shaft in a mining claim to the depth required by law to constitute a valid location, before the plaintiff, whose claim under a prior location was alleged to have been forfeited, resumed work, and did the assessment work required by law, restoring his original rights.

6. Where defendants, claiming a forfeiture of a location by plaintiff of a mining claim, relocated thereon, defects in their location certificate cannot be cured, as against him, by filing amended certificates after he had re-entered the claim.

Appeal from District Court, Teller County; M. I. Bailey, Judge.

Action by James G. Field against Carl Tanner and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Welcott & Valle and Wm. W. Field, for appellant. Scott Ashton, for appellees.

\* CAMPRELL, J. In this action to recover the possession of real property the controversy is over the right of possession of a plot of mineral land in the Cripple Creek mining district. It lies within the outer boundaries of what appellant (plaintiff below) calls the Great Divide and Last Chance lode mining claims, to which he asserts ownership, and it is substantially the same territory embraced within the Ohio and Last Chance lodes, claimed by appellees (defendants below), all of which are unpatented. Upon issues joined by the pleadings the trial was to the court without a jury. Findings were in favor of the defendants, and by the judgment the action was dismissed. The facts, so far as material upon this review, are sufficiently stated in the opinion.

1. In his attempt to show his right of possession to this property plaintiff conceived that a prima facie case was made out merely by proving that he and his grantors had done work and made improvements thereon, and that at the time of the intrusion by defendants he was in the occupancy thereof, and that, until defendants showed paramount title in themselves, or an antecedent possession, he might rely upon his right of possession thus established, and cites *Armstrong et*

*al. v. Lower et al.*, 6 Colo. 581. Two kinds of possession of mining property are recognized by the state and federal decisions, as the opinion in that case states—one within which plaintiff first attempted to bring himself; the other resulting from a valid statutory location. When plaintiff closed his evidence, which tended to show right of possession based upon occupancy, the court intimated that he had not established any right of possession at all, and could not without proof of valid statutory locations. Acting upon this suggestion, plaintiff then produced proof tending to show under the federal and state mining laws valid locations of the two claims to which he asserted ownership, without proof of which, according to the court's ruling, no right of possession could be established under the pleadings. If there were error in this ruling—as to which we need not decide—the same was harmless, and waived by plaintiff's producing proof of valid statutory locations from which the right of possession springs, provided proof of the latter kind was sufficient to show compliance with the statute. In the natural order, then, we proceed first to inquire whether, in the light of all the evidence, the locations owned by plaintiff were valid when made, or before the inception of defendants' rights.

2. Plaintiff's locations were made, the Last Chance in the early part of 1893, and the Great Divide in May of that year; the defendants on January 1, 1899. Defendants contend that plaintiff failed to make sufficient proof as to the validity of his locations, but the only defects to which our attention is called are that the discovery shaft of one of the claims was not sunk to the required depth, and that there was not disclosed therein a well-defined crevice of mineral-bearing rock in place. Were it necessary, it could easily be demonstrated from the evidence that all necessary acts of location were performed by the locators of these two claims at the time they fix as the date of original location. The necessity for doing so, however, is obviated because the proof is clear and unquestioned, even by the testimony of defendants' own witnesses, that before the alleged rights of the defendants accrued a valid discovery in both plaintiff's locations was made, and all other acts of location performed. So that in our further discussion we may regard it as satisfactorily proven that plaintiff's locations were valid, and his right of possession established, at the time defendants entered to make their locations, unless such right was lost because of some delinquency on the part of plaintiff which forfeited the same.

This brings us to a consideration of the defenses interposed by the defendants, which, if made out, operate at once as a forfeiture of all of plaintiff's rights, and a restoration to the public domain of the land which plaintiff may have theretofore segregated, and upon which they might, and as a matter of fact,

† 1. See *Mines and Minerals*, vol. 34, Cent. Dig. § 51.

they say they did, make valid locations, or relocations, under the laws of the United States and of Colorado, by virtue of which, as they allege, arose their right of possession at the time of institution of the action. These defenses are: First. That the plaintiff did not do, or cause to be done, for the years 1897 and 1898, upon either of his claims, the necessary assessment work to the value of \$100, and thereby the ground which theretofore was located by plaintiff became again unappropriated public domain of the United States. Second. That after such failure upon the part of plaintiff to do such assessment work they entered upon the ground in controversy, and made valid locations, or relocations, thereof, of that portion of the ground theretofore included in the boundaries of the Great Divide claim under the name of the "Ohio Lode Mining Claim," and of the ground included within the plaintiff's Last Chance claim under the same name. Third. Another defense, though not specifically and affirmatively pleaded, but which, defendants say, arises out of plaintiff's own evidence, is that the plaintiff at the beginning of the action was at most the owner of only an undivided, less than an entire, interest in the claims in question, and therefore was not entitled to recover any portion of the same under his allegation of sole ownership. These defenses we shall consider in their order.

3. As to whether the annual assessment work to the value of \$100 on each claim was done for the year 1897, the testimony is conflicting. Beyond all doubt plaintiff in good faith attempted to comply with the federal statute so requiring. He employed men to do the work, paid them therefor the sum of \$100 for the labor they did on each location, and recorded the affidavit of labor, as section 3161, Mills' Ann. St., provides that he may; the recording of which is prima facie evidence of the performance of the annual labor required. These workmen testified that at the regular contract price for similar work in that district that done on each claim was of the value of \$100. On the part of defendants there was evidence that such value was less than \$100. Were it necessary to decide this particular point from the evidence, under the liberal construction of the act in question which the courts have adopted, and remembering that forfeiture for failure to do assessment work must be established by clear and convincing proof, it might be that we should hold that forfeiture upon the ground alleged had not been made out. In this connection it is appropriate to say, and the observation applies to other branches of the case, that we do not believe that this question of fact was resolved by the lower court in favor of the defendants. There were no specific findings of fact upon any of the issues, the finding being in general terms in favor of defendants. To our minds it is apparent from the rulings of the trial court upon the evidence and other questions that

were raised at the trial that the case was not decided in favor of defendants upon the issues of fact, but upon the court's construction of the following act of Congress, passed July 2, 1898, of which only sections 1 and 2 are pertinent:

"An act to relieve owners of mining claims who enlist in the military or naval service of the United States for duty in the war with Spain from performing assessment work during such term of service:

"That the provisions of section twenty three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, shall not apply to claims or parts of claims owned by persons who may enlist in the volunteer army or navy of the United States for service in a war between this country and Spain, so that no mining claim or any part thereof owned by such person which has been regularly located and recorded shall be subject to forfeiture for non-performance of the annual assessments until six months after such owner is mustered out of the service, or, if he should not survive the war, then six months after his death in the service.

"Sec. 2. That those desiring to take advantage of this act shall file, or cause to be filed, a notice in the clerk's office where the location certificate of said mine is recorded before the expiration of the assessment year, giving notice of his enlistment and of his desire to hold said claim under this act."

Act July 2, 1898, c. 563, 30 U. S. Stat. 651 [U. S. Comp. St. 1901, p. 1428].

When hostilities between the United States and Spain broke out, plaintiff was a retired surgeon of the navy, and soon after the declaration of war volunteered his services and enlisted as a surgeon in the navy of the United States for service in the war between this country and Spain. Choosing to take advantage of the provisions of the foregoing act, in December, 1898, he caused to be prepared and filed and recorded in the clerk's office where the location certificates of his mines were recorded a notice of his enlistment and desire to hold the claims, as therein provided. It is plaintiff's contention that the filing of this notice was the equivalent in all respects of the performance by him of the annual work upon each of the claims for the year 1898, and lifted the forfeiture, if any occurred by reason of his failure to do such work for the year 1897. The defendants hold to the contrary. The question, then, is, what is the meaning of this act? Section 2324 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1426], therein referred to, declares that for failure to do the annual assessment work upon unpatented lode mining claims the same become liable



to forfeiture and relocation. The section also specifically provides that, if the original owner shall resume work upon such claim after such failure, and before such location by a third person, the rights of the original locator are revived. It will be observed that failure to do the annual assessment work does not ipso facto work a forfeiture of a lode mining claim, but the same merely becomes liable to forfeiture, which may be complete and final when the rights of third persons accrue. If, however, before such rights do attach, the original locator resumes work, the forfeiture is avoided. *McGinnis et al. v. Egbert*, 8 Colo. 41, 5 Pac. 652; *Belk v. Meagher*, 104 U. S. 279, 23 L. Ed. 735. It is a fair construction of the act of Congress of July 2, 1898, and we so hold, that an enlisted person, being an owner of an unpatented mining claim which has been regularly located and recorded, who files or causes to be filed in the proper clerk's office the notice provided for by section 2, is relieved of the necessity of doing the annual assessment work required by section 2324 of the Revised Statutes, and the filing of such notice is equivalent in all respects to, and is attended with the same consequences that result from, its actual performance. In other words, to apply the principle concretely, since plaintiff during the year 1898 filed the notice prescribed in section 2, this was in lieu of the assessment work for that year, and in law constituted a resumption and performance in full of the assessment work for that year, just as effectually as if plaintiff had actually performed \$100 worth of work upon each claim. It follows, therefore, that, if plaintiff did fail to do his annual assessment work for the year 1897, the claims were, nevertheless, not liable to forfeiture for such failure, because the filing of this notice was the equivalent of resumption and full performance of the annual assessment work for the year 1898, which, in law, saved to plaintiff all the rights he ever had in the locations, and avoided the forfeiture which, in the absence of resuming work, might have resulted. It clearly appears from the record that defendants did not attempt to locate this ground on the 1st day of January, 1898, at which time they say plaintiff's claims were liable to forfeiture, nor did they enter thereupon, or attempt to secure any right thereto, prior to the passage of the act of Congress of July 2, 1898, and not until the 1st day of January, 1899. On that day, however, the ground was not, for the reason just stated, open to relocation, and unless by some subsequent default of plaintiff it became so he still owns it.

4. That such default occurred is another contention of defendants. Their counsel argue that, since plaintiff admits that he returned from the war about the 1st day of March, 1899, and, as he also concedes, did not within the period of six months thereafter, as limited by section 1 of the act of 1898, resume labor and perform the same

upon either of these claims, his right of possession is lost. While it is true that plaintiff returned to Colorado in the month of March or April, 1899, there is no evidence to which our attention is called that he has ever been mustered out of the service. A sufficient reply to this contention might be that, so far as the record shows, plaintiff is still a surgeon in the United States navy, though the war has long since ended; and, as the burden of proof is upon defendants to establish a forfeiture upon the ground alleged, they have failed if plaintiff is still in the service. But assuming, as we well may, that plaintiff was mustered out in March or April, 1899, let us see if his rights to these locations are gone by reason of his not having actually done the annual assessment work for the year 1899. Section 1 of the act speaks of annual assessments from the performance of which the enlisted owner of mining claims is exempt. Possibly, by a liberal construction of the act, under the facts of this case, plaintiff is exempt from the performance not only of annual labor for the year 1898, but also for 1899. But it is not necessary so to hold here, for upon another ground the contention of defendants is untenable. The record discloses that plaintiff was not aware of any attempt by others to locate this property for an alleged failure by him to do assessment work until some time in the month of August, 1899, when, in the course of a correspondence with Tanner, one of the defendants, Tanner wrote to him that he and some of his codefendants claimed that they had relocated the claims on the 1st of January, 1899, because, as they then said, of the failure of plaintiff to do the assessment work for the year 1898. After they were advised of the passage of the act of Congress of July 2, 1898, and learning that plaintiff was not delinquent for failure to do the actual annual assessment work for that year, they shifted ground, and asserted that such failure related to 1897. But, whether defendants made their locations because of the alleged failure of plaintiff to do the work for the year 1897 or the year 1898, we have already decided that the ground was not open to relocation on the 1st day of January, 1899, which they fixed as the date of their locations. They were in actual possession of these claims in August, 1899, when plaintiff began to take steps to do the annual assessment for that year, which was within the six months from the time it was alleged he was mustered out of service. In good faith he attempted to do, or have done, this assessment work, when he discovered that his property was in possession of defendants, who held under a claim hostile and adverse to him, and was informed that they themselves had done or would do such work, and that if he did the same it would not inure to his benefit. Later in the year he went upon the ground itself, and endeavored to effect some arrangement with defendants which would obviate the ne-

cessity of legal proceedings, but to no purpose, and was then given to understand—and we think it clearly so appears from the record—that he could not, with safety to himself, or peaceably, make entry upon the claims for the purpose of doing the assessment work, though it was said by one of the defendants at the trial that they would not have interfered with him had he entered upon the property with that object in view. However that may be, it does not lie with defendants, who were holding this property wrongfully, and adversely to him, to say that he did not do the assessment work for the year 1899, when it is clear from the record that they themselves, by their own wrongful acts, prevented him at a reasonable time from making compliance with the provisions of the statute. They will not thus be allowed to take advantage of their own fraudulent and wrongful conduct. Plaintiff's failure, therefore, under the facts of this case, cannot be utilized by the defendants, and they gain nothing by the alleged failure.

5. Another position taken by defendants is that, assuming the validity of plaintiff's locations when made, and their superiority to the locations of defendants, still he cannot recover in this action, because at most he is the owner of an undivided interest in each of the claims of which, in his complaint, he asserts sole ownership. That plaintiff, when the action was begun, was the owner of an undivided, less than an entire, interest in the two claims, is clear beyond all cavil. He asserts ownership of the remaining interests as the result of forfeiture proceedings which he conducted under the federal statute, which provides that the interests of a co-owner of a mining claim who refuses or neglects to contribute his share of annual assessment work may be forfeited to an owner who does the work. To evidence produced by plaintiff tending to show such title defendants made objections, which appear to have been sustained, relating to irregularities and defects in the proceedings so conducted by plaintiff. It is not essential to pass upon these rulings of the court, but it is appropriate to say that this court has held in *Becker v. Pugh et al.*, 17 Colo. 243, 29 Pac. 173, that a stranger to the title of the co-owners, whose rights are thus sought to be terminated, cannot object to irregularities in the proceedings. And in *Elder et al. v. Horseshoe Mfg. Co.*, 87 N. W. 586, the Supreme Court of South Dakota decided that a publication of the notice of forfeiture under this same federal statute, such as defendants here say was not sufficient, was in full compliance with the law. But, if these forfeiture proceedings were insufficient to divest the interests of plaintiff's co-owners, and invest him therewith, as the unquestioned owner of an undivided interest in each of these claims, he was entitled, as a tenant in common, to recover as against a stranger the entire interest; and, if the defendants derain title from plaintiff's original co-owners,

he still would be entitled to recover as against them the interest which it is shown he had in these claims at the time this action was begun. But as the defendants are not tenants in common with plaintiff, but claim under a title hostile and antagonistic to him and that of his original co-owners, they are strangers to his and their title. The rule in this jurisdiction is that in an action to recover real property one tenant in common may recover possession of the entire tract as against all persons except his co-tenants. *Weese et al. v. Barker et al.*, 7 Colo. 178, 2 Pac. 919; *Newell on Ejectment*, c. 3, § 35, p. 83; *Erhardt v. Boaro*, 113 U. S. 527, 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; 10 Enc. Law (2d Ed.) 512.

6. From the foregoing it follows that the mining locations attempted to be relocated by the defendants on January 1, 1899, were not then subject to location, because they were not a part of the unappropriated public domain. The ground was then included within previously located and existing valid lode locations, and, so far as the record discloses, up to this point nothing has since occurred to work a forfeiture of plaintiff's rights therein. But if this ground in controversy was, at the time defendants attempted to locate it, unappropriated public domain, they did not make what the law considers a valid location of either claim. While there is testimony by one of the locators that the discovery shaft of each claim was sunk to the required depth, the best evidence—that of defendants' own engineer, whose testimony was given at their instance—clearly showed that neither of defendants' location shafts was sunk to the depth required by law, and, so far as the evidence shows, this defect was not remedied by them before the plaintiff resumed work and did the assessment work for the year 1900 (which it is admitted he did), and the statutory time for the doing of the various acts of location by defendants had long expired before such re-entry by plaintiff.

7. After the expiration of the six months limited by the act of 1893 for the resumption of work by an enlisted person, and some time in November, 1900, defendants filed amended location certificates of their claims, the effect of which was, they say, to confirm their title, even though their original locations were defective. Since these amended location certificates are expressly predicated and based upon the original locations of January, 1899, and were made for the express purpose of correcting errors in the original location certificates, we are unable to see how defendants' title has been in the slightest degree helped thereby. As against plaintiff, they did not cure any defects which existed at the time defendants' original locations were made, and, if the locations of the two claims by defendants were invalid when made—as we have held that they were—the filing of amended location certificates, as

against plaintiff, did not validate them. We are not called upon to construe section 3 of the act of 1898 (Act July 2, 1898, c. 563, 30 Stat. 651 [U. S. Comp. St. 1901, p. 1428]), which points out the procedure by which a relocation may be made of the interests of the co-owners of an enlisted person when such co-owners have failed to do the necessary assessment work. The defendants have made no attempt to comply therewith. They rely upon the proposition that the entire ground in controversy was open to relocation at the time they made their entry, and so base their rights upon the proposition that the entire interest in plaintiff's locations was forfeited, and the ground covered thereby relocated by them, as provided by our state statute.

Many other questions are argued by counsel on both sides, but they are either unimportant or disposed of by the foregoing discussion. As already intimated, we are not embarrassed by any specific findings of the trial court upon the material and vital questions of fact. It is so apparent that the decision was based upon an erroneous construction of the act of Congress of 1898, which governs the rights of the parties to this controversy, that we may rightfully assume that, if the court had not considered its wrongful construction of that act controlling, the facts would have been decided in favor of the plaintiff. But, however that may be, it is so clear to us that both the facts and the law are with the plaintiff that we have no hesitation in reaching the conclusion that he is entitled to recover possession of the entire territory in conflict. After a careful consideration of the record, we are satisfied that the case should not be remanded for a new trial, but that the judgment should be directed by this court. The judgment of the trial court is therefore reversed, and the cause remanded to the district court, with instructions to vacate the judgment in favor of the defendants, heretofore entered, and to enter a judgment as of the date of the former one in favor of the plaintiff, adjudging him to be entitled to the possession of the entire property in controversy.

Reversed.

(32 Colo. 355)

**PEOPLE ex rel. OIL CREEK GOLD MIN.  
CO. v. COURT OF APPEALS.**

(Supreme Court of Colorado. March 7, 1904.)

CERTIORARI—SCOPE—ERRORS REVIEWABLE.

1. Where the Court of Appeals held that a certain defense in an action for the price of machinery as pleaded related to matters not within the terms of the contract, and therefore could not be proved, error, if any, in such decision, was an error relating merely to the court's construction of the contract, which was insufficient to invest the Supreme Court with authority to review its judgment on certiorari.

Certiorari by the people, on the relation of the Oil Creek Gold Mining Company, against the Colorado Court of Appeals. Writ denied.

R. T. McNeal, for relator. Stuart D. Walling, for respondent.

**PER CURIAM.** This proceeding is instituted by relator for the purpose of having this court review the judgment of the Court of Appeals rendered in the case of the Oil Creek Gold Mining Company v. Fairbanks, Morse & Company (Colo. App.) 74 Pac. 543. From an examination of that case it appears that Fairbanks, Morse & Co. commenced an action in the district court of Arapahoe county against the Oil Creek Gold Mining Company to recover the balance due for a gasoline air compressor sold and delivered to the latter under a written contract set out *hæc verba* in the complaint. The mining company answered, averring facts whereby it was sought to establish that the compressor did not fulfill the terms of the guaranty under which it was sold. Judgment was rendered on the pleadings in the trial court in favor of the plaintiff. The defendant appealed to the Court of Appeals, where the judgment was affirmed.

The Court of Appeals based its decision upon the proposition that when parties to an agreement have reduced it to writing, whereby a contract complete and unambiguous in its terms is evidenced, the law conclusively presumes (in the absence of fraud, accident, or mistake) that the writing constitutes the whole engagement between the parties, and that no extrinsic evidence of prior or contemporaneous negotiations between them is admissible to vary or qualify either its terms or legal import. From this statement of the law respecting contracts the conclusion was reached that the facts pleaded in the answer upon which a breach of the contract was predicated could not be shown. It thus appears that the decision of the Court of Appeals was based upon the construction of the contract, in connection with the defenses interposed; that is to say, the court concluded that the written contract set out in the complaint was complete and unambiguous as to the terms and conditions under which the compressor was sold, and that the imperfections of the compressor, as pleaded in the defenses, related to matters not within the terms and scope of the contract, and therefore could not be shown. This does not present a question which the Supreme Court can review on error. If the decision of the Court of Appeals is wrong, it is because of error in so construing the contract, in connection with the defenses, as to inhibit the defendant from establishing a breach thereof on the facts pleaded upon which it relied to establish that defense. Whether or not such construction was correct is not a matter which we can consider in this proceeding, because all that can be claimed on behalf of the relator is that the Court of Appeals erred. Mere error by that tribunal is not sufficient to invest the Supreme Court with authority to review its judgment on certiorari. People

ex rel. Salomon v. Court of Appeals, 30 Colo. S, 69 Pac. 606.

The writ is denied, and proceeding dismissed.

STEELE, J., not sitting.

(32 Colo. 241)

PEOPLE ex rel. COLORADO BAR ASS'N v. ROBINSON.

(Supreme Court of Colorado. March 7, 1904.)

ATTORNEY AND CLIENT—UNPROFESSIONAL CONDUCT—FAILURE TO PAY BALANCES—WITHHOLDING PAPERS—CHARGES INVOLVING CRIME—MISSTATEMENTS—AIDING FRAUDS—EXORBITANT FEES.

1. Where it clearly appears that an attorney has not been guilty of any fraud or deception towards his client, the fact that he may owe the client a balance on an account growing out of professional relations between them is not ground for disbarment, where the balance is the subject of a bona fide dispute.

2. Testimony of a client that an abstract of title was not among the papers turned over by her attorney to her, which fact she did not discover until some months after she received the papers among which the abstract was, was not sufficient to show that the attorney appropriated the abstract to his own use, or willfully withheld it from his client, so as to show him guilty of professional misconduct.

3. On disbarment proceedings for professional misconduct, a charge of raising a note—involving, as it does, the commission of a serious crime—should be clearly established.

4. The fact that an attorney stated to his client that the records of his office showed that nothing had been collected on a sum intrusted to him, whereas in fact a certain sum had been collected, was not ground for disbarment, where the sum collected was the minimum collection charge.

5. Advice given by an attorney to his client to remove money and valuables from a safety deposit vault, to be placed in the safe of a third person, in order to avoid an attachment, did not involve moral turpitude on the attorney's part, or tend to prove that he was attempting to aid his client in a fraud.

6. Where a client voluntarily gave his attorney securities for the express purpose of securing him his fees, and upon the obligations assumed in going on bonds, the fact that the fees charged were more than the attorney was reasonably entitled to was no ground for disbarment.

7. The fact that an attorney foreclosed a chattel mortgage made by a client to him, to the detriment of the client's family—the debt for which it was given being legally due—was no ground for disbarment.

Original proceeding for disbarment by the people, on the relation of the Colorado Bar Association, against Ewing Robinson. On rule to show cause. Rule discharged.

George L. Hodges, for relator. O. E. Le Fevre, H. B. Babb, and Morrison & De Soto, for respondent.

PER CURIAM. Respondent is charged with unprofessional conduct, by an information embracing six counts, as follows: (1) Failure to pay over to Mrs. Buffington the sum of \$25. (2) Failing to return her an abstract of title. (3) In raising a note. (4) Failure to pay over to Mr. Ames a sum of

money collected for him on an account. (5) The wrongful appropriation of \$1,600 belonging to Peter Johnston, and in aiding him to prevent this money from being reached by attachment; the wrongful appropriation of equities in real estate belonging to him; the wrongful foreclosure of a chattel mortgage given by him to respondent; and the conversion of certain jewels, whereby the family of Johnston were left destitute; and because of exorbitant and unreasonable fees charged as an attorney for the purpose of absorbing the property in his hands belonging to Johnston. (6) Unprofessional conduct in attempting to establish a liability upon an injunction bond.

1. It appears that, several years prior to the date when the information was filed, respondent had been employed by Mrs. Buffington to loan money which she placed in his hands for that purpose. This employment extended over a period of a little more than a year. In the course of this employment he collected interest, and made charges for services rendered and for disbursements on her account. It seems, also, that during part of this time she occupied a house belonging to him, for which she was charged rent. The result was that a dispute seems to have arisen between respondent and his client with respect to some of the items of this account. On his part, he claims that it was fully settled and paid, and there is testimony tending to prove this assertion. After this alleged settlement, it seems that Mrs. Buffington was dissatisfied with some of the items, and returned for the purpose of having the account corrected, and made a demand upon him for certain items which she claimed were improperly charged against her. Respondent appears to have corrected the account, and asserts that he has paid the balance agreed upon at this second settlement. Whether or not the respondent owes Mrs. Buffington \$25, or any other sum, as a balance of the account between them, is immaterial in this inquiry. That question is a proper subject of investigation in a civil action, where, as in this instance, it clearly appears that respondent has not been guilty of any fraud or deception toward his client. The fact that an attorney may owe his client a balance of an account growing out of that relation between them will not be entertained as the subject of a proceeding to disbar, when it appears that such balance is the subject of a bona fide dispute.

2. In the course of loaning money for Mrs. Buffington, an abstract of title to property upon which she had made a loan was received by respondent. It is charged that he has appropriated this abstract to his own use. There is testimony tending to prove that all papers belonging to her, including this abstract, were turned over to her. She claims, however, that the abstract was not among such papers, but does not appear to have discovered that fact until several months

after the date when, according to the testimony, she may have received it. So far as the testimony on this count is concerned, if it is not sufficient to establish that the abstract was returned to Mrs. Buffington as claimed, it certainly fails to show that respondent has appropriated it to his own use, or willfully withholds it from her.

3. By the third count it is charged that respondent raised a note originally for the sum of \$65 to read \$75.15. The most that can be claimed on this question on the part of relator is that the testimony is conflicting. The testimony of experts, however, who examined the note and made the usual tests, is unequivocally to the effect that it was not changed in any way after it was signed. Certainly, in the face of this testimony, the charge is not proven. It involves the commission of a serious crime, and should be clearly established.

4. Respondent was employed by Mr. Ames to collect an account. He sent it to another attorney at the place where the debtor resided. It appears that \$4 was collected on the claim, one-half of which was remitted to the respondent. Later, Mr. Ames made inquiries of the respondent regarding this collection, and was informed by him that the records of his office showed that nothing had been collected. Whether this statement was intentionally false, or an honest mistake, is not altogether clear. Respondent, in explaining the method of keeping a record of collections, and where the entry of the \$2 received appeared, tended to prove that he may have been honestly mistaken when he informed Mr. Ames that nothing had been collected. This, however, in the circumstances, is not the material or crucial question. According to the testimony, which is undisputed, respondent was entitled to the full \$2, as the minimum charge on account of the collection in question, and Mr. Ames was not defrauded or deceived by the statement made. A misstatement by an attorney which does not defraud the person to whom it is made, or deceive him, to his prejudice, is not sufficient to justify disbarment.

5. The testimony relative to the transactions with Peter Johnston, which form the basis of the fifth charge, is quite voluminous, and it can serve no useful purpose to notice it in detail, or to analyze its alleged inconsistencies. Johnston was charged with an offense against the federal laws, and employed respondent to defend him. At the time of this employment, he had \$1,000 and other valuables in a safety deposit vault. The party whom he had defrauded was seeking to seize property of Johnston, and the latter, for the purpose of avoiding an attachment, removed this property from the safety vault, and placed it in the hands of respondent, at the rooms of the deposit company. The testimony of respondent is to the effect that he took this property to his office; that he and his partner agreed it had better be placed

in the safe of a third party; that it was accordingly put in a sealed package, and placed in the safe of a well-known attorney; and that the package contained the money in question. These statements are corroborated by the testimony of his partner, who, as well as the respondent, says he thinks Johnston was present when the package was made up. Johnston denies that he was present, but the young lady in charge of the safe in the office in which the package was deposited corroborates the statement that Johnston was probably present. The directions were to deliver the package to Peter Johnston, thus placing it entirely beyond the control of the respondent. The testimony is undisputed that this package was subsequently delivered to Johnston in the condition received, but he claims that the \$1,000 was not in the package at this time. The statement of Johnston that the money was not in the package is flatly denied by respondent. Our attention is directed to other testimony tending to prove (so it is argued by counsel for relator) that respondent must have in some way obtained possession of and retained this money; but, without attempting to state those matters upon which relator relies to establish the receipt of the money by respondent, it is sufficient to say that the testimony on the subject, as a whole, is not of that clear, convincing, and satisfactory character which would justify a finding against respondent on this question. *People ex rel. v. Benson*, 24 Colo. 358, 51 Pac. 481. The purpose of Johnston in removing the money and other valuables on deposit in the safety vault appears to have been to avoid an attachment. Respondent apparently advised him as to the best course to pursue, but the advice given certainly did not involve any moral turpitude on the part of respondent, or tend to prove in the slightest degree that he was attempting to aid his client in the commission of a fraud. It is urged he knew at this time that Johnston had been guilty of defrauding another out of this money. We do not so understand the testimony. Prior to the date when the money was removed from the deposit vault, Johnston had been set at liberty by the magistrate before whom the preliminary examination was held in a prosecution brought against him on account of the transaction through which the money was received. The respondent represented Johnston at this hearing. If, after an exhaustive examination, the magistrate was satisfied from the testimony that the charge of fraud which constituted the crime for which Johnston had been arrested was not established, his counsel would seemingly be justified in believing that his client was not guilty of any offense. The remaining charges embraced in count 5 may be considered together. Johnston was subsequently prosecuted and convicted of a crime growing out of the transaction by which he obtained the \$1,000. There were also suits brought

against him based upon the same transaction. In all these suits and proceedings, respondent represented him as counsel. He also appears to have gone upon his bonds. For the purpose of securing respondent on account of the obligations assumed, and securing to him the payment of attorney's fees, Johnston conveyed to him equities in real estate, and also through him obtained money on a chattel mortgage given on household furniture. The conveyances were made for the express purpose of securing respondent. He appears to have devoted considerable time in looking after the interest of his client. Whether or not the fees charged were more than respondent was reasonably entitled to is a question which might well be the subject of litigation in a civil action between the respondent and Johnston, but it has no place in a proceeding to disbar, where it appears that Johnston voluntarily gave the respondent the securities he did, and for the express purpose of securing him his fees, and upon the obligations which he assumed when he signed his bonds. The jewelry mentioned is held by respondent on account of a balance which he claims Johnston is owing him on account, and we shall not attempt to determine in this proceeding whether that balance is due respondent or not. A court of law can settle that question. The alleged wrongful appropriation of equities in real estate consisted simply of the respondent selling certain property which had been conveyed to him by Johnston for the purposes already noticed. Whether the action of respondent in this respect is right or wrong, or whether he should account to Johnston for any money thus received, presents matters which the parties should either settle between themselves, or, if they cannot agree, a court, in an appropriate proceeding, can give Johnston the relief to which he is entitled, if he should establish that the charges of respondent against the funds coming into his hands were unreasonably large. These observations dispose of the questions raised on account of the chattel mortgage, except the one that respondent wrongfully foreclosed it, to the detriment of the family of Johnston, unless we add—which appears proper from the testimony—that it was given for a debt which both parties to it agree was due, and to secure a loan which was made. It may have worked a hardship upon the family of Johnston to be deprived of the property which this mortgage covered, but because this result may have followed the action of respondent in enforcing his claim does not render him legally liable to either Johnston or his family, and much less to a proceeding for disbarment.

6. The sixth and last count presents the most serious question in this proceeding. There can be no doubt but that respondent was guilty of improper conduct in attempting to establish a liability on an injunction bond. We shall not attempt, however, to de-

termine whether the acts charged and proven under this count would be sufficient to justify disbarment, because circumstances in connection with this matter relieve the court from the responsibility of passing directly upon that question. The acts complained of occurred between four and five years before the information was filed. Respondent, when the facts in connection with the affair were brought out in court, realized he had done wrong, and promptly admitted his mistake. No one was substantially injured by his action. The whole matter was made public and published in the daily press. This publicity has, in our judgment, after the lapse of so long a period, been a sufficient punishment for respondent; and in view of the fact that he has promptly admitted his wrong, and made such reparation as he could, we do not believe that any beneficial end would be accomplished by inflicting a punishment at this time, even if justified originally.

There seems to be an inclination on the part of some of counsel for respondent to criticize relator. This is not justified. The record with respect to some of the charges certainly discloses a state of affairs which fully warranted the relator in taking the steps it did—in fact, imposed upon it the duty of so doing. The explanation of respondent as to these matters is not of that satisfactory character which would justify us in saying that he is fully exonerated, but, for the reasons given in disposing of each specific charge, we shall direct that the rule on respondent be discharged, and the proceedings dismissed. Rule discharged and proceedings dismissed.

STEHLÉ, J., not sitting.

(32 Colo. 263.)

# OVERLAND COTTON MILL CO. et al. v. PEOPLE.

(Supreme Court of Colorado. March 7, 1904.)

CORPORATION—CRIMINAL LIABILITY—EMPLOYMENT OF CHILD IN MILL—INFORMATION—EVIDENCE—DEATH OF PERSON CONVICTED—ABATEMENT OF JUDGMENT.

1. A judgment of conviction for crime is abated by the death of the person convicted.

2. An information charging a crime cannot be attacked on the ground that it appears on trial that the person who made the affidavit supporting it did not have personal knowledge of the commission of the offense.

3. Mills' Ann. St. § 413, providing that "any person" who shall employ a child under 14 years of age in a mill shall be guilty of a misdemeanor, and providing for imprisonment if the fine is not paid, applies to corporations as well as to natural persons.

4. Where the official of a corporation who employed a child under 14 years of age in a mill had general authority to engage employes, the corporation is guilty of a violation of Mills' Ann. St. § 413, prohibiting such employment, though the official was instructed not to employ children under 14.

5. Evidence showing that an assistant superintendent of a mill, who had authority to hire and discharge employes, knew, or by the exer-

cise of due diligence should have known, that a child under 14 years of age was in the employ of the company, was sufficient to sustain his conviction for violation of Mills' Ann. St. § 413, prohibiting such employment.

Error to County Court, City and County of Denver; Ben. B. Lindsey, Judge.

The Overland Cotton Mill Company and others were convicted of employing a child under 14 years of age in a mill, and bring error. Affirmed as to defendant Overland Cotton Mill Company and another, and abated as to defendant John L. Jerome.

Thos. H. Hood, for plaintiffs in error. N. C. Miller, Atty. Gen., and J. B. Melville, Asst. Atty. Gen., for defendants in error.

GABBERT, J. Each of plaintiffs in error was found guilty of violating the provisions of section 413, 1 Mills' Ann. St. This section provides, in substance, that any person who shall hire and employ a child under 14 years of age in any mill or factory shall be guilty of a misdemeanor. The affidavit supporting the information charged that the Overland Cotton Mill Company, John L. Jerome, as its treasurer, and Dean Sutcliffe, as its superintendent, had violated this statute by employing a boy under 14 years of age in the mill belonging to the company.

Since the cause was brought here, plaintiff in error Jerome has died. The purpose of enforcing a penal statute is to punish the person found guilty of violating its provisions. The representatives of deceased are not responsible for the alleged violation of the statute by him during his lifetime. They cannot be required to satisfy the judgment rendered against him. It is only the person adjudged guilty who can be punished, and a judgment cannot be enforced when the only subject-matter upon which it can operate has ceased to exist. As to the deceased, the proceedings are abated by operation of law. *O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143; *Town of Carrollton v. Rhomberg*, 78 Mo. 547; *March v. State*, 5 Tex. App. 450; *Herrington v. State*, 53 Ga. 552; *U. S. v. De Goer* (D. C.) 38 Fed. 80; *Schreiber v. Sharpless*, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. Ed. 65.

During the progress of the trial it developed from the testimony that the party who made the affidavit supporting the information did not have personal knowledge that the defendants had committed the offense charged. Thereupon they moved to quash the information. This motion was denied. There was no error in this ruling. Whether or not an affidavit to support an information states the facts required by the statute must be determined from the affidavit itself. Its statements cannot be attacked by extraneous evidence, or upon the ground that the testimony may disclose that the party who verified it did not have the knowledge relative to the offense charged which the statute requires. *Bergdahl v. People*, 27 Colo. 302,

61 Pac. 228; *Holt v. People*, 23 Colo. 1, 45 Pac. 374:

The Overland Cotton Mill Company is a corporation organized under the laws of this state, and it is argued that, because the statute only says that "any person" who shall employ children under the age of 14 years in any mill or factory shall be deemed guilty of violating its provisions, therefore a corporation, in its capacity as such, cannot be reached in a prosecution of this character—in other words, because the statute does not specify corporations, that they are exempted from the statutory provision on the subject of the employment of children under the age of 14 years. In support of this contention, attention is directed to the provision that the officer to whom a warrant is issued against the person charged with violating the statute shall bring that person into court, and that such person, if found guilty, shall be committed to jail if the fine imposed is not paid; that other provisions in the chapter relating to children, in which the section under consideration appears, expressly include corporations; that a corporation cannot be imprisoned; and that the act can be amply enforced by proceeding against the employees of corporations who violate it. These matters may be taken into consideration in ascertaining whether or not corporations are included, but they are not conclusive, nor do they furnish the true test in determining whether or not the word "person," as employed in the statute, embraces a corporation. In the earlier cases, and before corporations had become such important factors in industrial affairs, it was held that, as statutes imposing a penalty were to be strictly construed, they did not apply to corporations, unless they included them in express terms or by clear implication. This view is no longer entertained by the modern decisions, either in England or this country, for various reasons, among which may be noticed that it ignored the principle that statutes are to be applied to corporations, when they can be, the same as to natural persons; that, so far as their nature will permit, they are amenable to the laws of the land, the same as individuals; and that to exempt them from the operation of a statute would result in conferring upon them rights which natural persons were not permitted to enjoy. 10 Cyc. 1208. Prima facie, the word "person," in a penal statute which is intended to inhibit an act, means "person in law" (that is, an artificial as well as a natural person), and therefore includes corporations, if they are within the spirit and purpose of the statute. *The Pharmaceutical Ass'n v. The London & P. S. A., Limited*, 5 Appeal Cases (Law Reports), 857; 7 Enc. of Law (2d Ed.) 841; 1 Clark & Marshall's Private Corp. § 252; *Bishop's Stat. Crimes* (3d Ed.) § 212; *Stewart v. The Waterloo Turn Verein*, 71 Iowa, 228, 32 N. W. 275, 60 Am. Rep. 786. Whether corporations are included within the statute de-

pendes largely upon its object. *Pharmaceutical Ass'n v. London & P. S. A., Limited*, supra. The purpose of the statute, as indicated by its title, was to prohibit the employment of children under 14 years of age in certain kinds of work. It is common knowledge that the places which, by the statute, children under the age of 14 years are inhibited from working in, are operated largely by corporations. Whether such places were operated by individuals or corporations could make no difference with respect to the employment, for it would be just as detrimental to the child in one instance as in the other. If corporations are exempted from the act, then the purpose of the Legislature in inhibiting the employment of children under a certain age in certain kinds of work would not be accomplished. Corporations, therefore, are clearly within the spirit and purpose of the statute, because its ultimate object was to prevent children under a given age from being employed in specified work. That the statute provides for imprisonment if the fine imposed is not paid is not an objection which a corporation can urge against its enforcement. True, the corporation cannot be imprisoned, but the fine can be collected through the means provided for the collection of money judgments. *Commonwealth v. Pulaski Agr. Ass'n*, 92 Ky. 197, 17 S. W. 442.

It is next urged that, because instructions were issued to the subordinate officers of the company not to employ children under the age of 14 years, the corporation is not liable for the violation of the statute by its employes. A corporation can only act through its agents. Their acts, within the scope of their authority, are the acts of the corporation. The official who employed, or is responsible for the employment of, the child on account of whom the prosecution was commenced, had general authority to engage employes. It is immaterial that he may have been instructed not to employ children under the age of 14 years, for, by engaging the boy under a general authority with respect to hiring employes, he became the employe of the company, and the latter is not relieved from the consequences of this act merely because its duly authorized agent may have disobeyed specific instructions. In short, a corporation is responsible for the acts of its servants of the character under consideration, when done within the scope of their general authority, although forbidden by the corporation. *State v. Railroad*, 91 Tenn. 445, 19 S. W. 229; *Ry. Co. v. Ryan*, 56 Ark. 245, 19 S. W. 839; 2 *Wood's Railway Law*, § 337.

On behalf of the defendant, Dean Sutcliffe, it is contended that the evidence was not sufficient to justify his conviction. An agent of a corporation is presumed to have that knowledge of its affairs particularly under his control and management which, by the exercise of due diligence, he would have as-

certained. 21 *Enc. of Law*, 896; *McClure v. People*, 27 Colo. 358, 61 Pac. 612. A Mr. Cumnock was the general superintendent in charge of the mill. He had charge of the hiring of employes. Mr. Sutcliffe was the assistant superintendent, acting for and under the authority of Mr. Cumnock. He was engaged at the mill, and, in the performance of his duties, had the authority to hire and discharge employes. It thus appears from the testimony that by reason of his relationship to the company, and the performance of his duties, he either knew, or, by the exercise of due diligence upon his part, should have known, that a minor under the prohibited age was in the employ of the company. For this reason he must be held as having violated the statute, for it was within his power, by virtue of the relationship he bore to the company, to have prevented the employment. An officer of a corporation, through whose act the corporation commits an offense against the laws of the state, is himself also guilty of the same offense. *People v. White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

In conclusion, it is but just to remark that the record clearly shows there was no willful violation of the law. On the contrary, it appears that Mr. Jerome was solicitous that it should be observed. He had frequently instructed those charged with the duty of engaging employes to strictly observe its provisions. His duties did not require his presence at the mill but occasionally. He had nothing to do with the hiring of employes. He had no knowledge that the boy was in the employ of the company. He certainly did all as an individual, or as an official of the company, to prevent the law from being violated, which could be required of him, and, had his wishes and desires been carried out, the law would have been strictly observed. The boy had worked less than two months in the mill. The family of which he was a member had only recently moved to the state. They were in poor circumstances. The mother also worked in the mill, and the father contributed nothing to the support of his family, who appear to have been dependent upon their labor for a livelihood. These conditions may have influenced Mr. Sutcliffe in permitting the boy to have employment. At most, his offense consisted of not strictly observing the law, rather than an intentional disregard of its provisions. On the whole, the case presented appears to have been one where the observance of the law could have been readily secured without resort to a prosecution. It is a benign one, but of a character where the circumstances may be such that discretion in resorting to a prosecution for its violation in the first instance can well be exercised, or, in case of conviction, judicial clemency extended, without in the least detracting from its efficiency. These considerations, however, are not sufficient to either excuse the corporation or Mr. Sutcliffe,



and as to them the judgment of the county court will stand affirmed. As to the deceased, the judgment is abated.

(32 Colo. 207)

VENNER et al. v. DENVER UNION WATER CO. et al.

(Supreme Court of Colorado. March 7, 1904.)

APPEAL—RECORD—ABSTRACTS—OMISSIONS—  
BONDS—IRREGULARITIES—AMENDMENT  
—MOTION TO DISMISS.

1. Whether an abstract of record is sufficiently full cannot be determined on a motion to dismiss the appeal.

2. That an abstract of record was not sufficiently full to authorize consideration of the assignments of error was not prejudicial to appellees.

3. Where appellees were not satisfied with appellants' abstract of the record, because of alleged omissions, they were entitled to file an abstract supplying the omissions.

4. Where a motion to dismiss an appeal is made because of irregularities in the bond, and appellants, by cross-motion, ask leave to amend, leave to amend will be granted, and the motion to dismiss denied.

Appeal from District Court, Arapahoe County; N. Walter Dixon, Judge.

Action between Clarence H. Venner and others and the Denver Union Water Company and others. From a judgment in favor of the latter, the former appeal. On motions to dismiss. Motions denied.

See 75 Pac. 412.

Yeaman & Gove, Goudy & Twitchell, and H. B. Babb, for appellants. Wolcott, Vaile & Waterman, H. H. Dunham, and Chas. J. Hughes, Jr., for appellees.

PER CURIAM. Appellees move to dismiss the appeal because of the alleged insufficiency of the abstract of record filed by appellant. The volume of such abstract would indicate that it is sufficiently full, but in support of the motion it is urged that it does not present the parts of the record to which reference is made in the assignment of errors with a sufficient degree of fullness to enable the court to fully understand and determine the correctness of the rulings, findings, and decree which the assignments of error undertake to present for review, and that important and necessary parts of the record are wholly omitted. Its alleged defects in these particulars are referred to with considerable minuteness in the motion filed. On its face, the abstract filed purports to state, in substance, the parts of the record upon which appellants rely to support the errors assigned. In such circumstances, the motion cannot be considered, for many and manifest reasons. Whether or not an abstract of record is sufficiently full must often, and in this instance may, be the subject of a difference of opinion between counsel. If the court should be required to settle that question in advance, the result would be to practically determine the cause

upon its merits on a preliminary motion. Such a motion could not be intelligently considered without ascertaining what legal propositions were urged and involved, and what parts of the record were material to the questions upon which the rights of the parties depended. If the abstract does not present the record so that the assignments of error can be considered, the appellants alone will suffer, because, under the repeated rulings of this court, the errors assigned which are not sufficiently presented by the record as abstracted will not be passed upon. On the other hand, if the appellees are not satisfied with the abstract because portions of the record are left out which they may think ought to be included, or the statements of the contents or legal import of pleadings are not correct, they may file an abstract under the rules, and thus fully protect their rights.

Appellees also move to dismiss the appeal because of an irregularity in the execution of the appeal bond. Appellants, by cross-motion, ask leave to amend the bond. Leave is granted to amend the bond in such manner as will cure the irregularities pointed out in the motion; such amendment to be made within 30 days from this date.

Both motions on the part of appellees are denied. Motions denied.

(19 Colo. App. 250)

CURRIER et al. v. CLARK.\*

(Court of Appeals of Colorado. Nov. 9, 1903.)

EXECUTORS—AGREEMENT TO RESIGN—PUBLIC POLICY.

1. An agreement of an executor with beneficiaries to resign for a consideration is illegal as against public policy, making invalid the notes given as the consideration.

Appeal from District Court, Weld County.

Action by Horace G. Clark against Lydia W. Currier and another. Judgment for plaintiff. Defendants appeal. Reversed.

Charles D. Todd, for appellants. Esteb & Wolff and H. N. Haynes, for appellee.

GUNTER, J. The complaint was upon two promissory notes signed by appellants and payable to appellee. The answer set up the following agreement:

"Memorandum of agreement made and entered into this 23rd day of November, A. D. 1896, by and between Horace G. Clark, of Greeley, Colorado, of the first part, and Lydia W. Currier, and Henry F. Currier, acting for themselves, and so far as they are able acting for other parties interested in the estate of Warren Currier, deceased, of the second part:

"Witnesseth: In consideration of an amicable adjustment, compromise and settlement of divers matters heretofore in controversy it is hereby agreed as follows:

\*Rehearing denied March 14, 1904.

¶ 1. See Contracts, vol. 11, Cent. Dig. § 533.

¶ 2. See Appeal and Error, vol. 3, Cent. Dig. § 2586.

"1st. Said Clark shall and hereby does tender his resignation as one of the executors of the last will and testament of Warren Currier, deceased, a copy of which is attached hereto and made part hereof, to take effect on or before the 25th day of January, A. D. 1897, on conditions therein expressed as well as those herein provided, not subject to revocation unless the conditions herein mentioned shall not be complied with.

"2nd. The compensation of said Clark as said executor when said resignation is accepted, shall be settled upon a basis of an annual salary of five hundred dollars per year, net, to said Clark as said executor. Any disbursements for aid in book-keeping and for commissions of collectors of rent, shall be allowed as an expense item against the estate, and not be deducted from the salary of the executor.

3rd. Upon the acceptance of said resignation and as a condition to all matters herein provided, an appeal now pending in the district court of Weld county, Colorado, of a certain proceeding brought by Lydia W. Currier, the minor grandchildren of the late Warren Currier, deceased, by Abel K. Packard, their next friend, and Virginia W. Currier, against said Clark and his co-executor Johnson, and against Henry F. Currier and George W. Currier, shall be dismissed at the cost of petitioners and appellants.

"4th. In further consideration of said resignation, as a part of said general compromise, it is understood that certain notes signed by the parties of the second part, payable to said Clark, have been delivered simultaneously herewith.

"5th. The trial order in said cause pending in the district court shall by stipulation be forthwith vacated and said cause stand continued until the agreements herein contained are carried out, on or before the 25th day of January A. D. 1897, and if not then carried out said cause to stand on the docket for trial as the parties may be advised.

"In witness whereof, the parties have hereunto set their hands the day and year first above written in duplicate.

"Horace G. Clark.

"Lydia W. Currier.

"H. F. Currier.

"State of Colorado, County of Weld—ss.:

"In the County Court sitting for probate business. In the matter of the estate of Warren Currier, deceased. Resignation of Horace G. Clark, as executor.

"Comes now Horace G. Clark, one of the executors of the last will and testament of Warren Currier, deceased, heretofore appointed as such in lieu of Charles H. Wheeler, resigned, and tenders to said court his resignation of said office or trust, to take effect on the 25th day of January A. D. 1897, or as soon prior thereto as full itemized and detailed report and statement of account of the acts and doings and financial transactions of the undersigned, and his co-executor, Bruce

F. Johnson, are filed with said court, and this resignation shall be accepted, with acquittance of the undersigned and his sureties on account of his executor's bond heretofore filed herein.

"Dated at Greeley this 23rd day of November A. D. 1896. Horace G. Clark."

The answer also averred that the notes sued on were made at the same time as the foregoing contract, and were a part of the same transaction. These allegations were admitted by the replication. Appellee upon trial introduced the notes, and rested. Appellants thereupon moved for judgment upon the pleadings, which being denied, they stood on their motion, and judgment went for appellee. Therefrom is this appeal.

As the execution of the notes was admitted by the answer, their introduction did not change the case as presented by the pleadings. Its determination rests upon the pleadings, and the single question is, does the allegation of the answer, that the notes were a part of the above contract, constitute a defense to this action? If so, the judgment below should be reversed. The notes are part of those referred to in paragraph 4 of the contract. Appellants contend that the contract is illegal; that the notes, being an inseparable part thereof, and being executory, are vitiated by the same illegality. Several reasons are urged why the contract is illegal. It is necessary to consider but one, that is, the provision thereof that there shall be a resignation of appellee as executor of the estate of Warren Currier, deceased. The contract was between appellee, then an executor of said estate, and appellants, certain of the beneficiaries thereof. Thereby appellee agreed, in consideration of the settlement of divers matters theretofore in controversy, and upon conditions expressed in the contract, and set out in his resignation attached thereto, to resign as executor. These conditions were: (1) That he should be allowed a certain net compensation, as executor, upon final settlement. (2) That a certain suit pending against him and others should be dismissed. (3) That a certain sum should be paid him, evidenced by delivered notes, part of which are the notes in suit. (4) That he and his bondsmen should be discharged from liability on his bond as executor. Paragraph 1 of the contract states that the agreement to resign is upon conditions provided in the contract. One of the conditions of the contract resting upon appellants is the giving of the notes in suit. Paragraph 4 of the contract recites in effect that in further consideration of the resignation the notes are delivered. The resignation was in part conditioned upon the giving of the notes, the giving of the notes in part upon the agreement to resign. The agreement to resign and the notes are inseparable parts of the same contract. If the agreement to resign was illegal, it vitiated the entire contract, including the notes executed as a part thereof. "Where a contract

which is entire contains a stipulation or agreement which is illegal, and which, therefore, is not severable from the balance of the contract, such illegal stipulation or agreement cannot be ignored and the other provisions of the contract enforced; the illegal stipulation or agreement in such a case penetrates and corrupts the whole contract, and vitiates it as an entirety." 15 Am. & Eng. Ency. of Law (2d Ed.) p. 988; Hoyt v. Macon et al., 2 Colo. 502; The Pueblo & Arkansas Valley R. R. Co. v. Taylor et al., 6 Colo. 1, 45 Am. Rep. 512. The agreement of appellee for a consideration to resign as executor was illegal.

In *Bowers v. Bowers*, 26 Pa. 74, 67 Am. Dec. 398, an intestate was indebted to plaintiff, his father. The defendant agreed, if plaintiff would renounce the right to administer, and permit and procure letters of administration to be issued to the defendant, that he, defendant, would assume and pay the amount of indebtedness of deceased to plaintiff. The contract was held illegal. The court further held that the office of administrator very much resembled a public office; that if public policy forbade traffic in an office, such as postmaster, it would for superior reasons interdict barter in respect to the more sacred trust of administration. The principle upon which the case rests is that the office of administering an estate is a place of trust and confidence, and may not be made a matter of traffic and sale.

In *Eddy v. Capron*, 4 R. I. 394, 67 Am. Dec. 541, the action was upon an order drawn by defendant, then physician of the Marine Hospital of the port of Providence, upon Bradford, collector of that port, requesting Bradford to pay to plaintiff's assignor a certain sum, which should then be due to defendant for medical services rendered to the Marine Hospital. The consideration for the order was the resignation of the said office of port physician. There was no evidence of any promise to recommend the defendant, or to exert any influence to procure his appointment as port physician. The gist of the facts was that the consideration for the order was the agreement of the port physician, defendant's predecessor, to resign. The court held, although the contract provided simply for a bare resignation, that because it did so provide it was illegal, being against public policy, and that the order sued on, being based upon and a part of the illegal contract, was void.

In *Porter v. Jones*, 52 Mo. 399, 403, the plaintiff agreed with defendant that, in the event the then administrator of an estate resigned, he would procure the appointment of a responsible individual as his successor. A note was given by the defendant to plaintiff as a part of this agreement, a part of the consideration thereof being his agreement to secure the appointment of a responsible individual as administrator. The court held the contract illegal as against public

policy, and the note void. In the course of the opinion it said: "The main purpose of the agreement was to secure the appointment of an administrator. This agreement amounts to a trafficking in this important trust. Although it is not a public office, it is nevertheless a private trust just as sacred, and arises from the appointment to be made by a public court or officer. An agreement to procure an appointment to office is against public policy and void. The trust devolved upon an administrator through the appointment of a public functionary ought to have the same safeguards thrown around it as if it were a public office. The note sued on in this case, and the agreement upon which it was based, must be taken together and viewed as one instrument. As they amounted to a trading in the appointment of an administrator they are void as against public policy. This seems to be well settled by the authorities." "Contracts for the payment of money to a public officer in consideration of his resigning his office have been held illegal." 15 Am. & Eng. Ency. of Law, 967.

In *Ellicott v. Chamberlin*, 38 N. J. Eq. 604, 48 Am. Rep. 327, 329, 330, an executor agreed to resign as such, in consideration of which there was an agreement to pay him a certain sum. It was held that the agreement to resign was illegal, being against public policy, and that such illegality vitiated the contract to pay money arising thereon. The court said: "There is no doubt that the agreement of Mr. Chamberlin to renounce for a consideration was illegal, not because of fraud or duress, as was urged before the chancellor, but because it is against public policy. It is a general principle, universally enforced, that trustees cannot use their relations with trust property to their personal advantage. An agreement to accept money or other valuable thing, as consideration for violating or abandoning a trust, is illegal. A person named in a will as executor is not obliged to accept. He may voluntarily renounce for reasons that do not involve mercenary motives, but he has no right to make merchandise of the confidence reposed in him by a testator."

In *Staunton v. Parker*, 19 Hun, 53, the executor, for a consideration, agreed to renounce his appointment as such. The agreement was held void as against public policy. See, also, *Estate of True's Estate*, 120 Cal. 352, 52 Pac. 815.

The agreement by appellee to resign for a consideration was a part of the contract upon which these notes were based. The agreement to resign entered into the contract and into the notes. It was illegal. Such being true, the illegality vitiated the notes. The judgment below upon the pleadings should have been for appellants. It was otherwise, and must be reversed.

Reversed.

(19 Colo App. 445)

**FRANK v. BAUER et al.\***

(Court of Appeals of Colorado. Dec. 14, 1903.)

**TRIAL—WAIVER OF JURY—FEDERAL REVENUE LAW—STAMPS—FAILURE TO AFFIX STAMP TO CONTRACT—MINES—CONTRACT FOR SALE—CONSTRUCTION.**

1. Under the express provisions of Mills' Ann. Code, § 178, a trial by jury may be waived, with assent of the court, where a party to an issue of fact fails to appear at the trial.

2. The federal revenue act of June 13, 1898, c. 448, § 14, 30 Stat. 455 [U. S. Comp. St. 1901, p. 2296], providing that no instrument required by law to be stamped shall be used as evidence in any court until a legal stamp shall have been affixed, does not apply to state courts.

3. The owner of mining property placed a deed thereof to defendants in escrow, to be delivered on payment of certain sums before a specified time. All payments were to be forfeited on defendant's failure to complete the purchase. It was also agreed that 35 per cent. royalty on smelter returns of all ores removed by defendant should be paid to the owners, and applied on the price. Held that, while the failure of defendants to make the payments required terminated their right to purchase, it was not a rescission of the contract, and hence the owners were thereafter entitled to recover the specified royalties.

4. In the absence of any evidence, the phrase "smelter returns" should be construed as meaning returns from the ore, less the smelting charges, without deducting the charges for hauling, freight, and switching.

5. The parties to a contract having construed the phrase "smelter returns" by paying royalty on the value of the ore, less smelting charges, and without deducting for hauling, freight, and switching, such construction, in the absence of any other evidence, will be adopted by the court.

Appeal from Montezuma County Court.

Action by George Bauer and others against Joseph Frank. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

John W. Helbig, for appellant. S. W. Carpenter and C. M. Kendall, for appellees.

GUNTER, J. Appellees (plaintiffs below) executed a deed; grantee, appellant; consideration, \$60,000; subject-matter, mining property—and deposited the same with one of appellees, a banker, upon terms stated in a writing signed by appellant and appellees, of which the following is a copy:

"Mancos, Colo., Aug. 9th, 1899.

"To Mr. George Bauer, Banker, Mancos, Colorado: You will please hold this envelope and enclosed deed of Sundown mine in escrow under the following conditions:

"If Joseph Frank pays into your hands the sum of \$1,000.00 this 9th day of August, 1899, and the further sum of \$6,500.00 on or before the 20th of August, 1899, and the further sum of \$7,500.00 on or before November 9th, 1899, and the further sum of \$45,000.00 on or before May 9th, 1900, then you will deliver this envelope and enclosed deed to Joseph Frank, or his agent, and if the said Joseph Frank, or his agent, fails to pay the

above-mentioned sums at the time above given, or fails to make any one of said payments as stipulated, then you are instructed to return said deed to the signers thereof at their request. It is further agreed that all improvements, tools and so forth in or outside of mine, excepting heavy machinery, are to be forfeited together with all moneys paid, should Joseph Frank fail to make payments as above stipulated. It is also agreed that thirty-five per cent. royalty on mint or smelter returns of all ores removed are to be paid owners, and a statement given by Joseph Frank of all work and expenditure at the end of every month, said thirty-five per cent. royalty is to be applied on purchase price of the mine. We agree to the above conditions."

Thereunder appellant took possession of the mine and operated it for a time. He made the payments maturing August 9th and 20th, aggregating \$7,500. Ore removed from the mine was shipped to the smelter and returns made September 18th and 30th, and October 4th, 7th, 9th, and 14th, the aggregate of which was \$7,296.99; that is, the value of the ore, less treatment charges, as shown by the smelter statements, was \$7,296.99. The smelter paid from this sum charges for hauling the ore from the mine to the railroad, and also freight and switching charges. The aggregate of the hauling, freight, and switching charges so paid amounted to \$1,607.21, and the difference between this sum and the above aggregate of \$7,296.99, to wit, \$5,689.78, was paid by the smelting company to the shipper of the ore, appellant. Thirty-five per cent. of \$5,689.78 is \$1,991.42. Thirty-five per cent. of \$7,296.99 is \$2,553.94.

October 14th appellant, by his manager, wrote:

"October 14th, 1899.

"To George Bauer, Banker and holder of escrow papers on the Sundown mine—Dear Sir: I herewith make you statement of all ores shipped from the Sundown mine during the month of September and enclose you a check for (35) thirty-five per cent. on the smelter returns, as per escrow conditions agreed upon.

Gross Pounds.	Net Pounds.	Total Value.
.....	.....	\$7,296 99
35 per cent. royalty.....		\$2,553 94

"[Signed]

Joseph Frank,  
"By J. B. Page."

Under the head "Gross Pounds," in this letter, are given in detail the shipments of ore covered by the smelter statements, commencing with September 18th and ending with October 14th. Appellant states by the letter that he incloses a check for 35 per cent. "on the smelter returns as per escrow conditions," and fixes the smelter returns on this ore at \$7,296.99, which, as stated, is the return from the ore, less smelter charges, and not the return from the ore, less smelter charges, and the charges for hauling, freight, and switching. He incloses a check for \$2,-

\*Rehearing denied March 22, 1904.

¶ 2. See Internal Revenue, vol. 29, Cent. Dig. § 89.

553.94, as 35 per cent. on \$7,296.99. On the escrow agent directing attention to this remittance as being \$100 short of 35 per cent. on the smelter returns, as shown by the letter, the agent of appellant, October 31st, paid the \$100. The parties here construed the meaning of the words "smelter returns," and acted on such construction. They construed them not as meaning the value of the ore less treatment charges, and charges of hauling, freighting, and switching (that is, \$5,689.78), but as the value of the ore less only the treatment charges (that is, \$7,296.99); and appellant paid, not \$1,991.42 (that is, 35 per cent. on \$5,689.98), but \$2,553.94 (that is, 35 per cent. on \$7,296.99). The materiality of this construction will appear as we progress. This payment of \$2,553.94 was applied on the installment of the purchase price (\$7,500) falling due November 9th. Appellant defaulted in the payment of the remainder of this installment. November 10th appellees demanded the return to them of the deed from the escrow agent, and this was made. They also requested payment of royalty for the remainder of the ore mined and shipped to the smelter prior to that date. Nine smelter returns, other than those contained in above statements, were made from ore shipped October 11th, 13th, 18th, 23d, 26th, 30th, and 31st, November 8th, and November 22d. The aggregate value of this ore at the smelter, less smelter charges, was \$3,599.38. Thirty-five per cent. of this amount is \$1,259.78. The aggregate amount paid by the smelting company upon this ore for hauling to the railroad, freight on the railroad, and switching charges was \$1,160.99, which charges were paid by the smelting company from the value of the ore, less treatment charges, and the difference, to wit, \$2,438.39, transmitted to the shipper, appellant. Thirty-five per cent. of this sum is \$853.44. November 10th a demand was made upon appellant for payment of 35 per cent. royalty upon the eight smelter returns enumerated between October 11th and November 8th, and such 35 per cent. was based upon the value of the ore at the smelter, less smelter charges. Payment was refused, for what reason does not appear. Suit was instituted December 26, 1899, to recover 35 per cent. royalty upon the nine smelter returns, commencing with October 11th and ending with November 22d, all of the ore for which had been shipped prior to November 8th. Appellant answered, denying the allegations of the complaint which presented the foregoing matters, and set up certain matters upon which he asked affirmative relief. The replication put in issue the affirmative matter of the answer. March 17th appellant filed his motion for a continuance, in order that his deposition might be taken, as he would be absent at the time of the trial. The motion was supported by affidavit disclosing testimony that would be given by the witness if permitted to testify. March 20th

the court entered an order granting the continuance until March 27th, but setting the case for trial on that date "on plaintiffs' admitting that the evidence stated in the defendant's attorney's affidavit filed in support of said motion for continuance would be given by him (the said defendant), and that it be considered as actually given by him upon said trial." Trial was had March 27, 1900; appellees appearing in person and by attorney, and defendant appearing neither in person nor by attorney. Trial was to the court, without a jury, and a judgment had for appellees in the amount prayed in their complaint, which amount is 35 per cent. upon the value of the ore, less treatment charges, as shown by the nine smelter statements last mentioned, and legal interest thereon. Therefrom is this appeal.

1. No error was committed in trying the case without a jury. The pleadings presented issues of fact. The defendant (appellant) made no appearance at the trial. This waived his right to a trial by jury. "Trial by jury may be waived by the several parties to an issue of fact with the assent of the court in the following manner: First, by failing to appear at the trial." Mills' Ann. Code, § 178; Leahy et al. v. Dunlap, 6 Colo. 552.

2. The above contract upon which this action is based was not stamped. The federal revenue act of June 13, 1898, c. 448, § 14, 30 Stat. 455 [U. S. Comp. St. 1901, p. 2296], provides that no instrument required by law to be stamped shall be used as evidence in any court until a legal stamp shall have been affixed thereto. If we assume the above contract to be within the statute—which we do only for the purpose of the ruling—the court did not err in admitting the instrument unstamped; and a sufficient reason for so holding is, the act does not apply to state courts. Trowbridge v. Addoms, 23 Colo. 518, 48 Pac. 535.

3. The above writing of August 9th constituted a contract between appellees and appellant. By it appellees agreed that the deed placed in escrow should be delivered to appellant upon his making the payments in the amounts and at the times stipulated therein. Appellant agreed that, in the event he failed to make any one of said payments, the escrow agent, upon request of appellees, should return the deed to them, and that he (appellant) would forfeit all payments made, and certain improvements upon the mining property. Appellant further agreed that he would pay to appellees 35 per cent. royalty on mint or smelter returns of all ores removed from the mine. Appellees agreed that the royalty thus paid should be credited upon the purchase price. This contract determined the rights and duties of the parties to it. Under it, appellant operated the mine as above stated. The contract provided what the rights and duties of the parties should be in the event appellant failed to make any

one of the stipulated payments. In such contingency, if appellees requested the return of their deed, appellant forfeited his payments previously made, and certain improvements. By the contract, appellees were given a right to the payments, and a right to the forfeited improvements. A failure to make the payments did not operate as a rescission of the contract, but merely terminated the right of appellant to purchase the mining property under the contract. The agreement to pay royalty was another section of the contract providing unconditionally the royalty appellant should pay upon the ores mined. There was no express or implied provision of the contract that the right to this royalty should be defeated by the failure of appellant to make any one of the payments provided in the contract. It was an unconditional agreement to pay royalty on the ore mined. After appellant defaulted in his payments, appellees had the same right to rely upon the contract for the recovery of their royalty as they had to claim the return of the deed, or to claim ownership of the mining improvements, or ownership of the payments made. The contract remained in force as to all of these matters. It was at an end so far as it gave appellant the right to purchase the property at the rate stipulated in the contract. "But while it is essentially true that in case of a rescission the vendee may demand that he be restored to his original condition, it does not follow that a vendor who refuses to convey after such breach by the vendee thereby rescinds. To the contrary, in refusing to convey after the vendee's default he is not treating the contract as at an end, but is expressly standing upon it, and basing his rights upon its terms, covenants, and conditions." *Clock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 14, 55 Pac. 713, 717, 43 L. R. A. 199, 69 Am. St. Rep. 17. "It cannot be that, when one insists upon his stipulated rights under a contract, he indicates an intention not to be bound by it, and these cases must not be so understood." *Aikman v. Sanborn* (Cal.) 52 Pac. 729, 730; *James H. Rice Co. v. Pennsylvania Plate Glass Co.*, 88 Ill. App. 407. Claiming a return of the deed and a forfeiture of the payments and improvements did not work a rescission of the contract. It did not work a satisfaction of any sum due to appellees by appellant for royalties. At the time the forfeiture was claimed, the contract remained in full force as to its stipulation to pay these royalties. Appellant was delinquent upon the royalties, and was indebted to appellees in the amount of such delinquency. The judgment was for the amount of the delinquent royalties and legal interest.

4. Appellant contends that the 35 per cent. royalty should be computed upon the sum ascertained by deducting the charges for hauling, freight, and switching from the value of the ore, less smelting charges. Appellees contend that the 35 per cent. royalty

should be computed upon the value of the ore at the smelter, less the smelting charges. In other words, the controversy is as to the meaning of the words "mint or smelter returns," as used in the contract. No evidence whatever was introduced as to any custom defining the meaning of these words. In the absence of any evidence as to the meaning of "smelter returns," we think it to be returns from the ore, less the smelting charges. In this case, however, the parties themselves construed the contract in this respect by paying royalty upon the value of the ore at the smelter, less smelting charges. They thus defined the meaning of the words "mint or smelter returns," and this interpretation, in the absence of other evidence, we are justified in accepting. *Union Pac. R. Co. v. Anderson*, 11 Colo. 293, 299, 18 Pac. 24; *Sumpter Gold Min. Co. v. Browder* (Colo. Sup.) 73 Pac. 38, 39.

We find no error in this record justifying a reversal. Judgment affirmed. Affirmed.

(27 Utah, 372)

#### GILLMOR v. DALE, Tax Collector.

(Supreme Court of Utah. March 17, 1904.)

#### TAXATION—LIEN—MUNICIPAL CORPORATIONS—SEVERANCE OF TERRITORY.

1. It will be presumed, from a judgment disconnecting certain territory from a city, that the city was served with notice of the filing of the petition for the division, as required by Rev. St. 1898, § 288.

2. A lien is a hold or claim which one person has upon the property of another as a security for some debt or charge.

3. A tax or assessment cannot exist so as to become a lien or incumbrance on real estate until the amount thereof is ascertained.

4. Rev. St. 1898, § 2516, provides that the assessor must, before the first Monday in May, assess all property subject to taxation; and sections 2595, 2596, and 2597 declare that every tax has the effect of a judgment, and every lien the force and effect of an execution, and that every tax upon real property is a lien against the property assessed. Section 206, subd. 3, authorizes city councils to levy and collect taxes on real and personal property as provided by law, and Const. art. 13, § 10, provides that all corporations or persons shall be subject to taxation within the territorial limits of the authority levying the tax. By Rev. St. 1898, §§ 253, 2689, city councils are required, on or before the first Monday in July, to fix the rate of taxes, and levy the same on property within the city; and by section 2694 the tax so levied becomes a lien on the property assessed from the same time, and subject to the same conditions, prescribed in sections 2595, 2596, and 2597. Certain real estate within the limits of the city had been assessed, but, before the rate of taxes had been fixed by the council or any levy had been made, a judgment was rendered disconnecting the property from the city, and providing that it should no longer be subject to any liabilities, obligations, or taxes, or to the further imposition of taxes. *Held*, that the tax did not become a lien upon the property so severed.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Charles Gillmor against W. H. Dale, as treasurer of Salt Lake county, and ex officio collector of taxes for Salt Lake City.

From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. L. Nye, City Atty., and Walter C. Shoup, Asst. City Atty., for appellant. C. S. Patterson and Geo. W. Moyer, for respondent.

BASKIN, C. J. This is an action for the recovery of certain sums of money paid as taxes, under protest, to the defendant, as treasurer of Salt Lake county, who, as such, had authority to collect the city taxes. The general demurrer interposed to the complaint having been overruled, the defendant rested, and judgment was rendered against him. From this judgment he appeals, and assigns as error the overruling of the demurrer and the rendering of the judgment.

Among other allegations of the complaint it is alleged, in substance, that by a final judgment of the district court of Salt Lake county, rendered upon the petition of the plaintiff and others on the 20th day of May, 1902, a portion of the territory of Salt Lake City was disconnected therefrom, and declared to be no longer a part of said municipal or corporate territory of said city, "and that the said territory and the real property embraced therein shall be and the same is forever released and discharged from paying any part of the bonded municipal indebtedness of said Salt Lake City, and no longer subject to any liabilities or obligations or taxes relating thereto, nor to the further imposition of any taxes whatsoever for said or any city municipal purposes whatsoever, and that the said territory be and it is hereby released from any and every city jurisdiction and control of said Salt Lake City and the government thereof." That on or about the 28th of July, 1902, the city council of Salt Lake City, by ordinance, levied a tax of nine mills for city purposes on all the taxable property within its corporate limits. That on the 17th of July, 1902, the county assessor and county treasurer, being the officers charged with such duty, in pursuance of law, and in accordance with a certificate theretofore received by them from the board of education of Salt Lake City, levied a tax of 8.4 mills on the dollar on all the taxable property within the corporate limits of said city for school purposes. That the plaintiff during the year 1902 was the owner of certain real estate which was situate within the boundaries of the territory so as aforesaid disconnected from the limits of said city. "That the said defendant, W. H. Dale, as county treasurer, collected for the use and benefit of the defendant, Salt Lake City corporation, and paid to the said Salt Lake City corporation, the sum of \$3.10, levied against said property as city taxes, and \$2.89 levied against said property as city school taxes, and that on or about the 19th day of November, 1902, this plaintiff paid said amounts to said W. H. Dale, treasurer as aforesaid,

under protest." The complaint also contains several other separate causes of action, in each of which it is alleged that the person therein named, during the year 1902, also owned certain real estate within the boundaries of the territory so as aforesaid excluded, and paid as taxes, under protest, and under the same circumstances as hereinbefore stated in the first cause of action alleged in the complaint, to the said defendant, W. H. Dale, the sums therein mentioned, and that the claim for the sums so paid was assigned to the plaintiff.

Section 2516, Rev. St. 1898, provides that the assessor must, before the first Monday in May in each year, assess all property subject to taxation, except such as is required to be assessed by the State Board of Equalization, to the person by whom it was owned, claimed, possessed, or controlled at 12 o'clock m. on the first Monday of February, next preceding.

On the subject of tax liens the Revised Statutes contain the following sections:

"Sec. 2595. Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all personal property of the delinquent. The judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof.

"Sec. 2596. Every tax upon personal property is a lien upon the real property of the owner thereof, from and after twelve o'clock m., of the first Monday in February of each year.

"Sec. 2597. Every tax upon real property is a lien against the property assessed; and every tax due upon improvements upon real estate assessed to others than the owner of the real estate, is a lien upon the land and improvements; which several liens attach as of the first Monday in February in each year."

Subdivision 3, § 206, Rev. St. 1898, authorizes the city council to levy and collect taxes for general and special purposes on real and personal property as provided by law.

Article 13, § 10, Const., provides that "all corporations or persons in this state, or doing business herein, shall be subject to taxation for state, county, school, municipal or other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax."

Under the provisions of sections 253 and 2680, Rev. St. 1898, the city council, at a regular meeting thereof, is required, on or before the first Monday of July in each year, by ordinance or resolution, to fix the rate of taxes and levy the same on the real and personal property within the city made taxable by law; and under section 2694 the tax so levied becomes a lien on the property assessed from the same time, and is subject to the same conditions, as prescribed in sections 2595, 2596, and 2597.

The only contention of the appellant is that, "under the provisions of the statutes" hereinbefore referred to, "this tax for 1902, although not levied until after the alleged detachment of the territory, was a valid unpaid lien upon the property, prior to such detachment; and as no provision was made in the judgment of the court for the payment or discharge of this lien then existing, it is clear that such lien was not and could not have been interfered with by the judgment of the court severing the property from the city. All that remained after that judgment was the determination of the amount and collection thereof by the proper authorities. The act of severance was not a barrier to enforcing payment of the prior valid lien." The judgment disconnecting the real estate in question from the city in terms declared that the territory so disconnected should no longer be subject to any liabilities, obligations, or taxes relating to the city, nor to further imposition of any tax whatever for municipal purposes, and was thereby released from any and every city jurisdiction and control and the government thereof. While the record is silent as to whether the city was served with the notice of the filing of the petition for said division, as required by section 288, Rev. St. 1898, that it was so served must be presumed from the rendition of the final judgment; therefore that judgment must, as its validity is not disputed in the pending action, be given its full force. By it the real estate in question, after the disconnection, was no longer subject to a tax levy or any jurisdiction whatever by the city; nor was said real estate ever subject, under the said provisions of the Revised Statutes, to the lien contended for by the appellant.

A lien is a hold or claim which one person has upon the property of another as a security for some debt or charge. "In the nature of things, no tax or assessment can exist so as to become a lien or incumbrance upon real estate until the amount thereof is ascertained and determined." *Black on Tax Titles*, § 189; *Dowdney et al. v. The Mayor*, etc., 54 N. Y. 186.

Under the provisions of the Revised Statutes a city tax does not become a lien on real estate until the rate thereof is fixed, and the tax levied, in pursuance of sections 239, 2604; but when the rate is so fixed, the amount determined and levied, a lien on each tract of real estate assessed by the assessor attaches, by relation, for the amount of the tax thereon, "as of the first Monday of February" preceding the levy. *McLaren v. Sheble*, 45 Mo. 130; *Reeve v. Kennedy*, 43 Cal. 643; *Hallinger v. Zimmerman* (N. J. Ch.) 51 Atl. 963; *Hohenstatt v. Bridgeton*, 62 N. J. Law, 169, 40 Atl. 649; notes to 2 Cooley on Taxation, p. 871 et seq.

The city council was not authorized, either under the Constitution or by the provisions of the Revised Statutes, to levy a tax, except on property within its corporate limits, and

any levy upon property not within such limits is without authority and void. As no lien can exist for taxes illegally levied, the appellant's contention in respect to the lien claimed in this case is untenable.

The judgment is affirmed, with costs.

BARTCH and McCARTY, JJ., concur.

(27 Utah, 378)

#### PENCE v. CALIFORNIA MIN. CO.

(Supreme Court of Utah. March 18, 1904.)

INJURY TO EMPLOYE—INEXPERIENCED MINER—PRECAUTIONS FOR SAFETY—EVIDENCE OF RULE OR CUSTOM—ADMISSIBILITY—NEGLIGENCE—SUFFICIENCY OF EVIDENCE—REVIEW—QUESTION FOR COURT OR JURY—CHANCE VERDICT—BURDEN OF PROOF.

1. The Supreme Court is bound by the findings of fact in an action at law.

2. Under Rev. St. 1898, § 3292, providing for the vacation of a verdict and a new trial where the verdict is found "by a resort to the determination of chance," the determination, to have such effect, must have been the means of inducing one or more jurors to assent to the verdict, and hence a resort to chance to obtain an average sum will not vitiate the verdict, if, notwithstanding, the jury afterward continue to deliberate in good faith, and finally arrive at their verdict as a result of such deliberation.

3. Affidavits of jurors in an action where defendant seeks to set aside the verdict for cause found by resort to chance considered, and held insufficient to establish the fact of a previous agreement among the jurors to abide by the quotient obtained by the process of addition and division of several sums as the amount of their verdict.

4. The burden of proof to show that the assent of one or more jurors was obtained by the determination of chance, or that it was in fact a chance verdict, is on the party assailing the same.

5. An average verdict is not objectionable where the jurors do not agree before voting to be bound by the result, but accept the average only after further deliberation and discussion as a fair and reasonable finding.

6. Before the question of negligence becomes one of law for the court, the facts shown by the evidence must be such as that all reasonable men must draw the same conclusions from them; and, if the facts proven are such as reasonable men may fairly differ about, the question of negligence is for the jury to consider.

7. In an action against a mining company for injuries to an inexperienced miner, claimed to be due to a failure to instruct him how to perform his services, evidence as to what the usual custom was that prevailed in the mines in Utah and at defendant's mine in respect to having an experienced miner work with one whom the employer knows to be inexperienced was admitted to show what precautions were generally taken in such cases, as bearing on the degree of care which defendant exercised for plaintiff's safety. *Held*, that the evidence was admissible for this purpose, without showing that the custom had been in existence long enough to constitute it a common-law custom.

Appeal from District Court, Summit County; C. W. Morse, Judge.

¶ 2. See *New Trial*, vol. 37, Cent. Dig. § 104.

¶ 5. *Archibald v. Kolitz*, 72 Pac. 935, 26 Utah, 226.

¶ 6. *Lowe v. Salt Lake City*, 44 Pac. 1050, 1051, 13 Utah, 91, 98, 57 Am. St. Rep. 708.

¶ 7. *Fritz v. Western Union Tel. Co.*, 71 Pac. 208, 25 Utah, 268.



Action by Charles E. Pence against the California Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Snyder & Wight, for appellant. Powers, Straup & Lippman, for respondent.

BARTCH, J. This action was brought to recover damages for personal injuries which the plaintiff alleges he received, because of the negligence of the defendant. It is alleged in the complaint, among other things, that the plaintiff, at the time of the accident which resulted in his injury, was a young man about 22 years old, wholly inexperienced as a miner, unfamiliar with drilling and blasting and the use of powder and fuse; that he applied to the defendant's foreman for work at its mine; that the foreman, knowing his inexperience, assigned him to work drilling and blasting alone in a tunnel, without giving him any instructions how to perform the service, or in the use of powder and fuse, or as to the dangerous character of the employment; that while so at work alone, during his first shift, in attempting to blast he used fuse which had been cut and capped, and had been pointed out to him by the foreman, and that the fuse being too short, one of the blasts went off, and caused the plaintiff's injuries, he not having had time to get out of the reach of danger. The answer avers that at the time of his employment the plaintiff represented himself as a skilled miner, denies the allegations of negligence in the complaint, and avers that the plaintiff's misfortune was the result of his own negligence, and that he assumed the risk of his employment.

While there is some conflict in the evidence as to knowledge of the foreman of the inexperience of the plaintiff, the preponderance thereof appears to sustain the allegations of the complaint on that point. Without referring to the evidence in detail, it is sufficient to say that it appears to support all the material allegations of the complaint, and the jury must have found such allegations to be true. This being a case at law, we are bound by the findings of the jury so far as the facts are concerned.

The appellant company, in the first instance, insists, however, that the jury arrived at their verdict by chance, and in seeking to set it aside and obtain a new trial invokes the aid of the statute, which, in section 3292, Rev. St. 1898, so far as material here, provides that a verdict may be vacated and a new trial granted for the "misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any questions submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors." Under the provisions of the statute a verdict of a jury may be set aside and a new trial granted in

any case where such verdict was found "by a resort to the determination of chance," and "such misconduct may be proved by the affidavit of any one of the jurors." The "determination of chance," however, to have such effect, must have been the means of inducing one or more jurors to assent to the verdict. It follows that the mere fact that the jury, in a given case, may, during their deliberations, have resorted to chance to obtain an average sum, will not vitiate their verdict, if, notwithstanding such sum, they thereafter continued to deliberate in good faith, and finally arrived at their verdict as a result of fair and honest deliberation, free of any inducement from the resort to chance. The burden of proof to show that the assent of one or more jurors was obtained to the verdict by the determination of chance, or that it was in fact a chance verdict, is upon him who assails the verdict.

The appellant, in support of its motion for a new trial, and to show that the jury returned a chance verdict, filed the affidavit of the juror Lawrence E. Eldredge, who did not concur in the verdict, wherein, so far as material here, it appears that, in the consideration of the case the jurors "first took a vote on the question as to whether or not there was a cause of action"; that "on this question seven of the jurors voted in the affirmative" and one "in the negative"; that "after some discussion it was proposed by one or more and consented to by the others of the seven who voted in the affirmative that a ballot be taken, each one writing on a slip of paper the amount of damages he thought the plaintiff entitled to, and the sum divided by seven to be the verdict"; that this was done, and resulted in the sum of \$14,400, the amount of the verdict; that "it was then suggested by one juror that the amount of damages be placed at \$14,000," which was rejected; that "another juror proposed that \$15,000 be the amount awarded," which was also rejected, it being contended that they had agreed to this method, and should stand by the agreement; and that the "verdict was then made up, and the amount \$14,400" written into it, which "amount they thus agreed they would award to the plaintiff by their verdict." The appellant also filed an affidavit from one of the concurring jurors, Wm. Beard, in which occurs the expression: "And the quotient obtained by this operation was, as by previous agreement, the amount awarded to the plaintiff as damages in said action." The use of this expression, however, in an affidavit made by the same affiant for the respondent, was explained as follows: "Since the making of said [first] affidavit my attention has been called thereto, and especially to the language therein used, 'And the quotient obtained by this operation was, as per previous agreement, the amount awarded, etc.' At the time I made the said affidavit I did not observe the said language above quoted, nor

notice the effect thereof, especially the words 'as per previous agreement,' for that it is not true that before said quotient was declared that there was any agreement or understanding that the said jury, or any member thereof, should be bound by such result as and for the verdict of the jury, but I, as well as each and every member of the jury, was at liberty to accept or reject the said amount; and I do not wish to be understood as saying or declaring that there was any previous agreement, or any binding effect on any juror, to accept said amount so derived by the said quotient amount, and to make that the verdict of the jury." In rebuttal the respondent filed the affidavits of the seven concurring jurors, including one from the juror Wm. Beard, in each of which, after stating what was done by them to obtain an average amount of what each respective juror thought ought to be the amount of the verdict, are contained statements as follows: "Before the said amount was thus ascertained, as aforesaid, there was no agreement or understanding of any kind that the said amount so resulting from said addition and division, as aforesaid, should be the amount of the verdict, nor was I or any of the jurors bound thereby, but I and each and all of the jurors was at liberty to accept or reject the said amount, or to add thereto, or subtract therefrom, as I or he thought fit and proper. After said amount was so found, as aforesaid, the same was then discussed by the said jurors, some expressing opinions that the verdict ought to be more than said amount, and in which said discussion we talked over the nature and the extent of the plaintiff's injury, and the permanency thereof, and took into consideration the loss of his leg, the substantial loss of one eye, the loss of his earnings, the pain and suffering necessarily attending his said injuries, the charge of the court, and we considered and discussed quite fully the said loss and injury in detail, and then, after such discussion, one of the jurors moved that the amount that had been found by the said addition and division, as aforesaid, be made the amount of the verdict, while yet another moved that the said verdict be made \$15,000; but finally it was agreed by the said concurring jurors to make the verdict the said amount of \$14,400, which was done, the said seven concurring members of the jury having no difficulty whatever in agreeing that a verdict should be rendered for the plaintiff, and most of the time the dissenting juror did not seriously contend against it. But we were considering and determining the amount of the said verdict for about, or close to, two hours, during which time we went over the subject-matter in all its situations, and had some difficulty in agreeing on the amount; but when we did finally agree to the said amount that was rendered as our verdict each and all of the seven concurring jurors expressed complete and entire satisfaction therewith."

From a careful examination of all the affidavits it is clear that the appellant has failed to establish its contention that the jury returned a chance verdict, or that there was a previous agreement among the jurors to abide by the quotient obtained by the process of addition and division of the said several sums as the amount of the verdict. Considering the facts stated in the various affidavits, we must assume that neither one of the concurring jurors was, or felt himself, bound by the result of the resort to the determination of chance. While such practice on the part of a jury must, under all circumstances, be discouraged as improper, still under the facts appearing in this case we cannot say that their misconduct was such as to vitiate the verdict. "The method of arriving at the amount of the fine, of the damages where they are unliquidated, or the length of the term of imprisonment in criminal cases, whereby each juror puts a number into a hat, and all the numbers so put in are added up and the sum divided by twelve, vitiates the verdict, where the jurors agree in advance to abide by the result. But it is otherwise where the amount which each juror puts into the hat is a mere proposition, and there is no previous agreement to abide by the result. The ground of objection to the jurors binding themselves in advance to the amount to be determined by addition and division by twelve is that such agreement cuts off all deliberation on the part of the jurors, and places it in the power of a single juror to make the quotient unreasonably large or small by naming a sum extravagantly high or ridiculously low. It is not material on what particular scheme of averages this 'quotient verdict' is devised; the vitiating fact is the agreement in advance to abide by the result." 2 Thomp. Tr. § 2602. In 22 Ency. Pl. & Pr. 856-858, it is said: "A jury is not allowed to substitute for the exercise of that deliberate judgment and reflection which the law requires any resort to chance devices, the contingent result of which is allowed to determine what its verdict shall be. If the jury in a civil or criminal case fixes the respective amounts of recovery or term of imprisonment by setting down the respective amounts or periods which each juror favors and dividing the aggregate by twelve, agreeing in advance to abide by the result, the verdict will be held invalid. But where there is no previous agreement to abide by the result so reached, the verdict will not be set aside. So it has been held that an averaged verdict was not objectionable where the jurors did not agree, before voting, to be bound by the result, but accepted the average only after further deliberation and discussion as a fair and reasonable finding." Hayne, New Trial, § 71; Archibald v. Kolitz, 28 Utah, 226, 72 Pac. 935; McDonnell v. Pescadero Stage Co., 120 Cal. 476, 52 Pac. 725; Hunt v. Elliott, 77 Cal. 580, 20 Pac. 132; City of Kinsley v. Morse,

40 Kan. 588, 20 Pac. 222; Knight v. Fisher, 15 Colo. 176, 25 Pac. 78; Watson v. Reed, 15 Wash. 440, 46 Pac. 647, 55 Am. St. Rep. 899; The St. L. & S. E. Ry. Co. v. Myrtle, 51 Ind. 566; Hamilton v. Des Moines V. R. Co., 36 Iowa, 31; Dodge v. Carroll, 59 N. H. 237.

The appellant also insists that the court erred in overruling its motion for a nonsuit, made at the close of the plaintiff's evidence. The motion was based upon various grounds, among them that the evidence did not show that the "defendant was negligent in setting the plaintiff to work in the particular place" where he was injured, or that it was the duty of the defendant to warn the plaintiff of danger in his employment; and that the evidence shows that the plaintiff was guilty of contributory negligence, and assumed the risk of danger incident to the employment. Considered in the light of the facts disclosed by the plaintiff's testimony, none of the grounds stated in the motion can be of avail to the appellant. Without referring to the evidence in detail, it is sufficient to say that the proof was ample to require the submission of the case to the jury, and therefore the court did not err in denying the motion. "Before the question of negligence becomes one of law for the court, the facts shown by the evidence must be such that all reasonable men must draw the same conclusions from them. If the facts proven are such that reasonable men may fairly differ as to whether or not there was negligence, the question is one for the jury to consider." *Lowe v. Salt Lake City*, 13 Utah, 91, 98, 44 Pac. 1050, 1051, 57 Am. St. Rep. 708. The facts in evidence when the plaintiff rested his case were so manifestly against the contention of the appellant in its motion for nonsuit, and the law applicable in such cases has so frequently been declared by this court, that an extended discussion of the various grounds of the motion herein is not deemed necessary or important.

At the trial there was some evidence introduced to show what the usual rule or custom was that prevailed at the mines in this state and at the defendant's mine in respect to having an experienced miner work with one whom the employer knows to be inexperienced. This evidence was objected to by the defendant upon the ground, among others, that it was not shown that such rule had prevailed for such a length of time as to give it the force of a common-law custom. The appellant complains of the action of the court in overruling the objections to such testimony. We perceive no error in the rulings in relation thereto. The evidence in question was not introduced for the purpose of showing that a technical common-law custom prevailed respecting the employment of inexperienced miners, although the word "custom" may have been used by counsel and witnesses in questions and answers. That proof was offered and admitted merely to

show what precautions were generally taken in such cases, as bearing upon the degree of care which the employer had exercised in regard to the safety of an employé whom he knew had no experience in the work he was to perform. For that purpose the evidence was admissible, without showing that the rule or custom had been in existence for the length of time required to constitute it a common-law custom. This court, as to objections to similar proof, held likewise in *Fritz v. Western Union Tel. Co.*, 25 Utah, 263, 71 Pac. 200.

A careful examination of all the questions presented in this case reveals no reversible error.

The judgment is affirmed, with costs.

BASKIN, C. J., and McCARTY, J., concur.

(12 Wyo. 389)

### SUMMERS v. MUTUAL LIFE INS. CO.

(Supreme Court of Wyoming. March 28, 1904.)

INSURANCE—APPLICATION—TIME OF TAKING EFFECT—REFUSAL TO ISSUE POLICY—ACTION TO RECOVER PREMIUM PAID—PLEADING.

1. That the petition in an action against an insurance company demands damages for the refusal of the company to issue a policy, on which the first premium has been paid, does not affect the right of the plaintiff to recover in that action the amount paid, as money had and received.

2. In an action against a life insurance company to recover back a premium paid, allegations that the company's agents were authorized to solicit contracts of insurance, to make contracts for policies, and to receive and receipt for premiums thereon, and that they were authorized generally to transact the company's business in the state, will not be construed, as against plaintiff, to allege that the agents themselves were to write and issue the policies, since, under the Code, pleadings are to be liberally construed, and the common-law rule that they are to be construed most strongly against the pleader is not applicable.

3. Where the plaintiff executed a note to an insurance company's agents in consideration of an agreement that the company should issue a life policy within a stated time, and the company, having received the proceeds of the note, neglected to deliver the policy, the plaintiff being without fault, he may consider the contract rescinded, and recover the sum advanced, as money had and received.

4. Where, on an application for a life policy, there was no agreement as to the time when the insurance should take effect, and a policy was to be issued after the applicant should have taken a medical examination, and it was agreed that a note given in payment of the first premium should not be negotiated till the policy should be delivered, the insurance would not take effect until the policy was issued.

Error to District Court, Uinta County; David H. Craig, Judge.

Action by William M. Summers against the Mutual Life Insurance Company. From a judgment sustaining a demurrer to the amended petition, plaintiff brings error. Reversed.

J. H. Ryckman, for plaintiff in error. T. S. Taliaferro, Jr., and John W. Lacey, for defendant in error.

¶ 3. See Insurance, vol. 28, Cent. Dig. § 460.

POTTER, J. To the amended petition filed in this action, containing seven causes of action, a general demurrer was sustained; and thereupon, the plaintiff declining to plead further, a judgment was rendered in favor of defendant for costs. Of that judgment, the plaintiff complains, and assigns as error the order sustaining the demurrer, and the rendition of judgment for defendant. If no error was committed in sustaining the demurrer, there is no error in the judgment. The demurrer being general to the entire petition, it follows that, if any one of the several causes of action is sufficient, the demurrer should have been overruled.

The first cause of action sets out: That in the months of February, March, April, and May, 1896, the defendant was engaged in the general life insurance business, as a life insurance company, and that A. B. Ragsdale and H. H. Wright were the authorized general agents of the defendant to solicit contracts of insurance in this state, to make contracts for policies of insurance, and to receive and receipt for money and premiums thereon, and generally to transact defendant's business in Wyoming. That on or about February 27, 1896, the defendant and said Ragsdale and Wright, as its agents, at Uinta county, in this state, solicited the plaintiff to contract for a policy of insurance on his life with said defendant company in the sum of \$10,000; said defendant and said Ragsdale and Wright representing to plaintiff that defendant greatly desired to have the plaintiff to become a patron of defendant company, and to take out a policy on his life in said company, and further representing that defendant intended making a general canvass among plaintiff's neighbors and friends to secure contracts of life insurance, and it would aid and facilitate defendant in securing such contracts to have the name of plaintiff as one of its patrons. That in consideration that the plaintiff would contract with the defendant, and with the said Ragsdale and Wright as the agents of the said defendant, for a policy of insurance with the defendant company in the sum of ten thousand dollars, and would then and there make, execute, and deliver to the defendant and the said Ragsdale and Wright, as the agents of the said defendant, the plaintiff's promissory note in the sum of \$454, payable in sixty-five days thereafter, in payment of the first annual premium on such policy of insurance, then and thereupon the defendant would issue to the plaintiff, as soon as said plaintiff should pass the necessary medical examination, and within sixty-five days from and after the said 27th day of February, 1896, and before said promissory note should become due and payable, a specially favorable life insurance policy, in the sum of ten thousand dollars, which said policy of insurance the defendant, and the said Ragsdale and Wright, as the agents of the defendant, in consideration

of the premises, then and there stated, promised, and represented to the plaintiff should contain, among other stipulations, promises, and agreements on the part of the said defendant company, the following provisions, to wit: (a) That if the plaintiff should live 10 years, and should pay to the defendant each year the sum of \$454, plaintiff should at the end of the 10-year period have the right and option to demand of the defendant, and the defendant would pay him, the full sum of \$10,000 in cash, or, if the plaintiff preferred, he should have the right to leave said sum of \$10,000 with the defendant, and receive from the defendant annually the legal interest thereon until such time as plaintiff wished to draw the same from defendant in cash; (b) that if plaintiff should not live 10 years, but should each year until his death pay the said annual premium of \$454 to the defendant, then and in that event the said sum of \$10,000 should be paid to the surviving wife of plaintiff in installments of \$500 per year; (c) that if plaintiff should pay to the defendant the annual premium of \$454 for 3 years, and should be unable to pay further, or become dissatisfied, plaintiff should then have the right to demand and would receive from the defendant the premiums paid by him to the defendant company in full, without interest. That said Ragsdale and Wright represented themselves, as agents, to have authority to make such specially favorable contract for said policy of insurance on behalf of the defendant; and the plaintiff, relying upon said representations and promises, and on the integrity and honesty of defendant and said agents, made, executed, and delivered to said Ragsdale and Wright, as the agents of defendant, his promissory note for \$454, payable to plaintiff's order in 65 days thereafter, and, at the request of said agents, indorsed the same in blank, and delivered it to Ragsdale and Wright, as defendant's agents, in full payment and satisfaction of the first annual premium upon said policy of insurance. "And said defendant, and said agents on the part of the defendant, then and there represented and promised to the plaintiff that said promissory note should not be sold, transferred, or negotiated by the defendant or the said agents before maturity, but should be held by and kept in the possession of said defendant until said special policy of insurance should be written and delivered by the defendant to the plaintiff, and should be by him found in all respects satisfactory to him, and in conformity to the said parol promises made by the defendant and its said agents, and should be by the plaintiff approved and accepted. That, in the execution and delivery of the foregoing promissory note, said contract for said policy of insurance between the plaintiff and the defendant was, upon the part of plaintiff, completed, and plaintiff thereby and in all other respects fulfilled his obligations, promises,

and agreements as to said policy of insurance, \* \* \* and passed said medical examination, but that the defendant, in disregard of its promises and agreements by it made as aforesaid, has failed and neglected, and still fails and neglects, to issue to the plaintiff said policy of insurance, though often requested so to do by the plaintiff." That said Ragsdale and Wright, as agents of defendant, in disregard and violation of said promises and contract for said policy of insurance, did on or about March 1, 1896, sell and discount said note to North & Stone, bankers at Evanston, Wyoming, and paid the proceeds thereof to the defendant, and that thereafter said North & Stone, claiming to be innocent purchasers of said note for value before maturity, made demand upon plaintiff for payment thereof, and plaintiff paid them the said sum of \$454 under protest. That plaintiff frequently made demand upon defendant that it issue to him said policy of insurance, but it has failed and neglected so to do. That thereupon plaintiff demanded the return of the said sum of \$454 paid by him for said policy of insurance, but defendant has refused and neglected to return the same, to plaintiff's damage in the sum of \$454, and interest thereon from February 27, 1896. A subsequent paragraph alleges, by way of special damages, that certain expenses were incurred by plaintiff for court costs and attorney's fees, loss of time, and mental annoyance; and the prayer is for the recovery of \$2,000 and costs of suit.

The other causes of action are based upon similar claims held by other parties against the defendant company, and assigned to plaintiff. The allegations as to those causes of action are substantially the same as the first above set out. There are some slight exceptions. For instance, the second cause of action is founded upon the claim of one George Finch, whose note was for \$438, given at the same time as the note of plaintiff, to mature October 1, 1896; and in his case, also, it is alleged that the policy was agreed to be issued before the maturity of the note, and was agreed to be held and not negotiated until the delivery and acceptance of the policy. In that cause of action the time when said Finch submitted to a medical examination is stated as having occurred in the month of March, 1896, and said examination is alleged to have been satisfactorily passed by him. If, therefore, the failure to allege in the first cause of action the date of plaintiff's medical examination is material, which we do not decide, the defect, if any, does not appear in the second cause of action; and the latter contains substantially all the averments above set out as contained in the first cause of action. In the sixth and seventh causes of action it is alleged that plaintiff's assignors therein named paid the premium in cash. We think it will be unnecessary to consider whether

that fact will make any difference in regard to the right of recovery. Those causes of action are more concisely stated. It is alleged that said agents solicited plaintiff's assignor to insure his life with defendant company, and to make a parol contract for a policy of insurance, and that the agents represented that defendant was prepared to issue a policy to said assignor, specially favorable to him, which should contain a certain provision, set out in the petition, among other provisions not set out, and that the first annual premium was paid in cash, and the medical examination was passed, but that defendant has failed and neglected to issue the policy. The damage alleged in the sixth cause of action is \$500, while the premium paid was \$193; and in the seventh cause of action the premium paid was \$211, and damages are claimed in the sum of \$500.

The theory of the petition seems to be that defendant is liable in damages for the breach of its contract to issue the policy of insurance. But if the measure of damages, assuming that the right of recovery is shown, should be held limited to the amount of the premium paid, or even a proportionate part of it, that would not warrant the sustaining of a demurrer, provided sufficient facts are set out to constitute a cause of action for the recovery of some amount. Notwithstanding the evident theory of the pleader, the petition would seem sufficient to support a judgment for money had and received, if sufficient for any purpose. Therefore we do not deem it very material upon the demurrer, to consider whether the amount sued for is recoverable, if at all, as damages for breach of contract, or as money had and received. Nor is it necessary to consider the measure of damages or the amount recoverable, unless, indeed, it should appear, as contended by counsel for defendant in error, that the only right shown, if any, is to recover nominal damages, merely, in which event, it is insisted, the judgment ought not to be reversed. In plaintiff's brief it seems to be admitted that the measure of damages is the premium paid.

Plaintiff's counsel maintain that whether the petition sets up a parol contract of insurance, or a contract to issue a certain kind of policy, is immaterial, but that a suit for specific performance or for damages was open to the plaintiff. He contends that parol contracts of insurance are valid, and that a policy is only evidence of the contract, which may exist in parol; citing *Ellis v. Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *Ruggles v. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674; *Insurance Co. v. Shaw*, 94 U. S. 574, 24 L. Ed. 291; *Ins. Co. v. Ins. Co.*, 7 Bush, 81, 3 Am. Rep. 301; *Angell v. Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Humphry v. Ins. Co.*, 15 Blatchf. 35, 12 Fed. Cas. 883, No. 6,874.

Counsel for defendant do not dispute the

principle laid down by those authorities, but rely thereon; contending that, as in the cases cited the insurance was held to be in force notwithstanding the policy had not issued, and the insured entitled to recover upon such oral contract for the loss which had been insured against and had occurred, so in this case the contract was in force, and, had the death of the insured occurred while so in force, recovery might have been had, regardless of the nonissuance or nondelivery of the policy. Hence it is argued that, upon the allegations of the petition, the plaintiff and his assignors were insured, the company had carried the risk of their deaths, respectively, and no recovery is permissible for a return of the premium paid, in the absence of a rescission of the contract, or a showing of absolute abandonment on the part of defendant, and that such rescission or abandonment, and demand for return of the premium, must have occurred before the premium had been earned. It is insisted that the petition, failing to show that the premium paid entitled the plaintiff or his assignors to insurance beyond the year for which it was paid, and to show a rescission or abandonment and demand within such year, does not present any right of recovery, since, for all that appears, the company fully earned the premium by carrying the risk agreed on for the full period required under the contract by the amount of premium paid. Defendant's counsel therefore treat the action as an action upon the contract, to the same effect as if the policy had issued, and as no loss was sustained, against which the contract insured, it is urged that no damages can be recovered, and that it would be impossible to aver a damage from a failure to have the evidence of his contract, because no loss covered by the contract was sustained, and the policy was never needed to enforce his contract. Counsel further argue that had demand been made shortly after the consummation of the oral agreement, and if upon such demand the defendant failed and refused to deliver the policy, then, under the present averments, no loss having occurred, the damages would be merely nominal.

The argument presents a question of considerable nicety. The great weight of authority sustains the proposition upon which counsel are agreed—that an oral contract of insurance may be valid, and, if completed by a meeting of the minds of the parties, the company will be liable for a loss occurring before the issuance and delivery of the policy. That result follows in case it is understood that the insurance is to date from the oral agreement. But it is not unusual for applications for insurance—particularly life insurance—to provide that the insurance shall not take effect until the delivery of the policy, and in such cases it is reasonably held that no risk is assumed until such delivery. Quite frequently it is provided in the application for life insurance, and occasionally for

insurance against loss of property by fire, that the insurance shall not become effective until the application shall be accepted by the home office or a principal officer of the company, or the application is made subject to a provision for such acceptance; and sometimes the agent has authority, and exercises it, to provide that pending acceptance or rejection the applicant shall be considered insured. Where acceptance or delivery is necessary to put the insurance into effect, there will, of course, be no risk until the things precedent agreed upon shall happen. Instances are to be found where the payment of premium is made a condition precedent to the consummation of the insurance contract or to the delivery of the policy. The rule is not, therefore, that every contract for insurance will authorize recovery in case of loss, in the absence of a policy, independent of other agreements or conditions. The agreement itself or the application may show that the contract was not one for present insurance, but for insurance to take effect in the future, depending upon some condition, such as the acceptance of the application or delivery of the policy, or upon the performance of some act, such as the payment of premium. Again, it is often a nice question whether the negotiations of the parties have resulted in a complete contract—whether there has been such a meeting of minds as to render nothing else necessary to completion of the agreement. And the difficulty usually encountered in attempting to recover for a loss occurring in the absence of a policy of insurance has been to establish the making of a complete and binding contract, as to which the policy would be but a mere memorial covering an agreement already fully and completely entered into. This has generally been an easier matter in cases of fire insurance than in insurance upon life, on account of the usual larger authority of fire insurance agents, the custom of such agents to issue policies already in their possession, and the greater facility with which such business is ordinarily conducted. It is probably safe to say that it is a matter of common knowledge that policies of life insurance are generally written at the home office, or at least by some principal officer, which also usually has the right of acceptance or rejection of the risk; and there is nothing in the petition in this case to show a different custom as to defendant. Indeed, the business is shown to have been transacted with agents, and the policy was thereafter to be written; and it is not to be assumed from any averment of the petition, we think, that the agents themselves were to write and issue the policies. Under the Code, pleadings are to be liberally construed, and the common-law rule that they are to be construed most strongly against the pleader is not applicable. *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933. Moreover, the petition does not charge any such authority in the agents, but, if anything, rather negatives it.

It is alleged that the agents were authorized to solicit contracts of insurance, to make contracts for policies of insurance, and to receive and receipt for money and premiums thereon, on behalf of defendant. The added averment that they were authorized generally to transact defendant's business in Wyoming might mean much or little under different circumstances. We think, in its connection, it is not to be construed as averring their authority to write and issue policies.

It is not entirely clear that, because an action may be brought upon an oral contract for insurance for a loss occurring before the issuance of the policy, an action may not be maintainable to recover the premium, or at least a proportionate part of it, if no such loss has occurred, upon the failure or refusal of the company to write and deliver the policy as agreed, or that in every such case the damage can be only nominal. That such is the law has been denied in a few cases where the direct question has been to some extent involved. In *Lawrence v. Griswold*, 30 Mich. 410, suit was brought upon a premium note for life insurance. The note provided that the policy should be void unless the note was paid at maturity. It was given for three months to the superintendent of agencies of the company. Defendant testified that he had never received any policy, and had received no consideration for the note. It seems that he endeavored to show that, as a part of the consideration of the note, he was to receive an appointment as agent for the company. That defense was ruled out. The plaintiff's testimony was to the effect that the policy had been sent to the company's agent, the payee of the note, and he had sent it, with the note, to another party, to be delivered on payment of the note. With reference to the point here made by defendant in error, Mr. Justice Christlancy, in delivering the unanimous opinion of the court, said: "If [under the agreement stated in the receipt] the payment of the premium by defendant below would have rendered the company liable for the amount insured, in case of death, as assumed by the court, but which we do not think entirely clear, in an action at law, at least, still, if the evidence shows, as we think it tended to show here, that what the defendant contracted for was a policy of insurance, instead of any such resulting liability, he was entitled to have what he contracted for, and was not bound to accept any such resulting liability as a substitute for the policy. A policy might be much better and more available to him than any such liability, to be shown only by evidence of all the circumstances. He might be able to assign a policy as security for a loan, but such doubtful or resulting liability would not be worth as much for this purpose, if for any other, as the policy itself; and the court erred in treating it as of equal value to the defendant, and denying to him the right of insisting upon what he had contract-

ed for." A judgment for the plaintiff on the note was reversed. The receipt referred to in the opinion acknowledged the receipt of the premium. There was a balance over and above the note and some cash paid, which balance, the receipt stated, was to be paid on delivery of the policy; and it was also recited therein that the policy was to be binding when the application is accepted by the company and policy issued, and, if no policy was written, said note and money were to be returned. In *Collier v. Bedell*, 39 Hun, 238, suit was brought to recover an insurance premium paid to the defendant as agent of an insurance company. Plaintiff contended that he had never received the policy or renewal receipt. Defendant insisted, among other things, that, as he was the agent of the company, his receipt of the money and the parol agreement to insure bound the company, and therefore that the plaintiff was in fact insured, although he never received any policy or renewal receipt, and hence he could not recover; citing *Ellis v. Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495. The court said: "Now, it may be true that if a fire had occurred, and the plaintiff had chosen to insist upon the facts of verbal agreement and payment, he might have recovered, even though the defendant had never delivered the policy or a renewal receipt. But he had a right to insist that the defendant should procure for him and deliver to him a policy, or, it might be, a renewal receipt. He was not obliged to rest on the verbal agreement when he had bargained for something more. He was left in uncertainty and insecurity, with no safe evidence on which to rely. \* \* \* The possession of the policy or the renewal receipt was of value. And the plaintiff ought, if his story be true, to recover what he paid." In a recent case decided by the Supreme Court of Iowa, the plaintiff sued to recover from a life insurance company the amount of several notes given by him and his assignors in payment of the first premium upon certain policies of life insurance applied for by the makers of the notes, respectively. In the case of the plaintiff and one of his assignors, policies had been delivered and returned, and the question was whether there had been an acceptance thereof by the insured. In the case of the other assignor of plaintiff, it was alleged that no policy was ever delivered to him. In regard to the cause of action based upon the note of that party, the discussion in the opinion is meager, so far as the question now under consideration is concerned. But it is said by the court as follows: "It will be observed that the issue tendered in the second count of the petition is predicated upon the allegation that there was an entire failure on the part of the defendant company to deliver a policy as applied for, and in payment of which the note was given. Counsel for appellant [the company] does not question the right of plaintiff to recover upon



proof of the matter alleged in said count." However, it appeared by the evidence that such a policy had in fact been issued, as applied for, and sent by mail, but the applicant refused to receive it from the post office and ordered it sent back. The court charged the jury upon this count that, if the company had not delivered the policy in a reasonable time, the applicant was not bound to receive it when it was tendered, and, if he did not accept the tendered policy, recovery could be had by the plaintiff for the amount of the note of such applicant. This instruction was held to be erroneous, on the ground that it was wholly foreign to the issues presented by the pleadings, since a failure to deliver was the only matter complained of, delivery was in fact made, and the subject of unreasonable delay was not suggested, except by the instruction. *Armstrong v. Mutual Life Ins. Co. (Iowa)* 96 N. W. 954.

Now, it is true that actions to recover in case of loss are maintainable where an application for insurance has been accepted, or an agreement to insure has been entered into, although no policy may have been delivered. While it is sometimes said that the action is in reality upon the contract of insurance, the same as though it had been brought upon an executed policy (*Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275, 45 N. E. 540), in other cases it has been held that the action is properly brought upon the agreement to insure; the damages recoverable in case of loss being the same as if based upon a loss under the policy. In other words, where loss has occurred by fire, in case of fire insurance, or where death has occurred, if it be an agreement for life insurance, the applicant for the insurance or the beneficiary may, upon showing a breach of the contract to insure, by failure to deliver the policy, recover as damages the same amount that would have been recoverable upon the policy, had it been issued. And it is usually held, where the company has failed to issue a policy, that recovery does not depend upon making proofs of loss in the manner and at the time which would have been required under the policy. *Campbell v. Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Commercial Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34; *Ellis v. Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *Humphry v. Ins. Co.*, 15 Blatchf. 504, 12 Fed. Cas. 884, No. 6,875; 1 *Joyce on Ins.* § 38. This general principle does not seem to be opposed by the case of *Hicks v. British Am. Assur. Co. (N. Y.)* 56 N. E. 743, 48 L. R. A. 424, cited by counsel for defendant in error. The rule laid down in that case was based entirely upon a consideration of the standard policy, which was required by statute to be used in all cases of fire insurance; and, in consequence thereof, it was held that a parol contract called for such a policy, whose terms were established by law. However, three of the justices dissented, holding that, notwithstanding

ing the legislative provisions for the standard policy, where none had been issued, and loss occurred, proofs of loss as required by such policy were not necessary as a condition precedent to recovery.

Again, it is well established that a parol agreement to insure may be specifically enforced in a court of equity by requiring the issuance of the policy as agreed, either before or after loss, and that in such a case the court, having acquired jurisdiction, will afford full relief by awarding proper damages in case of loss. *Taylor v. Ins. Co.*, 9 How. 390, 13 L. Ed. 187; *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34; *Commercial Mutual etc., Ins. Co. v. Union Mutual, etc., Ins. Co.*, 19 How. 318, 15 L. Ed. 636; *Wooddy v. Ins. Co.*, 31 Grat. 362, 31 Am. Rep. 732; 16 *Ency. L.* 853. It was said in *Commercial, etc., Co. v. Morris*, supra, that there would be no necessity for courts of equity to entertain jurisdiction to enforce specific performance if an agreement to insure was in legal effect the same as a contract of insurance. It is also held that, where a company delivers a policy different from that contracted for, the applicant may refuse to accept it, and sue to recover the premium paid. *La Marche v. Ins. Co.*, 126 Cal. 498, 58 Pac. 1053; *Mutual Life Ins. Co. v. Gorman (Ky.)* 40 S. W. 571; *Gentry v. Ins. Co.*, 15 Mo. App. 215; *Tift v. Ins. Co.*, 6 Lans. 198. And when a contract of insurance is void ab initio, or where the risk never attached, the premium paid may be recovered back as money had and received. *Waller v. Northern Assurance Co.*, 64 Iowa, 101, 19 N. W. 865, and cases cited.

There is a long line of decisions to the effect that if an insurer wrongfully refuses to accept a premium when it is tendered, or wrongfully declares a life policy forfeited, and refuses further to recognize it as an existing contract, such insurer is liable to the insured or the policy holder for the full amount of premiums paid, notwithstanding that the insurance may have been in force for some time. *Am. Life Ins. Co. v. McAden*, 109 Pa. 399, 1 Atl. 256; 3 *Sutherland on Damages* (3d Ed.) § 838, and cases cited. But a different rule is maintained by other courts, viz., that the insured is entitled to recover in such cases what is known in the life insurance business as the value of his policy; thus allowing him only the amount in excess of the value of the insurance earned by the company in carrying the risk. *Lovell v. Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423. The author of *Sutherland on Damages* considers this the more reasonable rule.

If there is any substantial foundation for a suit in equity for specific performance to enforce the issuance and delivery of the policy before as well as after a loss insured against, it would seem to necessarily follow that an action at law would lie under the same circumstances for the recovery of what-



ever damages may have accrued on account of the failure to issue and deliver the policy. And, in view of the various elements which ordinarily aid in determining the rate of annual premium upon a life insurance contract, we think it might be difficult, upon the averments in this case, to find justification for holding that nothing but nominal damages could be recovered. It appears that the entire premium was to be paid in the course of 10 years, although plaintiff's life might be prolonged beyond that period. It is not clear, therefore, that the court ought arbitrarily to conclude that the policy would possess no value after the year for which the premium was paid.

The time of the maturity of the note is stated in the petition, and it is alleged that the policy was agreed to be delivered before such maturity, and that it was agreed that the company should not sell the note before maturity, but should hold it until the policy should be written and delivered, and approved and accepted by plaintiff. It is also alleged that they did sell the note and appropriate the proceeds, and that the policy was never issued or delivered. In such case it is doubtful, to say the least, if a demand for the policy was necessary, the time for delivery being fixed by agreement. *Western Mass. Ins. Co. v. Duffey*, 2 Kan. 347. Demand, however, is alleged. It is urged that, as time of demand is not stated, it must be presumed to have occurred immediately before filing the petition; but the petition before us is an amended petition, and there is nothing in the record to show when the suit was instituted, or the original petition filed. If such a presumption attaches at all, it would refer to the commencement of suit, rather than to the time of filing an amended petition. If essential to defendant's case, it may require the petition in this respect to be made more definite and certain.

The plaintiff having executed and delivered a note to defendant's agents in consideration of an agreement that the defendant would issue and deliver to plaintiff a life insurance policy within a stated time, and the defendant having received and appropriated the proceeds of the note, and failed and neglected to deliver the policy, the plaintiff being without fault, we think, upon reason and authority, that the plaintiff would be entitled to consider the contract as rescinded by the defendant, and recover the sum advanced, as money had and received. *Chitty on Contracts*, 689; *Randlet v. Herren*, 20 N. H. 102; *Nash v. Towne*, 5 Wall. 680, 18 L. Ed. 527; *Carter v. Carter*, 14 Pick. 424; *Armstrong v. Mutual L. Ins. Co. (Iowa)* 96 N. W. 954; *Lawrence v. Griswold*, 30 Mich. 410; *Collier v. Bedell*, 39 Hun. 238; *Stillwell v. Ins. Co.*, 83 Mo. App. 215. Under the contract pleaded, the note was to be held until the delivery and acceptance of the policy. This event never occurred, if the averments be true. Chief Justice Shaw said in

*Carter v. Carter*, supra, that it is well settled that where one receives money to hold upon a condition, and the condition does not happen, whether through his own default or otherwise, or for a special purpose, and that purpose is not accomplished, the party receiving cannot conscientiously retain the money, and thenceforth holds it in trust for the party who paid it, and is bound, *ex aequo et bono*, to repay it on demand.

Should there be any reason to doubt the correctness of this view of the case, there is another consideration that leads to the same result, and clearly requires a reversal of the judgment. We are unable to assent to the proposition that the allegations of the petition show a completed contract of insurance, so that the defendant would have been liable, had death occurred during the period covered by the premium paid, or within any period, to pay the amount of the insurance to the beneficiary, and hence there is no showing that the plaintiff had received any benefit from the contract. In general, the principle is well settled that where the parties to a contract intend that it shall be closed and consummated prior to the formal signing of a written draft, the terms having been mutually understood and agreed upon, the parties will be bound by the contract actually made, although it be not reduced to writing; but, on the other hand, if the parties do not intend to close the contract until it shall be fully expressed in a written instrument properly attested, then there will be no completed contract until the agreement shall be put into writing and signed. The Supreme Court of Maine state the principle briefly as follows: "If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract. If, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed." And that court mentions some circumstances as helpful in determining which view is entertained in a particular case, such as whether the contract is one usually put in writing, whether there are few or many details, whether the amount involved is large or small, whether it requires a formal writing for a full expression of the covenants and promises, and whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. *Steamship Co. v. Swift*, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545; 9 Cyc. 280-282; *Hodges v. Sublett*, 91 Ala. 588, 8 South. 800; *Sanders v. Pottlitzer*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757; *Spinney v. Downing (Cal.)* 41 Pac. 797. This general principle has been frequently applied to insurance contracts. From the many cases denying the consummation of such a contract, upon particular facts, in the absence of a delivery or acceptance of the policy,

we cite the following, as illustrating the application of the principle, and somewhat persuasive upon the facts in this case: *Farmers', etc., Ins. Co. v. Graham*, 50 Neb. 818, 70 N. W. 386; *Dickerson's Adm'r v. Provident, etc., Life Assur. Soc. (Ky.)* 52 S. W. 825; *Harnickell v. N. Y. Life Ins. Co.*, 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150; *Insurance Co. v. Young's Adm'r*, 23 Wall. 85, 23 L. Ed. 152; *McCully's Adm'r v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782; *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34; *Rogers v. Ins. Co.*, 41 Conn. 97; *Stillwell v. Ins. Co.*, 83 Mo. App. 215. What are the allegations of the petition? In the first place, it is to be observed that the petition nowhere states that there was any agreement that the insurance would be in force before the issuance of a policy; nor is there any averment showing what, if any, agreement there was as to the time when the insurance should take effect. It is hardly to be assumed that it was understood to run from the date of the oral agreement, since the applicant was required thereafter to submit to a medical examination, and it was not then known whether he would be found to be an acceptable risk. But the controlling circumstance in this respect is the fact, as alleged, that, as a part of the oral contract, it was agreed that the premium note should not be transferred or negotiated, but should remain in the possession of the defendant, until the policy should be written and delivered, found to be satisfactory, and approved and accepted. Can there be anything clearer, if this averment be true, than that the plaintiff declined to rely upon the oral negotiations or promises, and insisted that, before the appropriation of the premium by the company, he should receive and accept the policy, and that he should find it to conform to the promises made by the agents? The conclusion seems irresistible that the plaintiff refused to be bound until the promises of the company's agents should be confirmed by the policy itself, and, if he was not bound, the company was not. *Insurance Co. v. Young's Adm'r*, 23 Wall. 85, 23 L. Ed. 152. There can be no doubt but that a life insurance company has the absolute right to insist that it shall accept an application and issue a policy before it shall be bound as an insurer. Neither can there be any doubt of the right of one desiring or applying for insurance to require a delivery to him, and acceptance by him, of the policy, before he will be bound. It is true, a negotiable note was executed for the first year's premium, but it was so executed and delivered upon condition that the representations of the agent would be confirmed by and expressed in a policy to be delivered to and accepted by the maker. It is to be said that in this country parties do not customarily procure life insurance for a limited period of time. These parties were not intending to contract for an insurance upon their lives for a few months or a

year, nor were they expecting that such insurance was to be based solely upon their oral negotiations with the agents. It is usual, if not universal, for a contract of life insurance to be at some time expressed in a written policy to be held by the insured or the beneficiary. A reasonable time is ordinarily required for the preparation and delivery of the policy, and it may happen in occasional instances that death occurs before the policy can be written and transmitted, and that under the stipulations of the parties the insurer will be liable. In this case, however, a time for delivery of the policy was stipulated, and provision was made for its acceptance before the right of the company to the premium should attach. We think that, had death occurred, the proposition could not have been successfully maintained, upon the present allegations, that there was a completed contract of insurance, so as to bind the company notwithstanding the failure to deliver the policy, at least as to plaintiff and those of his assignors who were in the same position. In the case of *Dickerson's Adm'r v. Provident, etc., Soc.*, supra, suit was brought to compel the delivery of a policy of life insurance on the life of the decedent, and to recover the amount thereof. It appears that, when the application for insurance was made, the decedent was undecided as to whether he would take it; and it was understood between himself and the agent that he could finally decide when the policy came, if his application was approved and accepted. It was accepted, and a policy issued and sent to the agent; being received by the latter before the death of the decedent. But it was never otherwise delivered. It was held that, as the decedent was under no obligation to take the policy when it came, there was no meeting of minds that is essential to the formation of every contract. In *Harnickell v. N. Y. Life Ins. Co.*, supra, the agent of defendant entered into an agreement with the plaintiff by which two policies of insurance subsequently issued by defendant were to be accepted by plaintiff only upon condition that certain other policies then delivered by plaintiff to the agent should be surrendered by him to the issuing companies, and their surrender value in cash paid to him, or paid-up policies given in exchange therefor, in either case in amounts satisfactory to plaintiff. The agent failed to make satisfactory arrangements as to the surrender of the other policies, and the action was brought to have it adjudged that he had the right to return the policies issued by defendant, and to obtain the surrender to him of certain notes and a check given by him. His right was sustained. The court said that an individual may refuse to be bound by a policy of insurance until he has absolutely received and accepted it.

The demurrer should have been overruled. For the error committed in sustaining it, the judgment will be reversed, and the cause re-

manded, with directions to the district court to overrule the demurrer. Reversed.

CORN, C. J., concurs. KNIGHT, J., did not sit.

(12 Wyo. 397)

STICKNEY v. HUGHES.

(Supreme Court of Wyoming. March 28, 1904.)

EXCHANGE OF LANDS—CONTRACT—CONSTRUCTION—VALIDITY—VIOLATION OF PUBLIC POLICY—BURDEN OF PROOF—RECOVERY OF PAYMENTS MADE—WAIVER OF RIGHT—PAROL EVIDENCE—VARIATION OF WRITTEN CONTRACT—TRIAL—OFFER OF PROOF.

1. A contract between plaintiff and defendant recited that they had exchanged lands, and that there was a difference of \$550 due defendant, and that plaintiff and wife executed two notes to defendant—first, a note for \$450; and, second, a note for \$550, payable after the first—and a mortgage securing the same. It was agreed that, if a pending contest between M. and N. in the Interior Department as to certain land should be decided in favor of M., plaintiff should pay defendant \$550, according to the terms of the note last described, and "in that event the said note together with the note first above described \* \* \* shall be delivered up to said party of the first part [plaintiff] and canceled; and if said note or any part thereof shall have been paid \* \* \* then the amount so paid shall be refunded." It was provided further that, if plaintiff procured and delivered to defendant a relinquishment of M.'s right to the land, both notes should be canceled, and that any amount paid thereon should be refunded. Should the contest be decided in N.'s favor, and plaintiff failed to procure a relinquishment from him, he was to pay both notes; and, if he procured such relinquishment, both were to be canceled and discharged. Both notes were paid in full, and the contest was decided in M.'s favor, but no relinquishment was procured. *Held* to entitle plaintiff to recover the amount of the \$450 note so paid.

2. In an action to recover the amount of the \$450 note, it was contended that plaintiff had waived his right to payments made after the decision. It was not shown, however, that he knew thereof when they were made, and they were necessary to prevent default in, and possible foreclosure of, the mortgage. Moreover, plaintiff had sold the mortgaged property, and the purchasers paid the note, as a part of the price. *Held*, that there was no waiver of the right to recover pursuant to the agreement.

3. Where an offer of proof is made as a whole, and some of the facts are admissible, and others inadmissible, the court is not bound to separate it and admit such parts as are competent, though, in its discretion, it may do so.

4. In an action by plaintiff to recover the amount of the \$450 note, evidence that made the obligation to refund depend on an event or situation or promise altogether at variance with the written contract, which was intended, as otherwise appeared, to embody the ultimate agreement of the parties, was inadmissible.

5. If a contract is void because of some infraction of public policy, it devolves on the party so claiming to establish it by competent evidence.

Error to District Court, Albany County; Charles W. Bramel, Judge.

Action by Lewallen Hughes against Martha E. Stickney. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. V. S. Groesbeck, for plaintiff in error.  
N. E. Corthell, for defendant in error.

POTTER, J. The plaintiff in error, Martha E. Stickney, was defendant below in an action brought by Lewallen Hughes, defendant in error here, to recover the sum of \$450 and interest, alleged to be due upon a contract entered into between the parties on April 2, 1898, at the same time that two notes were executed by Hughes and wife to Mrs. Stickney for \$450 and \$550, respectively. The claim asserted by the petition is the promise of Mrs. Stickney to refund any money that may have been paid upon the \$450 note, upon the happening of a certain event specified in the contract. The happening of that event and the payment of the note in full are alleged and conceded. But there is a dispute as to the construction of the contract. The material recitals and provisions of the contract upon which the cause of action is based are as follows:

"This memorandum, made this second day of April, 1898, between Lewallen Hughes, of the first part, and Martha E. Stickney of the second part, Witnesseth: Whereas, the said Lewallen Hughes and Tillie Hughes, his wife, have this day executed two certain notes, in favor of the party of the second part, copies of which said notes are as follows, to wit:

"\$450.00. Laramie, Wyoming, April 2 1898. For value received I promise to pay to Martha E. Stickney Four Hundred and Fifty dollars in installments as follows, to wit: On or before January 1st, 1899, One Hundred and Fifty Dollars: On or before January 1st, 1900, One Hundred and Fifty Dollars: On or before January 1st, 1901, One Hundred and Fifty Dollars, and with interest on each installment, after maturity thereof, until paid, at the rate of eight per cent per annum."

"\$550.00. Laramie, Wyoming, April 2 1898. For value received I promise to pay Martha E. Stickney Five Hundred and Fifty Dollars, on or before January 1st, 1902, together with interest thereon from January 1st, 1901, until paid at the rate of eight per cent per annum."

"And whereas, said Lewallen Hughes and Tillie Hughes have executed to said Martha E. Stickney a mortgage for the said sum of One Thousand Dollars conveying the following described lands, to wit: Lots numbered One (1), Two (2), and Six (6); The south half of the northeast quarter (S.  $\frac{1}{2}$  N. E.  $\frac{1}{4}$ ); the southeast quarter (S. E.  $\frac{1}{4}$ ) and the east half of the southwest quarter (E.  $\frac{1}{2}$  S. W.  $\frac{1}{4}$ ) all in section numbered six (6), Township 16 N., of Range 75 west, including the water rights pertaining thereto, all situate in Albany County, Wyoming; said mortgage being conditioned upon the performance by said Lewallen Hughes of the conditions, upon his part, of this agreement. And whereas, the said Lewallen Hughes and the said Martha

¶ 6. See Contracts, vol. 11, Cent. Dig. § 1760.

said Martha E. Stickney,

"Now, therefore, It is agreed between the said parties hereto that if the pending contest in the Department of the Interior, between Samuel B. Myers on the one hand, and Ole P. Nelson on the other hand, involving the following described lands, to wit.

"The west half of the southwest quarter (W.  $\frac{1}{2}$  S. W.  $\frac{1}{4}$ ); the northeast quarter of the southwest quarter (N. E.  $\frac{1}{4}$  S. W.  $\frac{1}{4}$ ); and the southwest quarter of the northwest quarter (S. W.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$ ); of section numbered Twenty-six (26), in Township 17 N., of Range 75 West, in Albany County, Wyoming.

"Shall be finally decided in favor of the said Myers, then the said party of the first part shall pay said party of the second part the said sum of Five Hundred and Fifty Dollars, according to the terms of the note last above described, and in that event the said note together with the note first above described for Four Hundred and Fifty Dollars, shall be delivered up to the said party of the first part and canceled; and if said note or any part thereof shall have been paid by the party of the first part, then the amount so paid shall be refunded to him by the party of the second part.

"Provided, that if the said Lewallen Hughes shall, in the event of the success of said Myers, procure from him and deliver to said Martha E. Stickney a relinquishment of all his right to said lands, then both of said notes shall be canceled and discharged and delivered up to said Lewallen Hughes, and any amount he may have paid thereon shall be refunded to him.

"And in the event that the said contest shall be finally decided in favor of the said Nelson, and the party of the first part shall fail to procure from him and deliver to the said party of the second part a relinquishment of all his right to said land, then the party of the first part shall pay the whole of said sum of One Thousand Dollars, according to the terms of said notes; and in the event of the success of the said Nelson, if the party of the first part shall procure and deliver to the said party of the second part a relinquishment, by said Nelson, of all his right to said land, then both of said notes shall be canceled and discharged and delivered to said party of the first part.

"And in any case, whenever the party of the first part shall have become entitled, under the terms of this agreement, to have the said notes delivered to him, the said mortgage shall be properly discharged of record."

Both notes mentioned in the contract were paid in full, and the contest proceeding referred to was finally decided in favor of Myers, but there is no showing or claim that his relinquishment was procured. Hence it is contended by the plaintiff in the suit that the liability of the defendant, Mrs. Stickney,

\$549.93 and costs, and she brings the case here on error.

In the first place, the parties differ in their interpretation of the contract. Counsel for Hughes contends that the contract clearly requires Mrs. Stickney to refund the money paid on the note for \$450 in the event of a decision favorable to Myers in the contest proceeding. On the other hand, it is urged on behalf of Mrs. Stickney that the contract is ambiguous, and so uncertain that it is incapable of enforcement, but that, if the provision relied on as furnishing a cause of action means anything, the money to be refunded is that paid upon the other note, and that the plaintiff mistook his cause of action.

It is evident that the contract does not set forth all the facts which induced the parties to enter into the various stipulations respecting the land in contest between Myers and Nelson. The interest, actual or supposed, of the parties to the contract in the result of that contest, is not disclosed by any recital in the written agreement, or by any evidence in the case, and hence there are no considerations outside the terms of the contract to aid in the interpretation of any doubtful provision. But if the provision upon which suit is based is to be regarded as ambiguous or doubtful, standing alone, we think the other provisions and the recitals of the contract furnish a clear key to its meaning. We entertain no doubt as to its proper interpretation. Indeed, while the agreement set forth in the particular provision in question may be somewhat obscurely stated, we do not think it subject to much uncertainty.

The contract recites that the parties have made an exchange of lands, and that there is a difference of \$550 due to Mrs. Stickney. A note for that amount was executed, and it doubtless represented the estimated difference. The inducement for the other note is not shown, neither is it material for the purpose of interpreting the contract. The agreements contained in the contract relate to the payment or cancellation of those notes, and they are made dependent upon certain specified contingencies. First, it is agreed that, should the contest result in a decision in favor of Myers, then the note for \$550 is to be paid according to its terms. There can be no possible misunderstanding of that stipulation. It is clearly and unequivocally expressed. The event referred to did happen, and therefore that note was to be paid, unless the relinquishment of Myers should be procured by Hughes and delivered to Mrs. Stickney, as provided in the succeeding paragraph. The relinquishment was not procured. Since it would be unreasonable, it is not to be supposed that the parties would have provided for the payment of the

graph, for its nonpayment or cancellation, or the return of the money paid, upon the occurrence of the same event. But the paragraph in question refers to both notes. The one already mentioned in this connection it is agreed shall be paid, and then it, together with the other note, shall be returned and canceled. It is clear to our minds that the \$550 note was to be returned upon payment, in the event specified, while the other note was to be delivered to the maker for cancellation, although unpaid. Its payment is not provided for in the disputed paragraph. It clearly follows that the note referred to in the latter part of the paragraph, where it is agreed that if the note is paid the amount shall be refunded, is the note for \$450.

A consideration of the other provisions assists in this interpretation. Four events or contingencies are mentioned: First, a decision in favor of Myers; second, a decision in favor of Myers, and the procurement of his relinquishment, and its delivery to Mrs. Stickney; third, a decision in favor of Nelson; fourth, a decision in favor of Nelson, and the procurement of his relinquishment, and its delivery to Mrs. Stickney. The agreements depending upon these respective contingencies are as follows: First, in case of a decision in favor of Myers, without his relinquishment, the payment of the note for \$550, the cancellation of the other note, and the refunding of the money paid upon the latter; second, in case of such decision, and the procurement of his relinquishment, and its delivery to Mrs. Stickney, the cancellation of both notes, or, if paid, the refunding of the money paid; third, in case of a decision in favor of Nelson, without his relinquishment, the payment of both notes; fourth, in case of Nelson's success, and the procurement of his relinquishment, and its delivery to Mrs. Stickney, the cancellation of both notes. We think the undertaking of the parties is clear and certain upon the face of the contract.

It appears that there was an interlineation made in the disputed paragraph before execution, and this seems to have been the cause of the different views of the agreement as maintained by counsel. As originally constructed, the meaning was plain, and clearly required the cancellation of the note for \$450, or its refunding, if paid, in the event specified. But evidently to avoid a misunderstanding in providing for its cancellation without specifically requiring the return of the other note upon its payment, the words "said note together with the" following the words "and in that event the" were inserted. The inserted words referred to the note for \$550, whose payment was provided for, and, in their relation to the rest of the clause, clearly imply that the note is to be delivered to Hughes upon payment, and hence that note cannot be the one alluded to by the agree-

for the interlineation, and it tended only to obscure the meaning. Nevertheless we conceive the entire provision to be intelligible.

It is contended that, since two of the payments on the \$450 note occurred after the decision in the contest case, the plaintiff, Hughes, waived his right to recover the amounts so paid. It is not shown, however, that Hughes knew of the decision when the payments were made. But it is doubtful if Hughes could have recovered at all until the payment of the note for \$550, and that was not due until January 1, 1902, nor was it paid before that time, so far as shown by the record; and in the meantime the payment of the installments on the other note was necessary to prevent default in, and possible foreclosure of, the mortgage. Moreover, Hughes had sold to other parties the lands mortgaged to secure the notes, who were to pay the incumbrance as part of the purchase price, and such purchasers did in fact pay the notes to Mrs. Stickney. We think that, at least on the showing made, there was no waiver of the right to recover on the agreement. We are inclined to the opinion that the mere payment after the decision, even with knowledge thereof, would not amount to a waiver, in the absence of other facts going to show the intention of the parties when the payments were made.

It appears from the testimony that the land in contest between Myers and Nelson was in the possession of Nelson for some time after the contract was made between the parties to this suit, and that Mr. Stickney, the husband of plaintiff in error, may have cut the hay thereon in 1899, or had a contract with Nelson for the hay. Mr. Stickney was called as a witness on behalf of the defendant on the trial, and he testified, over objection, that all points agreed upon between the parties to be put in the contract were not there. He was asked by defendant's counsel to state what material matter was omitted from the contract, and also whether there was any consideration for the agreement to refund, as set out in the petition. These questions were objected to on the ground that they were irrelevant, immaterial, and incompetent, and as tending to impeach the written contract without laying a proper foundation. The objections were sustained, and thereupon the defense made an offer of proof as follows: "Counsel for defendant offers to prove by the witness Mr. Stickney and the defendant, Mrs. Stickney, that the consideration of the \$450 note had entirely failed, and that there was no consideration to support said note; that the agreement as to consideration of said note was that the plaintiff, Hughes, should put the defendant, Stickney, in possession of the land which was in a contest case between Myers, mentioned in the contract, and one Nelson; that the said Hughes was to get a relinquish-

ment of said land from the said Nelson, who had a filing upon said land, and that relinquishment was to be delivered to Mrs. Stickney, the defendant. She was to have the right to cut the hay crop on said land from the time of signing the contract until the final determination of said land case. In case the defendant, Stickney, so cut said hay, and became the owner of it, then, in case the \$450 note was paid, it should be refunded. Defendant, Stickney, was not let into possession of said lands, nor did she cut the hay on said lands, under her arrangement with said Hughes, and the understood consideration for the return of said note in case the same was paid by said Hughes wholly failed. As soon as a release was obtained from Nelson by the plaintiff, Hughes, then this \$450 note was to be delivered to said Hughes." An objection to the offer was sustained on the ground that it was incompetent, irrelevant, and immaterial, and tended to vary a contract by parol evidence, and that the offer did not accord with the pleadings, nor support any issue offered or tendered by the answer. The rulings of the court upon the objections to the questions and the offer were excepted to, and were incorporated in the motion for new trial as grounds therefor. The overruling of that motion is assigned as error, and it is contended that the evidence offered was competent, and should have been admitted. In the first place, the offer is far from clear, and it is doubtful if its rejection would not be warranted on account of its vagueness of statement. See *Abbott's Tr. Br. (Civ. Jur.)* 231. An offer of evidence should be clear, and without vagueness or uncertainty. As we understand the contention, it is not attempted to introduce the offered evidence upon the theory that the contract made between the parties, as finally consummated, was partly in writing and partly oral; nor does there seem to be any warrant for that theory in the testimony. We think it apparent that, whatever the preliminary negotiations may have been, the parties intended to embody their ultimate agreement in the written contract. The attorney who was employed to draw the contract testified as a witness for the plaintiff below, and on cross-examination he was asked some questions respecting the conversations occurring between the parties when the contract was prepared and executed, and the effect of his testimony is opposed to the idea that any of the terms of the contract were allowed to rest upon merely oral agreements. The statement of the witness Stickney that all the points agreed upon to go into the contract were not incorporated in it does not overcome such effect, for it may well be that, as the attorney testified, the original plan was changed when it came to the formal execution of the contract in written form; and, as a general rule, all prior negotiations are held to be merged in the written contract, so that its terms may

not be varied or contradicted by oral evidence.

But the proposition advanced by the answer in this respect, and the contention now made, and evidently asserted on the trial, is that the proof offered was proper for the purpose of showing the true consideration of the promise to refund the money sued for. It is a familiar doctrine that parol testimony is not admissible to vary, contradict, add to, or qualify the terms of a written instrument. There are, however, some important modifications of that rule. And it is a principle as well settled, as the general doctrine above stated that parol testimony is admissible to show the circumstances under which the instrument was executed, or that it was in fact without consideration. *Fire Ins. Assoc. v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860; *Bradner on Ev.* 263; *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837. It may be said generally that fraud, intimidation, illegality, want of due execution, want of capacity, want or failure of consideration, or mistake, may be established by parol. *Bradner on Ev.* 263. The existence of a separate oral agreement as to any matter on which a document is silent, and not inconsistent with its terms, may be shown by such testimony, if the court can reasonably infer from the circumstances that the parties did not intend the document or contract to be a complete and final statement of the whole transaction. *Id.* Upon the subject of a separate oral agreement, the Supreme Court of the United States has said that the existence of such an agreement may be shown as to any matter on which a written contract is silent, and which is not inconsistent with its terms, if, under the circumstances of the particular case, it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. "But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself, upon its face, is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing." *Seitz v. Brew. R. Co.*, *supra*; *Greenl. Ev.* § 275.

While, as a general rule, it is competent to show by parol the consideration of a contract, especially where it is not specifically set forth in the contract, and that a stated consideration, even, may, under some circumstances, be shown to be something different, it is not, as said in a Massachusetts case, admissible for a party, "under the guise of showing what the consideration is, to prove an oral

or vary the stipulations of his written covenant." *Simanovich v. Wood*, 145 Mass. 180, 13 N. E. 391. See, also, *Diven v. Johnson*, 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308. We are now referring to cases where no fraud or mistake is shown, nor any other element of a similar nature.

Upon the face of the contract in the case at bar, the only consideration for the promise sued on seems to be the note itself. That, of course, is a sufficient consideration for the promise to cancel it, or refund the money paid upon it, upon the happening of a future event. But the circumstances are not explained in the contract which may have induced the execution of the note by the one party, and the agreement of the other to refund the money paid upon it in case the land contest referred to should be decided in a particular way. And we are inclined to the opinion that it would have been competent to show the circumstances attending the execution of the contract, and the relation of the parties, respectively, to the contest, or the land involved therein, which might have disclosed the inducement to the promise of plaintiff in error, and establish the failure of the true consideration for that promise. But it was not admissible to show an entirely different contract from that contained in the writing. The important question, therefore, is whether the offer made was of proof merely showing the consideration of the agreement and its failure, or of a contract or promise variant from, and inconsistent with, the written agreement. Had the offer been to prove an understanding that Mrs. Stickney was to be in possession of the land in contest between Myers and Nelson until the determination of the contest, and that, in view thereof, it was agreed that, upon the decision being favorable to Myers, the note should be canceled, or the money paid refunded, and that she did not have such possession, we think it might have been competent. But that is not the offer, nor the effect of the offer. Under the offer as made, the refunding of the money is not made dependent upon a decision in favor of Myers. The offer contains no mention whatever of that condition of the contract. An event entirely variant from that set out in the contract is mentioned as determinative of the liability of Mrs. Stickney to refund the money. Let us examine the offer, and see if this is not so. In the first place, proof is offered that Hughes was to procure a relinquishment from Nelson, and deliver it to Mrs. Stickney. That is contradictory of the contract. Under the terms thereof, Hughes does not agree to obtain such relinquishment. It was merely agreed in that respect that, in case he did procure the relinquishment from Nelson in case of a decision in his favor, his notes should be returned to him. But he did not obligate himself by the contract to secure the relinquish-

vary and contradict the writing, and its admission would have violated the rule forbidding the introduction of parol evidence to vary or contradict a written instrument. Where an offer of proof is made as a whole, and some of the facts included in the tender are admissible, and others are inadmissible, the court is not bound to separate it, and admit such parts as are competent, although, in its discretion, it may do so. The refusal to do so, however, will not be error. 1 *Thompson on Trials*, § 678; *Mundis v. Emig*, 171 Pa. 417, 32 Atl. 1135; *Smith v. Bank*, 104 Pa. 518; *Herndon v. Black*, 97 Ga. 327, 22 S. E. 924; *Mueller v. Jackson*, 39 Minn. 431, 40 N. W. 565; *Cincinnati, etc., R. Co. v. Roesch*, 126 Ind. 445, 26 N. E. 171; *Abbott's Tr. Brief (Civ. Jur. Tr.)* 231. In the offer of proof, the fact that Hughes was to obtain Nelson's relinquishment is stated to be a part of the consideration of Mrs. Stickney's promise to refund. There is no claim of mistake or fraud, and no relief by way of reformation is sought. Since that part of the offer was clearly inadmissible, the court was justified in rejecting the entire offer. It is not necessary, however, to sustain the ruling of the court upon that ground alone. The remainder of the offer, in our judgment, is open to the same objection. It was offered to show that Hughes agreed to place Mrs. Stickney in possession of the Myers-Nelson land, and that she should have the right to cut the hay crop on the land from the time of signing the contract until the final determination of the land contest, and that if she did cut the hay, and became the owner of it, then, in case the note had been paid, it was to be refunded. Thus it appears that the question of the decision was to be entirely eliminated from the agreement. The money was to be refunded in case Mrs. Stickney was placed in possession of the land, cut the hay on it, and became the owner of the hay, or Nelson's relinquishment was obtained. It would seem that the offer was to show that such was the contract, independent of the decision. Take the converse of the proposition submitted by the offer, and, if it be established as stated, Mrs. Stickney obligated herself to refund the money in case she had possession and cut the hay. No reference there to a decision of the contest case. Why, then, does she agree, in the contract, to refund in case the contest is decided in favor of Myers? The facts stated in the offer do not explain the reason for the promise sued on, any more than the contract. They would only tend to further confuse the case, if anything. Instead of disclosing a consideration, it shows another and different contract. The obligation to refund is made dependent upon an event or situation or promise altogether at variance with the provisions of the written contract. We think the evidence offered was not admissible, and hence no error was committed in its rejection.

violates the rules of the Land Department of the United States concerning the disposal of the public lands. But this charge is rather indefinitely made, and we can see nothing in the contract authorizing the presumption that the transaction between the parties was violative of any law or policy of the government relative to its public lands. The situation is not explained, and the court would not be justified in an inference that the parties were attempting to deal concerning the public lands in an illegal manner. It is true that the benefit expected to accrue to Mrs. Stickney by a decision in the land contest does not appear. But it is also true that the evidence offered by her fails to make that matter any clearer. If the contract was void because of some infraction of the policy of the government, it devolved upon the party so claiming to establish the same by competent evidence. There does not seem to have been any attempt to do so, and it is certain that the contract does not furnish sufficient evidence to authorize such a conclusion.

We are unable to perceive any error in the record, and the judgment will be affirmed.

CORN, C. J., and KNIGHT, J., concur.

(30 Mont. 148)

### LARGEY v. LEGGAT.

(Supreme Court of Montana. March 21, 1904.)

PARTITION SALE—PURCHASER AS TRUSTEE—EVIDENCE OF TRUST—PLEADINGS AND FINDINGS—VERBAL AGREEMENT—MERGER IN WRITTEN CONTRACT—ATTORNEY IN FACT—SIGNATURE TO CONTRACT—EFFECT AS TO LIABILITY—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.

1. Civ. Code, § 2186, provides that the execution of a contract in writing, whether required to be in writing or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied its execution, and hence evidence of negotiations and conversations immediately preceding the execution of a written contract is incompetent to show an agreement concerning its matter made by one claimed to be bound thereby.

2. One who signs a contract only as attorney in fact for a party thereto is not bound by the contract, and it has the same effect, so far as an action against him based thereon is concerned, as if the party had signed only his own name thereto.

3. By agreements between defendants in partition and L., the latter agreed, by himself or agent, to buy in the property at the sale in his own name, and hold it for the former, to whom he was to reconvey the same, or a part thereof, as he should elect, on being reimbursed for the cost and expenses. One agreement was signed for one of the defendants by an attorney in fact, who afterwards bought the property at the sale in his own name, but who did not otherwise sign either agreement. *Held*, that the agreements did not establish a trust relation between the purchaser and L., who claimed that the property was bought for him.

4. Pleadings alleging that a trust relation was created between parties in question by virtue of written agreements do not support conclu-

the pleadings or the evidence as to a contract to purchase property for another at a partition sale whether the purchaser was to furnish the money or not, or whether he was to take the deed in his own name or otherwise, neither would support a decree for specific performance on the part of the purchaser.

6. An oral agreement by a purchaser at a judicial sale to take the deed in his own name, and convey to another, is void, as within the statute of frauds (Civ. Code, § 2342).

7. The agreement cannot be taken out of the statute, and enforced against the purchaser as a trustee *ex maleficio*, to prevent the perpetration of a fraud, where neither party had any interest in the property, and no money was advanced to the purchaser, or anything done towards carrying the agreement into effect.

8. Findings not within the issues made by the pleadings will not support a decree.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Suit by P. A. Largey against John B. Leggat. Before the trial, plaintiff died, and Lulu F. Largey, his administratrix, was substituted; and from a decree in favor of the latter, and from an order denying a new trial, defendant appeals. Reversed.

P. A. Largey brought suit in the district court of Silver Bow county to have the defendant declared to be a trustee, and to hold in trust for the use and benefit of plaintiff certain mining property, known as the "Gray Eagle Fraction Lode Claim," and to compel conveyance of such property to him. The complaint alleges that in 1896 plaintiff, Largey, entered into a contract with O'Rourke, Clark, and Ruth F. Leggat, three owners in the Gray Eagle claim, by the terms of which he agreed that he would attend a partition sale of that property, which had been ordered by the court in an action entitled "Murray v. Clark et al.," and, in the event no bid was made on the property in excess of \$7,000, he would, individually or by his agent, bid in the property, and pay for it with his own funds, taking the title in his own name, in trust, however, for the parties. O'Rourke, Clark, and Ruth F. Leggat; that in pursuance of such contract he (plaintiff) entered into an agreement with defendant, John B. Leggat, by the terms of which defendant agreed to attend such sale and make bid for and purchase said property as the agent of plaintiff; that, relying on the agreement with defendant, plaintiff did not attend the sale or make other arrangements; that defendant attended the sale and purchased the property for \$5,500, and such sale was confirmed; that defendant then repudiated the agreement referred to above, and claimed that he acted for himself in purchasing the property, took the deed therefor in his own name, and threatens to sell the property; and that plaintiff tendered to defendant the purchase price of the property. The prayer is that defendant be enjoined from disposing of the property; that he be adjudged to be a trustee, and to hold the same

¶ 2. See *Principal and Agent*, vol. 40, Cent. Dig. § 478.



To this complaint defendant filed an amended answer, which denies that defendant ever entered into any agreement with plaintiff to act as his agent, or to attend the partition sale, or to bid in the property for plaintiff, and denies that plaintiff was not represented at such sale, but avers that plaintiff did have a representative at the sale, who bid on the property for plaintiff. The answer then alleges that no agreement in writing was ever executed between plaintiff and defendant whereby defendant agreed to act for or as agent of plaintiff, or ever agreed to attend such sale, or bid on or purchase said property for plaintiff, or make any conveyance of such property to plaintiff. In reply, plaintiff denies that no contract in writing was ever made, but alleges that two such contracts were entered into by defendant with plaintiff relative to the sale and bidding in of said property, whereby a relation of trust and confidence was created between plaintiff and defendant, and whereby defendant was bound not to act in hostility to plaintiff in bidding on said property.

The cause was tried to the court without a jury, and at the conclusion of the trial the court made certain findings of fact and conclusions of law, and entered a decree against defendant. A motion for a new trial was made and overruled, and from the decree and order overruling defendant's motion for a new trial he appealed. Before the trial, P. A. Largey died, and his administratrix was substituted.

Carpenter, Day & Carpenter, for appellant. McBride & McBride and Bernard Noon, for respondent.

HOLLOWAY, J. (after stating the facts). Notwithstanding the purpose of the action, so far as indicated by the prayer of the complaint, it is very apparent from the pleadings that the only issues raised were: (1) Did plaintiff and defendant enter into an agreement whereby defendant promised to act as agent for the plaintiff in attending the partition sale, or in bidding for or purchasing the property in controversy? (2) If such agreement was made, was it in writing? And (3) if in writing, did it constitute defendant a trustee of the plaintiff?

In support of his contention, plaintiff offered in evidence the written agreement entered into between himself and O'Rourke, H. S. Clark, and Ruth F. Leggat. This agreement, after reciting that a suit in partition had been commenced by James A. Murray and others, who were owners of  $\frac{3}{8}$  of the Gray Eagle fraction lode claim, against O'Rourke, Clark, and Ruth F. Leggat, who were the owners of the remaining  $\frac{1}{8}$ ; that a decree in partition had been rendered; and that a sale of the property had been ordered for June 12, 1896, at 2 o'clock p. m.—then provides that Largey should attend the

less than \$7,000; that, in the event Largey's bid for any sum less than \$7,000 should be accepted, he should advance the money necessary for paying for the interest in the property owned by Murray and his coplaintiffs in the partition suit; that the deed for the entire property should be taken by Largey in his own name; that he should then have one year in which to elect whether or not he would retain for himself the  $\frac{9}{16}$  interest formerly owned by Murray and others, and, in the event he did so, O'Rourke, Clark, and Ruth F. Leggat were to repay to Largey their proportionate shares of the cost and expense, with interest at the rate of 1 per cent. per month, and, in the event he did not so retain that interest, then O'Rourke, Clark, and Ruth F. Leggat were to pay the amount of the purchase price of such property, together with costs and expenses, and interest thereon, and, in either event, receive deeds for their respective portions of the property. The foregoing are the only provisions of the contract material to this controversy. This agreement was entered into on the 12th day of June, 1896, about 12 o'clock noon, and was signed by Largey, O'Rourke, H. S. Clark, and Ruth F. Leggat, by John B. Leggat, her attorney in fact; John B. Leggat being the defendant in this action. Over the objection of defendant, witnesses were permitted to testify on behalf of the plaintiff to certain negotiations and conversations had at the meeting on June 12th, when this contract was entered into, but before it was executed, to the effect that the parties, O'Rourke, one McConville, who seems to have had some interest in the same share as that represented by O'Rourke, and H. S. Clark, agreed among themselves that defendant, Leggat, should attend the partition sale and bid for the property for the use and benefit of all of them and of Largey, and that Largey also agreed to this arrangement; that, after this agreement was finally concluded, the foregoing written agreement was executed. Defendant now complains that all of this testimony was incompetent, for the reason that whatever conversation was had or verbal agreement made was merged in the written contract executed thereafter, and in this we think the defendant is correct. Section 2186 of the Civil Code provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Disregarding this incompetent testimony, then, we observe that there is nothing whatever in the written contract of June 12, 1896, which binds the defendant, Leggat, to do anything. In fact, the agreement is not signed by Leggat. The mere fact that the signature appears, "Ruth F. Leggat, by John B. Leggat, her atty. in fact," does not bind the defendant in this ac-

tion at all. The agreement has the same effect, so far as this action is concerned, as if Ruth F. Leggat had signed her own name, and none other.

Plaintiff also offered in evidence what is designated in the record as the supplemental agreement, which is a mere memorandum in writing, signed by P. A. Largey only, whereby Largey agreed that in the event his bid for the property should be accepted, and he should not elect to retain for himself the  $\frac{2}{5}$  Murray interest, then he would execute to Ruth F. Leggat a deed for the  $\frac{2}{5}$  which she then owned, and her proportionate share of the  $\frac{2}{5}$  Murray interest, upon her paying to Largey her proportionate share of the purchase price, costs, and expenses, and that in no event should Ruth F. Leggat be held to assume any part of the  $\frac{2}{5}$  Murray interest over and above her pro rata share thereof. The purpose of the execution of this agreement is not apparent; neither is its materiality in the trial of this cause.

There is some testimony in the record which tends to show that, prior to June 12th, Leggat had agreed with Largey that he would attend the sale and represent Largey in bidding for and purchasing the property; that he also suggested that one Morgan should also attend the sale and bid in conjunction with him. Leggat denies that he ever entered into any agreement with Largey whatever, but says that Largey selected Morgan to act for him at the sale, and that he (Leggat) informed Largey that he intended to bid for himself at such sale. The testimony is undisputed that Leggat, Morgan, and Will. L. Clark, private secretary to P. A. Largey, all attended the sale; that both Morgan and Leggat made bids for the property; that Leggat's bid for \$5,500 was accepted as the highest bid; that after the sale Leggat paid to the referee 10 per cent. of the purchase price required by the order of sale; that Largey offered to pay this money himself, but his offer was declined by Leggat; that afterwards, and before the commencement of this action, Largey made tender of the whole amount of the purchase price to Leggat, and also to the referee, and demanded from each that the deed be made to Largey, which offer was declined, and demand refused.

Upon this evidence the court made a large number of findings of fact. After finding the respective interests of the parties in the property prior to the date of the sale, and the fact of the impending sale, and execution of the agreement between Largey, O'Rourke, Clark, and Ruth F. Leggat, the court finds (4) that the parties to that agreement selected defendant, John B. Leggat, to attend the sale and to bid in the property for the use and benefit of all of the parties to that agreement, and that Leggat agreed to attend the sale as agent of Largey, and to bid on the property for the use and benefit of all the parties to that agreement; (5) that

Leggat arranged with Morgan to attend the sale, and in conjunction with him bid for the property for the benefit of the parties to such written agreement; (6) that Morgan and Leggat did attend the sale, and did bid for the property for the use and benefit of all the parties to said written agreement; that Leggat's bid of \$5,500 was accepted, and that Leggat then and there paid to the referee, for the use and benefit of the parties to said written agreement, 10 per cent. of his bid, to wit, \$550; (7) that Leggat, in violation of his agreement to act for, and bid in the property for the use and benefit of, the parties to the written agreement, took the deed in his own name; (8) that, before the deed was executed, Largey, for the use and benefit of all the parties to said written agreement, tendered to the referee the purchase price of the property, which was refused; and (9) that he likewise tendered the amount to John B. Leggat, which was refused. The court then finds the respective interests of O'Rourke, H. S. Clark, and Ruth F. Leggat, and concludes with finding No. 19, which is as follows: "That the allegations and averments of plaintiff's complaint are true, and all the denials and allegations of defendant's answer are untrue." As conclusions of law, the court finds that, at the time that Leggat bid for the property in controversy, he was the agent of, and as such occupied a fiduciary relation towards, P. A. Largey, O'Rourke, Clark, and Ruth F. Leggat; that it would be inequitable to permit Leggat to make use of his agency for the purpose of depriving his principals of their property, and securing it for himself; that Leggat became, and is now, a trustee ex malificio, and by reason of said trust holds the title he obtained by the referee's deed for the use and benefit of Largey, O'Rourke, Clark, and Ruth F. Leggat; and that the plaintiff, as the trustee of the express trusts set out in the written agreement made between Largey, O'Rourke, Clark, and Ruth F. Leggat, is entitled to a judgment and decree directing the defendant, Leggat, to make, execute, and deliver to the plaintiff a deed for the property in controversy.

The findings are not supported by the pleadings, and, if the incompetent testimony be disregarded, are not supported by the evidence. If the purpose of this action is to have the defendant declared to be a trustee of the plaintiff, then the pleadings do not sustain the findings or decree. The reply, which is the only pleading containing any allegations which would tend to show that defendant became such trustee, alleges that such relationship was constituted by virtue of two written agreements. The only agreements offered in evidence were the original agreement between Largey, O'Rourke, H. S. Clark, and Ruth F. Leggat, and the supplemental agreement between Largey and Ruth F. Leggat, neither of which was signed by the defendant, and neither of which mentions him

giving them their broadest significance, they fall far short of establishing or tending to establish the relationship of trustee and cestui que trust as between Leggat and Largey.

As one of the conclusions of law, the court declared the defendant to be trustee *ex maleficio*, and that he holds the property in controversy in trust for the plaintiff, O'Rourke, Clark, and Ruth F. Leggat; but such a conclusion has no support in the pleadings whatever. It may be a fact that defendant obtained certain information, from his being present with those parties, which, in equity and good conscience, he should not be permitted to make use of for his own benefit; but there is no allegation whatever in the complaint that defendant did any such thing, or that he was in fact present with the other parties named, or obtained any information from them, or that any relationship of trust or confidence could have been created between them. As we have said, the only allegations with reference to that subject are found in the reply, and those allegations are that the relationship of trustee and cestui que trust was created between Leggat and Largey by virtue of two written agreements; and, as we have observed, those agreements show nothing of the kind whatever. At most, the competent testimony tends to show that, by oral agreement, Leggat undertook to act as agent for Largey in attending the sale and in bidding for the property, and that testimony tends to support the theory of the plaintiff as disclosed by the pleadings. But neither the pleadings nor this evidence would support a decree for specific performance, for the reason that the terms of the contract are too indefinite. It cannot be determined whether Largey was to furnish the money, or whether Leggat was to do so—whether Leggat was to take the deed in the name of Largey, or in his own name and transfer the property to Largey. If the contract was that Leggat was to take the deed in his own name and convey to Largey, then it is void, as within the statute of frauds (section 2342, Civ. Code); *Bauman v. Holzhausen*, 26 Hun, 505. Cases may be found where the contract has been taken out of the statute of frauds, to prevent the perpetration of a fraud, where one who has an interest in land which is about to be sold agrees with another that the other shall bid the property in, and hold it as security for money advanced, and that agreement has been consummated, or, in other instances, where there has been a part performance of the verbal agreement. And there are cases in which persons somewhat similarly situated as the defendant in this case have been made trustees *ex maleficio* of the property which they purchased at sales pursuant to parol agreements with others who were the owners, or had some interest therein, to buy for such persons' benefit. But in these cases the parol agreement was taken out of the statute of frauds to

whereby the owner of the whole or some interest in the property would be deprived of such interest, which it was the object of the parol agreement to protect. *Bauman v. Holzhausen*, *supra*. But in this instance neither Largey nor Leggat had any interest in the property. Largey advanced no money—in fact, did nothing towards carrying the verbal agreement into effect. Upon this subject the Supreme Court of New York said: "But no case can be found where a contract has been taken out of the statute, in favor of a party who had no existing interest in the property, who had done no act of part performance, who had parted with nothing under the contract, simply upon the ground that the other party was guilty of a fraud in refusing to perform his verbal agreement. That is all there is of this case, except the offer of performance by the plaintiff. To hold that to be sufficient to take the case out of the statute would repeal it. Care must be taken that this is not done under an idea that, as the statute was enacted to prevent fraud, it cannot be applied to cases where it appears that, in a moral sense, a party is attempting to perpetrate a fraud. A party in no legal sense commits a fraud by refusing to perform a contract void by its provisions. He has not, in that sense, made a contract, and has a perfect right, both at law and in equity, to refuse performance." *Levy v. Brush*, 45 N. Y. 599. At most, the complaint alleges, and the proof tends to show, only a violation of a parol agreement on the part of an agent; and the one gives rise to, and the other supports nothing more than, an action for damages for the breach of such contract, and this is not such an action.

The findings are not within the issues made by the pleadings, and will not support a decree. *Dutro v. Kennedy*, 9 Mont. 101, 22 Pac. 763; *Harris v. Lloyd*, 11 Mont. 390, 28 Pac. 736, 28 Am. St. Rep. 475. If it be said that finding No. 19, above, is responsive to the issues, then, as observed before, the evidence is insufficient to support that finding, even assuming that the terms of the contract are pleaded with sufficient certainty.

The judgment and order are reversed, and the cause remanded, with directions to the district court to set aside the findings heretofore made, and to enter judgment for defendant for costs. Reversed and remanded.

BRANTLY, C. J., and MILBURN, J., concur.

(30 Mont. 111)

MORRISON v. ORNBAUN et al.

(Supreme Court of Montana. March 14, 1904.)  
PROMISSORY NOTE—COLLECTION WITHOUT  
SUIT—RIGHT TO ATTORNEY'S FEES.

1. Civ. Code, § 3996, as amended (Sess. Laws 1899, p. 124), declares that a negotiable instru-

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. § 272.

act (Sess. Laws 1903, p. 231) provides that the sum payable is certain, within the meaning of the act, though it is to be paid "with costs of collection or an attorney's fee." *Held*, in view of these provisions, that a note made payable with reasonable attorney's fees entitles the holder to collect such fees, where the note is not paid at maturity, and it is placed in the hands of attorneys for collection, though it is not sued.

2. The right to collect attorney's fees pursuant to the provisions of a mortgage note, where the note is not paid and is placed in the hands of attorneys for collection, though the note is not sued, is not controlled by a stipulation in the mortgage for such fees in case of suit.

**Commissioners' Opinion.** Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Action by Mary A. Morrison against Maggie M. and Breck Ornbaun. From a judgment for plaintiff, defendants appeal. Affirmed.

Plaintiff commenced this action to obtain judgment against defendants for the sum of \$200, alleged to be due upon a promissory note, together with an attorney's fee, and for the foreclosure of a mortgage given to secure the payment of the note. The district court sustained plaintiff's demurrer to defendants' amended answer. Defendants have appealed. The note reads as follows: "One year after date we jointly and severally promise to pay to the order of Mary A. Morrison Two Hundred Dollars for value received. Negotiable and payable at the Judith Basin Bank in Lewistown, Montana, with interest from date at the rate of twelve per cent. per annum until paid, and reasonable Attorney's fees. The makers and endorsers hereby waive presentment, demand, protest and notice thereof." The mortgage provided for the payment of the "costs and charges of foreclosure suit, including reasonable counsel fees to be fixed and allowed by the court." Some months after the maturity of the note, and prior to the commencement of this suit, Messrs. Cort & Worden, attorneys for plaintiff, in whose hands the note had been placed for collection, demanded payment thereof from defendants. Thereupon defendants tendered to said attorneys the amount of principal and interest then due on the note, together with \$17 which plaintiff had paid out for insurance on the mortgaged property, amounting to \$251 in all. The attorneys demanded in addition thereto the sum of \$20 as an attorney's fee. This sum the defendants refused to pay. In order to keep their tender good, they deposited the \$251 in the Judith Basin Bank to plaintiff's credit, and gave her notice thereof, as provided by section 2035, Civ. Code. The defendants pleaded this tender in their amended answer.

Blackford & Blackford and F. W. Mettler, for appellants. Cort & Worden and H. S. Hepner, for respondent.

for the collection of the note? Counsel for defendants contend that the attorney's fee was payable only in the event of suit brought to enforce collection of the note. The precise point has not heretofore been before this court. *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Pac. 291, 14 L. R. A. 588, 28 Am. St. Rep. 461, and *Stadler v. First National Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582, were cases construing the negotiability of notes containing stipulations providing for the payment of attorney's fees in the event of suit. It has been a mooted question as to whether stipulations for the payment of attorney's fees in addition to the amount of the principal and interest due on the note are valid. A majority of the courts seem to hold the affirmative, while others say such contracts are usurious and against public policy. See discussion in note to *Kittermaster v. Brossard*, 55 Am. St. Rep. 437; *Stanford v. Coram*, 26 Mont. 285, 67 Pac. 1005. When the note was executed, and at the time of the trial, the contract was controlled by the terms of section 3396 of the Civil Code, as amended (Sess. Laws 1899, p. 124), which prescribes: "A negotiable instrument may contain a pledge of a collateral security, with authority to dispose thereof, also a provision for reasonable attorney fee or both." The terms of the section imply that the attorney's fee may be collected without suit, because it provides that the negotiable instrument may contain a pledge of collateral security, with authority to dispose thereof, and this, of course, means without suit. The payment of the attorney's fee provided for in the note now in litigation is recoverable only in case the note be not paid at maturity. Such is the evident and reasonable interpretation of the language employed. The note is payable one year after date, with interest from date. Presentment, demand, protest, and notice are waived. "On the principle of *noscitur a sociis*, it clearly follows that the agreement to pay attorney's fees could only become operative after the bill had been dishonored." *Farmers' National Bank v. Sutton Mfg. Co.*, 52 Fed. 191. 3 C. C. A. 1, 17 L. R. A. 595. Incidentally it is well to note that the Legislature, since the case before us was tried in the court below, has passed an act intended to establish a law uniform with the laws of other states relating to negotiable instruments. Section 2 of the act provides that the sum payable by the terms of a negotiable instrument is certain, within the meaning of the act, although it is to be paid "with costs of collection or an attorney's fee, in case payment shall not be made at maturity." Sess. Laws 1903, p. 237. Almost the identical question now presented to the court was passed on in *Monroe v. Staser* (Ind. App.) 32 N. E. 563. In that case the court held that an agreement to pay attorney's fees cov-

of the note, made necessary by the default of the maker, whether suit be brought or not. On rehearing the first decision was approved. *Monroe v. Staser* (Ind. App.) 33 N. E. 665.

In the case at bar it is disclosed by defendants' amended answer that Messrs. Cort & Worden were attorneys for plaintiff; that, prior to the time the tender was made, they demanded payment of the note from defendants; that the note was long past due; and that the defendants did not tender any sum whatever as an attorney's fee. Inasmuch as defendants failed to tender any sum as an attorney's fee, we are not called upon to express an opinion as to whether the fee demanded by the attorneys for plaintiff was a reasonable one; nor is it contended by defendants that Messrs. Cort & Worden are not attorneys at law, and we therefore need not determine whether the word "attorney" means any other attorney than an attorney at law. Attorneys at law usually undertake to collect the sums due on promissory notes, as a part of the business of their profession, and it appears that they were doing so in this case. Defendants' answer shows that they demanded a collection fee. The court said in *Monroe v. Staser*, supra: "When a party executing a note containing an unconditional agreement to pay attorney's fees, whether the amount is stated per cent. or undetermined, has failed to meet his obligation when due, and the payee, in good faith, and because he deems it necessary so to do in order to enforce collection, places the note in the hands of an attorney at law for collection, who renders professional services in and about the collection thereof, either by suit or otherwise, he must pay, in addition to the principal and interest, such reasonable attorney's fees as shall be sufficiently adequate to compensate him for the services rendered, in order to discharge the obligation. In no event, however, shall he be liable for a greater per cent. than that stipulated in the contract, where the per cent. is stated; but, when unlimited, then he shall pay a reasonable attorney's fee. As above stated, the right to collect an attorney's fee from a defaulting payor does not depend upon the institution and prosecution of a suit, but rather upon the question as to whether or not professional services have been rendered by an attorney at law in or about the collection of the principal of the obligation containing the stipulation for attorney's fees. In this case the question is not presented as to the extent of appellees' liability for attorney's fees, but simply whether or not the appellees are liable to pay any attorney's fees." In our opinion, the above quotation correctly sums up the law applicable to the matter now under consideration. The stipulation respecting an attorney's fee is intended for the benefit of the payee. It may often happen that the payee,

compelled to pay the latter more than the total amount of interest due upon the note to enforce its collection. Some courts, however, assert that the attorney's fee clause in promissory notes is really beneficial to the payor, as it tends to make him more punctual. They say that, if he knows he will be compelled to assume an additional burden in case he fails to redeem the paper at maturity, he will be careful to prevent its dishonor. On the other hand, it may be safely said that a very large number, if not a majority, of those who give notes, are unable to meet them at maturity. Upon these the attorney's fee provision may work a hardship, and for them no remedy can be suggested so long as our present statute obtains. What they need is a preventive. They should not sign notes containing such a provision. "It may be proper to add that, as contracts for the payment of attorney's fees are only upheld upon the ground that they are a reasonable indemnity against loss actually and necessarily occasioned by the failure of the payor, it follows that where expenses are unnecessarily, or where none are actually, incurred, the contract cannot be enforced. *Kennedy v. Richardson*, 70 Ind. 524; *Billingsley v. Dean*, 11 Ind. 331. The stipulation for the payment of attorney's fees only becomes operative when expenses have been actually and necessarily incurred in the employment of an attorney for the enforcement of collection, consequent upon the failure of the payor to keep his engagement, and then only to the extent of the expense actually paid or to be paid, or reasonably chargeable." *Goss v. Bowen*, 104 Ind. 207, 2 N. E. 704.

But it is also contended by counsel for defendants that the note and mortgage must be construed together, and, as it was provided in the mortgage that an attorney's fee might be allowed in case of suit, that stipulation is controlling, in preference to the one contained in the note. Not so. In executing the note and mortgage, the parties must have contemplated these three possibilities: That the note might be paid at maturity; that it might be collected after maturity by an attorney without suit; that it might be collected after maturity by a suit including a foreclosure of the mortgage. The provision for an attorney's fee in the mortgage was therefore only cumulative.

It occurs to us that the defendants have no cause to complain because the plaintiff endeavored to collect the amount of the note without suit. It was to the interest of both parties that it be paid without litigation. When the plaintiff placed the note in the hands of her attorneys for collection, the evident purpose was to collect the amount due thereon without the expense of a suit, and the attorney's fee charged would in such case be much less than would be assessable in case of suit. Defendants had violated

commenced on the note immediately after maturity, at the option of plaintiff. Defendants would then have been subjected to a much heavier attorney's fee than that asked, together with considerable court costs. Plaintiff ought not now to be compelled to pay the costs and charges of collection merely because, in the first instance, she adopted the course least expensive to defendants.

It follows that the judgment should be affirmed.

CLAYBERG, C. C., and POORMAN, C., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

(30 Mont. 96)

STATE ex re'. BOSTON & MONTANA CONSOL. COPPER & SILVER MIN. CO. et al. v. DISTRICT COURT OF SECOND JUDICIAL DIST. et al.

(Supreme Court of Montana. March 14, 1904.)

INJUNCTION—TRESPASS ON LAND—DETERMINATION OF TITLE—EVIDENCE—SUFFICIENCY.

1. In a proceeding to punish for contempt in violating an injunction restraining defendants from working mining properties decreed to be

tive, and based on projections made on concessions from facts observed in workings removed from the points in controversy. *Held* not sufficient to sustain a conviction.

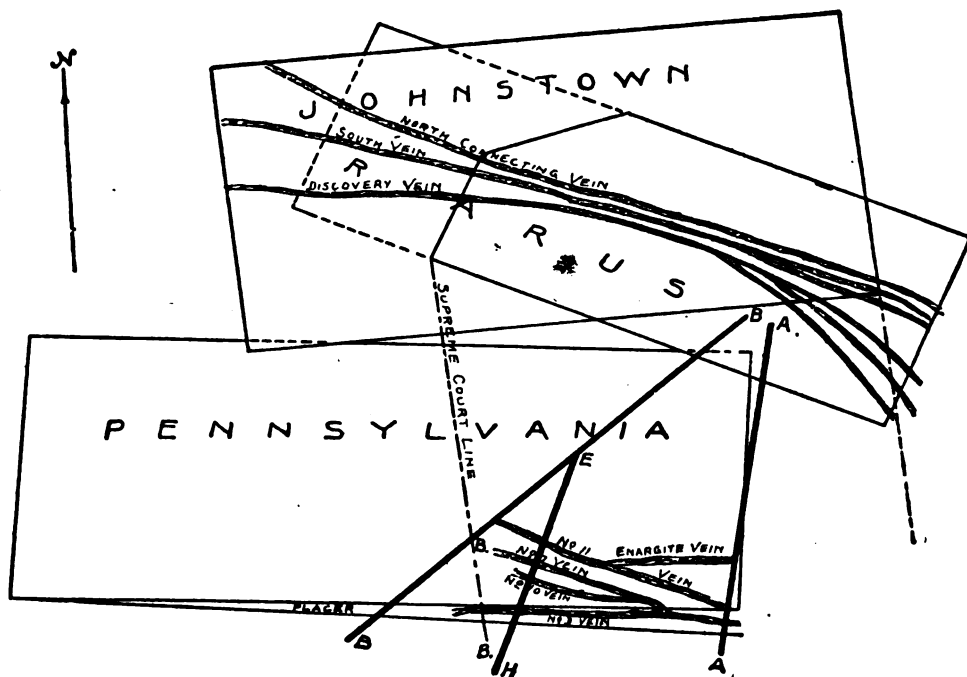
2. Plaintiff in an action for an injunction to restrain trespass on a mining claim alleged that another cause of action, which was stricken from the complaint, was for damages for trespasses on veins lying south of the vein with reference to which injunction was sought, and the court found all the issues for plaintiff. On a subsequent proceeding to punish defendants for violation of the injunction the evidence showed that the veins with reference to which the injunction was alleged to have been disobeyed were the only ones south of the vein involved in the injunction suit. *Held*, that the title to these veins was not determined by the injunction suit.

3. Contempt proceedings for violation of an injunction restraining trespasses on mining property cannot be resorted to for the purpose of determining the title to veins, the ownership of which was not determined in the injunction suit.

Application for a writ of supervisory control by the state, on the relation of the Boston & Montana Consolidated Copper & Silver Mining Company and others, against the District Court of the Second Judicial District of the State of Montana and another, to vacate an order adjudging relators guilty of contempt. Order vacated.

The following are the diagrams referred to in the opinion:

DIAGRAM I.



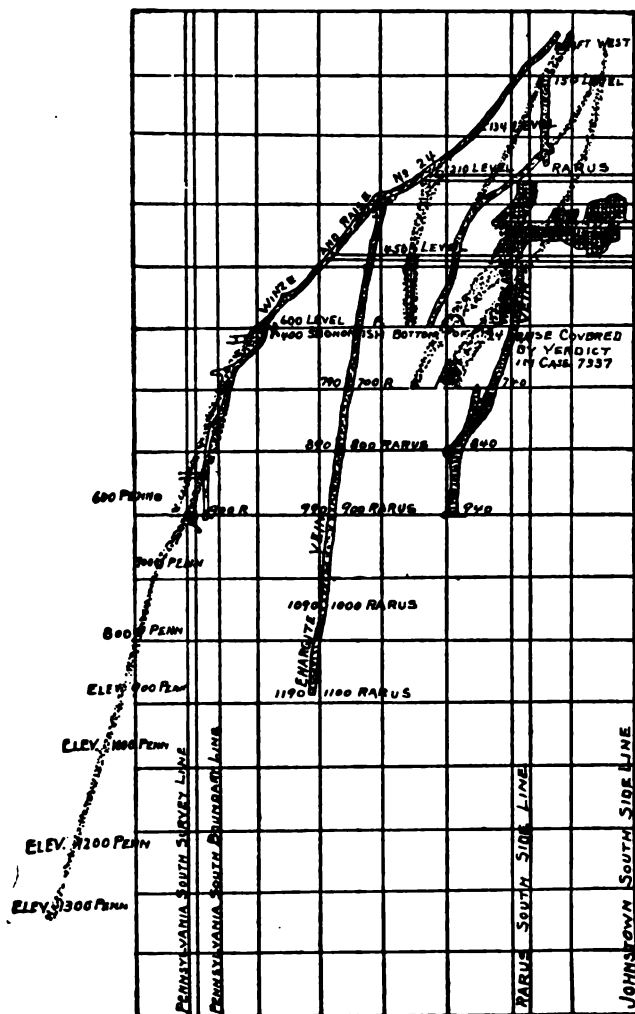
This proceeding was instituted for the purpose of having vacated an order of the district court of Silver Bow county adjudging the relators guilty of constructive contempt in violating the injunction contained in the decree in the cause entitled "Montana Ore Pur. Co. v. Boston & Montana C. C. & S. M. Co.," referred to in this proceeding as the "Pennsylvania Case." That cause was heretofore before this court on appeal, and the decree entered by the district court in favor of the plaintiff was modified and affirmed. 27 Mont. 288, 70 Pac. 1114; 27 Mont. 536, 71 Pac. 1005.

It is charged in the affidavit filed in the district court that the relator corporation and its co-relators, its agents, are or have been engaged in mining and removing ore from certain of the veins awarded by the decree

that the relators, as principals and agents, have been removing ores from the veins, but that they are embraced in the decree is controverted. The veins in controversy are known in the litigation between the corporations in the Pennsylvania case as Nos. 3, 10, and 7 of the Pennsylvania lode claim, alleged by the plaintiff to be parts of the discovery vein of the Rarus-Johnstown claim upon its dip beneath the surface of the Pennsylvania. After a hearing in the district court all the relators were adjudged guilty, and were each sentenced to pay a fine of \$300.

The decree in the Pennsylvania case, as modified by this court, describes the discovery vein of the Johnstown-Rarus claim as having its apex within the surface boundaries of that claim, as crossing both the par-

## SECTION A

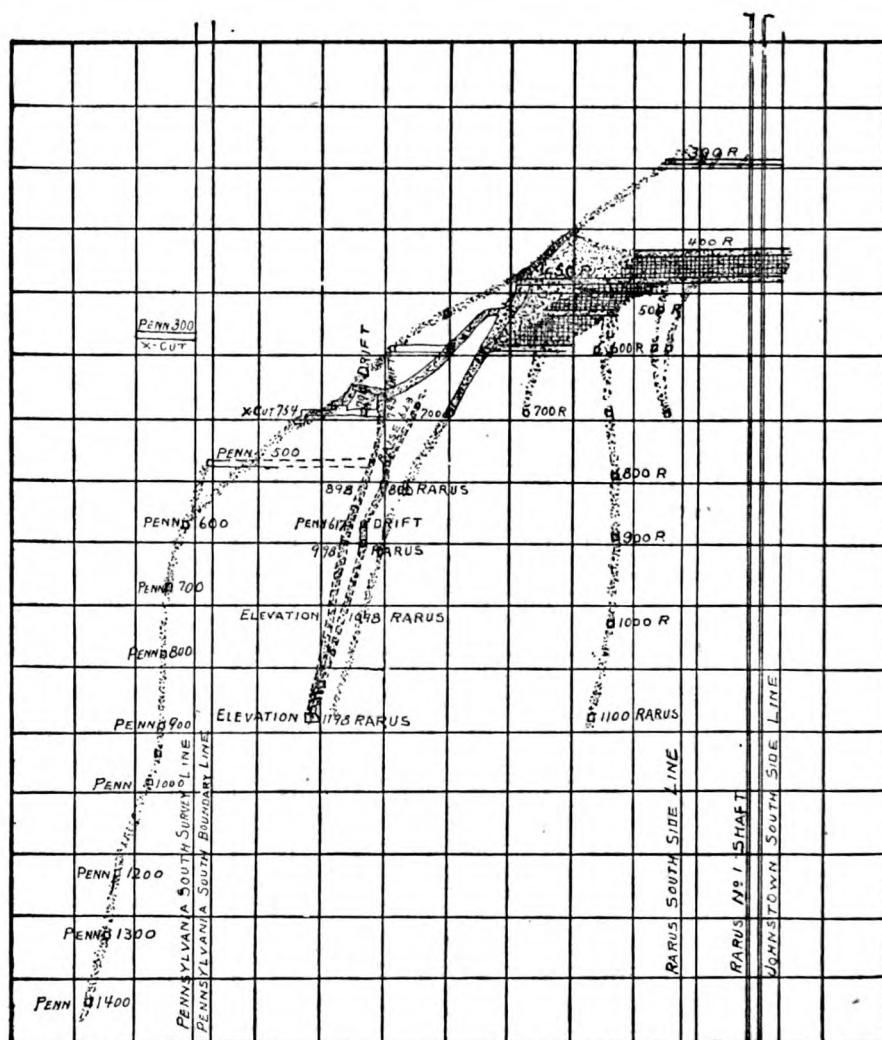


surface of the Pennsylvania claim on the 700-foot level of the Rarus in No. 10 winze, in raise 27 from the 700-foot level to the 400-foot level and above, and in upraise 24 from what is known as the 400-foot level of the Snohomish or 600-foot level of the Rarus to its apex in the plaintiff's ground. This vein and the two lying to the north having their apices within the plaintiff's boundaries were adjudged to belong to the plaintiff to their lowest depths between parallel planes extending perpendicularly downward, one through the east end line of the Pennsylvania claim, and the other through the most westerly point of the conveyed portion of the Johnstown claim, and designated in the diagram accompanying the opinion on rehearing by this court as line "E Q." 27

immediately to the south are very extensive. They are illustrated by numerous maps, sections, and models submitted with the record in this case. To undertake to follow the witnesses who testified at the hearing by the aid of these maps, models, etc., through the 1,500 pages of evidence in the record, much of which was given by experts, and is extremely technical in character, and in this way to give a definite idea of the controversy, would be a hopeless task. For present purposes a sufficiently clear idea of it may be obtained from the accompanying diagrams illustrative of the contending claims.

Diagram 1 shows the position of the discovery vein in the Rarus and Johnstown ground at the surface. The veins in controversy are those indicated at the extreme

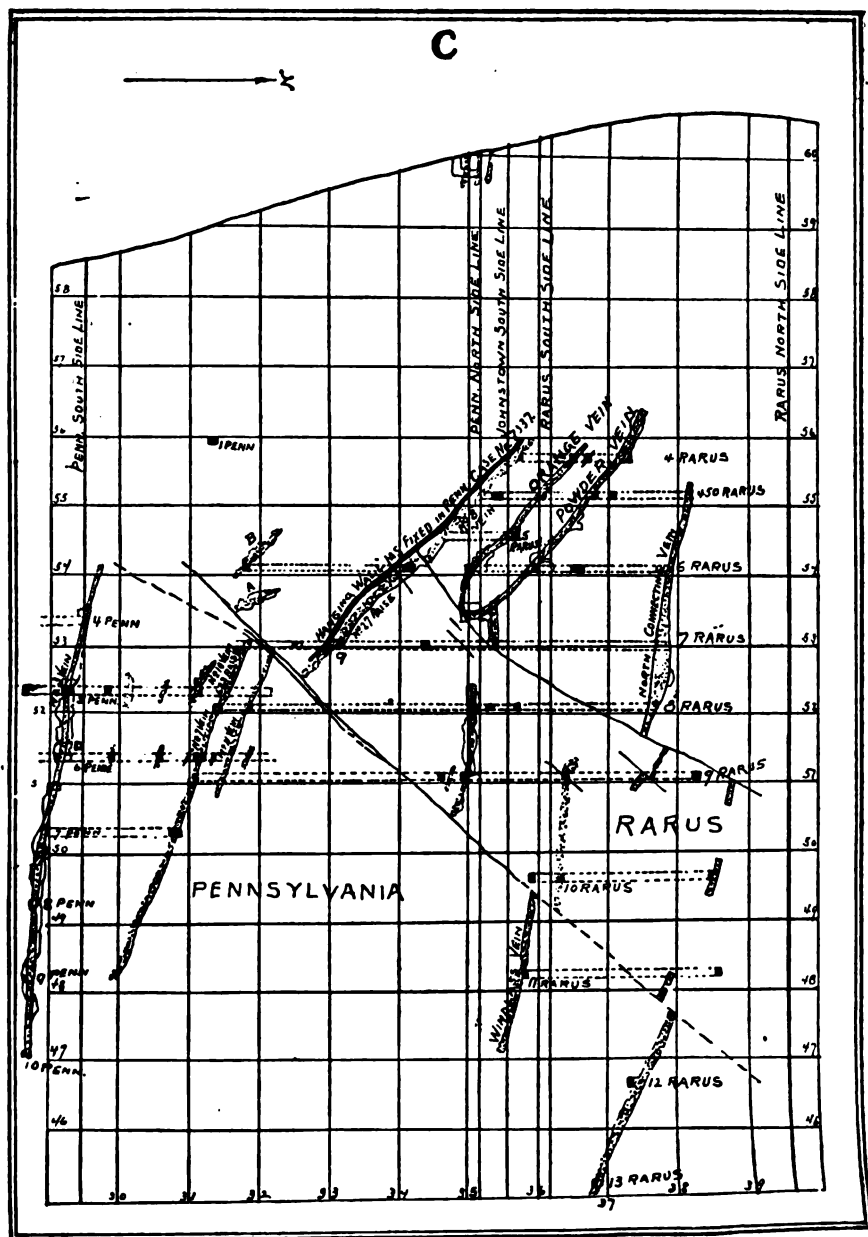
## SECTION B-B.





10, and 7. The diagram shows approximately the position of these veins as they are illustrated in the testimony of the witnesses, at or near the 600-foot level of the Pennsylvania workings from the Pennsylvania shaft, which is located near the letter "B" at the end of the line B B in ground immediately south of the Pennsylvania claim. This level corresponds in depth substantially with level 900 of the Rarus workings from a shaft which is near the letter "A" in the Rarus ground at the north end of the line marked "A A." The vein marked "No. 11" is, according to plaintiff's contention, the discovery vein as

vein and in the levels above where it overtops 7 and 10, as hereafter pointed out. Its contention is, and in its evidence it attempted to show, that the discovery vein of the Rarus-Johnstown, on its descent into the earth, has a flat dip not exceeding  $45^{\circ}$  to  $50^{\circ}$ , and overtopping and cutting off the veins designated as "Enargite, Nos. 10 and 7," unites with No. 3 vein on the dip along a line beginning near the southeast corner of the Pennsylvania claim, and declining below the horizon toward the west at a very flat angle. It contends that veins No. 7 to No. 3, inclusive, also unite on the strike with the discov-



ery vein near the southeast corner of the Pennsylvania claim, and thence pass out as one vein toward the east. This contention is illustrated approximately by Sections A and B B.

Section A is intended to represent a section of the country made by a plane passing perpendicularly downward along the heavy line A A on diagram 1, which follows substantially the direction of upraise 24 from the surface down to the 600-foot level of the Pennsylvania workings at the point Y. Upraise 24, called indifferently "Winze 24" and "Upraise 24," according to the plaintiff's contention, follows the discovery vein from the surface to the 600-foot level of the Pennsylvania. It is conceded that a short distance west of the plane of this section vein No. 3, or a branch of it, passes up beyond the line of union, and has its apex within the Pennsylvania surface boundaries. It has been extensively mined by the relator corporation by many levels below this line, and in ground to the south of the Pennsylvania, and for at least two levels above, all along from the line designated on diagram 1 as the "Supreme Court Line" to the point of union toward the east. It has a dip of 80° to 85°, and, while it has not been followed from below into the Pennsylvania ground, the witnesses all agree that its apex will be found within the boundaries of that claim.

Section B B illustrates this condition in part, the short vertical vein passing upward from the 600-foot level in the Pennsylvania where the two veins actually unite on the dip being a portion of vein No. 3. This section was made along the broken line B B B (diagram 1), and through workings along that line. So, while it appears to be a plane section, it in fact distorts the dip of the alleged overtopping vein, so as to make it appear much flatter than it really is. Besides, it has projected upon it, from the west, workings which extend along the direction of the line B B (diagram 1). Following on the plan, map, and models the points of exposure of the discovery vein beneath the surface of the Pennsylvania claim as designated in the decree, they indicate that this vein passes across the Pennsylvania claim in the general direction of No. 11 vein, at an angle north, 60° to 70° west. This condition the plaintiff seeks to conform to its theory of a union between this vein and No. 3 on the dip by testimony of witnesses—based partly, as it asserts, upon actual development of the vein at various points below the points mentioned in the decree, and partly upon projections through undeveloped ground—that, as the vein descends into the earth, the dip becomes much flatter. To illustrate: The witnesses testify that the vein has been developed by workings along the line B B in territory between the fault fissures to the west, as shown in Section C. These are projected to the east upon Section B B, and with reference to them some of the witnesses express the

opinion that, if the vein extends from crosscut 754 (Section B B) on the dip it appears to have in these workings, it will intercept No. 3 vein in the Pennsylvania workings. The portion of the vein extending from this crosscut downward is projected through undeveloped country.

Section C is designed to represent the conditions along the line marked "Supreme Court Line" on diagram 1. It illustrates the contention of the relators. On this section the hanging wall of the discovery vein of the Rarus-Johnstown, as fixed in the decree, is designated "Hanging Wall." This is intended to show the dip of the vein along that line, just as 24 raise is intended to show it on Section A. The other points mentioned in the decree along the strike of the vein between these limits indicate the course of the strike of the vein across the Pennsylvania claim at the depth to which development had been made at the date of the decree. The lines passing diagonally across the face of the section, and from left to right, apparently cutting the veins, indicate two parallel fault fissures descending through the Pennsylvania ground toward the northwest at an angle of about 50° below the horizon. These are supposed to reach the surface near the east end line of the Pennsylvania.

The contention of the relators is that Nos. 10, 7, and 3 veins are distinct and separate to the west of the point of union, having their tops or apices within the Pennsylvania surface, and ending against the fault fissures toward the west, and coming to the surface toward the extreme eastern portion of the claim. They contend that No. 11 is a separate and distinct vein from the discovery vein; that it cuts off on dip and strike all other veins that come in contact with it; that it is parallel on its strike and dip throughout with No. 7; that the latter, on its strike toward the east, unites with Nos. 10 and 3, and passes out into the territory toward the east from 20 to 25 feet south of No. 11 (diagram 1); that No. 11 also passes out in the same direction, not coming in contact anywhere with No. 7 or 10, either on the dip or strike; that it has a dip of about 80°; that the discovery vein on its dip overtops the enargite vein, and, passing down behind No. 11 to about the 400-foot level of the Snohomish, or the 600 of the Rarus, is there cut off by No. 11, and does not again appear in the lower workings; and that No. 11 should appear upon Section A as extending upward from the Snohomish 400-foot level. It is further contended that this vein is different in many of its characteristics from any of the other veins in the vicinity, in that it is between parallel clay seams, is exceedingly uniform in both dip and strike, has been developed both above and below the point of union with the discovery vein, and by its peculiar characteristics is readily recognized and traced. It is said that the union between vein No. 11 and the discovery vein is clearly

indicated by the difference in dip of the two, as well as by actual development in the ground. It is further claimed that vein No. 7 is separated from vein No. 11 by country rock varying in thickness from 25 to 40 feet, entirely free from mineralization of any kind. Upon these facts is founded the further contention that none of the veins in controversy were, or could have been, within the issues determined by the decree in the Pennsylvania case.

A. J. Shores, C. F. Kelley, and Forbis & Evans, for relators. J. M. Denny, for respondents.

BRANTLY, C. J. (after stating the facts). It is apparent from the foregoing statement of the contentions of the parties as to the physical facts touching the situation of the veins in controversy that there is a wide difference between them as to their relative rights. If the plaintiff's contention be sustained, then veins 7 and 10 certainly belong to it, and the relators were properly convicted, whatever conclusion might be reached as to the ownership of vein No. 3 below the alleged union on the dip between it and the discovery vein. On the other hand, if the relator corporation be upheld in its claim, veins 3, 7, and 10 belong to it, and the judgment of conviction may not stand. It is not proper for this court in this proceeding to analyze the evidence touching the question of ownership, or to express any opinion thereon. The theory upon which the plaintiff proceeded, and in which it was sustained in the district court, is that the decree in the Pennsylvania case embraced these veins, though it does not specifically describe them, because developments made subsequent to its rendition demonstrate that they are parts of the veins specifically described. As to veins 7 and 10, and the portion of 3 eastward of where it unites with the discovery vein on the strike, the plaintiff says the facts are conclusive. To determine the correctness of this claim requires an examination of the issues involved in that cause, and an ascertainment of what falls within the description contained in the decree. We have set forth in the statement the substance of the description. It does not extend, in terms, to any other vein or veins involved in the controversy than the discovery vein and those which appear to the north. It designates only certain points along the dip and strike of the former, and declares the plaintiff to be the owner of it to the depths. It does not refer to any vein or veins to the south, nor, though it has incorporated in it the findings of fact made by the court, does it refer indirectly to any such veins. This would not matter if the evidence tended merely to show trespass by the defendant corporation upon the same vein or veins at lower depths. Subsequent developments, however, tend to show conditions which could not have been

contemplated by the parties or the court at the time the decree was rendered. For illustration: No. 3 vein is not mentioned in the decree, yet the facts adduced at the hearing tend to show that it has its apex in the southern part of the Pennsylvania claim. To determine its ownership would require, upon proper issues, a determination of the question where the apex actually is, as well as the fact of the union between it and the discovery vein, and also the relative priorities of the dates of the Pennsylvania and Johnstown-Rarus locations. This determination would also require a consideration and determination of the fact whether or not the alleged overtopping vein is identical with the discovery vein, for upon a determination of these and other facts would depend the ownership of the united vein. There would be involved, also, an inquiry whether the defendant corporation has extralateral rights upon No. 3 vein. If there is in fact no union between these veins, then the defendant corporation is without question the owner of No. 3 vein. If there is a union of them on their strike toward the east, and they become one from that point, still this does not determine the ownership of No. 3 to the west of the point of union—the very portion of it where the alleged trespasses have occurred. It may be said, also, of the other two veins in controversy, that, if their apices are to be found in the Pennsylvania claim as they rise up to the fault or surface to the south of the discovery vein, or vein No. 11, according to the theory of the relators, then they are the property of the relator corporation. It cannot be said of the evidence that it demonstrates the plaintiff's ownership of any of these veins. This court would hesitate to so find upon the facts in this record, even in an action brought for the purpose of determining the question of ownership. Much of it is speculative in character, and is based upon projections made upon conclusions from facts observed in workings remote, in some instances, by hundreds of feet from the particular points in controversy. Under these circumstances the conviction should not be sustained.

One fact, however, appearing from the record of the Pennsylvania case, demonstrates that the action of the district court in this proceeding cannot be justified. The pleadings presenting the issues in the Pennsylvania case were introduced in evidence. From them it is apparent that the points in controversy here were not involved in the action, and therefore could not have been embraced by the decree. At the close of the evidence the plaintiff asked and obtained leave to amend the complaint. The amendment was made. This required an amendment to the answer, which set up the fact, as matter in abatement of the action (see statement preceding opinion in *Mont. Ore Pur. Co. v. B. & M. C. C. & S. M. Co.*, 27 Mont. 288, 70 Pac. 1114), that the suit had

upon the points in controversy in the action, and equitable relief had been sought only as ancillary to the law action; and that, as the action had been dismissed as to the count for damages, the count for ancillary relief should also be dismissed. A count for damages set up in the original complaint had, as a matter of fact, been dismissed, and the defendant thus sought to have the action abate as a whole. The replication of the plaintiff to this answer contained the following: "And plaintiff denies that at the time of the commencement of this action it commenced an action at law to recover from the defendant for alleged trespass upon the veins claimed in this action by the plaintiff, or that it made the allegations therein which are stated in defendant's answer to plaintiff's amendments to its complaint, but avers the fact to be that at the time of the commencement of this action there were included in the complaint two causes of action—one at law for the recovery of damages for ores extracted by the defendant from veins within the Pennsylvania lode claim, which were alleged to have their tops or apices in the Johnstown lode claim, and the parcel of ground owned by the plaintiff; that said veins referred to in said cause of action lie far to the south of the veins which have been developed by the workings made by the plaintiff within the Pennsylvania lode claim." Inasmuch as the court found all the issues for the plaintiff, and the evidence in this record shows conclusively that these veins are the only ones within the Pennsylvania claim south of the discovery vein, it is manifest that they were excluded from the issues, and hence the title to them could not have been determined.

Under the circumstances presented in this record, contempt proceedings are not the appropriate remedy. Where the title to property has been once finally adjudicated, and it appears from the judgment record, or from the record supplemented, if necessary, by evidence identifying the subject-matter, that this is the case, and that the defendant has been enjoined from further interference, contempt proceedings must be resorted to. *Mont. Ore Pur. Co. v. B. & M. C. C. & S. M. Co.*, 27 Mont. 410, 71 Pac. 403. This was held in the case cited with reference to the same veins now in controversy, the theory of this court being that, as the complaint alleged ownership in the plaintiff under the decree rendered in the Pennsylvania case (27 Mont. 288, 70 Pac. 1114), it would be most effectively enforced to prevent trespass in violation of the injunction contained therein by contempt proceedings, these furnishing a complete and adequate remedy. Now, it appears that the claim made in that case is not true, and that contempt proceedings have been resorted to to adjudicate and settle title to property in no way affected by the decree.

be issues presented by formal pleadings in an appropriate form of action at law or in equity, after due notice, when the parties may be heard in the usual way. And it must always be the case where there is a bona fide controversy as to ownership of property which has not been adjudicated; otherwise a party might be summarily deprived of his property without due process of law. This rule may be deduced from the following authorities: *Ex parte Hollis*, 59 Cal. 405; *State v. Ball*, 5 Wash. 387, 31 Pac. 975, 34 Am. St. Rep. 866; *Wirt v. Brown* (C. C.) 30 Fed. 187; *Onderdonk v. Fanning* (C. C.) 2 Fed. 568; *Temple Pump Co. v. Goss Pump Co.* (C. C.) 31 Fed. 292; *Baldwin v. Hosmer* (Mich.) 59 N. W. 432, 25 L. R. A. 739; *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992; *Beach on Receivers*, § 241.

Counsel for respondents in this proceeding invoke the rule that "a judgment is conclusive upon the parties, not only as to such matters as were in fact determined in the proceeding, but as to every other matter which the parties might have litigated incident to or essentially connected with the subject-matter in litigation, whether the same, as a matter of fact, were or were not considered." We shall not now stop to consider whether this is a correct statement of the rule under the statute and the decisions of the state. *Code Civ. Proc. § 3196*; *Campbell v. Rankin*, 2 Mont. 360; *Meyendorf v. Frohner*, 3 Mont. 318; *Kleinschmidt v. Binzel*, 14 Mont. 54, 35 Pac. 460, 43 Am. St. Rep. 604. As we have already pointed out, the rule does not apply to the circumstances of this controversy, for the reason that the issues in the case in which the decree was rendered expressly excluded a consideration of the situation and ownership of the veins in dispute.

Counsel for relators have devoted a considerable portion of their argument to questions touching rulings of the court in admitting and excluding evidence upon the hearing in this proceeding in the court below. As the order must be vacated, it is not necessary to consider these questions.

The order of the district court is vacated with directions to dismiss the proceeding. Order vacated.

MILBURN, J., concurs.

HOLLOWAY, J. In order to support a conviction in a contempt proceeding, the proof of guilt ought to be clear and convincing, leaving no reasonable doubt of such guilt. For the reason that the judgment roll in the Pennsylvania case, together with the other evidence received on the hearing in this proceeding, does not furnish that convincing proof that veins 3, 7, and 10 were adjudicated in the Pennsylvania case, I agree with the order vacating the order of the dis-

lation of the decree in that case.

Nothing said in the determination of this proceeding should be susceptible of any interpretation which would apparently indicate an opinion of the court as to the actual ownership of the ore bodies in controversy, or as to the effect of the testimony given, aside from holding it insufficient to support the order of the court below.

(30 Mont. 117)

### MARES v. DILLON.

(Supreme Court of Montana. March 21, 1904.)

MINES—LOCATION—ADVERSE CLAIMS—ACTIONS—NATURE—SUITS IN EQUITY—EFFECT—ESTOPPEL—STATE AND FEDERAL STATUTES—OTHER ACTION PENDING—ABATEMENT—INSTRUCTIONS—ESTOPPEL TO OBJECT.

1. Pol. Code, § 3610 et seq., providing additional requirements for the valid location of mining claims to those required by the acts of Congress, are not in violation of U. S. Const. art. 4, § 3, giving Congress power to dispose of, and make all needful rules and regulations respecting, the territory or other property of the United States.

2. In the absence of proof tending to impeach the truth of the facts stated in a declaratory statement for a mining claim, it is immaterial to an adverse locator that the declaration was verified on information only.

3. That the locator of a mining claim verified the declaratory statement on information only, instead of on his personal knowledge, did not render the statement void under Pol. Code, § 3612, requiring such declaratory statement to be verified by the "oath of the locator."

4. Defendant filed an application for a patent of a mining claim, the survey of which conflicted at different points with two locations made by plaintiff, known respectively as the "G. H." and "G. R. H." claims, neither of which conflicted with the other. Plaintiff filed an adverse on behalf of each of his claims, and afterwards brought a separate suit in support of each, and defendant, in answering the suit on the G. H. claim, referring to the action brought on the G. R. H. claim, alleged that in that action no claim was made to any portion of defendant's location by virtue of plaintiff's alleged ownership of the G. H. claim. *Held*, that plaintiff's actions were separate and distinct, and therefore the pendency of the one was no bar to the other.

5. Since U. S. Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430], providing that an adverse claimant to a mining claim, within 30 days after filing his claim; must commence proceedings in a court of competent jurisdiction to determine the right of possession, etc., does not prescribe the form of action, the character of the suit to be brought thereunder depends on state practice.

6. U. S. Rev. St. § 2326, as amended by Act March 3, 1881, c. 140, 21 Stat. 505 [U. S. Comp. St. 1901, p. 1430], providing that, if title to the ground in controversy in an action to establish an adverse claim to a mining location shall not be established by either party, the jury shall so find, does not require that such finding should be by a jury, where the suit to determine the adverse claim is in equity.

7. Code Civ. Proc. § 1310, provides that an action may be brought by any person against another, who claims an estate or interest in real property adverse to him, to determine such adverse claim; and section 1322 declares that, in an action to determine the respective rights of claimants to the possession of a mining claim, it is immaterial which party is in possession, and that it is sufficient if it appears

patent has been made and an adverse claim filed and allowed, and requires the verdict or decision to find which party is entitled to possession of the premises. *Held*, that where the complaint in an action to determine an adverse claim to a mining location set up the filing of plaintiff's adverse claim, as provided by section 1322, after defendant had applied for a patent, and prayed that defendant be required to set forth the nature of his claim to the ground, and that all adverse claims of defendant might be determined by the judgment of the court, and the answer denied plaintiff's ownership and possession, and prayed that defendant be adjudged to be the owner and entitled to possession of the premises sued for, the suit was one of equitable cognizance, and not an action at law.

8. Where, on the trial of a suit to determine an adverse claim to a mining location, a jury was not demanded by either party, and the court tried the case as a suit in equity, without objection by defendant, the latter was estopped to object for the first time on appeal that the action was one at law, and that he was entitled to the verdict of the jury as to which, if either, party was entitled to possession of the ground in question.

9. Where, in a suit to determine an adverse claim to a mining location, defendant was estopped to deny that the suit was equitable in its character, he could not object to instructions to the jury.

Commissioners' Opinion. Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Action by Frank Mares against Richard Dillon, in support of an adverse claim to a mining location. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

T. J. Walsh, for appellant. H. G. & S. H. McIntire, for respondent.

CLAYBERG, C. C. Appellant, Dillon, made application to the United States Land Office for a patent to the Black Eagle quartz lode mining claim. Respondent, Mares, filed two adverse claims in the Land Office against this application—one based upon the Gold Hill quartz lode claim, and one based upon the Gold Rocky Hill quartz lode claim, with both of which the surface of the Black Eagle was in conflict. Within the time allowed by the statute of the United States, respondent instituted two suits, in support of his adverse claims (one on each of his locations), in the district court of Lewis and Clarke county. In the appeals under consideration, the suit based upon the Gold Hill location is involved. The action was tried by a court and jury, and from the judgment entered in favor of the validity of the Gold Hill location, and from an order overruling his motion for a new trial, appellant appeals.

#### Validity of State Statute.

Counsel for appellant insists, with great force and much reason, that the statutes of Montana requiring certain acts to be performed by one locating a mining claim, in addition to the requirements of the acts of Congress (section 3610 et seq., Pol. Code), are in violation of section 3, art. 4, of the

Constitution of the United States, which provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." Also, that these requirements are inconsistent with the provisions of the acts of Congress in regard to the location of mines, and therefore void. Also, if these provisions of the state statute are held to be permitted or recognized by the acts of Congress, then such acts, to that extent, are in violation of the above section of the Constitution of the United States. The question of the constitutionality and validity of our present statute, and of the provisions of the territorial statutes of a somewhat similar character, have been before this court and its predecessor, the Supreme Court of the territory, quite frequently, and we find that, whenever this question was discussed and decided by either court, the validity and constitutionality of these statutes have been uniformly upheld. In *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302, the court for the first time directly considered the point made, relative to the constitutionality of the acts of the Legislative Assembly of the territory, and holds such legislation valid. Chief Justice McConnell says: "By the reservation to itself of the sole right to dispose of the soil in the first instance, Congress meant to make title to its purchasers, and receive the product of the sales, and not to regard those local regulations, looking to the acquisition of possessory rights merely, and their manner of enjoyment, as an interference with its prerogatives." Of course, some distinction might be drawn between the legislative acts of a territory and of a state, as to whether they conflict with the acts of Congress, the former being always under the direct control and supervision of Congress, while the latter, if upon proper subjects of legislation, are entirely beyond congressional control. In *Metcalfe v. Prescott*, 10 Mont. 283, 25 Pac. 1037, this court had the matter under consideration for the first time, and says: "This court, after incidentally doubting the validity of the law of the territory requiring a location notice to be verified (*Wenner v. McNulty*, 7 Mont. 30 [14 Pac. 643]), afterwards, in *O'Donnell v. Glenn*, 8 Mont. 248 [19 Pac. 302], met the proposition squarely, and held the law to be good. While we can conceive doubts as to this power of the Territorial Legislature, we do not feel it our duty to disturb the rule in *O'Donnell v. Glenn*, and the practice established upon that rule. We therefore sustain the law." The question came up for consideration again in this court in the case of *McCowan v. Maclay*, 16 Mont. 234, 40 Pac. 602, and Mr. Justice De Witt says: "Our statute requires that the notice of location of a mining claim shall be on

oath. Comp. St. 5th Div. § 1477. That this requirement of our statute is within the power of the State Legislature was doubted in *Wenner v. McNulty*, 7 Mont. 30 [14 Pac. 643], but was finally affirmed in *O'Donnell v. Glenn*, 8 Mont. 248 [19 Pac. 302], which ruling was afterwards followed as the law of the case on the second appeal of *O'Donnell v. Glenn*, 9 Mont. 452 [23 Pac. 1018, 8 L. R. A. 629], and was followed as stare decisis in *Metcalfe v. Prescott*, 10 Mont. 283 [25 Pac. 1037]. The Ninth Circuit Court of Appeals of the United States recently encountered this question in *Preston v. Hunter*, 67 Fed. 996 [15 C. C. A. 148], but passed it without an expression of opinion. We shall not now disturb the law of this jurisdiction in this respect." The question was again before this court in the case of *Berg v. Koegel*, 16 Mont. 266, 40 Pac. 605. The court say: "This decision [of the court below] is made upon the authority of *McCowan v. Maclay*, 16 Mont. 234 [40 Pac. 602], to the effect that our statute requiring the location notice to be verified is not in conflict with the laws of the United States upon the subject of the location of mining claims." It was again before this court in the case of *Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 154, where the court uses the following language: "That the Legislative Assembly had power to enact sections 3610 to 3613 of the Political Code is, in this state, too firmly established to permit of serious discussion or doubt; and that the provisions of these sections are mandatory, reasonable, and not in conflict with any act of Congress, seems clearly within the principles announced or tacitly recognized in *O'Donnell v. Glenn*, 8 Mont. 248 [19 Pac. 302], *McCowan v. Maclay*, 16 Mont. 234 [40 Pac. 602], and *Sanders v. Noble*, 22 Mont. 119 [55 Pac. 1037]." It was again before this court for consideration in the case of *Baker v. Butte City Water Co.*, 28 Mont. 222, 72 Pac. 617, and the court said: "The question as to the right of the Legislature to provide rules for the marking of the boundaries of mining claims, and providing for a record of such location, and what the recorded paper must contain, has so long been recognized in this state, and has so many times been approved by this court, that it would be useless to enter again into any consideration of the questions so decided." To now hold these statutes unconstitutional or void, would be to reverse these uniform decisions, which have been followed and relied upon for many years; and this should not be done unless, in the opinion of the present court, such result would be the only one possible to be reached from a consideration of the questions. We would not, therefore, be justified in such a conclusion, if, after a careful investigation, we felt any doubt as to their correctness. We cannot say that we have an "abiding conviction" that these decisions are erroneous, but, at most, only that we have serious doubts as to their correctness.

States has not, to our knowledge, had the question presented to it in the same form that it is presented in this case, yet that court has indirectly at least, in many instances, held that the Legislatures of the states might enact laws supplemental to the act of Congress relative to the location, possession, and working of a mining claim. *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; *Iron Silver Mining Company v. Elgin M. & S. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; *Enterprise M. Co. v. Rico-Aspen M. Co.*, 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96; *Parley's Park S. M. Co. v. Kerr*, 130 U. S. 256, 9 Sup. Ct. 511, 32 L. Ed. 906. The same doctrine is held by the Court of Appeals of the Ninth Circuit, in *Northmore v. Simmons*, 97 Fed. 386, 38 C. C. A. 211. The Supreme Court of Nevada has reached the same conclusion in *Sisson v. Sommers*, 24 Nev. 379, 55 Pac. 829, 77 Am. St. Rep. 815. Also the Supreme Court of Utah, in *Copper Globe Min. Co. v. Allman*, 64 Pac. 1019. Questions of the construction of the federal Constitution and statutes can be finally settled only by the Supreme Court of the United States. This court should not assume the authority to declare any acts of Congress to be in violation of the provisions of the Constitution of the United States, except in cases entirely clear and free from doubt. Such decision by this court would only be binding within the state, and then only until the question should be finally decided by the Supreme Court of the United States. Again, if this court should hold these statutes void because in conflict with the federal Constitution or acts of Congress, and locations should thereafter be made not complying with their requirements, and the Supreme Court of the United States should afterward decide to the contrary and hold them valid, all locations made in the interim, not complying with their requirements, would be void. This would be a calamity which should be avoided if possible. On the other hand, if this court holds these statutes valid, all locations must comply with their requirements in order to have any validity, and, if the Supreme Court of the United States should afterward decide that they were void, no one would be injured, because all locations made in conformity with these statutes would surely be valid, even if the statutes were void, as all the requirements of the acts of Congress would be fully complied with. We, therefore, while entertaining very serious doubts as to the correctness of this court's past ruling, in consideration of the circumstances above set forth, must refuse to declare the legislative action of the state of Montana unconstitutional.

#### Verification.

The verification of the Gold Hill declaratory statement was made by Frank Mares, the locator. This verification seems correct

but that it was made upon the personal knowledge of the affiant. However, evidence was given on the trial that the affidavit was made without any actual personal knowledge of the facts sworn to, but entirely upon information derived from affiant's brother and the engineer who had performed the specific acts of making the location. Counsel for appellant insists that this fact renders the location void.

The verification, by the terms of the statute (section 3612, Pol. Code), is required to be made by the "locator" of the claim. Its object, as announced by the Supreme Court of the territory of Montana, "was to prevent fraud by subjecting the locator to the penalties of perjury if he swore falsely or corruptly." If the verification is in form and substance in accordance with the statute, it is *prima facie* sufficient, and the facts stated therein are *prima facie* true. Of course, its effectiveness could be avoided by a proof that the facts verified did not exist or were untrue. This record does not disclose that any evidence was offered to challenge the truth of the affidavit, nor is it claimed that any of the facts therein stated did not exist or were not true. Therefore we must consider the verification as true, and we cannot conceive how appellant was injured, even if it was not made upon the personal knowledge of the affiant, but upon information. What concerns him is the truth of the facts verified.

Again, the statute simply provides that the statement "must be verified by the oath of the locator," etc. (section 3612, Pol. Code), not that it shall only be made upon the personal knowledge of the affiant. As well said by Chief Justice McConnell, in considering a similar provision in the territorial statute, in the case of *Wenner v. McNulty*, 7 Mont. 30, 14 Pac. 643: "It is not usual to require such strictness, unless the statute prescribing the oath expressly requires it. The object of recording the declaratory statement is to give the public notice that a location has been made, and the object of requiring an oath was to prevent fraud, by subjecting the locator to the penalties of perjury if he swore falsely and corruptly. If the affiant in such cases swears falsely and corruptly, he will be as much amenable to the penalties of the law denounced against perjury as if he had made the oath upon his own alleged personal knowledge; and the mere fact that the oath is absolute in form, when in fact it was made upon information and belief, does not invalidate it. 12 Myer's Fed. Dec. § 1047."

We therefore cannot hold that the location of the Gold Hill lode mining claim was void on this ground or for this reason.

#### Another Suit Pending.

Appellant sets forth in his answer the following facts, in substance: That, after he

had filed his application for a patent to the Black Eagle quartz lode claim in the Land Office, respondent claimed that the surface area of the Black Eagle conflicted with the surface area of the Gold Hill quartz lode mining claim, and also with the surface area of the Gold Rocky Hill quartz lode mining claim, and thereupon filed an adverse based upon the location of the Gold Hill, and another based on the location of the Gold Rocky Hill; that afterwards respondent brought suit, in the district court of the First Judicial District of Montana in and for the county of Lewis and Clarke, simultaneously on each of said adverse claims so filed, and that both suits are still pending. Counsel for appellant insists that respondent had but one cause of action, and that, having split this action into two suits, the pendency of the other suit prevents him from prosecuting this one. We find in the answer the following very pertinent allegation: "In which said action [referring to the action brought on the Gold Rocky Hill] no claim was made to any portion of said Black Eagle by virtue of plaintiff's alleged ownership of the Gold Hill lode mining claim." Respondent demurred to a portion of the answer, and, after hearing, the court sustained the demurrer thereto. To this counsel for appellant excepts, and urges the alleged error before this court.

It appears, from the plat attached to the answer, that respondent made two locations, one of which he designated the "Gold Hill" and the other the "Gold Rocky Hill"; that the surface of each of these locations conflicts with the surface of the Black Eagle, but the one does not conflict with the other. Respondent, as stated, filed a separate adverse claim to appellant's application for patent on the Black Eagle, based upon each of his two locations. We have no doubt but that this was entirely proper, and a justifiable practice, but counsel for appellant says that respondent had only one cause of action, and therefore could maintain only one suit. We think that this position is erroneous, and that respondent had two separate and distinct causes of action, one of which was based solely and exclusively on his location of the Gold Hill lode, and the other solely and exclusively on the location of the Gold Rocky Hill lode. The action instituted is primarily for the purpose of determining who was entitled to the possession of the ground in controversy, and ultimately for the purpose of determining who was entitled to a patent for such ground. The purpose of adverse suits is in "aid of and for the information of the Land Department, to determine as between the litigants the right to the possession of the mining claim in dispute." *Lavagnino v. Uhlig* (Utah) 71 Pac. 1046, citing *Doe v. Waterloo M. Co.*, 70 Fed. 455, 17 C. C. A. 190; *Wight v. Dubois* (C. C.) 21 Fed. 694. Of course, the effect of a judgment in favor of respondent in either suit would be

to prevent appellant from acquiring a patent from the United States for the surface ground in conflict between the locations in such suit, and to allow patent to the same to be issued to respondent. This was not the primary purpose of either suit, but would be the result of the judgment recovered. We cannot see how the two suits instituted by respondent could possibly have been tried as one cause of action. Each is based upon a separate and distinct location. One location may be good, the other bad. Respondent could only recover judgment upon a valid location, because the right of possession can only come from a valid location. The proof in each case would be entirely different; in one location respondent may have been the locator, in another he may have been the purchaser; so that proof in one case would not "fit" the other case, nor authorize judgment to be entered thereon. As we view the proposition, it is the same in effect as though A. held two promissory notes of B., each for a hundred dollars. Although they may bear the same date and be exactly identical in language and amount, each note constitutes a separate cause of action; and while A. may bring one suit against B. covering the two notes, each cause of action would have to be separately stated. A. would have the right to bring suit on one note and not upon the other. A judgment on one note would not be a bar to a suit on the other. The pendency of the suit on one note could not be pleaded in abatement to the pendency of a suit on the other note. If A. brought a separate suit on each note, the court, under our statute, might compel a consolidation of the cases, and try the two causes of action in the same case. So here, possibly, although we do not desire to express any definite opinion on this proposition, Dillon might have asked the court below to consolidate the two causes of action, and have them heard at the same time, under the provisions of section 1804 of the Code of Civil Procedure. In order for the pendency of one suit to be pleaded in abatement in another suit, the two suits must be identical, at least in subject-matter and parties; so that, if a judgment upon the merits is obtained in one, that judgment becomes final as to both suits, and could be pleaded in bar in the other action. The question is, as this court has said, "Could the plaintiff in the former action have obtained all the relief which he alleges he is entitled to in the present action?" *Wetzstein v. B. & M. Co.* (Mont.) 72 Pac. 865.

Recalling the allegation in appellant's answer, above quoted, we find that respondent made no claim, in the suit brought upon the Gold Rocky Hill adverse, to any part of the Black Eagle lode claim which conflicts with the Gold Hill lode claim, and in this action based upon the Gold Hill location he makes no claim to any part of the Black Eagle which conflicts with the Gold Rocky Hill. There is therefore no identity of cause of



in one will bar a judgment in the other? The proof would be absolutely dissimilar. The language of the Supreme Court of the United States, in *Watson v. Jones*, 13 Wall. 715, 20 L. Ed. 671, is particularly in point in this regard. That court said: "When the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, \* \* \* there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that, if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties." Very true, the validity of the Black Eagle location is brought into question in each of the suits, but respondent's right of action depends not only upon the invalidity of the Black Eagle location, but upon the validity of his own location in each case.

#### Character of the Suit.

As already stated, the suit was brought in support of an adverse claim against appellant's application for patent duly filed in the Land Office.

Section 2326 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1430] provides as follows: "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim." Thus, the act of Congress provides that a suit shall be brought, in support of the adverse claim, within 30 days after the filing thereof, "in a court of competent jurisdiction." The Supreme Court of the United States says, in regard to this section: "Thus the determination of the right of possession as between the parties is referred to a court of competent jurisdiction, in aid of the Land Office, but the form of action is not provided for by the statute; and, apparently, an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession." *Perego v.*

Ed. 113. In other words, the character of the suit depends upon the practice in the state in which the suit is brought. If, under the statutes of the state, an action to quiet title is provided for, such suit will be sufficient; if, under such statute, an action of ejectment is provided for, then the action may be in ejectment; if a statutory proceeding is provided for, it may be followed, but if such proceeding is made exclusive by the statute, then its provisions must be followed; so that the only question for us to determine is whether or not, under the statute and practice of Montana, the action brought by respondent is an action in equity, at law, or a special statutory proceeding.

Counsel for appellant seems to insist that he is entitled to a verdict of the jury upon the proposition as to which, if either, party to the suit is entitled to possession of the ground in conflict, and cites the amendment of March 3, 1881, c. 140, 21 Stat. 505 [U. S. Comp. St. 1901, p. 1430], to section 2326, which provides: "If in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find." This amendment was construed in the case of *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113, and the court said: "We do not think the intention of this act was to change the methods of trial. Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the Land Office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. The whole proceeding is merely in aid of the Land Department, and the object of the amendment was to secure that aid as much in cases where both parties failed to establish title as where judgment was rendered in favor of either; and, while the finding by a jury is referred to, we think that where the adverse claimant chooses to proceed by bill to quiet title, and as between him and the applicant for the patent neither is found entitled to relief, the court can render a decree to that effect, just as it would render judgment on a verdict if the action were at law. If Congress had intended to provide that litigation of this sort must be at law, or must invariably be tried by a jury, it would have said so. There is nothing to indicate the intention thus to circumscribe resort to the accustomed modes of procedure, or to prevent the parties from submitting the determination of their controversies to the court. It must be remembered that it is the question of the right of pos-

party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands, as against the government, may be determined by the courts in a suit against the latter. *United States v. Jones*, 131 U. S. 1 [9 Sup. Ct. 600, 33 L. Ed. 90]; *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683, 694 [15 Sup. Ct. 733, 39 L. Ed. 859].” Section 1310 of the Code of Civil Procedure provides: “An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.” This section would be sufficient of itself to give authority for the commencement and maintenance of a suit to determine the matters directed to be ascertained by section 2326 of the Revised Statutes of the United States, without any further legislative action; but the Legislature went further, and enacted section 1322, which provides: “In an action brought to determine the respective rights of claimants to the possession of a mining claim or quartz lode, under the provisions of the acts of Congress of the United States, it is immaterial which party is in possession, and it is sufficient to confer jurisdiction upon the court, if it appears from the pleadings that the application for a patent has been made and an adverse claim thereto filed and allowed in the proper land office; and the verdict or decision must find which party is entitled to the possession of the premises in dispute.” The complaint in this case alleges that plaintiff “is the owner, except as against the paramount title of the United States, and is in the possession and entitled to the possession of all and singular that certain quartz lode mining claim.” He then sets out the facts necessary to a valid location, and afterwards alleges that the defendant assumed to locate a part of the claim, and made an application to the Land Office for a patent thereto; that plaintiff filed his adverse and commenced this suit; then alleges that the defendant “is without any right whatever, and that said defendant has not any estate, title, interest, or claim to the possession of the same, or any part thereof, and that the claim of the defendant thereto casts a cloud upon the title of this plaintiff in and to his said Gold Hill quartz lode mining claim, and greatly interferes with and injures him in the use and enjoyment thereof.” The prayer of the complaint is that the defendant be required to set forth the nature of his claim to the ground, “and that all adverse claim of said defendant may be determined by a judgment of this court.” The answer in the case denies the ownership of plaintiff, or that he is in possession or entitled to the possession of the premises, and then alleges defendant’s location of the Black Eagle quartz lode min-

tiff take nothing by his suit, “and that the defendant be adjudged to be the owner and entitled to the possession of the premises sued for.” Both parties claim under separate locations of mining claims, and the suit was for the purpose of determining who had the right of possession to the ground in conflict, for the guidance of the Land Office in issuing a patent therefor. It must be remembered that the prayer of plaintiff’s complaint is that the defendant set up his adverse claims, and that the court determine that plaintiff is entitled to the possession of the property in question. The defendant sets up his adverse claim, and ends with practically the same prayer. We cannot conceive how this action could be treated as any other than one of equitable jurisdiction to determine an adverse claim. It has no semblance to an action at law, neither has the defense set forth in the answer any semblance to an answer setting forth a legal title to the premises. Both parties seem to desire the court to determine who is entitled to the possession of the premises on the adverse claim set forth. There is no allegation in the pleading upon which an action at law could be brought.

Again, appellant’s attorney in the trial of the case (as recited in the record) took the position before the court below, in support of his application to submit special interrogatories to the jury, “that the interrogatories ought to be submitted because the case was in nature an action in equity.” The record does not disclose that a jury was demanded by either party. The court tried the case as an equitable case, without objection on the part of appellant, as is very apparent from the fact that, in addition to the findings of the jury, it made several other findings. It is too late for appellant to urge the point in this court, for the first time, that the action was not one of equitable cognizance, but one at law, having tried the action in the court below as one of equity, and stated in that trial that it was a case of that character. The rule as announced by this court in the case of *Talbot v. Water Co.* (Mont.) 73 Pac. 1111, is as follows: “The matter was treated in the district court throughout as a suit in equity. In fact, the opening statement in appellant’s brief is, ‘This is an equitable action.’ And without disposing of the question whether in fact it is an action at law or a suit in equity, it is sufficient to say that, when a cause has been tried upon a certain well-defined theory, neither party will be heard in this court, on oral argument, for the first time, to assume a position antagonistic to such theory. *Harris v. Lloyd*, 11 Mont. 390, 28 Pac. 736, 28 Am. St. Rep. 475; *Leavenworth N. & S. Co. v. Curtan* (Kan.) 33 Pac. 297; *Davis v. Jacoby* (Minn.) 55 N. W. 908.” See, also, *Hendrickson v. Wallace* (Mont.) 75 Pac. 355; *Perego v. Dodge*, 163

selves, i. e., Does section 1322, supra, provide for a statutory proceeding in cases of this character? If so, does it intend that such proceeding should be exclusive? The consideration and determination of these questions does not arise in this case, as such proceeding would necessarily be equitable in character, and we have seen that appellant cannot question the equitable character of this suit. We therefore hold, not only that the suit was actually one of equitable jurisdiction, but that appellant, by the admissions and action of his attorney in the lower court, is now estopped from saying that it was not.

Appellant's counsel having placed himself in a position where he cannot be allowed to question the equitable character of the suit, all of his objections to the instructions of the court to the jury are unavailing. *Hendrickson v. Wallace* (Mont.) 75 Pac. 355, and cases cited. The findings of the jury were therefore only advisory to the court, and the court was justified in making the necessary findings.

This disposes of all questions raised and argued by appellant's counsel.

We advise that the judgment appealed from be affirmed.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

(30 Mont. 144)

#### MARES v. DILLON.

(Supreme Court of Montana. March 21, 1904.)

#### MINES—ADVERSE CLAIMS—ISSUES—JUDGMENT COSTS—DISBURSEMENTS—APPEAL.

1. Where, in an action in support of an adverse claim to a mining location, the only part of the surface of the ground of plaintiff's location affected by the suit was that part which was in conflict with the surface of defendant's location, for which a patent had been applied for, the court's jurisdiction was limited to the extent of the conflict, and hence it was error for the court to render judgment determining the validity of a portion of plaintiff's location outside of the points of conflict.

2. Disbursements for filing an adverse claim to a mining location in the land office for surveying, the making of a plat, and for an abstract of title for use in the land office, were not taxable as costs under Code Civ. Proc. § 1866, authorizing taxation of disbursements for matters to be used in the trial of the cause.

3. An appeal does not lie from an order taxing costs, but the error, if any, may be considered on appeal from the judgment.

Commissioners' Opinion. Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Action by Frank Mares against Richard Dillon. From a judgment in favor of defendant, plaintiff appeals. Reversed.

CLAYBERG, C. C. Appeal from judgment and order taxing costs. Respondent (Dillon) made application to the United States Land Office for a patent to the Black Eagle lode claim. This application was adverse by appellant (Mares) upon his location of the Gold Hill lode claim. Appellant brought suit, in support of his adverse claim, within the time allowed by the statutes of the United States. The action was tried in the court below, and judgment was entered against respondent. At the trial, evidence was introduced tending to show, and the jury found, that the discovery vein in the Gold Hill claim departed from the south side line thereof at a point about 400 feet from the southwest corner of the claim, and the court by its judgment held appellant's location valid only to the extent of 1,100 feet in length, thus cutting off 400 feet from the westerly end of the claim. From this judgment, and an order taxing costs, appellant appeals.

This is an appeal by the opposite party in the same case, this day decided by this court. *Mares v. Dillon* (Mont.) 75 Pac. 963. The plat brought up in the record disclosed the conflict between the Black Eagle claim and the Gold Hill claim to be very small, and the judgment of the court below found against the validity of the Black Eagle claim.

The first question for decision is, did the court err in holding that the westerly 400 feet of the Gold Hill location should be cut off? We are of the opinion that it did. The only part of the surface ground of the Gold Hill location affected by this suit is that part which is in conflict with the surface of the Black Eagle location, and therefore the court below had no jurisdiction to determine any matters with reference to any part of the location other than that embraced in such conflict. A judgment in favor of the validity of the Gold Hill location as against the Black Eagle could only apply and be effective as to such area. Upon filing a certified copy of the judgment roll, appellant would be entitled to a patent to such area only. If he desired to acquire a patent to the remainder of his location, he would be compelled to make an original application therefor, and comply with the United States statutes and the rules and regulations of the Land Office. 2 Lindley on Mines (2d Ed.) § 765. By the judgment the Black Eagle location is denied validity, and the record does not disclose that any person claims any rights in conflict with the surface area of the Gold Hill location. Appellant is therefore, prima facie, the owner of the entire location as marked on the ground, as against every one except the United States, and if he complies with the acts of Congress he has the right of possession to the entire

upon the entire claim, the Land Department would have jurisdiction to inquire into the question of the extent of his location, and its determination, in the absence of fraud and bad faith on the part of its officers, would be conclusive. If it should determine to patent the entire claim to the appellant, no one not having a claim to some part of the surface included within these boundaries could be heard to object. If the Land Department should refuse to patent the entire surface ground, its decision in this regard would be equally conclusive. The amount of surface ground included in the location, and its character, being matters exclusively within the jurisdiction of the Land Department of the United States, to be exercised when application is made for patent to the claim, and the court below being without jurisdiction to determine the question of the extent of the surface, location outside the area in conflict with the Black Eagle, there was error committed in the action of the court below complained of. We therefore do not consider or decide the question as to the validity or invalidity of the Gold Hill location as to any ground not in conflict with the Black Eagle location.

The judgment entered by the court below decreed that appellant (Mares) was entitled to the possession of the east 1,100 feet of the Gold Hill claim, specifically describing the same. This judgment is erroneous. As said above, the only question to be tried by the court below was who, if either, of the parties was entitled to the possession of the area in conflict which is specifically described in the complaint? Under the judgment as rendered, appellant might present a certified copy of the judgment roll and demand a patent for the entire east 1,100 feet of his claim. The plat attached to the record in the case, and the description set forth in the complaint, show distinctly that the area in conflict was much less than the judgment finds appellant entitled to the possession of. In our opinion, the court below should be ordered to modify its decree so as to determine that the appellant is entitled to the possession of simply the ground in conflict, as described in the complaint.

Appellant also appealed from an order taxing costs, by which the court disallowed the following items: Ten dollars, Land Office fees for filing adverse in the Land Office; \$40 paid A. S. Hovey for surveying the ground in conflict, and making a plat for the Land Office; and \$5 paid to the county clerk for abstract of title for use in the Land Office. None of these items come within the provisions of section 1866 of the Code of Civil Procedure. None of them were paid out or expended for matters to be used in the trial of the case below; all of them were paid out for the purpose of enabling appellant to complete his adverse claims filed in

sary to the maintenance of the suit, but only necessary to the filing of the adverse, which is entirely separate from and preliminary to the actual suit. All these items must therefore be disallowed.

Appellant in his notice of appeal specifies that the judgment is appealed from, and also an appeal "from said judgment as modified by the order of said district court made and entered on the 28th day of December, A. D. 1901, retaxing the costs in said action." Under the decisions of this court, an appeal does not lie from an order taxing costs, but the error, if any, may be considered on appeal from the judgment. *M. O. P. Co. v. B. & M. Co.*, 27 Mont. 288, 70 Pac. 1114; *Murray v. N. P. Ry. Co.*, 26 Mont. 268, 67 Pac. 625.

We advise that this court direct the court below to modify the judgment appealed from, so that it may determine that the appellant is entitled to the possession of the area in conflict, and specifically describe the same as set forth in the complaint.

POORMAN and CALLAWAY, CC., concur.

PER OURIAM. For the reasons stated in the foregoing opinion, this cause is remanded to the district court with directions to modify the judgment so as to make it conform to the views expressed in the opinion, and that, when so modified, it be affirmed.

(34 Wash. 362)

HUNT et al. v. PHILLIPS et al.

(Supreme Court of Washington. March 16, 1904.)

WILLS—CONTEST—BURDEN OF PROOF—BENEFICIARIES—ERROR IN ADMITTING EVIDENCE.

1. On a contest of a will, proponents need not establish *in prima facie* before contestants are required to introduce evidence in support of their objections; it being so established when admitted to probate.

2. Admission of incompetent evidence on a will contest is not ground for reversal, the case being triable *de novo* on appeal.

3. Testatrix having had testamentary capacity, and there having been no undue influence or fraud, the will is to be sustained, though the beneficiaries were not her relatives.

Appeal from Superior Court, Thurston County; A. L. Miller, Judge.

Will contest by John G. Hunt and others against Albert A. Phillips and others. From an adverse judgment, contestants appeal. Affirmed.

W. F. Arnold, Ben. Sheeks, J. W. Robinson, and J. B. Reavis, for appellants. T. N. Allen, Troy & Falknor, and C. D. King, for respondents.

DUNBAR, J. This is a proceeding in contest of the will of Abbie Howard Hunt Stuart, deceased, a resident of Thurston county,

executed on the 18th day of September, 1901, and Mrs. Stuart died on the 5th day of the following January. On January 14, 1902, a document purporting to be the will of decedent was probated by the superior court for Thurston county. This document named Albert A. Phillips and Henry B. McElroy as executors. The will disinherited all of the relations of the decedent, except John G. Hunt, a brother, who was bequeathed \$100. The assets of the estate are variously estimated at from \$50,000 to \$100,000, and, aside from mementos and bequests of some considerable value to Albert A. Phillips and Georgiana S. Govey, the will devised said estate, in equal parts, to Eva W. Gove, of Tacoma, Wash., Mary Lowe Dickinson, of New York, and Sarah M. Utt, of California, neither of whom is related to decedent. Within the statutory period, John G. Hunt, a brother, and the nieces and nephews of the deceased, whose parents are dead, filed their verified petition in contest, alleging the relationship of the contestants to the decedent, and showing petitioners to be the only heirs at law of Mrs. Stuart. They also set forth in their petition their objections and exceptions to the ex parte probate of the alleged will, because the same was not the will of Abbie H. H. Stuart; because the same was not signed by her, or witnessed or attested as by law required, or at all; because decedent was of unsound mind, and incapacitated from lawfully devising her property—and alleged that at the date of the execution of the paper writing purporting to be a will, and long prior thereto, Eva W. Gove and other principal legatees exercised a strange, abnormal, and unlawful influence over the decedent, and, as a result thereof, they unduly and fraudulently influenced her to make the will in question and to disinherit the petitioners. Issues were substantially made up by denial of the material contesting allegations. At the beginning of the trial, which was before the court without a jury, attorneys for the defense moved that the proponents be required to establish the will prima facie before the contestants were required to introduce any evidence in support of their objections and exceptions and the negative allegations in the petition, for the reason that, the relationship being admitted, the contestants, as the heirs at law of deceased, had a right to rest upon the law of descent and distribution. The court, however, ruled that the burden of proof was upon the contestants; that they must establish every material affirmative and negative allegation of facts contained in their petition by a fair preponderance of the evidence. To this ruling the contestants saved an exception, and the trial proceeded upon that theory, and a decree was entered upholding the will, from which this appeal is taken.

After the decree had been made, con-

med, and this ruling is also here for review. The court found, in addition to the date of the death, execution of the will, etc., as set forth above, that said will was duly presented for probate by said executors; that its due execution, publication, and attestation on the 18th day of September, 1901, together with the death of the testatrix as aforesaid, were proven to the satisfaction of said court on the 14th day of January, 1902, as was also the testamentary capacity of said testatrix at the time she made her said will; that the testimony was duly reduced to writing and subscribed and sworn to by the attesting witnesses on the said 14th day of January, 1902, and that on said last-mentioned day a finding of fact and certificate in accordance with said testimony was duly made and entered by the court and judge thereof, establishing said will, and admitting the same to probate, and directing letters testamentary to issue to said executors; that thereupon testamentary letters were duly issued to said executors, who took possession and control of said estate, and entered upon the discharge of their duties as said executors; reciting the institution of the action by Hunt and others, and the grounds of the contest; and finding that the testatrix at the time of the execution of the will was of sound mind and disposing memory; that she was not unduly influenced in disposing of her estate thereby; that said will was in writing, and was wholly written by her, the said Abbie Howard Hunt Stuart, together with the attestation clause, and was duly subscribed and published by her in the presence of two competent attesting witnesses, and that said witnesses, in her presence and at her request, and in presence of each other, duly witnessed and attested the same by subscribing their names thereto; and that in all respects said will was duly and legally executed, published, and attested. As a conclusion of law, it was found that the will and testament aforesaid was in all respects a valid instrument, and was the last will and testament of said Abbie H. H. Stuart, and that the disposition made therein of the real and personal estate of said testatrix was legal, binding, and sufficient; that said disposition was conclusive as to the rights or claims of all persons whomsoever, including the contestants or plaintiffs in this action; that the contestees or defendants were entitled to a judgment in conformity to said findings and conclusions. Certain findings of fact and conclusions of law were proposed by the contestants, which were denied by the court.

The first contention of appellants is that the court erred in overruling the motion of the attorneys for contestants that the proponents be required to establish the will prima facie before the contestants were required to introduce any evidence in support

of their objections and exceptions and the negative allegations in the petition. We think the court did not err in overruling the motion. The will had already been established *prima facie*. That being true, it must stand as a valid will until such *prima facie* establishment has been overcome by the evidence of the contestants. We think, instead of doing violence to the ordinary rules of pleading and evidence, the ruling of the court was in exact harmony with the general proposition of law that the burden of proving a proposition is upon him who asserts it. In addition to this, this question was squarely before this court in *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489, where it was decided that, where the record showed that the court had jurisdiction, and the facts showed *prima facie* a valid will, the burden was on the appellants to show that the will was invalid. And, further, it is immaterial to the consideration of this case by this court what the ruling in this respect was, as this court tries the case *de novo*, and will give to the whole testimony such weight as it thinks it is entitled to.

This disposes, also, of the objection to the admission of certain affidavits. If testimony admitted is not competent, it will not be considered. But, as we have repeatedly announced, in a case tried *de novo* in this court the admission of incompetent testimony will not be ground for the reversal of a judgment, although for manifest reasons the refusal of the trial court to admit competent testimony would ordinarily be good ground for reversal.

The other questions involved reach the merits of the case. A great deal is said in the elaborate briefs of counsel for appellants upon the duty of courts to construe wills with reference to the rights of heirs at law, conferred by the law of descent and distribution. But the rights conferred by the law of descent and distribution are no more potent than the right conferred by the law to make a voluntary distribution of one's estate. It is doubtless true that the law of descent and distribution disposes of the estate, in the absence of testamentary disposition, in accordance with the dictates of common affection; but the right of independent disposition is just as absolute, and no presumption can be indulged in against the exercise of this legal right. A case in many respects similar to the one at bar was that of *In re Gorkow's Estate*, decided by this court, and reported in 20 Wash., at page 563, 56 Pac. 385. In reviewing the facts in that case, it was said by this court: "The substantial facts, without controversy, shown, were that the deceased was a man of violent and ungovernable passions; that he was inordinately dissipated; that his acts evinced a total want of moral nature and natural affection; that he had for a number of years preceding his death been the subject of several painful maladies, some of them incurable,

and that physically his system was completely wrecked; that he required a body servant for a considerable time, constantly in attendance; that his second marriage was eccentric, foolish, and, from every reasonable standpoint, reprehensible. In fact, it may be conceded from the whole testimony that the deceased, as stated in the rather vigorous language of counsel for petitioner, was 'a moral leper,' and that the inference might reasonably be drawn from all these facts that his mental vigor was impaired. Indeed, the record does not disclose any particular mental capacity or traits in the deceased, except the ability to make and take care of money during his life. But the capacity required for a will is very well summed up and stated, as the deduction from a long line of recognized authorities, by Judge Redfield, in the following language: 'The result of the best-considered cases upon the subject seems to put a quantum of understanding requisite to the valid execution of a will upon the basis of knowing and comprehending the transaction, or, in popular phrase, that the testator should at the time of executing the will know and understand what he was about.' And the following quotations are excerpts from decisions cited with approval by this court: "The right of a testator to dispose of his estate depends neither on the justice of his prejudices, nor the soundness of his reasoning. He may do what he will with his own, and, if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust." *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681. "It is a testator's privilege to make such disposition of his property as he pleases, and if the will is his—that is, if it is the voluntary act of a competent testator—it must stand, if properly executed in form." *In re Mitchell's Estate*, 43 Minn. 73, 44 N. W. 885. "It may be harsh, and, under some circumstances, cruel, to disinherit one child and to distribute the estate among the others; but, if the testator be of sound mind, and execute his will as prescribed by law, no court can interfere." *Potter v. Jones*, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161. "But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper." *In re McDevitt*, 95 Cal. 17, 30 Pac. 101. "He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or charities to gratify his pride, and we must give effect to his will, however much we may

ton v. Knight, 6 Moak, Eng. Rep. 349. An analytical review of the testimony in the case would be unprofitable. It is sufficient to say that, from an examination of all the testimony, we think the findings of the court were fully justified, both as to the legal execution of the will, and the lack of undue influence exercised upon the testatrix as alleged by contestants, and that it plainly appears that at the time of the execution of the will the testatrix was of a sound and disposing mind.

It is not necessary to enter into a discussion of the question of the power of the court under the statute to award costs to the contestants, for we do not think that the record discloses a case which, under the circumstances, would justify the court in awarding such costs.

The judgment is in all things affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

(34 Wash. 360)

SIMPSON et al. v. WEISE.

(Supreme Court of Washington. March 16, 1904.)

EVIDENCE—WRITTEN CONTRACTS—NONPRODUCTION—MEMORANDUMS—REFRESHING MEMORY.

1. Where plaintiff sued on a written contract, claiming the original to be in the hands of the defendant, and that a copy had been demanded by plaintiff, which defendant had failed to furnish, and, on defendant being asked by the court for the original, defendant simply referred the court to his answer, denying ever having made the contract, either oral or in writing, it was not error to permit the introduction of a memorandum, from which plaintiff claimed the written contract was made, for the purpose of refreshing plaintiff's memory.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by R. H. Simpson and others against H. J. Weise. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Louis Henry Legg, for appellant.

PER CURIAM. The action is upon a written contract. Judgment for plaintiffs. The only legal assignment is that the court erred in permitting the respondents to offer in evidence a memorandum of the contract. The appellant objected to its introduction on the ground that a demand had been made for a copy of the written agreement on which the suit was founded, and that the same had never been furnished. It appears from the testimony that the agreement in question had been written by the defendant; that the plaintiffs had made a demand upon the defendant for the written agreement, or a duplicate thereof, which the defendant had agreed to furnish to plaintiffs, but that he had neglected to furnish it, and that the

that the evidence introduced was simply a memorandum for the purpose of refreshing the memory of the plaintiffs. Upon the objection being made, it was said by the court: "There has been no testimony that this is a copy of the contract. They sue on the contract, and they put a witness on the stand, and he says that he has not a copy of that contract, and never did have; that the original was with the defendant; that he asked for a copy; they promised him a copy, and he asked for it, and they never gave it to him. I asked you, then, if you had the original, and I was referred to the answer, and the answer denies ever having made this contract or any contract, either oral or in writing. Now, then, he is doing the next best thing which the law allows—proving that contract orally and by memorandum, and this memorandum that he claims from which the written contract was made." The statement of the court seems to be justified by the testimony, and there was no error in admitting the memorandum under the circumstances. On the merits of the case, we are satisfied with the conclusions reached by the trial court.

The judgment is affirmed.

(34 Wash. 344)

McCARROLL v. CITY OF SPOKANE.

(Supreme Court of Washington. March 16, 1904.)

MUNICIPALITIES—DEFECTIVE STREETS—INJURIES—NOTICE OF CLAIM—COMPLAINT—VARIANCE—OBJECTION TO EVIDENCE.

1. Where plaintiff's claim for injuries filed against a city recited that while claimant, in the exercise of ordinary care, was walking on one of defendant's sidewalks, he was run against by two bicyclists, and was thereby injured, and the complaint stated that plaintiff was injured by reason of being led to believe by the action of the city that he was walking on one of its sidewalks, where he had a right to be, when in fact he was not traveling on the sidewalk, but on a cinder path built for bicycle travel, there was a material variance between the statements made in the claim and the allegations of the complaint, which justified the sustaining of an objection to the admission of any evidence.

Appeal from Superior Court, Spokane County; Geo. W. Bell, Judge.

Action by Patrick F. McCarroll against the city of Spokane. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

L. H. Prather, for appellant. John P. Judson and A. H. Kenyon, for respondent.

DUNBAR, J. This is an action for damages on account of personal injuries, claimed by appellant to have been caused by the respondent's negligence. Appellant alleges in his complaint that respondent negligently constructed and controlled in the said city of Spokane a bicycle path beside a walkway, which it negligently allowed to become impassable for pedestrians, and so negligently



constructed said bicycle path and walkway in relation to each other as to lead pedestrians to believe that the bicycle path was the sidewalk, and negligently failed to use any means to inform or show pedestrians that the bicycle path was not the sidewalk, and was dangerous to pedestrians; that at the place where the injury occurred the sidewalk was impassable for pedestrians on account of boulders and other obstructions, and the only way to pass was on and along said bicycle path; that said bicycle path was dangerous to pedestrians on account of persons riding bicycles thereon; that respondent knew all these facts, and by the use of reasonable care could have known them; that during the existence of the conditions aforesaid, on the 20th day of April, 1901, at about 9 o'clock in the evening, it then being dark, and the street muddy, appellant was rightfully walking on the sidewalk at said place, and, coming to the space in said walkway where there was no sidewalk, and the walkway being impassable on account of boulders and other obstructions, to proceed on his journey walked onto said bicycle path, believing it to be the sidewalk, and having no knowledge to the contrary, and there being no other place for him to walk; that while so walking on said sidewalk two persons rode up behind him on bicycles unawares to him, and rode against and upon him, causing the injuries complained of; that on the 20th day of June, 1901, he filed with the city council of the city of Spokane a claim, as required by the charter of said city, except the filing was 60 days after the accident instead of 30, as required by said charter; that the said city council duly considered and passed on said claim and disallowed it; that appellant's injuries were such as to render him incapable, both mentally and physically, of knowing or stating the facts of said injury as to time, place, and circumstances for more than 3 months thereafter and up to the time of filing the complaint herein; that appellant was damaged in the sum of \$20,000, for which he demanded judgment. A demurrer was filed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled, and an answer interposed denying negligence on the part of the city, and alleging contributory negligence on the part of the appellant. After the opening statement of counsel for the appellant to the jury, respondent objected to the introduction of any testimony, upon the following grounds: Because the claim of the plaintiff presented to the city council which is attached to plaintiff's complaint does not state facts sufficient for the basis for an action to recover damages against the defendant city; because the facts stated in plaintiff's complaint are not consistent with, and that they contradict, the statements made in the claim as to the cause or causes of plaintiff's injury, the place of

the injury, and negligence of the city; because it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action; because the opening statement made by plaintiff's counsel to the jury, considered in connection with the claim filed, shows that the plaintiff cannot maintain this action.

The counsel's opening statement was in substantial harmony with the allegations of the complaint. As we view the case on the merits, it is not necessary to discuss the question as to whether or not the claim was filed in time, for it plainly appears that the allegations of the complaint, considering the claim presented to the city council as one of the allegations, are too inconsistent to sustain a judgment, the other material allegations of the complaint contradicting the statements made in the claim. The statements made in the claim, which is the basis of the complaint, do not show any cause of action against the city. The substance of the claim is that, while the claimant, in the exercise of ordinary care, was walking upon one of the sidewalks of the city, he was run against and upon by two young men who were then and there riding bicycles, and was thereby injured. The city could certainly not be held responsible for injuries resulting from a circumstance of this kind, especially in view of the fact that the complaint shows that there was a city ordinance against the riding of bicycles on any of the walks of the city. Nor is the claim strengthened by the bare assertion, following the statement of facts, that the claimant was injured by reason of the city's neglecting and carelessly failing to build and construct proper sidewalks at the places where the claimant received said injuries. The complaint, outside of the statements of the claim presented, presents altogether another case and another theory, viz., that the injury was caused by reason of the appellant being led to believe by the action of the city that he was walking on one of the sidewalks of the city, where he had a right to walk, when in reality he was not on the sidewalk at all, but on a cinder path built especially for bicycle travel. The court did not err in sustaining the objection to the admission of evidence.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

(34 Wash. 357)

#### SANDERS v. STIMSON MILL CO.

(Supreme Court of Washington. March 16, 1904.)

SHIPPING—INJURIES TO SEAMAN—MARITIME CONTRACT—MEDICAL ATTENDANCE—INJURIES—ACTIONS—JOINDER—CONTRACT AND TORT.

1. Where, in an action for injuries to a seaman, the complaint stated a cause of action in tort only for the negligence and wrongful acts of the defendant, and contained no statement of



a cause of action on a maritime contract, express or implied, plaintiff could not recover in that action for medical care, nursing and attendance, etc., under an implied contract.

2. An appeal must be determined on the same theory on which the case was tried below.

3. Alleged errors not raised below will not be reviewed on appeal.

4. An action in tort for injuries to a seaman cannot be joined with an action on contract to furnish the seaman medical care, nursing, and attendance at the expense of the ship on which he was injured.

. On rehearing. Affirmed.

For former opinion, see 73 Pac. 688.

DUNBAR, J. This case was originally argued and submitted at the October term of court, 1903, and the decision is reported in 73 Pac., at page 688, where a statement of the case can be found. It was there decided that there was no negligence on the part of the respondent which was shown to be the proximate cause of the injury to the appellant, and the action of the trial court in taking the case from the jury and rendering judgment for the respondent on that ground was approved. But upon the argument of the case in this court it was contended by the appellant that he was entitled under a maritime contract to compensation for medical services and attentions and other expenses incident to his recovery, he being hurt while in the service of the ship, regardless of the question of negligence. This view was adopted by this court, and the judgment was modified to that extent, and the cause remanded, with instructions to the trial court to allow appellant to introduce proof of damages of this character. Upon petition for rehearing being filed by both appellant and respondent, the cause was reassigned, and has been again argued and submitted.

Upon the main question in relation to want of negligence of the defendant company and the lack of proof of proximate cause, we are satisfied with our former decision, and will not discuss it again. But upon a reconsideration of the subject we think we erred in holding that the appellant was entitled to compensation of any kind under a maritime contract, express or implied, so far as this action is concerned; for, whatever the law may be upon that subject, the question is not presented here, as an examination of the complaint shows conclusively that the appellant sued in tort, and that the action was brought to recover for damages sustained by the alleged negligence and wrongful acts of the respondent, and that there is no element of maritime contract expressed or intimated in the complaint or in any of the succeeding pleadings, but the pleadings throughout were framed as are the pleadings in the ordinary personal damage case, involving only the questions of negligence, contributory negligence, and assumption of risks incident to the employment. Not only were these the only

issues presented to the trial court by the pleadings, but the trial of the cause was confined exclusively to these issues, and an examination of the record shows that no claim whatever was made during the trial that anything was due the appellant by virtue of a contract of any kind, this question being raised for the first time in this court. We have uniformly held, for reasons that must be manifest without repetition, that we will determine a case here upon the theory upon which it was tried below, and that alleged errors which were not called to the attention of the court would not be reviewed here. See *Bethel v. Robinson*, 4 Wash. 446, 30 Pac. 734; *Weigle v. Cascade Fire, etc., Ins. Co.*, 12 Wash. 449, 41 Pac. 53; *Hardin v. Mullin*, 16 Wash. 647, 48 Pac. 349; *Coleman v. Montgomery*, 19 Wash. 610, 53 Pac. 1102; and many other cases. But not only was there no claim for damages of this character made in the cause, but it could not have been made in this action, for under our Code an action in tort and an action on contract cannot be joined. *Clark v. Great Northern Ry. Co.*, 31 Wash. 658, 72 Pac. 477.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

(34 Wash. 371)

# O'TOOLE v. FAULKNER.

(Supreme Court of Washington. March 17, 1904.)

INJURIES TO WIFE—DAMAGES TO COMMUNITY—DEATH OF HUSBAND—HUSBAND'S EXECUTOR—JOINDER—WITNESSES—INTEREST—CONVERSATION WITH DECEASED PERSON—TRIAL—NEWLY DISCOVERED EVIDENCE—CORROBORATION OF PARTY.

1. Where a wife was injured in a collision with a street car, and special damages were sustained by the community for medical attendance and for wages paid to persons employed to perform the wife's work before the husband's death, the wife was entitled to join herself as the husband's executrix in a suit brought by her after his death to recover for such injuries.

2. Where the motorman of a street car which struck plaintiff was not made a party to an action by her to recover for her alleged injuries, and, as executrix of her husband's estate, for injuries sustained to the community by reason thereof, and such motorman had not been notified to appear in the suit, the record in such action was not binding on him, nor conclusive as to his liability over to the defendant in case plaintiff recovered, and hence he was not a party in interest, and prohibited by 2 Ballinger's Ann. Codes & St. § 5901, from testifying to a conversation with the husband before his death.

3. A new trial will not be granted on the ground of newly discovered cumulative evidence, though it tends to corroborate the evidence of a party to the suit.

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by Margaret O'Toole personally and as executrix of the last will of E. O'Toole, deceased, against L. B. Faulkner. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

¶ 4. See Action, vol. 1, Cent. Dig. § 469.

Israel & Mackay and Vance & Mitchell, for appellant. T. N. Allen and Troy & Falknor, for respondent.

HADLEY, J. This cause was once before in this court on appeal, as will appear in *O'Toole v. Faulkner*, 29 Wash. 544, 70 Pac. 58. The judgment was reversed, with instructions to sustain the plaintiff's demurrer to an affirmative answer of the defendant. Upon the return of the cause to the superior court the remaining issues were tried before the court and a jury. A verdict was returned for the defendant, and judgment entered accordingly. The plaintiff has again appealed.

Reference to the former opinion will show that the action is for personal injuries received by the appellant, Margaret O'Toole, through the alleged negligent handling of a street car on the streets of the city of Olympia. The action was brought by Margaret O'Toole in her own proper person, joined with said Margaret O'Toole as executrix of the last will of E. O'Toole, deceased. At the time of the accident on the 23d day of February, 1900, the said deceased and Margaret O'Toole were husband and wife, and remained such until the 10th day of June, 1900, when the said husband died. After the death of the husband this suit was brought by the wife to recover for her own injuries. No claim is made for recovery for injuries to the husband, but it is alleged that the damage was to the community. The estate of the husband was evidently joined as party plaintiff on the theory that the proceeds of this suit, if recovery shall be had, will belong to the community. The complaint shows that a little more than three months after the accident the community, by the death of the husband, ceased to exist. The damages alleged are chiefly of a permanent and continuing character because of consequent personal disability of the surviving wife. The only special damages to the community alleged are \$100 paid for medical attendance and treatment at the hospital, and \$50 paid to employ other persons to perform the duties and work of the wife. The community being dead when this suit was brought, it may be doubted if it was such an entity as could be continued through an administration for the purpose of sharing in the proceeds of unliquidated and unrecovered damages for continuing lifetime disabilities of a surviving member. While damages of the last-named character comprise the gravamen of the demand in this action, yet the community is interested in the special damages above mentioned, and to that extent, at least, the estate of a deceased person is a party. The pertinence of these comments will more fully appear by what is hereinafter said. It has been suggested by respondent that the action is wholly for the benefit of Margaret O'Toole on account of personal injuries to herself, and that the estate of her deceased husband,

although made a nominal party, has not such an interest as brings the case within section 5991, 2 Ballinger's Ann. Codes & St. (section 937, Pierce's Code), which declares the disability of certain persons to testify as to transactions had with deceased individuals. What has been said above will dispose of this feature of the case without further comment, when its applicability becomes more apparent by what follows hereinafter.

The testimony of several witnesses for the defense was to the effect that the deceased, O'Toole, was riding with his said wife in a wagon drawn by a team which he was driving; that the team was going northward on Adams street, and had just about crossed the street railway track on Fourth street, which runs east and west; that the horses were turned in a northwest direction on Fourth street, and that they and the wagon occupied the space between the street railway track and the sidewalk on the north; that the said husband was sitting upon the left and his wife upon the right side of the wagon; that at that time an electric street car approached from the west on Fourth street, traveling at the rate of about five miles an hour; that as the car approached the team became unmanageable, and, while their said driver tried to urge them forward, they began pushing the wagon backward in such a manner that the wheels were thrown across the street railway track in front of the approaching car; that the motorman brought the car to a standstill when it was about 12 or 14 inches from the wheels of the wagon; that the said O'Toole was thereafter still unable to control his team; that the latter made a lunge, drawing the wheels of the wagon over the fender of the car, which upset the wagon and threw out the occupants, whereby Mrs. O'Toole received her injuries. The evidence of the appellant did not agree with the above in some essential particulars, but such, in any event, was the testimony of respondent's witnesses. After the injured woman was taken in charge by attendants, the motorman continued with his car to the end of his line. On his return, when he came to the front of the building where the lady was carried from the scene of the accident, he stopped his car, and inquired about her condition. At that time and place he had a conversation with Mr. O'Toole, who was the driver of the team aforesaid, and who is now the deceased husband of the injured woman. Of that conversation the motorman testified as follows: "Q. You may tell the conversation you had with Mr. O'Toole. A. When I came back from Puget street, I stopped my car in front of Bates', and the driver was standing on the edge of the sidewalk, and I stopped to make inquiry if the lady was hurt much, and how. And he addressed me by saying 'They tell me that you did not run into me.' I says, 'No, I did not.' He says, 'How did the wagon get upset?' I says: 'Your horses ran the wheel

says, 'If I had got on the other side where the brake was, I could have held them.'" Objection was made to the above question, but the same was overruled, and it is here assigned that the court erred in its said ruling. It is contended that the witness, as an employé of respondent, was interested in the result of the suit in such a degree as to disqualify him from testifying adversely to the estate of the deceased concerning any conversation had with the deceased. It is urged that the action is based upon the theory of carelessness on the part of the motorman as respondent's employé, and that, in the event of a decision in the case adverse to the respondent, the motorman must respond to his employer to reimburse him for his outlay by reason of the servant's negligence. Here it will be observed from what we have already said that the estate is such a party to this action as renders the above testimony objectionable if the witness comes within the disqualifications of the statute hereinbefore cited. We think, however, that he is not a "party in interest or to the record" who was admitted "to testify in his own behalf" within the meaning of the statute. This view is sustained by the decision of this court in *Sackman v. Thomas*, 24 Wash. 600, 64 Pac. 819. It was there pointed out that a party in interest may testify, but not in his own behalf, and that one not a party to the record cannot be said to testify in his own behalf when he merely testifies to a state of affairs that may collaterally or remotely affect his interest. It was further made clear that, before a witness can be said to testify in his own behalf, his interest must be such as will be bound by the judicial proceeding in which he testifies. Such is not the case with this witness. He was not notified to appear and assist in the defense of the action. He is in no sense a party, and cannot be bound by the result of this suit. The record in this suit cannot be interposed to his prejudice should an action be brought against him by the respondent. His defense to such a suit upon all questions involved may be made as fully as if this action had never existed. Not being bound by the judgment in this action, then, under *Anderson v. Bigelow*, 16 Wash. 198, 47 Pac. 426 notwithstanding any judgment that may be rendered in this cause if respondent should hereafter sue the witness, he must prove his cause of action dehors the record here. In *Burkman v. Jamleson*, 25 Wash. 606, 66 Pac. 48, the general principle was discussed and applied that one not a party to an action is not concluded by the judgment therein. As particularly pertinent to the subject under discussion here, see *Nearpass v. Gilman*, 104 N. Y. 506, 10 N. E. 894; *Perline v. Grand Lodge*, etc., 48 Minn. 82, 50 N. W. 1022; *Mull v. Martin*, 85 N. C. 406; *Dickson v. McGraw Bros.*, 151 Pa. 98, 24 Atl. 1043; *Wormley v.*

is an interest in the event of the action, and that the true test of interest is that the record will be legal evidence against him in another action. The last case cited also states that, if the interest is of a doubtful nature, the objection goes to the credibility of the witness, and not to his competency. We believe the foregoing authorities declare the correct rule, and that the court did not err in admitting the criticized testimony.

It is next assigned that the court erred in refusing to grant the motion for a new trial on the ground of newly discovered evidence. The affidavits in support of the motion do not, however, disclose the discovery of evidence tending to establish any new or independent fact. The discovered evidence is only corroborative of the appellant's testimony, and is therefore merely cumulative. The affidavits disclose that the affiants, in the event of a new trial, would probably testify that the car was not stopped before it reached the wagon, but that, while still moving, it struck the wagon and overturned it. Such, however, was the testimony of appellant. It is a general rule that a new trial will not be granted on the ground of newly discovered evidence when the new evidence relied upon is merely cumulative of that introduced at the former trial. 8 Am. & Eng. Enc. of Law (2d Ed.) pp. 472, 473. A very long list of authorities is cited in support of the text above mentioned. Appellant, however, insists that the above rule as to cumulative evidence does not apply when the newly discovered evidence is corroborative only of that given by a party to the suit. It is contended that it is not cumulative evidence, within the meaning of the rule, unless it is in corroboration of the testimony of a disinterested witness. In their brief counsel cited in blank and discussed a case said to support their contention as above stated, but the actual citation has not been supplied. We have, upon examination, however, discovered the following cases, which hold that the rule applies when testimony of which the new evidence is cumulative is that of the party moving for the new trial, as well as when it is that of any other witness introduced by him: *Fox v. Reynolds*, 24 Ind. 46; *Lefever v. Johnson*, 79 Ind. 554; *State v. Hendrix*, 45 La. Ann. 500, 12 South. 621; *Nininger v. Knox*, 8 Minn. 140 (Gil. 110); *Shute v. Jones* (Sup.) 24 N. Y. Supp. 637. Parties in this state may become witnesses, and when they voluntarily become such their testimony in the particular here discussed is subject to the same regulations as that of other witnesses. It is said in some of the above-cited cases that the change of the law which grants to parties the privilege of becoming witnesses has not changed the rule as to cumulative evidence on motions for new trial. A good reason therefor is aptly stated in *Fox v. Reynolds*, supra: "Any other con-

such, in case the jury dissented, and, soon about with increased diligence for newly discovered cumulative evidence." The court therefore did not err in denying the motion for new trial on the ground of newly discovered evidence.

We have discussed the only assigned errors urged by appellant. The judgment is affirmed.

FULLERTON, C. J., and ANDERS, MOUNT, and DUNBAR, JJ., concur.

(34 Wash. 379)

**GALLAMORE v. CITY OF OLYMPIA.**

(Supreme Court of Washington. March 17, 1904.)

**MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—INJURIES—CONTRIBUTORY NEGLIGENCE—DAMAGES—EXCESSIVENESS—PLEADING—DEMURRER—AMENDMENT—OBJECTIONS AFTER VERDICT—INSTRUCTIONS—APPEAL.**

1. In an action for injuries on a city sidewalk, an allegation in the complaint that the injury occurred on the north side of Maple Park, a street within the corporate limits of defendant city, and that between F. and M. streets, on the north side of such park, there was at all times a sidewalk constructed, maintained, and supervised by the city, through its officers and servants, was sufficient to show that the street on which the accident happened was a "public street."

2. Since all the streets of a city are presumed to be public streets in the absence of a showing to the contrary, an objection to a complaint for injuries by reason of an alleged defect in a city street that it was not alleged that the street was a public street could not be raised by demurrer.

3. Such complaint was not subject to general demurrer on the ground that it failed to allege that the "sidewalk" on which plaintiff fell was within defendant's corporate limits.

4. Where, in an action for injuries on a city sidewalk, evidence was admitted without objection showing that the sidewalk was within the corporate limits of the city, and the case was tried throughout by the city on such assumption, an objection that the complaint did not allege such fact was unavailable after verdict.

5. Where a complaint in an action for injuries on a defective city sidewalk alleged facts sufficient to charge the city with constructive notice of the defect, it was not objectionable for failure to charge in terms that the city had such notice.

6. A statute requiring "demands" against a city to be presented to the city council for rejection or allowance does not apply to, nor require presentation of, claims for damages for personal injuries.

7. An exception to a charge as a whole, and to each and every part thereof, was not available where any one of several propositions contained therein was correct.

8. Where, in an action for injuries, evidence was introduced without objection that plaintiff had undergone pain and suffering, and was destined to undergo much more in the future, the court was warranted in submitting such future suffering as an element of damage, though no such demand therefor was made in the complaint.

amendment was on appeal be regarded as made. 10. In an action for injuries, an instruction that the jury may consider, in making up their verdict, the "probable" amount of pain, loss of time, and amount of expense plaintiff would suffer and be subjected to in the future on account of her injuries, is not objectionable as authorizing the jury to give contingent and speculative damages resting on mere possibilities.

11. Where, in an action for injuries, the court, in a prior part of the charge, explained the degree of proof necessary in order to enable plaintiff to recover, an instruction that the jury might consider, in determining plaintiff's damages, the "probable" amount of pain, loss of time, and expense plaintiff would suffer in the future on account of her injuries, should be construed as using the word "probable" with reference to the quantum of plaintiff's recovery in case she was entitled to recover at all, and not as to the measure of proof.

12. One traveling on a sidewalk without notice of any defect therein has a right, when using due care and diligence, to presume and act on the presumption that it is reasonably safe through its entire width.

13. In an action for injuries on a city sidewalk, evidence held sufficient to sustain a verdict in favor of plaintiff.

14. Where, though a person injured by a defect in a city sidewalk had passed over the walk prior to the injury, she testified positively that she did not know of the defect, her contributory negligence was for the jury.

15. Where, though plaintiff was seriously injured by a defect in a city sidewalk, a part, at least, of her permanently impaired physical condition at the time of the trial was due to a surgical operation preceding her fall on the sidewalk, a verdict in her favor for \$8,040 was excessive, and should be reduced to \$5,000.

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by Rose Gallamore against the city of Olympia. From a judgment in favor of plaintiff, defendant appeals. Modified.

M. G. Royal, Frank C. Owings, and James A. Haight, for appellant. Troy & Falknor, for respondent.

FULLERTON, C. J. The respondent, who was plaintiff below, brought this action to recover for personal injuries received by her, as she alleges, from a fall caused by a defect in the sidewalk of the appellant city. At the trial in the court below a verdict was returned in her favor for the sum of \$8,040, for which sum, together with the costs of the action, a judgment was entered against the city. This appeal is from that judgment.

The appellant first challenges the sufficiency of the complaint. It is objected that the complaint fails to allege that the street upon which the accident happened was a public street, that the sidewalk through which the respondent fell was within the corporate limits of the city of Olympia, that the city had notice of the defect in the walk which caused the injury, or that a claim for the damages sued for was ever presented to the city council of the city of Olympia for rejection or allowance. But we think there is no merit in either of these contentions. As to the first,

¶ 6. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1697.

side of Maple Park, a street within the corporate limits of the said defendant city, and between Franklin and Main streets, on said north side of said Maple Park, there is and was at all times mentioned herein a sidewalk which was constructed and had been maintained and supervised by said defendant city through its legally constituted officers and servants." This, in our judgment, is sufficient to show liability on the part of the city for defects in the walk. If the city assumed jurisdiction over the walk by constructing, maintaining, and supervising it, it is responsible for its safe condition, whether the walk was or was not on a public street. But, aside from this, the omission complained of would not be fatal to the complaint in any event. All streets of a city are presumed, in the absence of a showing to the contrary, to be public streets; and, if it were the fact that the street mentioned was not a public street, the objection could not be raised by a general demurrer, but would have to be taken by answer. As to the second objection, it is true there is no direct allegation that the sidewalk on which the accident occurred was within the corporate limits of the city of Olympia. In the quotation from the complaint above made it will be observed that the allegation is that the street named is within the corporate limits of the city, and that the sidewalk is on the north side of the street. To the ordinary mind, however, this conveys the idea that the sidewalk was laid along the north side of the street and in the street; and, if it was, it is, of course, within the corporate limits of the city. This, we think, is good as against a general demurrer, whatever might have been its effect as against a motion to make more definite and certain. But, aside from this, proofs went into the record without objection that the sidewalk was within the corporate limits of the city, and the case was tried throughout by the city on that assumption. In the light of this fact it is idle now to contend that the omission would be fatal even were it true that the complaint did not contain the allegation in question. As to the allegation of notice on the part of the city, the complaint, instead of alleging directly that the city had notice of the defect complained of, stated facts from which such notice would be inferred. This is enough. As proof of constructive notice of the defect causing the injury would sustain a recovery, it is sufficient to allege constructive notice. The allegations need not be stronger than the required proofs. The last objection on this branch of the case is answered in *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847. It was determined in that case that the general statute requiring "demands" against a city to be presented to the city council for rejection or allowance did not include claims for damages for personal injuries. This rule has been

statute. The demurrer to the complaint was properly overruled.

It is next assigned that the court erred in instructing the jury that they might, when making up their verdict, take into consideration, if they found that the respondent was otherwise entitled to recover, the pain and suffering she had undergone, and might undergo in the future, by reason of her injuries. This contention is founded on the form of the prayer of the complaint. The respondent, after setting out in her complaint in detail the cause and nature of her injuries, and the several ways she had been damaged by reason thereof, demanded judgment for loss of wages, for amounts she had paid and contracted for gurney hire, for amounts she had paid and contracted for drugs and medicines, physicians' services, hospital charges, and "for damages caused by permanent injuries," but made no special demand for damages caused by pain and suffering. It is argued that, because no special demand was made for damages on account of these items, the respondent was precluded from recovering therefor, and consequently it was error for the court to charge the jury that she might so recover. To this contention there are several answers, the first of which is that the appellant has not properly preserved the question for review in this court. The part of the charge complained of was contained in a paragraph consisting of several distinct propositions, each of which, except possibly the one in question, was free from error. The exception was to the paragraph as a whole, "and to each and every part thereof," but it did not point out to the court the precise matter thought to be objectionable. This was not enough. The rule is general that an exception taken to an entire charge containing several distinct propositions is unavailing if any one of the propositions be correct, and the same rule applies where the exception is to a part of a charge which contains in itself more than one proposition. *Lichty v. Tannatt*, 11 Wash. 37, 39 Pac. 260; *Rush v. Spokane Falls & Northern Ry. Co.*, 23 Wash. 501, 63 Pac. 500; *Blashfield's Instructions to Juries*, § 366; 8 Enc. Pl. & Pr. 258-261. As was said in *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476: "The general exception, 'to all and each part of the foregoing charge and instructions,' suggests nothing for our consideration. It was no more than a general exception to the whole charge. If the trial court's attention had been specifically called at the time to the particular part of the charge that was deemed erroneous, the necessary correction could have been made. An exception 'to all and each part' of the charge gave no information whatever as to what was in the mind of the excepting party, and therefore gave no opportunity to the trial court to correct any error committed by it." This language is

peculiarly apt when applied to the exception before us. At the trial, evidence that the respondent had undergone much pain and suffering, and was destined to undergo much more in the future, was offered and received without objection. Pain and suffering following an injury are elements properly to be considered in estimating damages caused by that injury. The court was therefore warranted in assuming that the complaint was as broad as the evidence, and the appellant cannot be permitted to take advantage of that mistake without showing that it called attention to it. The exception as taken failed to do this. It failed even to mention the objectionable part of the charge. Much less did it give the reason why it was objectionable. Indeed, had the form of the exception been the result of a studied effort to obscure the real objection, it could not have been framed more happily to secure such a result. But, if the question were properly before us, the result would not be different. This particular defect in the complaint was one capable of being amended, and could have been amended at the trial as of course. Amendments which might have been made in the court below on motion will, in the appellate court, be deemed to have been made.

The court instructed the jury that, if they found the respondent was entitled to recover, they might take into consideration, in making up their verdict, the probable amount of pain, the probable loss of time, and the probable amount of expense she would suffer and be subjected to in the future on account of her injuries. It is objected to this that it left the jury to give damages against the appellant for consequences which were contingent, speculative, or merely possible, while the rule is that damages for future pain and suffering, loss of time, and the like, can only be given when it is reasonably certain that they will ensue as a result of the injury. Undoubtedly it would be error for the court to allow the jury to award damages for matters purely speculative, or for those conditions not supported by a preponderance of the evidence, but we think the instruction complained of is far from doing this. The word "probable" is defined in Webster's International Dictionary as "having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely"; and in common acceptation the word implies, when applied to a condition which may be supposed beforehand, that we know facts enough about the condition supposed to make us reasonably confident of it, or, at the least, that the evidence preponderates in its favor. In civil actions it is a general rule, to which there are but few exceptions, that the jury may find according to the preponderance of the evidence. We know of no reason why an exception should be made in this instance, and we do not think the court's applying the term "reasonably certain" to supposed fu-

ture conditions meant any more than this, but that each of them would have approved an instruction to the effect that the jury might return damages for future pain and suffering if they found by a preponderance of the evidence that such pain and suffering would ensue. However, the charge of the court is not without direct authority in its support. In *Sedgwick on Damages* (8th Ed.) vol. 1, p. 249, the author, speaking of prospective losses, after stating the rule to be that such losses must be reasonably certain to ensue, uses this language: "This 'reasonable certainty' does not mean absolute certainty, but reasonable probability;" citing *Griswold v. N. Y. C. & H. R. R. Co.*, 115 N. Y. 61, 21 N. E. 726, 12 Am. St. Rep. 773, and *Feeney v. L. I. R. R. Co.*, 116 N. Y., 375, 22 N. E. 402, 5 L. R. A. 544, where it was held not error to permit answers to questions put to an expert medical witness concerning the probability of the injured party suffering in the future from his injuries. In *Hamilton v. Great Falls S. R. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713, the court said: "The court charged, among other things, that damages could be awarded for 'such consequences as are reasonably likely to ensue in the future'; and again, 'plaintiff may recover for all pain and suffering which she has sustained, or in reasonable probability will hereafter sustain,' etc. The appellant now contends that damages can only be awarded when it is rendered reasonably certain from the evidence that damages will inevitably and necessarily result from the original injury. In this case all testimony as to future disability consisted of expert medical opinions. Certainty of future effects was impossible, and reasonable probabilities were necessarily the bases of the opinions expressed. Therefore to say that she could recover for suffering which she would in reasonable probability sustain was practically to say that she might recover for suffering which she was reasonably certain to sustain. The degree of proof would be the same in either case." And in *Pennsylvania* it was held that a charge which told the jury that they might allow for such pain and suffering as the injured person was "likely to suffer" in the future by reason of his injuries was not error. *Scott Township v. Montgomery*, 95 Pa. 444. To the same effect is *Illinois Cent. R. Co. v. Davidson*, 76 Fed. 517, 22 C. C. A. 306. And see, also, *Swift v. Raleigh*, 54 Ill. App. 44; *Kenyon v. City of Mondovi*, 98 Wis. 50, 73 N. W. 314. In some of these cases it is true the phrases used were "likely to suffer," "reasonably likely to suffer," and the like, but there can be no distinction in meaning between such phrases and the phrase under discussion.

Counsel for both appellant and respondent have argued the questions pertaining to this instruction as if the court used the word "probable" with reference to the possibility of the respondent suffering and sustaining

question with the same thought in view. It has seemed to us, however, after a reading of the entire charge, that it is a misconstruction of the meaning of the court. As we read the charge, the court did not use the word in this connection with the idea of expressing the degree of proof necessary in order to enable the respondent to recover (elsewhere in the instructions it had done that), but used the word rather as a measure of the quantum of her recovery in case they should find she was entitled to recover at all. The court did not, by this instruction, say that the jury could find for the respondent if they found that she would probably suffer pain in the future and probably sustain the other enumerated losses, but it charged them to the effect that, if they found by a fair preponderance of the proofs that she would suffer pain in the future, and would be subject to loss of time and expenditures because of her injuries, then the jury could, in estimating her damages, take into consideration the probable amount of pain she would suffer, the probable loss of time, and the probable amount of expense she would be put to in the future on account of such injuries, which, as we say, gives it rather the sense of a measure of quantity than the expression of a possibility. If this be the true meaning of the instruction, it is clearly not erroneous.

It is complained that the court erred in charging the jury to the effect that one traveling upon the sidewalk or street of a city without notice of any defect therein has the right, when using due diligence and care, to presume and act upon the presumption that it is reasonably safe throughout its entire width. This instruction is sustained by the case of *Gallagher v. Town of Buckley*, 31 Wash. 380, 72 Pac. 79, and is, we think, a correct statement of the law.

The appellant challenges the sufficiency of the evidence to support a verdict for respondent. It argues that it does not appear from the evidence that the hole in the walk into which the respondent fell was one existing prior to the accident, that it was not shown that the city had knowledge of it prior to that time, and that it does appear that the respondent was guilty of contributory negligence; but on each of these questions we find a substantial conflict in the evidence, and think they were properly submitted to the jury. The testimony of the respondent and the woman who accompanied her at the time of the injury is to the effect that she fell into an existing hole in the walk, and the testimony of other witnesses shows that the holes had been in the walk at that place for something like a year prior to the accident, and that they rendered the walk unsafe for

and the respondent stepped into an existing hole, this evidence was sufficient to make a case for the jury, even though contradicted. So, also, the testimony that the unsafe condition of the walk existed for so long a time was proof sufficient to go to the jury on the question of the city's knowledge of the defect. It was evidence of constructive notice, and constructive notice is sufficient. The only thing we have discovered in the record indicating contributory negligence was the fact that the respondent passed over the walk prior to the injury, and for that reason may have known of the existing holes. Her testimony, however, was positive to the effect that she did not know of them. This made it a question for the jury.

The other errors assigned, save the one next to be noticed, we think, hardly merit separate consideration. Indeed, some of them are passed over by the appellant with nothing more than their mere mention. Suffice it to say, therefore, that we have examined them with care, and find nothing that requires a reversal of the judgment rendered.

Lastly, it is contended that the judgment is excessive, and with this contention we are inclined to agree. Doubtless the appellant was at the time of the trial, in so far as her state of health was concerned, in a somewhat pitiable condition, but the evidence makes it clear that this was not entirely the result of her injury. She had been subjected to two surgical operations, each of which was critical in its nature. One of these occurred prior to the time of her injury, and, of course, could in no wise be traceable thereto. The second occurred some little time after, and it is doubtful, at best, whether the condition necessitating it was the result of, or only aggravated by, the injury. The conditions of the body necessitating these operations were alone sufficient to account for much of her ill health, and it appears to us that the jury, in making up their verdict, may not have very carefully segregated the conditions for which the city could be held responsible from those for which it could not. For these reasons we have decided to reduce the judgment to \$5,000. The order of the court will be, therefore, that if the respondent, within 30 days from the time of the filing of this opinion, will remit from the judgment all in excess of the sum of \$5,000 and the costs taxed in the court below, the judgment will stand affirmed for those sums; otherwise the judgment will be reversed, and a new trial granted. In case the remission is made, neither party will recover costs in this court. If not so made, costs of this court will go to the appellant.

DUNBAR, HADLEY, MOUNT, and ANDERS, JJ., concur.

(34 Wash. 413)

CITY OF PORT TOWNSEND v. LEWIS et al.  
(Supreme Court of Washington. March 21,  
1904.)

QUIETING TITLE—COMPLAINT—SUFFICIENCY—  
MUNICIPAL CORPORATIONS—RIGHT TO SUE—  
ADVERSE POSSESSION—COLOR OF TITLE—  
LANDS HELD FOR PUBLIC—EVIDENCE—CROSS-  
EXAMINATION—APPEAL—ERRORS WAIVED—  
PLEADING OVER—NONSUIT.

1. A motion to strike or to make more definite and certain is waived by pleading over and going to trial on the merits.

2. On appeal from a judgment quieting title to and awarding the possession of land, the Supreme Court tries the case de novo, in so far as the findings have been excepted to, and will disregard any evidence which it finds inadmissible, so that error in the admission of evidence is not available to appellant.

3. By going on with the trial and introducing evidence on their behalf, defendants waived their motion for a nonsuit, and could not complain on appeal of error in denying the same.

4. In an action by a city to recover possession of, and quiet title to, land claimed by it as a public street, allegations of fact showing the premises to be a public street of the city are sufficient, though there is no allegation that the city is the owner of, or entitled to the possession of, the street.

5. Under the statute giving third-class cities the right to sue and be sued, and to establish, lay out, etc., streets, such a city may maintain ejectment to recover a portion of one of its public streets.

6. It is not proper for defendant to cross-examine plaintiff's witnesses as to matters pertaining to an affirmative defense.

7. To constitute adverse possession, there must not only be an ouster of the real owner, followed by an actual, notorious, and continuous possession on the part of the claimant during the statutory period, but there must have existed an intention on his part, for a like period, to claim in hostility to the title of the real owner, so that a contest with other claimants of a preference right to purchase the lands in dispute from the state is inconsistent with an adverse possession.

8. Ballinger's Ann. Codes & St. § 5503, giving title to persons in actual possession of land under color of title, who continue in possession for seven successive years, paying taxes, does not apply to a case where the person in possession has no color of title.

9. Ballinger's Ann. Codes & St. § 5503, giving title by seven years' adverse possession and payment of taxes, does not extend to lands held for a public purpose.

10. Where items of a cost bill are not such as could under no circumstances be taxed, but could all be taxed under certain circumstances, the Supreme Court is bound to presume, in the absence of a record showing the actual circumstances, that sufficient showing was made to justify their taxation by the court below.

Appeal from Superior Court, Jefferson County; Geo. C. Hatch, Judge.

Action by the city of Port Townsend against Solomon Lewis and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Sachs & Hale, for appellants. A. W. Budress, for respondent.

FULLERTON, C. J. The respondent, the city of Port Townsend, brought this action to recover possession of, and quiet its title to, a portion of land claimed by it as a public

street of which the appellants were in possession. From the record it appears that the predecessors in interest of the appellants, during the years 1885, 1886, and 1887, constructed on tide lands in front of the city of Port Townsend a wharf extending from the shore out towards deep water a distance of some 300 feet. They were in possession of and in the actual use of this wharf at the time the territory of Washington was admitted into the Union as a state—the time the lands on which the wharf was constructed became state property. After the admission of the territory as a state, the city of Port Townsend, pursuant to the authority of the state Constitution and the laws passed thereunder, extended its streets across the tide lands lying in front of itself, one of which, known as "Front Street," crossed the end of the appellants' wharf, cutting off some 105 feet thereof. The builders of the wharf continued in its possession, and when the board of appraisers for tide and shore lands were appraising tide lands in front of the city of Port Townsend, in 1895, they sought to have that board appraise the lands in the street covered by their wharf as state lands, so that they might purchase the same as tide lands upon which they had improvements, and, on the refusal of the board to make such an appraisal, brought mandamus against them to compel them so to do. The trial court refused to grant the writ, and an appeal was duly taken to this court, where the judgment of the trial court was affirmed. In that case, which was against the predecessors in interest of the present appellants, the validity of the dedication and the proceedings taken to establish the street called "Front Street," as well as the rights of the possessors of the property to purchase it from the state, were in issue, and were determined against the rights of the applicants for the writ. The applicants continued in possession, however, and they, with the successors in interest, the appellants, have been in possession ever since. In fact, there has been a continuous possession of the wharf by the appellants and their predecessors in interest ever since the same was constructed, in 1887.

In its complaint the city set out the proceedings had to establish the street, and the decision of the trial court and of this court in the mandamus proceedings before mentioned, and averred that the appellants were in possession of a portion of the street, claiming an interest therein, but without right. It prayed that its title and right to the street be established and quieted, that the appellants be ejected therefrom, and for general relief. The appellants moved to strike from the complaint certain parts thereof, and to make certain other parts more definite and certain. The motion to strike was sustained as to all that part of the complaint relating to the mandamus proceedings and the judgment of the court thereon, and overruled as to the remainder. The appellants there-

¶ 7. See Adverse Possession, vol. 1, Cent. Dig. § 287.



upon filed a general demurrer to the complaint, which was also overruled, whereupon they answered, putting in issue its material allegations, and pleading affirmatively the statute of limitations, and certain facts thought to estop the city from asserting its rights to the street in question, if any it ever had. A reply was filed denying generally the allegations of the answer, and again setting out the mandamus proceedings, with the judgments entered therein. A jury was waived, and a trial had before the court, resulting in findings and a judgment for the city.

The appellants assign, among other things, that the court erred in overruling, in part, their motion to strike from the complaint, and to make certain allegations thereof more definite and certain; that it admitted evidence over their objections; and that it refused to grant a motion for nonsuit made at the conclusion of the respondent's evidence. These assignments, however, suggest questions which are of no moment at this stage of the proceedings, no matter how pertinent they may have been at the time they were presented to the lower court. A motion to strike or to make more definite and certain is waived by pleading over and going to trial on the merits. Had the appellants stood on their motion, and appealed from the judgment the trial court might have thereafter entered against them; this court would listen to their objections, but they cannot have the benefit of the technical objection and the benefit of a hearing on the merits at the same time. They must waive either one or the other, and when they proceed to the merits it is a waiver of the technical objection. The claim that the trial court erred in the admission of evidence is equally without avail. The case is one which this court tries *de novo*, in so far as the findings have been excepted to; and, this being so, it will disregard any evidence which it finds inadmissible. It is also immaterial whether or not the trial court erroneously refused to grant a nonsuit. By going on with the trial and introducing evidence on their behalf, the appellants waived any technical advantage they might have availed themselves of by such a motion. Of course, if the evidence of the respondent did not at that time warrant a recovery, and the defect in the evidence was not subsequently supplied, the appellants can now successfully urge that the evidence before the court is insufficient to justify the findings and judgment; but the court must look to the whole of the evidence to ascertain that fact, not alone to the evidence of the respondent.

It is next urged that the complaint fails to state facts sufficient to constitute a cause of action. It is said there is no allegation in the complaint to the effect that the respondent is the owner of, or entitled to the possession of, the street in question. Facts are alleged, however, which show it to be a public street of the city of Port Townsend, and, if

a city of the third class may maintain an action of ejectment to recover a portion of one of its public streets, the complaint states a cause of action. On this question we have no doubt that such a right is vested in the city. By the statute it is given the right "to sue and be sued," and "to establish, lay out, alter, keep open, open, widen, vacate, improve and repair streets," etc. (1 Ballinger's Ann. Codes & St. §§ 925, 938, subd. 4), which is undoubtedly a grant of power sufficient to enable it in some manner to protect its streets against the encroachment of individuals. While the cases are not uniform on the question, we think the better rule is that the city may maintain a civil action for that purpose. *Southern Pacific Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522; *People v. Holladay*, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; *Metropolitan City Ry. Co. v. Chicago*, 96 Ill. 623.

The next contention is that the court erred in sustaining an objection to certain questions asked the respondent's witnesses on cross-examination. These questions, it seems to us, called for matter pertaining to the appellants' affirmative defense, and were properly refused as not cross-examination. But were it otherwise, we hardly think the appellants could be heard to complain of it successfully. The fact thus sought to be established was subsequently testified to by the appellants' witnesses, and, as there was no contradictory evidence, it may be taken as established.

The principal contention of the appellants is, however, that the action is barred by the statute of limitations, and to the argument of this question the principal part of the briefs is devoted. We have not, however, found it necessary to follow counsel on the main branch of this question, for, if it be conceded that title to a portion of a public street can be acquired by adverse possession during the period of the statute of limitations, it seems to us that the appellants' proofs fall short of showing such a possession as the rule requires. Undoubtedly they have shown actual and exclusive possession of the property in dispute by themselves and their predecessors in interest for more than 10 years prior to the commencement of this action, but we think they have failed to show that such possession was adverse for that length of time. The record shows that as late as 1895 they were contesting with the officers of the state and municipality their claim of a preference right to purchase these very lands. These acts on their part were wholly inconsistent with the idea of an adverse possession. To constitute an adverse possession, there must be not only an ouster of the real owner, followed by an actual, notorious, and continuous possession on the part of the claimant during the statutory period, but there must have existed an intention on his part for a like period to claim in hostility to the title of the real owner. *Blake v. Shriver*, 27 Wash. 597, 68 Pac.

330. Possession is not adverse "if it be held under or subservient to a higher title." *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30. Tested by these rules, there was no adverse possession prior to 1895; and, if it be conceded that possession subsequent to that time was of a character to put the statute in motion, it has not continued for the required period.

The appellants also claim by virtue of section 5503, Ballinger's Ann. Codes & St., but plainly this section is inapplicable, for at least two reasons: In the first place, title is conferred thereby only when the claimant holds under color of title for the prescribed period, and the appellants in this instance have no color of title; and, in the second, it is provided specially that it does not extend to lands or tenements held for any public purpose, and these lands are held for a public purpose, namely, a public highway.

The appellants have brought up in the transcript a certified copy of the cost bill filed in the court below, their motion to retax the costs, and the journal entry of the court denying the motion, and urge us to review the matter. What showing was made at the hearing of the motion does not appear, and the record is insufficient, for that reason, to enable us to determine whether or not there was any error in the ruling of the court. If the cost bill contained items which under no circumstances could be taxed as costs, this court would, on the showing made, strike them out. But the items objected to are not of that character. They could all be taxed under certain circumstances, and this court is bound to presume, in the absence of a record showing the actual circumstances, that sufficient was made to appear to justify their taxation by the court below.

The appellants also make the contention that the evidence was insufficient to justify the findings of fact, but we think the record fully supports the trial court.

There being, therefore, no substantial error, the judgment must be affirmed, and it is so ordered.

DUNBAR, HADLEY, ANDERS, and MOUNT, JJ., concur.

(34 Wash. 420)

CRISWELL v. BOARD OF DIRECTORS OF EVERETT SCHOOL DIST. NO. 24 et al.  
(Supreme Court of Washington. March 23, 1904.)

SCHOOL DISTRICTS—SCHOOLHOUSE—CONSTRUCTION—PROPOSALS—ADVERTISEMENT—BIDS—SPECIFICATIONS—ALTERATION—CONTRACTS—NONCOMPLIANCE—QUANTUM MERUIT—SCHOOL WARRANTS—PAYMENT—INJUNCTION—TAXPAYERS' ACTION—DEFECT OF PARTIES—WAIVER—ATTORNEY'S FEES—ALLOWANCE.

1.1 Ballinger's Ann. Codes & St. § 2366, provides that in all school districts contemplated by the chapter, when, in the opinion of the board of education, the cost of any contemplated building will equal or exceed \$200, it shall give due notice by publication of the intention to receive bids, and that the board shall determine the specifications for such bids,

which shall be public. *Held*, that such section limited the power of the board only to the extent of requiring publication of notice of intention to receive bids on open specifications, and did not prohibit the board from changing the specifications for a school building after the bids had been received so as to reduce the cost of the building, and deducting a sum agreed on from the offer of the lowest bidder before such change, and then making a contract with him for a building conforming to the changed specifications, which did not change the general plan of the building, without again advertising for bids.

2. Where a contractor for the erection of a school building made many material changes and omissions in the work without authority of the board of school directors, and against the protests of the architect, but notwithstanding this the contract was not fraudulent nor ultra vires, and the district accepted and used the building after it was completed, the district, though not liable on the contract, was bound to pay the reasonable value of the building.

3. Where, in a taxpayer's action to restrain the payment of school warrants issued for the construction of a schoolhouse, the complaint alleged that the warrants had been issued to the contractor, and he answered, admitting the fact, but did not allege that other persons not parties to the action were the owners of the warrants, though such fact was within his knowledge, he was not entitled to object that there was a defect of parties defendant under 2 Ballinger's Ann. Codes & St. §§ 4909, 4911, providing that, where a defect of parties does not appear on the face of the complaint, the objection may be taken by answer, and if objection is not so taken defendant will be deemed to have waived the same.

4. A trial court has no power to allow an attorney's fee in a taxpayer's action to restrain the collection of school warrants in the absence of statutory authority.

Appeal from Superior Court, Snohomish County; John C. Denney, Judge.

Action by A. W. Criswell against the Board of Directors of Everett School District No. 24 and others. From a judgment in favor of plaintiff for less than the relief demanded, both parties appeal. Reversed in part.

McMurchie & Bundy, for plaintiff. Brownell & Coleman, for defendant school board. Cooley & Horan, for defendant T. L. Grant.

MOUNT, J. This action was brought in the lower court by the plaintiff, a resident and taxpayer, to restrain the payment of certain school warrants issued by the officers of School District No. 24 in Snohomish county in payment of the contract price of a school building for said district constructed by defendant Grant. Upon a trial the court entered a decree restraining payment of a part of the warrants and refusing to restrain payment of the balance, and also ordered the school district to pay \$500 as an attorney's fee to plaintiff's attorneys. The plaintiff appeals from that part of the decree refusing to restrain the payment of all the warrants. Defendant Grant appeals from that part of the decree restraining the payment of warrants. The school district appeals from that part awarding an attorney's fee in favor of the plaintiff.

The amended complaint contains four causes of action, one of which was abandoned

by stipulation. The gist of the other three is (1) failure of the contractor to construct the building in accordance with the plans and specifications; (2) that the contract was void because of failure of the school board to advertise for bids for the erection of the building; and (3) fraud and collusion in making the contract. The answer of the defendant Grant, after denying the material allegations of the complaint, alleges substantial compliance with the contract, but admits certain minor departures and omissions from the plans and specifications, and denies any fraud or collusion. For affirmative defenses he alleges the facts in relation to the advertisement for bids; that his bid was the lowest; that, after certain changes in the plans and specifications to conform the building to a new site, the contract was let to him, and was substantially performed before the action was brought. For a second affirmative defense he alleges laches on the part of the plaintiff. The answer of the school board denies generally the material allegations of the complaint, but admits certain departures from the original plans, and also pleads laches on the part of the plaintiff. The plaintiff, for reply, denies the new matter set up in the answers. Upon the facts as they appear in the record there is substantially no dispute, except as to the reasonable value of the building which was erected. They are, briefly, as follows: In February, 1902, the school district was reorganized under the law providing for a district in cities containing over 10,000 inhabitants. At that time the school buildings in the district were inadequate to accommodate the school children, and there was great necessity for another school building. The city board of education determined to erect an eight-room school building on the site of the Jefferson school grounds, to be known as the "Jefferson Annex." Architects were thereupon employed to prepare plans and specifications for such building. A building was designed, consisting of a two-story wooden structure resting on a basement of masonry. On account of the site being a hillside, the basement walls were not of the same dimensions on all sides. The superstructure contained a number of ornamental wooden columns at the entrances. The specifications provided for a complete eight-room building provided with ventilating and heating apparatus and a basement. Upon these plans and specifications bids were advertised for. In response to the advertisement 10 bids were filed by different parties. The bid of defendant Grant for \$32,900 was the lowest. Upon receipt of these bids the board was of the opinion that the building was more expensive than the district wanted to build, and a meeting of the electors of the district was called to consider the question of the cost of the building. The result of this meeting was an authorization to the board to purchase another site for the proposed building after eliminating the ornamental columns and a portion of the founda-

tion. The board accordingly purchased another site on a level place, and directed the architects to amend the specifications so as to eliminate the ornamental columns and make the basement conform to the new site. These changes and others necessitated by the location were made in the plans and specifications. The size of the building was also slightly reduced without the knowledge of the board. The architects thereupon gave the board an estimate of \$6,230 as the amount which should be deducted on account of these changes. Thereafter, on March 29, 1902, the board adopted a resolution authorizing the erection of the building on the new site "in accordance with the changes and alterations as suggested by the board and architects of the original plans," and the name of the new building was changed from "Jefferson Annex" to "Jackson School." No further advertisement for bids was published, but the board deducted \$6,230, as estimated by the architect to be the difference in cost between the original and the modified plans and specifications, from the bid of Mr. Grant, and authorized a contract with him for the erection of the building for \$26,670. This contract was entered into on April 1, 1902. It is the usual builder's contract, providing for deductions and extras and for the payment of 75 per cent. of the value of the work and materials as the work progressed. Bonds were given by the contractor, as required by law, for the faithful performance of the contract. Work was begun on the building on May 1, 1902. During the progress of the work the district decided to make a change in the heating plant, and it was accordingly made, and a more expensive heating plant was installed, and an allowance of \$1,500 was made to the contractor on account thereof. Extra work on the foundation was ordered, and also allowed, to the amount of \$892.50. Numerous other minor changes were made by the contractor for his benefit without the knowledge or authority of the board, which changes are estimated to amount to about \$1,200. In September, 1902, when this action was begun, the building was substantially completed, and was shortly thereafter put to use by the district, and was occupied as a school building during the trial of the case. Warrants amounting to \$27,092.50 had been issued by the board, and delivered to the contractor, and disposed of by him before the action was begun. The holders of these warrants were not made parties to the action. Defendant Grant held none of the warrants. The building erected is a good, substantial, modern school building, well adapted to the purposes intended, and well supplied with sanitary, lighting and heating facilities, but lighter in structure, somewhat smaller in size, and cheaper in many details of construction than the building first advertised for. In addition to the facts above stated, the trial court found that the defendant Grant and the architects who were the agents of the board collusively and fraud-

ulently changed the plans and specifications, and substituted inferior materials in the course of the construction of the building, in order to obtain an excessive and dishonest profit; that the reasonable value of the building as completed is \$20,535.56. The court, upon its findings, entered a decree restraining the district from issuing any further warrants, and restraining the payment of all issued in excess of the reasonable value of the building as stated, ordered the school district to pay to plaintiff's attorneys \$500, and entered judgment against defendant Grant for the costs of the action.

It is first argued by appellant Criswell that the contract which was entered into by defendant and the school board was ultra vires and void, because it was let without advertising for bids. Many cases are cited to the effect that, where a municipal corporation is required by its charter to let contracts in a certain specified way, it is beyond the power of such a corporation to let contracts in any other way; that obligations entered into in violation of law are void, and no rights or liabilities are incurred thereunder. The cases cited are all based upon statutes which require the officers of the corporation to advertise for bids and to let the contract to the lowest bidder, and there was no discretion left to the officers, except, perhaps, to determine the lowest bid. Among many cases cited are: *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29; *State v. Pullman*, 23 Wash. 583, 33 Pac. 265, 83 Am. St. Rep. 836. There can be no doubt that the principles announced in these cases are the settled law, not only of this state, but of all the states where similar questions have arisen. If this case falls within the principles of those cases, the rules therein announced must govern.

The power of the board of education to build a school building we understand is not questioned, or, if so, the record is clear that they had such power. The question is, did the board have the right to enter into the contract? The statute governing such transactions is as follows: "In all districts contemplated by this chapter, when, in the opinion of the board, the cost of any lot of furniture, stationery, apparatus, fuel, building or improvements, or repairs to the same, will equal or exceed the sum of \$200, it shall be the duty of the board to give due notice by publication in at least one daily newspaper published within said city, and if there be no daily, then in one or more weekly papers in three regular consecutive issues, of the intention to receive bids for such lots of furniture, stationery, fuel and other supplies, or for said improvements and repairs. The board shall determine the specifications for such bids, which shall be public." Section 2366, 1 Ballinger's Ann. Codes & St. While this statute does not require the contract for such supplies, buildings, or repairs to be let to the lowest bidder, yet it is the evident purpose to require a notice and an opportunity

for competitive bidding, so that the contract may be let for the best advantage of the municipality. The power of the board to contract is limited by the section quoted only to the extent of requiring notice of intention to receive bids upon specifications which are open to bidders. No other restrictions are made. The terms and conditions of the contract are left entirely to the discretion of the board. *Mayo v. County Commissioners*, 141 Mass. 74, 6 N. E. 757. It was not the purpose of this section to tie the hands of school boards so that every detail in plans and specifications for school buildings shall be irrevocably fixed, and no contract made or building constructed except exactly as specified. The evident purpose was to benefit the school district by inviting competitive bidding upon contracts for proposed buildings and supplies, etc. The plans and specifications are for the purpose of showing the substance of what is desired. In this case the board was authorized to construct a school building. Plans and specifications were prepared. They were public. A notice, as required, was published, and bids were received. Defendant Grant's bid for \$32,900 was the lowest. There can be no doubt that the board, under all the authorities cited by appellant, Criswell, was authorized to enter into a binding contract with defendant Grant at the price bid for the construction of the building as planned at the time advertisements were published. Nor can there be any doubt that by such contract the board might have reserved a right, as it in fact did, to make alterations in the specifications agreeably to both during the progress of the work, so long as the general plan of the building was not changed. *Board of Com'rs v. Cincinnati Steam Heating Co.*, 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 503; *Bass Foundry & Machinery Works v. Parke County Com'rs*, 115 Ind. 234, 17 N. E. 593; *Kitchel v. Board of Com'rs*, 123 Ind. 540, 24 N. E. 306. If this may be done after the contract is entered into, it may be done at the time as a part of the contract. It is no doubt true that one bidder may not change his bid after knowledge of other bids, so as to make it lower than another. This would be a fraud upon other bidders. And the board of education may not call for bids upon a given plan, and, after bids have been made thereon, so change the plan as to make an entirely different building, and require bidders to accept a contract upon the plan as changed. Nor may the board enter into private negotiations with one of the bidders upon a different plan. This would avoid the statute. But where the plan remains substantially the same, and the parties act in good faith, detail features, which are not necessary to the building, and which do not change the substantial character of it, may be eliminated on terms agreeable to the board and the bidder entitled to the contract upon the plans as advertised. Where a proper deduction from his bid is made on account

would not be ultra vires of the board. This, we think, is all that was done in this case. There is no evidence of any bad faith on the part of the board or the defendant Grant in this respect, and we are therefore of the opinion that the contract entered into was within the powers of the board, and was a valid and binding contract upon the district.

The next two points presented by appellant Criswell are to the effect that, the contract being ultra vires and void, the contractor, Grant, cannot recover upon the contract or upon the quantum meruit, and the fact that the district occupies the building and has accepted the benefits creates no liability. This is no doubt correct where the contract is ultra vires. But, since we have already concluded that the contract was not beyond the power of the board, it will not be necessary to notice these points.

It is next contended that the contract was void for fraud. It is not claimed, however, that the school board was guilty of any fraud, or that the members thereof were actuated by other than the best of faith, and solely with a view to the best interests of the district. But it is claimed that defendant Grant and the architects fraudulently changed the plans and specifications so as to make a dishonest profit. We have carefully examined the whole record in the case, and particularly that bearing upon this question, and are satisfied that there is no sufficient evidence upon which to base a conclusion of fraud on the part of either the architects or the contractor prior to the time the contract was entered into. Before the contract was let, specifications upon which the advertisement was made and the ones upon which the building was constructed were compared by the architect and a committee of the board of education, and the board were unable to find any material differences therein except a change in the foundation and in the ornamental columns. There were, however, minor changes, some of which were noticed and discussed, while others were not discussed or not noticed. But in the main the specifications were identical. The slight change in the size of the building, which did not interfere with its efficiency, was not called to the attention of the board, and they apparently did not notice it until after the trial was in progress. The architect explains this by saying that it was made to reduce the cost of the building, and a proper deduction was made for it; that he supposed the board had knowledge thereof. However, this point becomes immaterial, because the court concluded on account of such fraud that the district was liable only for the reasonable value of the building, which was found to be \$20,535.56. In this conclusion we think the court was right, not because of the fraud, but because the contractor, after the contract was entered into, made many material changes and omissions in the work without authority of the board, and against

count, if Grant were suing, he could not recover upon the contract. But where the contract is not unlawful, and the district has accepted and is using the building, which is in all respects suitable for its purposes, common honesty requires that it should pay the reasonable value thereof. 6 Cyc. 111, and cases cited; *Kagy v. Independent Dist.*, 117 Iowa, 694, 89 N. W. 972; *Chapman v. Douglas County*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378.

Appellant contends that the amount allowed is in excess of the reasonable value. There is much conflict in the evidence upon this point, and for that reason we shall not disturb the finding of the trial court.

Appellant Grant maintains that there is shown to be a defect of parties, and that the cause must therefore be reversed. This contention is based upon the fact that all the warrants issued by the district and delivered to Grant were disposed of, and are held by purchasers who were not made parties to the action, and who are not now before the court. The statute, at section 4907, 2 Ballinger's Ann. Codes & St., provides that, where it appears upon the face of the complaint that there is a defect of parties, objection may be taken by demurrer. Section 4909 provides that, where this fact does not appear upon the face of the complaint, the objection may be taken by answer. Section 4911 provides that, if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same. The complaint alleged that the warrants had been issued to defendant Grant. When defendant Grant answered, he admitted this fact, but did not allege that other persons, not parties to the action, were the owners thereof, although the fact was within his knowledge. At the trial, and over the objection of the plaintiff, Grant was permitted to state that he was not the owner of any of the warrants, but had disposed of all of them before the action was begun. Under the statute it is clear that Grant had waived this point, and it was too late for him then to raise the question. *State ex rel. McCain v. Metschan*, 32 Or. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692. It is true that in *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25, this court held, in a case where the action was brought to restrain the payment of interest on certain bonds, that absent bondholders were necessary parties, and that the court could make no decree affecting their rights, and this decision is no doubt in accord with the rule of law upon the question; but in that case the question was properly and seasonably raised. See, also, *Savage v. Sternberg*, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751. By the appeal of the school district the authority of the court to allow an attorney's fee of \$500 in this case is questioned. There is no statute in this state allowing attorney's fees in a case of this kind, except section 5172, 2 Ballinger's Ann. Codes

& St., which provides for \$10 to be taxed as costs. In the absence of a statute an allowance except for costs as provided is beyond the power of the court. *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315; *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124; *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. Rep. 817. That part of the judgment allowing an attorney's fee is therefore reversed. In all other respects the judgment is affirmed. The board of directors will recover costs against appellant *Criswell*. Appellant *Grant* will recover no costs.

FULLERTON, C. J., and DUNBAR, HADLEY, and ANDERS, JJ., concur.

(34 Wash. 409)

#### STATE v. YANDELL.

(Supreme Court of Washington. March 21, 1904.)

#### CRIMINAL LAW—HOMICIDE—INFORMATION—APPEAL—STATEMENT OF FACTS—SERVICE—FILING—TIME—AFFIDAVITS—CERTIFICATION.

1. Affidavits attached to a transcript on a criminal appeal cannot be considered where they have not been certified as a part of the record of the case.

2. Where a copy of the statement of facts on a criminal appeal was served before the original was filed, as required by statute, it could not be considered.

3. Where the statement of facts on a criminal appeal was not served until more than 30 days after the date of the judgment, and no extension of time was granted by stipulation or order of the court, it could not be considered.

4. An information for murder by the prosecuting attorney, accusing defendant of the crime of murder in the first degree, committed as follows: that said defendant, in O. county, state of Washington, on a day specified, purposely and of his deliberate and premeditated malice killed S. by then and there purposely and of his deliberate and premeditated malice shooting and mortally wounding said S. with a pistol (revolver), which he, the said defendant, then and there held in his hand—was sufficient.

Appeal from Superior Court, Okanogan County; C. Victor Martin, Judge.

George W. Yandell was convicted of manslaughter, and he appeals. Affirmed.

E. Fitzgerald, for appellant. E. K. Pendergast, for the State.

DUNBAR, J. On March 28, 1903, an information was filed by the prosecuting attorney of Okanogan county, charging defendant with murder in the first degree. On April 9th defendant was arraigned, and on April 10th his plea of not guilty was entered. He was brought to trial on the regular May term of said court, and upon the 15th day of May, 1903, the jury brought in a verdict finding him guilty of manslaughter. On May 18 1903, he was sentenced to the penitentiary for a term of four years. From that judgment this appeal was taken.

Respondent moves to dismiss this appeal for the reasons that the appellant's brief was not filed within the time required by law, and that no extension of time for the

service or filing of said brief had been given by the court, nor by stipulation, nor otherwise, nor at all; that no statement of facts had been served within the time required by law, or at all, and that no statement of facts has been certified to this court at all; that no notice has been given at any time or place when application would be made for the settlement of any statement of facts, as required by law, or at all; and for various other reasons, which it is not necessary to notice, for the fact appears that no statement of facts has been certified to this court. A supplemental transcript embodying certain affidavits has been filed by the appellant in this case, but the affidavits cannot be considered here for the reason that they have not been certified as a part of the record of the case. This has been the uniform ruling of this court. Affidavits in support of a motion for new trial will not be considered on appeal when not embodied in a bill of exceptions or a statement of facts. *Shuey v. Holmes*, 27 Wash. 489, 67 Pac. 1006. It appears that the only proposed statement of facts that has at any time been served or filed in this action was served on the 17th day of July, 1903, and not filed until the 20th day of July, 1903. This is not a compliance with the requirement of law, under the rule announced in *Erickson v. Erickson*, 11 Wash. 76, 39 Pac. 241, where it was said: "In contemplation of law there can be no statement of facts in a case until it has been properly filed therein, and no valid service of a statement can be made by copy until the original has been filed. In other words, service cannot precede the filing of the statement. \* \* \* We think, therefore, that the statement of facts was not served as provided by law." The same rule was announced in *Boyle v. Great Northern Ry. Co.*, 13 Wash. 383, 43 Pac. 344, and *Barkley v. Barton*, 15 Wash. 33, 45 Pac. 654. But, in any event, there was no proper statement of facts proposed, for the judgment was rendered on May 18, 1903, and the statement of facts was not served until the 17th of July, 1903, or filed until the 20th of July, 1903. The law provides that the statement of facts must be filed and served within 30 days from the date of judgment, unless an extension of time is granted by stipulation or order of the court. *State v. Landes*, 26 Wash. 325, 67 Pac. 72; *Wollin v. Smith*, 27 Wash. 349, 67 Pac. 561.

There being no statement of facts here, the only question that can be raised under the assignments made by appellant under his motion in arrest of judgment is that the facts stated in the information do not constitute a crime or misdemeanor. The material part of the information is as follows: "Comes now E. K. Pendergast, county attorney and prosecuting attorney in and for Okanogan county, state of Washington, and by this information does accuse one George W. Yandell with the crime of murder in the first

of Okanogan, state of Washington, on the 11th day of March, A. D. 1903, purposely and of his deliberate and premeditated malice, killed Fred Starrett, by then and there purposely and of his deliberate and premeditated malice shooting and mortally wounding the said Fred Starrett with a pistol (revolver) which he, the said George W. Yandell, then and there held in his hand." In addition to the fact that it would seem that no legal objection could be raised to an information of this character, this court has passed upon an information drawn in exactly the same words, with the exception of dates and the names of the combatants, in *State v. Cronin*, 20 Wash. 512, 56 Pac. 26, where the information was sustained, and the court, after citing numerous cases in which this character of information had been sustained, said: "The attacks so repeatedly made upon this form would seem to indicate that this court's conclusions had not met with the entire approval of the bar; but to reverse our former holdings now would entail such grave consequences that such a course is not to be considered, and we must insist that the question is no longer an open one.

The judgment is affirmed.

HADLEY, MOUNT, and ANDERS, JJ.,  
concur. FULLERTON, C. J., concurs in the result.

(24 Wash. 393)

BERGMAN v. LONDON & L. FIRE INS. CO.

(Supreme Court of Washington. March 21,  
1904.)

PLEADING—AMENDMENTS—TIME OF MAKING—  
INCONSISTENT DEFENSES—TRIAL—RE-  
OPENING CASE.

1. An amendment to a paragraph in an affirmative reply was properly denied where the allegations of the reply had already denied every material affirmative allegation of the answer.

2. Where, in an action on an insurance policy, plaintiff replied to a plea of compromise and settlement in two paragraphs, the first admitting the acceptance of a sum on the policy, but alleging that such acceptance was the direct result of duress, was not accepted as full payment, but was accepted on account, and because of the duress; and the second of which specifically denied the receipt of the sum in full settlement, but alleged that it was received on account, and because of the duress—an amendment adding to the reply a general denial of each and every allegation made by defendant, except that plaintiff claimed the full amount insured by the policy, did not change the scope of plaintiff's case, or, with the reply, present inconsistent defenses to the affirmative matters set forth in the answer.

3. The allowance of an amendment to a reply by merely adding a general denial, which, in effect, did no more than specifically deny what had been denied in the affirmative portion of the reply, after the jury had been impaneled, was not prejudicial to defendant.

4. There was no error in permitting plaintiff to reopen her main case after defendant had closed, in order to offer testimony as to the

avalued itself thereon.

Appeal from Superior Court, Klug County; R. B. Albertson, Judge.

Action by Mary Bergman against the London & Lancashire Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Granger & Helfner, for appellant. Leroy V. Newcomb and R. W. McClellan, for respondent.

DUNBAR, J. This is an action brought to recover a balance claimed to be due under a policy of insurance issued by appellant to respondent. Issues are presented by an amended complaint, answer, reply, and a verbal amendment to the reply. The case was tried by a jury, and the verdict and judgment were in plaintiff's favor for \$500. Inasmuch as the main contention in this case is that the reply presents inconsistent defenses to the affirmative allegations of the complaint, it will be necessary, to a correct understanding of the case, to set out the pleadings at some length. The answer, after making some immaterial admissions and denying the allegations of the complaint that the defendant had not paid the amount due the plaintiff upon the policy, and that there was \$500 due thereon, for further answer and by way of affirmative defense alleged:

"(1) That after the occurrence of the alleged fire referred to in said amended complaint the plaintiff claimed to and from the defendant the full amount insured by said policy; and the defendant believed, and in good faith contended, that it was not liable for any sum under said policy and by reason of said loss; and that thereupon, for the purpose of compromising and settling the said dispute, and to the end that litigation might be avoided, the plaintiff and the defendant settled and adjusted all of the rights of the plaintiff and the liability of this defendant under and by virtue of the policy and the said loss sued upon in this cause, whereby the said defendant agreed to pay to the plaintiff, and the plaintiff agreed to receive from the defendant, the sum of \$500 in full settlement of all liability of this defendant to this plaintiff under and by virtue of the policy and alleged loss sued upon in the plaintiff's amended complaint in this cause.

"(2) That on or about September 25, A. D. 1901, in pursuance of said agreement and settlement, the defendant paid to and the plaintiff received from the defendant the sum of \$500 in full settlement of all liabilities of this defendant by reason of the facts alleged in the plaintiff's amended complaint in this cause."

The following reply was interposed to this affirmative defense:

"(1) Replying to paragraph 1 of said affirmative defense, plaintiff says that on or

about the 25th day of September, 1901, this defendant, by its agent, Sam B. Stoy, did falsely represent to this plaintiff herein that it would settle and pay the amount of the policy referred to in plaintiff's complaint herein; that the plaintiff, believing that the defendant herein would pay the policy as promised, accompanied the said Sam B. Stoy, agent of the defendant herein, to a room in a certain hotel, to wit, the Hotel Butler in the city of Seattle, where the said Sam B. Stoy, acting as the agent of the defendant herein, did keep this plaintiff confined in the room aforesaid for a long time, and until said plaintiff became weak, faint, and sick, and did by the use of violent threats and profane and abusive language so overpower, frighten, and intimidate the said plaintiff as to deprive said plaintiff of the control of her senses, and render plaintiff incapable of acting freely and voluntarily; and that said plaintiff, while thus overpowered by fear and fright, which fear and fright was the direct result of the aforesaid confinement, violent threats, and abusive language on the part of the said Sam B. Stoy, agent of defendant herein, did accept the sum of \$500 upon the policy aforesaid; that the acceptance of the said \$500 was the direct result of the fear and fright aforesaid; that the defendant herein did thus by the use of duress, fraud, and undue influence induce this plaintiff to accept the sum of \$500 upon the aforesaid policy; that the plaintiff herein did not accept the sum of \$500 as full payment of the said policy freely and voluntarily, but accepted the same on account and because of the aforesaid duress, fraud, and undue influence exercised upon her by the defendant herein. Plaintiff denies each and every allegation in said paragraph 1 of defendant's affirmative defense, except that the plaintiff claimed to and from the defendant the full amount insured by said policy.

"(2) Replying to paragraph 2 of said affirmative defense set out in defendant's amended answer herein, the plaintiff denies that she received the sum of \$500 on or about the 25th day of September, 1901, in full settlement of all liability of the defendant by reason of the facts alleged in the plaintiff's amended complaint herein, and alleges that the \$500 was received on account, and because of the aforesaid duress, fraud, and undue influence practiced by the said defendant upon the plaintiff herein."

And after the opening of the case the court allowed the plaintiff to amend her reply by adding the following: "That plaintiff denies each and every allegation by the defendant made in said paragraph except that the plaintiff claimed to and from the defendant the full amount insured by said policy."

It is insisted by the appellant that by this amendment plaintiff was permitted to change the entire scope of her case; that up to this time plaintiff was admitting that a settlement had been made, and that the

plaintiff had received \$500 in full settlement of the loss, but by this denial she was permitted, after the trial had commenced, to deny all of these material facts; that such a denial, even if permissible at the proper time, should not have been permitted after the jury had been impaneled; and that the amendment, together with the reply, constituted inconsistent defenses to the affirmative matters set forth in the answer, and should not have been permitted under the rule announced by this court in *Seattle National Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 8 L. R. A. 177. In that case it was held that, where an allegation of general denial in an answer is followed in an affirmative defense by a special averment of the truth of the matter which had been denied, the defenses are so inconsistent that they cannot stand together, and that plaintiff will not be compelled to establish the truth of the allegation in his complaint to which such defenses are set up. But it does not seem to us that this case falls within the rule announced in the slightest degree. So far as the amendment offered and allowed by the court is concerned, a reference to the statement of facts and the colloquy indulged in between the court and counsel shows that it was simply an attempt on the part of the plaintiff to make plain that which had already been made plain by the allegations in reply. A long amendment to the reply had been presented by counsel for the plaintiff, which was objected to by the court for the reason that it was so lengthy that the court could not keep in mind the relation it bore to the reply which it sought to amend; the plaintiff, in answer to this objection, saying: "It is simply a direct denial of what the defendant alleged in its answer. Your honor said yesterday it seemed that we didn't specifically deny these allegations. The Court: Why don't you specifically deny it then? Mr. McClellan: We are denying it. That is what I am doing right now—simply denying what the defendant alleges in its answer. I am using defendant's answer to deny what it alleges. You will see, by referring to defendant's affirmative answer, the matters that I have denied set out almost verbatim et literatim." And, after considerable talk with the court, the counsel again said: "I want to bring in a general denial of these allegations, except what he admits—that we claimed the full amount. That is the purpose that I am offering this amendment now for to that paragraph of the defendant's answer. And we desire to amend the second paragraph of plaintiff's reply. \* \* \* The Court: Well, why don't you? It seems to me that the amendment will be complete, and such as you desire, if you added that it denied each and every other allegation in said paragraph 1 contained, except that plaintiff admits that she did claim the full amount." And that was accepted, and another amendment offered to the second paragraph in the affirma-



allegations of the reply had already denied every material allegation of the affirmative allegations of the answer. It seems to us that there was no admission in the reply that there had been any settlement wherein \$500, or any other sum, had been accepted in full payment of the policy. The reply simply presented a plain statement of facts to the effect that by reason of the violent threats, profane and abusive language, etc., the plaintiff was so overpowered, frightened, and intimidated as to deprive her of the use of her senses, and to render her incapable of acting freely and voluntarily, and that while in this condition she accepted the sum of \$500 simply as the direct result of fear and fright; but constantly and in terms denied that the said sum of \$500 was accepted as a compromise, or in any other way than on account. And if the statements in the reply are true, and the \$500 was paid under the circumstances therein alleged, it must have been paid on account, and could not have been paid in accordance with an agreement to compromise. Paragraph 2 of the reply is simply a repetition of the allegations of paragraph 1, in an attempt by the pleader to answer separately the separate allegations made by the answer, separating the agreement itself from an agreement to agree. In *Seattle National Bank v. Carter*, supra, this court said, after announcing that, if inconsistent allegations were allowed, inconsistent proofs could be submitted under them: "This theory, carried to its logical result, would permit a defendant who was sued upon a promissory note to allege nonexecution, want of consideration, and payment. Under such allegations he would be permitted to swear that he never executed the note; that he did execute the note, but that it was without consideration; and that he did execute the note, that the consideration was good, and that he had paid the same"—stating that such a practice as this would not only be farcical, but absolutely wrong and immoral, and an encouragement of perjury. But we are unable to see how an instance of the kind cited there could be made to apply to the pleadings in this case, where it is stoutly denied from beginning to end that the \$500 was accepted under an agreement of compromise. Nor do we think that any prejudice was sustained by the appellant by the allowance of the amendment complained of at the time that it was allowed.

The appellant also complains that the court abused its discretion in permitting plaintiff to reopen her main case after defendant had closed its case, and offering testimony in relation to the value of the property consumed by fire. But, in addition to the fact that it does not appear to us from the record that the court abused its discretion in this respect, or that the appellant was in any manner prejudiced thereby, the same latitude was of-

ed in this respect. On page 162 of the statement of facts the following occurs: "Mr. Granger: In view of the fact that the plaintiff's case was reopened for further testimony, the defendant now offers the testimony to be taken of the witness Mr. Brown as a part of its defense, on the defense to the matters and things brought out by the plaintiff. The Court: The case was only reopened with regard to the particular question of the value of the personal property covered by the insurance. The testimony was directed to that single point. Mr. Granger: I think this goes to that. The Court: If it does, of course it would be proper in rebuttal. Mr. Granger: If it doesn't, then I will ask the same privilege that plaintiff had—to go into any subject I want to. But I will treat this, for the present, as meeting the testimony offered upon the reopening of the case. The Court: Very well." And the testimony was accordingly admitted. Again, upon page 168, the following occurs: "The Court: Anything further for the defense? Mr. Granger: I believe not, although this case has begun to take a course that there might be something I have omitted by oversight. As far as I can now recall, there is nothing. The Court: I would be glad if counsel would consider the case, and get in their testimony now. The doors having been opened once, the case must be concluded some time. If there is any matter in the way of testimony in chief which counsel desire to offer at this time, the court, having permitted the plaintiff to reopen the case, will be called upon to extend the same indulgence to the defense; but I do not feel that the door should be kept open indefinitely. Mr. Granger: We rest." So that it appears from the whole record that in the interest of justice liberal latitude was allowed by the court to both parties to the action.

We have examined the instructions, and think that they comprise a fair presentation of the law of the case. The case was tried without error, and the judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

(34 Wash. 391)

AMERICAN PAPER CO. et al. v. SULLIVAN.

(Supreme Court of Washington. March 19, 1904.)

EXECUTIONS — EXEMPTIONS — RELEASE OF PROPERTY — APPRAISEMENT — NATURE OF PROCEEDING—OBJECTIONS—ESTOPPEL.

1. Under the express provisions of 2 Ballinger's Ann. Codes & St. § 5255, where a debtor claimed certain personal property levied on to be exempt, and delivered to the officer making the levy an itemized list of all his personal property, etc., and the creditor made no demand for an appraisement thereof, the officer was required to return such property as exempt.

2. Where, after execution levied on a debtor's property, he filed an affidavit in the original cause, claiming the property to be exempt, and asked an order on the execution creditor and the sheriff to show cause why the property should not be released, and they appeared, and moved to vacate the order, and, if such motion should not be granted, for time to make return thereto, which was granted after denial of the motion to vacate, and the hearing and procedure were in all essential particulars, such as would be appropriate to a writ of mandamus, the respondents to the order could not thereafter claim that the court had no power to order the release of the property, except in a mandamus proceeding.

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by the American Paper Company and others against J. P. Sullivan. From an order releasing defendant's property levied on under a judgment in favor of plaintiffs, plaintiffs appeal. Affirmed.

J. C. Cross, for appellants. John O. Hogan, for respondent.

HADLEY, J. It has been made to appear to this court that the respondent J. P. Sullivan died during the pendency of this appeal, and that Laura W. Sullivan has been appointed by the superior court of Chehalis county administratrix of the estate of said deceased. It further appears that said administratrix has filed a petition herein praying that she be substituted as party respondent in this action, and, the attorneys of the respective parties having stipulated that such substitution may be made without notice, it is therefore hereby ordered that said administratrix be, and she is hereby, substituted as such party respondent.

Judgment was obtained by the appellant American Paper Company against the respondent J. P. Sullivan in the superior court of Chehalis county. Thereafter, on the 19th day of July, 1902, the said appellant caused an execution under said judgment to be levied upon a certain printing press and printing outfit belonging to said respondent. On the 24th day of the same month said respondent filed an affidavit in the cause in which the judgment was rendered, stating that he was a householder, the head of a family consisting of himself, a wife and three children, with whom he resided in said county; that he was a mechanic, a job printer by trade, and that all of the personal property so levied upon was at the time of the levy in actual use by him as the tools and instruments for carrying on his said trade for the support of himself and his family; that after said levy was made the said respondent delivered to the officer making the levy a verified, itemized list of all personal property owned by him; that he also delivered to the officer a list of separate items of property claimed by him as exempt; that the claim for exemption was ignored, and that the appellant American Paper Company made no demand for an appraisalment; that the officer informed said respondent and his attorney that the said

appellant would not demand an appraisalment; that the officer refused to release the property, and was proceeding to sell the same. The affidavit concluded with a prayer that the court should make an order directing the sheriff to release the property from the levy, and deliver possession to said respondent. Accompanying the affidavit, and filed with it, was a motion asking the court to make an order directing the sheriff, his deputy, and the appellant American Paper Company to show cause on the following day why the sheriff should not be ordered to release said property from said levy as exempt. Such an order was made. At the time fixed, the sheriff, his deputy, and the said American Paper Company appeared by counsel, and moved for an order vacating the order to show cause. The motion, however, stated that, if the requested vacation should be denied, then in that event they moved the court for an order continuing and extending the time for making return to the order to show cause for a period of 10 days. The vacation of the order to show cause was denied, but the continuance was granted, and separate returns were thereafter made. The returns admitted the refusal to release the property from the levy, and also that no appraisalment was demanded. Upon a hearing the court found that the property was exempt, and that the said respondent had claimed the same as exempt in the manner provided by law. The sheriff was ordered to release the property, and this appeal is from that order.

No appraisalment having been demanded by the execution creditor, the debtor was entitled to the release of the property claimed as exempt. Section 5235, 2 Ballinger's Codes & St.; State ex rel. Hill v. Gardner (Wash.) 73 Pac. 690; Messenger v. Murphy (Wash.) 74 Pac. 480.

It is claimed by appellants that the court had no jurisdiction to order the release in this proceeding. In the cases above cited, and also in an earlier case (State ex rel. Achey v. Creech, 18 Wash. 186, 51 Pac. 363), this court held that mandamus is a proper remedy to procure the release of property under such circumstances. As we have seen, the procedure here was begun by the filing of the affidavit in the original case. An order to show cause followed, and to that order an appearance was made. Under the appearance a motion in the alternative was made that the order be vacated, or that further time be granted for return thereto. Upon the granting of the latter alternative, returns were made, a hearing was had, evidence was taken, and the procedure, in all essential particulars, excepting name, was that of mandamus. The procedure was begun by an affidavit which in all particulars would have served the purposes of a mandamus suit, even if it had been so called, and by the alternative request of appellants they invited the adoption of procedure in the nature of mandamus. To properly insist now

that the court had not jurisdiction under the motion in the original action would have necessitated standing upon objections to that motion, rather than to have voluntarily invited the procedure which was followed to the end. We think the course pursued was a submission to the jurisdiction of the court for the determination of the controversy.

Respondent insists that the court had the power to make the order for release, even under the mere motion in the original action, by reason of the principle that there is inherent power in every court to supervise the conduct of its officers and the execution of its judgments and processes. It is unnecessary to pass upon that contention now, however, and we do not do so, since, for the reasons already stated, we think the court did not err in its disposition of the case.

The judgment is affirmed.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

(34 Wash. 395)

#### STATE v. GARBE.

(Supreme Court of Washington. March 21, 1904.)

#### BURGLARY—INDICTMENT—ATTEMPT—STATUTES.

1. 2 Ballinger's Ann. Codes & St. § 7106, provides that if any one be found at night, armed with any instrument, with intent to break or enter any building, etc., and to commit any felony or misdemeanor therein, or if any one be found having any implement of burglary, with the intent aforesaid, and under such circumstances as shall not amount to an attempt to commit a felony, he shall be guilty of a misdemeanor. The compiler's headnote to the section is, "Attempt to Commit Burglary, Possession of Tools," etc. Section 7437 provides that every person who attempts to commit any crime is punishable, in the absence of special provisions, by imprisonment, etc. An indictment charged that defendant, in the nighttime, and having in his possession implements of burglary, to wit, a brace and a keyhole saw, did "attempt" to commit the crime of burglary while unlawfully attempting to break and enter a store. *Held*, that the indictment charged not alone an "intent" to commit the crime of burglary, which was the misdemeanor contemplated in section 7106, but charged defendant, under section 7437, with an "attempt" to commit the crime of burglary.

Appeal from Superior Court, Skagit County; George A. Joiner, Judge.

Louis H. Garbe was convicted of attempting to commit burglary, and he appeals. Affirmed.

Hurd & Brickey, for appellant. J. C. Waugh, for the State.

DUNBAR, J. On the 12th day of May, 1903, an information was filed against appellant in the superior court of the state of Washington, Skagit county. Omitting the formal parts, it was as follows: "Then and there being, Lewis H. Garbe, in the nighttime, and having in his possession implements of burglary, namely, a bit, a brace, and

a keyhole saw, did attempt to commit the crime of burglary on the 26th day of April, 1903, in the city of Anacortes, county of Skagit, state of Washington, by unlawfully and feloniously attempting to break and enter into a certain store building of the Anacortes Mercantile Company, a corporation, in which goods, wares, and merchandise are kept for sale, with intent to commit a felony or misdemeanor therein." Thereafter, on the 25th day of May, 1903, the appellant was duly arrested under said information, and pleaded guilty thereto. One of appellant's counsel thereupon suggested to the court that the information charged a misdemeanor, and not a felony, and that sentence should be imposed as for a misdemeanor, and not as for a felony, whereupon the court overruled appellant's contention, and sentenced him to two years at hard labor in the State Penitentiary; to all of which appellant excepted. Judgment was entered upon said plea.

The question presented here is, does the information, under the law, charge any offense greater than a misdemeanor? It is contended by the appellant that the information was drawn under section 7106, 2 Ballinger's Ann. Codes & St., and that the penalty cannot be other than the penalty provided for in such section. Section 7106 is as follows: "If any person shall be found at night around [armed] with any dangerous instrument or offensive weapon whatsoever, with intent to break or enter into any dwelling house, building, room in a building, cabin, stateroom, railway car or other covered inclosure where personal property shall be, and to commit any larceny, felony or misdemeanor therein, or with the intent to commit any larceny, felony or misdemeanor, or if any person shall at any time be found having in his possession any picklock, crow, key, bit, jack, jimmy, nippers, outsiders, pick, drill punch, betty or other implement or implements of burglary, with the intent aforesaid, and under such circumstances as shall not amount to an attempt to commit felony, every such offender shall be deemed guilty of a misdemeanor." But we think the appellant is mistaken in concluding that the information was drawn under this section. On the other hand, the crime charged falls within the provisions of section 7437, which provides that: "Every person who attempts to commit any crime but fails or is prevented or intercepted in the perpetration thereof, is punishable, when no provision is made by law for the punishment of such attempt, as follows: (1) If the offense so attempted is punishable by imprisonment in the penitentiary for five years or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the penitentiary or in the county jail, as the case may be, for a term not exceeding one-half of the longest term of imprisonment prescribed upon a conviction of the offense so attempted. \* \* \* It

was the evident intent of the pleader in this case to charge the appellant not alone with an intent to commit the crime of burglary, which is the misdemeanor contemplated in section 7106, but with an attempt to commit the crime of burglary. It is true that the compiler's headnote to section 7106 is "Attempt to Commit Burglary, Possession of Tools," etc., but the section itself does not, as it will be seen, provide that an attempt to do certain things shall be considered a misdemeanor, but only the intent, as distinguished from an attempt; for the latter part of the section provides, "And under such circumstances as shall not amount to an attempt to commit felony, every such offender shall be deemed guilty of a misdemeanor," while the information in this case plainly charges the appellant with an attempt to commit the crime of burglary by unlawfully and feloniously in the nighttime attempting to break and enter, etc. It is true that, according to the recitals of the information, the appellant at the time of the attempt had in his possession implements of burglary, viz., a bit, a brace, and a keyhole saw; but the statement of this fact was purely surplusage on the part of the pleader, and at the most could be but presumptive evidence of an intention to commit the crime charged, viz., an attempt to commit burglary.

We think the appellant was properly sentenced, and the judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

(34 Wash. 406)

MANNING v. TACOMA RY. & POWER CO.  
et al.

(Supreme Court of Washington. March 21, 1904.)

WRONGFUL DEATH—PERSONS ENTITLED TO SUE.

1. 2 Ballinger's Ann. Codes & St. § 4828, provides that, when the death of a person is caused by an injury received from the wrongful act of another, his heirs or personal representatives may maintain an action against the person liable. *Held*, that the words "heirs" and "personal representatives," as so used, were intended to include only the widow and children of the deceased person, and did not authorize an action by the mother for the wrongful death of her unmarried adult son, on whom she was dependent.

Appeal from Superior Court, Pierce County; Thad Huston, Judge.

Action by Nancy A. Manning against the Tacoma Railway & Power Company and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Stiles & Doolittle, for appellant. B. S. Grosscup and A. V. Avery, for respondents.

HADLEY, J. This action was brought by appellant to recover damages on account of

the death of her son. The complaint avers that the death was due to the negligence of the respondent railway company and of its co-respondent, who was the motorman of one of its cars at the time of the accident which resulted in said death. It is also alleged that the deceased was an unmarried man, of the age of 27 years, and in good health; that he was able to earn, and did earn, \$75 per month at his occupation of hotel clerk; that there has been no administration of his estate, and that the plaintiff is his sole heir, his father having died before him; that plaintiff is 53 years of age, and has not sufficient means for her support; that she is, and for a long time has been, dependent upon her sons, of whom she had three, for her support and maintenance; that said deceased son contributed largely to her support, and would have continued so to do while he and plaintiff both lived. Separate demurrers to the complaint were interposed by the defendants in the action. One of the stated grounds of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The demurrers were sustained. The plaintiff elected to stand upon her complaint, and refused to plead further. Judgment was thereupon entered dismissing the action. The plaintiff has appealed.

It is conceded by counsel that the court below sustained the demurrers on the authority of *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822, in which this court held that no action lies for the death of an adult unmarried person. It is frankly stated that this appeal is prosecuted with the purpose of asking a reinvestigation of the question decided in the above-named case, to the end that the same may be overruled. No right of recovery in the premises exists at common law, and, if there be such right, it must be by virtue of a statute. Different statutory provisions bearing upon this subject were collected together and placed in one section in the Code of 1881, as section 8 thereof, and the same also appear in section 4828, 2 Ballinger's Ann. Codes & St. In the case above cited it was held that the word "heirs," as used in said section, does not include parents or collateral relatives, but includes only the widow and children of the person whose death is caused by the wrongful act of another. Counsel for appellant in this case ably review the history of these statutes, and earnestly insist that the construction announced in *Noble v. Seattle* was erroneous, and should be overruled. It is also contended that this court had recognized a different rule in prior cases. However that may have been, a direct and unmistakable construction was adopted in that case. The opinion was filed March 24, 1898. It has for six years stood as the adopted construction and as the rule of decision upon the subject in this state. A little more than two years later, on May 24,

¶ 1. See *Death*, vol. 15, Cent. Dig. §§ 40, 43.

Resort v. N. T. Ky. Co., 22 Wash. 333, 61 Pac. 141. But little is said in that opinion, yet the question presented was identical with that in Noble v. Seattle. We have examined the appellant's briefs in that appeal, and find that able counsel elaborately and comprehensively covered the same ground as to our statutory history and the Kentucky statutes and decisions, and otherwise carefully placed before this court the same argument that is now also skillfully and vigorously invoked by counsel for this appellant. Notwithstanding the earnest and forceful argument in that case, the court deemed it unnecessary to discuss the subject further than to say that it adhered to the ruling in Noble v. Seattle. In view of the fact that the court then declined to reopen the subject, and that the criticised construction has stood for six years as a rule of decision, we think we should not now disturb it. It is furthermore a fact that, since the construction was first announced, three regular sessions of the State Legislature have been convened, and no change in the statute has been made. It may be reasonably assumed that the legislative department has acquiesced in the construction of the statute as being correct, or it would have made its meaning known by more definite and unmistakable expression.

We think it proper to say that, as this court is now constituted, if the question were now here as one of original statutory construction, it is not improbable that a different construction would be adopted. But a mere change in the personnel of the court should not be treated as justification for overruling former decisions, even though the individual judges may think that they were erroneous. Such a course would lead to the expression of mere opinionated, individual views, whereas the decisions of an appellate tribunal, which have been long followed and regarded as establishing rules governing property and personal rights, concern the people of an entire state, and should not ordinarily be subject to disturbance by either a change in the membership of the court or by change of individual views. We believe, therefore, that the subject urged upon this appeal should now be considered as at rest, unless the legislative department shall clearly express a different rule.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR, MOUNT, and ANDERS, JJ., concur.

(68 Kan. 691)

LANYON ZINC CO. v. FREEMAN et al.

(Supreme Court of Kansas. March 12, 1904.)

MINERALS — GAS — PETROLEUM — EXECUTORS  
— POWERS — OIL LEASE — PARTITION  
— ESTOPPEL.

1. Petroleum and gas are minerals. So long as they remain in the ground they are a part of the realty. They belong to the owner of the

2. A resident of Ohio owning in Kansas a farm that had never been used for other than agricultural purposes executed a will therein providing that the executor and trustee should take charge of said premises, and "lease and maintain the same in repair and good condition, with a view to obtain the best income therefrom without permitting the same to deteriorate in value or quality." Held, that the executor and trustee was not by said will authorized to execute an oil and gas lease granting to the lessee all the oil and gas under said premises, and bind the legatees thereby.

3. An executor and trustee, without having sufficient authority under the will to bind the legatees thereby, executed an oil and gas lease on a farm that had never been used for other than agricultural purposes. Prior to the execution of the lease he had individually acquired the interest of one of the legatees in premises. Soon thereafter he acquired the interest of another of the legatees. Held, in an action of partition, under the circumstances of this case, he was estopped from denying that the interest acquired by him was not subject to the lease.

(Syllabus by the Court.)

Error from District Court, Allen County; L. Stillwell, Judge.

Action by E. K. Taylor against Reuben R. Freeman, the Lanyon Zinc Company, and others, for partition. From the decree the Lanyon Zinc Company brings error. Modified.

Campbell & Goshorn, C. E. Benton, and J. B. F. Cates, for plaintiff in error. Oscar Foust & Son and Baxter D. McClain, for defendants in error.

ATKINSON, J. In 1895, Wilson A. Koontz, a resident of the state of Ohio, died solvent and testate. Letters testamentary were issued to one Reuben R. Freeman as sole executor and trustee of the estate of deceased. There were named as legatees the widow, Louisa C. Koontz, a son, Philip D. Koontz, and eight grandchildren, Iosa W. King, Enola G. King, Texas B. Koontz, Carla S. Koontz, Ernest S. Koontz, Mabel C. Koontz, and Helvyn L. Koontz; the six last named of whom were minors at the time of the commencement of this action. Among other premises owned by the testator at the time of his death was the southwest quarter of section 8, township 25, range 19 east, Allen county, Kan. The will devised the premises above described to the grandchildren, with the condition embodied therein that, in the event the testator should die before the period of 18 years from the date of said will, July 10, 1895, the executor and trustee should take charge of the premises, and "lease and maintain the same in repair and good condition, with a view to obtain the best income therefrom without permitting the same to deteriorate in value or quality" until such period of eighteen years shall have elapsed. The widow, Louisa C. Koontz, not having in writing consented to said will, elected to take under the law of descent and distribution. On the 15th day of March, 1898, said Iosa W. King and husband conveyed to Reu-

ben R. Freeman all their interest in said premises. On the 30th day of December, 1899, said Reuben R. Freeman, as executor and trustee, and said Louisa C. Koontz, in consideration of the sum of \$802.41, jointly executed to the Lanyon Zinc Company a lease granting unto the said company all the oil and gas under said premises, together with the right to enter thereon for the purpose of drilling and operating for oil and gas, and the right to erect and maintain thereon and remove therefrom buildings, structures, pipes, pipe lines, and machinery necessary for the production and transportation of oil and gas, with the right to the lessors to use the premises for farming purposes, except such as were in actual use by the lessee; said lessee to be liable for all damage to timber and growing crops by reason of operating under said lease for oil and gas. The lease also provided that, if no well be drilled on premises within 10 years, or if lessee reconveyed the premises, then, and in either such event, lease should become and be null and void. On the 7th day of February, 1900, said Enola G. King and husband conveyed to Reuben R. Freeman all their interest in said premises. On the 31st day of July, 1901, E. K. Taylor, by deed, acquired the interest of Louisa C. Koontz in said premises. On the 13th day of December, 1901, said E. K. Taylor filed in the district court of Allen county his petition asking a partition of said premises, therein claiming to be the owner of an undivided one-half thereof. In said petition plaintiff averred that Reuben R. Freeman was the owner of an undivided two-sixteenths, and each of said minors the owner of an undivided one-sixteenth in said premises. Said petition further averred that the Lanyon Zinc Company, a corporation, claimed some interest in said premises, and asked that it be required to set up its interest therein. All parties were brought into court as defendants, the said minors appearing by guardian ad litem. The Lanyon Zinc Company by answer, and upon trial, admitted the averments of plaintiff's petition as to the interest of plaintiff and defendants in the premises, averring and contending, however, that the interest of each was subject to the claim of the company under said oil and gas lease. Plaintiff, by reply, and defendants Reuben R. Freeman individually and as executor and trustee, and the minors through guardian ad litem, by answer, each denied to the Lanyon Zinc Company any right or interest in the premises by virtue of said lease, and averred the same to be void, and without force or effect. The court found plaintiff Taylor to be the owner of an undivided one-half interest in the premises, subject to the rights of the Lanyon Zinc Company under said oil and gas lease. The court further found that the said Reuben R. Freeman was the owner of an undivided two-sixteenths in said premises; that as to

the interest of Reuben R. Freeman and the interest of said minors said lease of the Lanyon Zinc Company was void, and without force or effect; and that plaintiff and the defendants then owning an interest in premises were tenants in common. Judgment of partition was by the court entered setting off and allotting the east one-half of said premises to plaintiff, decreeing the said lease of the Lanyon Zinc Company in full force and effect upon and against the same.

It being found by the commissioners that partition of the west half of said described premises could not be made among the owners according to their respective interests, the same, by decree of the court, was ordered sold if within 20 days parties in interest failed to file their election to take the same at its appraised value. By the judgment and decree of the court the said lease of the Lanyon Zinc Company was held to be without force or effect as to the west half of said described premises, and as to said premises said lease was canceled and held for naught. Said decree provided, however, that nothing therein should affect the right, if any, of the Lanyon Zinc Company to maintain an action to recover the money it has paid out in obtaining said lease as to the lands upon which said lease had been held invalid. To the judgment and decree of the court decreeing said lease invalid and canceling the same as to the west half of said premises, or any part thereof, the Lanyon Zinc Company excepted, and brings the case here for review.

Whether this oil and gas lease to the Lanyon Zinc Company was valid as against the interest of the said legatees in said premises must be determined by the extent of the authority given Reuben R. Freeman as executor and trustee under the will. The will provided that he "lease and maintain the same in repair and good condition, with a view to obtain the best income therefrom without permitting the same to deteriorate in value or quality." This language of the will can best be interpreted, and the intention of the testator best understood, in the light of the facts and surroundings at the time it was made. The admitted facts and the evidence disclose that the testator was a resident of Ohio. The land was farming land, and used for that purpose only. The surrounding lands were agricultural, and used for that purpose only. Natural gas had but recently been found in the neighborhood, and was being somewhat used in the city of Iola, not far distant. It can scarcely be said oil had been found in the neighborhood at that time. No gas or oil wells had been sunk upon these premises. None have since been sunk thereon. The oil and natural gas industry in that vicinity was then in fact new, and in its infancy. Did the testator contemplate the making of a lease to include the mineral below the surface, or did he contemplate the leasing of the surface of the land only? It is quite unlikely that he had

purposes. Again, the lease to the Lanyon Zinc Company in controversy contemplated not the usual tilling or cultivation of soil and the growing of crops thereon. It granted to the Lanyon Zinc Company all the oil and gas under the premises, together with the right to enter thereon for the purpose of drilling and operating for oil and gas and the right to erect and maintain thereon and remove therefrom buildings, structures, pipes, pipe lines, and machinery necessary for the production and transportation of oil and gas. Whatever may be the origin of petroleum and natural gas—and the question appears to be yet a matter in controversy—it is well settled that they are minerals. Donahue on Petroleum and Gas, §§ 7, 8; Thornton on Oil and Gas, § 19. Petroleum and gas, so long as they remain in the ground, are a part of the realty. They belong to the owner of the land, and are a part of it, so long as they are on it, or in it, or subject to his control. When they escape, and go into other lands, or come under another's control, the title of the former owner is gone. *Brown v. Spillen*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304; *Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729; *Murray v. Allred*, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721. In the case of *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292, the court held that an oil lease investing the lessee with the right to remove all the oil in place in the premises in consideration of his giving the lessors a certain per cent. thereof is, in legal effect, a sale of a portion of the land. In the case of *Stoughton's Appeal*, 88 Pa. 198, it was said that: "A guardian has ordinarily power to lease any of his ward's property of such character as makes it the subject of a lease, but without the approval of the orphans' court he cannot dispose of any part of the realty. Oil is a mineral, and, being a mineral, is a part of the realty; and a guardian cannot lease the land of his ward for the purpose of its development, as it would, in effect, be the grant of the corpus of the estate of his ward." It was held in the case of *Marshall v. Mellon*, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601, that "a tenant for life has no right to operate for oil or gas, or to make an oil or gas lease, unless operations for oil or gas were commenced before the life estate accrued." To the same effect is the case of *Williamson v. Jones* (W. Va.) 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 801, and the case of *Hook v. Garfield Coal Co.* (Iowa) 83 N. W. 963. We do not believe, from the language used in the will, and the circumstances and surroundings at the time it was made, that it was the intention of the testator to authorize the executor and trustee to execute the oil and gas lease

and trustee, to execute the lease in controversy, and bind thereby the interest of the legatees.

A more serious question arises upon the holding of the trial court that the interest of Reuben R. Freeman in the premises was not subject to the lease of the Lanyon Zinc Company. At the time Reuben R. Freeman, as executor and trustee, joined in the execution of the lease, he had individually acquired the interest of Iosa W. King. Soon thereafter he acquired the interest of Enola G. King. The lease, by its terms, included and covered the entire quarter section. The lessee dealt on the basis of acquiring a lease to the entire premises. The lessors dealt on the same basis, and received and retained the consideration thereof. Freeman, at the time the lease was executed, had full knowledge of the provisions of the will. There is nothing in the record to show that the lessee had either actual or constructive notice of the provisions of the will, or the want of authority of the executor and trustee to execute a valid oil and gas lease upon premises. Freeman is estopped from denying that his interest in premises is not subject to the lease of the Lanyon Zinc Company. *Lumber Co. v. Tomlinson*, 54 Kan. 770, 39 Pac. 694.

The judgment of the court below is affirmed, except as to the two-sixteenths interest in premises owned by defendant Reuben R. Freeman. As to his interest the judgment will be modified. The court below will enter judgment making the two-sixteenths interest owned by defendant Freeman subject to the lease of the Lanyon Zinc Company. All the Justices concurring.

(88 Kan. 627)

#### REDINGER v. JONES, Sheriff, et al.

(Supreme Court of Kansas. March 12, 1904.)

REPLEVIN—WRONGFUL DETENTION—ADMISSIONS—ESTOPPEL—HARMLESS ERROR—REMITTITUR.

1. The remedy of replevin can be invoked only in the case of a wrongful detention existing at the time the suit is commenced.

2. In an action of replevin for exempt property seized on execution, the validity of the judgment upon which the execution issued is admitted.

3. A debtor who, before sale, demands of the sheriff the return of his property seized on execution, on the ground that it is exempt, who attends the execution sale, and there objects to the sale of the property on the ground that it is exempt, and who sues the sheriff and the purchaser of the property for its return on the ground that it is exempt, cannot, on the trial, ambush his adversaries by showing the sale to be void on other grounds.

4. Only those errors which affect the substantial rights of parties who are in a position to complain of them will work a reversal of a judgment of a district court.

5. If, from an inspection of the record, it be apparent that a jury was not confused or misled by short and simple pleadings, which the court permitted it to take in connection with the instructions, a judgment upon the verdict



b. An error occasioned by the clerk wrongfully entering a judgment for a sum of money not found by the verdict of the jury, and without warrant in the pleadings, may be cured by a remittitur.

(Syllabus by the Court.)

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by J. E. Redinger against J. W. Jones, sheriff, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

In the month of February, 1900, Frank B. Houlette recovered a judgment against J. E. Redinger for the sum of \$400 and costs. Upon October 11, 1900, an execution upon this judgment was issued to the sheriff of the proper county, and levied upon certain corn in the shock, as the property of the judgment debtor. Upon October 18th of the same year, Redinger made a demand upon the sheriff for the possession of the corn, upon the ground that it formed a part of the exemption to which he was entitled as the head of a family. Upon October 22d the sheriff sold the corn to Houlette at a sale held at the door of the courthouse of the county, and not in the township where the shocks of corn were standing. Upon October 25th Redinger brought an action of replevin against the sheriff, the purchaser at the execution sale, T. J. Graham, and J. L. Pettyjohn, for the possession of the corn. The petition contained the necessary formal allegations, and, in addition, averred that the plaintiff was a married man, the head of a family, and a resident of the county in which suit was brought. With the petition was filed an affidavit in replevin, describing the property sued for, and stating that it was taken on an order or judgment against the plaintiff, but that it was exempt, and was not taken for the payment of any tax, fine, or amercement. No order of delivery was issued. The sheriff, Jones, answered by a general denial, and by pleading that he had levied upon and had sold the property claimed under and by virtue of an execution issued upon the judgment in the case of Houlette v. Redinger (describing it). The defendant Houlette answered by a general denial, and by pleading the judgment and execution mentioned, and his purchase of the property at the sale made pursuant to it. As a third defense, he pleaded an offset of the balance of the judgment after applying the proceeds of the sale of the corn to its satisfaction. The defendants Graham and Pettyjohn each pleaded special defenses, Graham admitting inferentially that he had been in possession of the corn. To the answer of the sheriff, Jones, the plaintiff replied affirmatively as follows: "For further reply to the answer of the defendant Jones, plaintiff alleges and states that, long before

answer, plaintiff was a married man, and head of a family, consisting of a wife and three minor children, all dependent upon him for maintenance and support, was a resident of Johnson county, Kansas, and occupied the land where said corn was raised as his homestead, and planted, cultivated, and raised said corn on said land in the year 1900; that prior to said pretended levy of said execution, being the owner thereof, he executed and delivered two chattel mortgages on said corn to secure the payment of two notes, for the aggregate sum of \$145—one of said notes payable to the order of A. D. Beckwith, and one to the order of I. O. Pickering—which said chattel mortgages were duly filed for record and recorded in the office of register of deeds long before said execution was issued, or said pretended levy was made on said corn; that after said pretended levy was made, and before said defendant sold or offered said corn for sale, plaintiff demanded the release thereof, and forbade said sale, by verbal and written notice to said defendant, for the reason that said corn was exempt to plaintiff, as the head of a family, and was not subject to sale upon execution; that, notwithstanding said demand and notice, said defendant refused to release said levy or to deliver said corn to plaintiff, but kept and retained the same, and afterwards made a pretended sale thereof to the defendant Houlette. Said written notice was in the words and figures following, to wit." Following this matter appeared the written notice referred to, the material portion of which is as follows: "You are notified hereby that we claim said property as being exempt to us under the exemption laws of the state of Kansas, and as necessary for the support of ourselves and family and stock for one year, as provided by law." To the answer of Houlette the plaintiff replied, admitting specifically the rendition of the judgment, its nonpayment, the issue of execution under it, the levy of such execution upon the corn sued for, and a sale of such corn to Houlette, but alleging facts showing the corn to be exempt, and further alleging as follows: "Plaintiff further states that, before said defendant bid upon or purchased said corn at said pretended sale, plaintiff warned him not to purchase the same, and, after said pretended sale, plaintiff demanded said corn from said defendant, and then and there claimed the said corn as exempt property, and that it was not subject to sale upon execution." To the answers of Graham and Pettyjohn, plaintiff replied by general denials. After issues had been framed, the plaintiff, by leave of court, withdrew his replies to the answers of Houlette, Graham, and Pettyjohn, and, instead, filed a demurrer to the third defense of Houlette's answer, and demurrers to the answers of Graham and Pettyjohn. These

¶ 6. See Judgment, vol. 30, Cent. Dig. § 616.



Pettyjohn again answered, and the action proceeded to trial without further replies. On the trial, to support the plaintiff's case, his attorney testified that he made the written demand upon the sheriff pleaded in the reply to the answer of that official. He further testified that he attended the sale, there demanded possession of the corn upon the ground set forth in the previous written notice, read a duplicate of that notice, in the hearing of the sheriff and the purchaser before the sale, and warned the sheriff and all bidders the corn belonged to Redinger. A portion of the court proceedings, ending with the sale of the corn, was introduced over the objection of the plaintiff, and the claim was made that, upon the evidence introduced, the judgment appeared to be void. Much evidence was introduced, over the objection and exception of the defendants, relating to the consideration, good faith, transfer, and validity of a mortgage lien upon the property, which the plaintiff claimed he had given, and which was then held by a person not a party to the suit. No demand upon Graham and Pettyjohn was shown. No facts appeared showing that a demand upon them would have been unavailing, and at the conclusion of the plaintiff's evidence a demurrer to it was sustained, in their favor. In submitting the cause, the court instructed the jury in a manner not satisfactory to the plaintiff concerning the transfer by the payee of the note secured by the chattel mortgage upon the corn to its holder, and refused instructions which he offered upon the same subject. Instructions asked by plaintiff relating to the validity of the sale at the place where it was made were likewise refused. With the instructions, the pleadings of the defendants Jones and Houlette were allowed to be taken by the jury. The instructions, however, briefly indicated the issues to be determined. Upon evidence given by the sheriff and his deputy, the jury found specially that, at the time suit was brought, the sheriff had sold the corn, and had delivered possession of it to the purchaser. Upon other evidence the jury made findings to the effect that the corn sued for was not exempt. Findings were also returned to the effect that the note secured by the chattel mortgage referred to was given without consideration, and that the chattel mortgage itself was given for the fraudulent purpose of securing the corn against execution upon Houlette's judgment. Other findings relating to the existence of a lien upon the corn were against the plaintiff. Some of them, relating to the good faith of the transfer of the note and chattel mortgage, the plaintiff asserted, were inconsistent with each other, and others upon the same subject were claimed to be without support in the evidence. Pursuant to a form submitted by the court, a general verdict was returned for the defendants Jones and Houlette. A new trial was denied. By mistake

to matter proper to be there, a money judgment in favor of the defendant Houlette, which Houlette subsequently remitted. The plaintiff seeks a review of these proceedings upon a petition in error to this court.

I. O. Pickering and H. L. Burgess, for plaintiff in error. J. W. Parker and Ogg & Scott, for defendants in error.

BURCH, J. This action was one of replevin. The gist of it was wrongful detention. The return of specific property was demanded. Damages were asked for wrongful detention, and the value of the property was prayed for only in the event a return of it could not be had.

The remedy of replevin is specific in purpose and limited in scope. It can only be invoked against a wrongful detention, which must exist at the time the suit is commenced. One who does not have the possession of coveted things does not detain them wrongfully, and cannot be compelled to deliver them. He is absolutely invulnerable to a suit in replevin, and the fact that the value of the thing detained may be recovered in the event it cannot be produced to satisfy the judgment does not enlarge the power of that remedy. In the case of *Ladd v. Brewer*, 17 Kan. 204, it is said: "A judgment for the return of certain personal property, and damages for its detention, cannot be sustained against one who is shown by the testimony neither to have possession, nor to claim any right to the possession." In the case of *Moses v. Morris*, 20 Kan. 208, a demand was made upon the sheriff for the return of property which he held under legal process. Afterward he sold the property under an order of court made in the course of the proceeding in which the process had issued, and delivered it to the purchaser. The demanding party then brought replevin against him. In determining the rights of the parties, this court said: "On the 10th of February, 1875, when the action of replevin was commenced by the defendant in error, the plaintiff in error was not wrongfully detaining the possession of the property sued for, as he then had neither the actual nor constructive possession of the same; neither did he have such possession conjointly with his codefendant Dffenbacher, nor was there any joint detention by him with Dffenbacher. After the sale of January 25th, Moses had nothing whatever to do with the property, and was indifferent to it. Without either actual or constructive possession, there is no power to deliver the property, and, in the absence of such possession, it cannot be said that a defendant wrongfully detains the property. He may have committed acts which make him liable in damages, and he may be liable for the value of use of the property in an action of another form, but the action of replevin is

in the case of *Davis v. Van De Mara*, 40 Kan. 130, 25 Pac. 589, the syllabus reads: "Replevin will not lie against a person who is neither in the actual nor constructive possession of the property sought to be recovered at the commencement of the action." This being the law, the judgment in favor of Sheriff Jones was undoubtedly correct. His conduct was solely that of an officer under an obligatory writ. When he sold the corn, his possession of it ended, and his interest in it entirely ceased. There was no mere shifting of possession for the purpose of defeating recovery, as in the case of *Schmidt v. Bender*, 39 Kan. 437, 18 Pac. 491. The principles there announced have no application, and no legal justification appears for joining the sheriff in this suit.

When the corn had been seized, the plaintiff made a demand upon the sheriff for its release, and, in order that his position might not be mistaken or misconstrued, he committed it to writing. The sole basis for the demand was that the corn was exempt. When the sale took place, the original attitude was maintained. The writing was again produced and read, and the plaintiff's right to the corn was reasserted, because it was exempt. When suit was brought, the petition itself contained some allegations upon which the claim of exemption might be predicated. With it was filed an affidavit admitting the corn had been seized upon execution, but claiming that it was exempt. In reply to the answer of Jones, it was conceded judgment had been rendered, execution issued and levied, and the corn sold, but it was said the corn was exempt. True, it is claimed in plaintiff's brief that such a concession was not made, but this court will not now permit him to higggle over equivocal phrases for the purpose of escaping the disadvantages of a situation which he thought to be advantageous when he established himself in it. The theory of the plaintiff's action, therefore, was that he had a right to the possession of the corn because it was exempt. This theory is further exemplified in the reply to Houlette's answer. There the judgment, execution, levy, and sale were expressly admitted, but it was said the corn was exempt. True, this reply was withdrawn, and thereafter could only be used as any other written admission; but, as the record fairly shows, it was withdrawn for the purpose of permitting an attack by demurrer to the set-off defense of the answer, to which the reply was not properly pertinent, and not for the purpose of shifting or abandoning the original theory of the case. With the reply to Houlette's answer withdrawn, the reply to the answer of the sheriff committed the plaintiff to the exemption theory of recovery, as against that defendant; and it is impossible that there should be one theory of a case for a defendant officer for selling corn under execution, and another for a

plaintiff, before the finding of the jury to the effect that the corn in controversy was not exempt precluded a judgment against the defendant Houlette.

The plaintiff, however, claims that the judgment upon which the execution issued was void. Since the action was one of replevin for exempt property seized under execution, the validity of the judgment upon which the execution issued was distinctly admitted by the very form of the action. "The requirement of the Civil Code [fourth clause of section 177] that the affidavit in replevin to recover the immediate possession of personal property shall state that the property sought to be replevied 'was not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine, or amercement assessed against him, or by virtue of an order of delivery issued in an action of replevin, or any other mesne or final process issued against said plaintiff,' is imperative. All these facts must be shown to exist before the order of delivery can be made, and, unless they do exist as facts, the action of replevin cannot be maintained [except in case of exempt property]. The object of the statute [fourth clause of section 177, Code] is not solely to protect process in the hands of the officer to whom it is directed, and who in virtue of such process detains the property sought to be replevied. One object is by prohibiting all such inquiry in the action of replevin, to compel the party who desires to contest the validity of any judgment or order of a court, or of any tax, fine, or amercement, to do so in some proper and direct proceeding for such purpose. The law affords a proper remedy in each case—one well adapted to try the question—but the action of replevin is not such remedy. An exception to the rule that property in the custody of the law cannot be replevied by the execution or attachment debtor is made in the case of property which by statute is exempt from seizure and sale on execution or attachment, and this exception is provided for by the fifth clause of said section 177 of the Code. But in every such case the validity of the judgment and execution, or order of attachment, is not questioned, but is distinctly admitted." *Westenberger v. Wheaton*, 8 Kan. 169.

Seemingly out of an abundance of caution, the defendants introduced portions of the record in the original suit between Houlette and Redinger, and probably enough to show a valid judgment. But whether sufficient for that purpose or not, so far as it went the evidence was consistent with the plaintiff's admission of the validity of the judgment, which the bringing of suit necessarily compelled, and could not, therefore, be prejudicial to him.

The plaintiff also claims the sale of the corn was void because conducted at an improper place. Plaintiff's attorney attended

He warned the sheriff and prospective purchasers that the corn was exempt, and nothing more. He sued the sheriff and the purchaser upon the ground that the corn was exempt. Upon his own estimation of his rights, it was immaterial to him where the sale was held. Having declared his position in the beginning, and having held it until after the issues were made up and a trial was in progress, he could not then ambush his adversary by an objection to the place of sale. "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. *Gould v. Banks*, 8 Wend. 562 [24 Am. Dec. 90]; *Holbrook v. Wight*, 24 Wend. 169 [35 Am. Dec. 607]; *Everett v. Saltus*, 15 Wend. 474; *Wright v. Reed*, 3 Durr. & E. 554; *Duffy v. O'Donovan*, 46 N. Y. 223; *Winter v. Colt*, 7 N. Y. 288 [57 Am. Dec. 522]." This authority has been quoted with approval in the following, among other, pertinent cases (see 9 *Rose's Notes*, 424): *Davis v. Wakelee*, 156 U. S. 680, 690, 15 Sup. Ct. 555, 39 L. Ed. 578; *Davis & Rankin Bldg. & Mfg. Co. v. Dix* (C. C.) 64 Fed. 406, 411; *Tabler, Crudup & Co. v. Sheffield Land, Iron & Coal Co.*, 87 Ala. 306, 310, 6 South. 196; *Harriman v. Meyer*, 45 Ark. 37, 40; *McDonald v. Hooker*, 57 Ark. 632, 638, 22 S. W. 655, 23 S. W. 678; *Wallace v. Minneapolis & Northern Elevator Co.*, 37 Minn. 464, 35 N. W. 268; *Wyatt v. Henderson*, 31 Or. 48, 55, 48 Pac. 790; *Harris v. Chipman*, 9 Utah, 101, 105, 33 Pac. 242; *City of St. Louis v. Gaslight Co.*, 5 Mo. App. 484, 524; *Ballou v. Sherwood*, 32 Neb. 666, 689, 49 N. W. 790, 50 N. W. 1131; *Frenzer v. Dufrene*, 58 Neb. 432, 436, 78 N. W. 719.

The evidence with reference to the existence of a mortgage lien upon the corn in suit was admitted apparently upon the theory that, if such a lien existed in good faith, the plaintiff was entitled to sufficient corn to satisfy it. But the jury found the claimed lien to have been fraudulently contrived by the plaintiff for the purpose of defeating the execution creditor in the enforcement of his rights. This being true, the plaintiff could not ask for its enforcement. He cannot be permitted to build up rights upon the basis of his own fraud. The assignee of the original holder was not a party to the suit, and can complain of no error committed at the trial. Therefore it is entirely immaterial whether or not the jury were properly instructed with reference to the transfer of the note and mortgage, whether or not findings upon that subject are consistent with each other, and whether or not any such findings are unsupported by the evidence. Only those errors which affect the substantial rights of

district court.

The pleadings in the action were short and simple, and easy to comprehend. The brief indication of the issues by the court tended to prevent any obfuscation the unexplained pleadings might cause. The special findings show that the jury was clear regarding the material facts, and these findings were in harmony with the general verdict. It is therefore impossible to conclude from an inspection of the record that the jury was confused or misled by the pleadings, which the court permitted them to take in connection with the instructions, and the judgment entered will not be overturned on account of the conduct of the court in that respect.

On the face of the record, the money judgment against the plaintiff entered by the clerk in opposition to the verdict of the jury, and without warrant in the pleadings, was invalid. The defendant in whose favor the unauthorized judgment apparently ran has relinquished every right it wrongfully seemed to afford him. "An error in a judgment, in that it exceeds the amount of the verdict on which it is entered, may be cured by a remittitur of the excess." 18 *Encyc. Pl. & Pr.* 142. The mistake was not called to the attention of the district court. It could have been corrected there by motion, practically without expense. Its commission is only one of many errors complained of here, and was not the inducement to this proceeding in error. Therefore the judgment will not now be reversed on account of it, and no costs will be allowed in this court because of it.

The plaintiff failed to prove a cause of action against either of the defendants *Graham* and *Pettyjohn*, even though it be conceded they were in possession of some of the corn. Therefore their demurrers to the evidence was rightfully sustained, the jury was properly instructed to make no finding respecting their rights, and judgment was properly entered in their favor.

The record is free from any material error, and the judgment of the district court is affirmed. All the Justices concurring.

(38 Kan. 699)

CLEVENGER et al. v. FIGLEY et al.

(Supreme Court of Kansas. March 12, 1904.)

JUDGMENT—COLLATERAL ATTACK—JURISDICTION.

1. In an action to foreclose a mortgage given by the owner of land jointly with the guardian of his insane wife, the district court has jurisdiction to determine whether or not the premises were a homestead at the time the mortgage was executed, and to decide whether or not the instrument expressed the joint consent of husband and wife; and a judgment involving an erroneous decision of those matters is not open to collateral attack, but is valid and binding

¶ 1. See Judgment, vol. 30, Cent. Dig. § 941.

upon the parties and their privies until corrected in a direct proceeding for that purpose.

(Syllabus by the Court.)

Error from District Court, Brown County; Wm. I. Stuart, Judge.

Action by J. M. Clevenger and others against Sarah M. Figley and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Prior to September 4, 1888, J. J. Figley was the owner of 360 acres of land in Brown county. On that date his wife, Sarah M. Figley, was adjudged to be insane, and Samuel Huston was appointed her guardian. Upon November 3, 1888, after formal proceedings for that purpose, the probate court directed the guardian of the wife to join with the husband in the execution of a mortgage upon the land to secure the payment of the sum of \$7,500, according to the terms of a promissory note due in three years from the date of the order. The executed mortgage was approved by the probate court. The obligation secured by this mortgage was not paid at maturity, and after default the holder commenced an action in the district court of the proper county to foreclose it. J. J. Figley, Sarah M. Figley, and Samuel Huston, as guardian of Sarah M. Figley, were made parties defendant. The petition exhibited all the allegations common to such cases, and, besides these, recited the insanity of Sarah M. Figley, the appointment and qualification of Samuel Huston as her guardian, the probate proceedings resulting in the mortgage, and made the following specific charge: "That said Sarah M. Figley has not now, nor did she ever have, any claim, right, or title or interest in the property hereinafter described, except as the wife of the said defendant J. J. Figley." The prayer was for a first lien upon the land, its sale, and a bar against all defendants asserting or claiming, after sale, any right, title, or interest of any kind in the land. Upon March 3, 1892, the court rendered a judgment in favor of the plaintiff, foreclosing the mortgage. The record of the proceedings recites the appearance of Sarah M. Figley and Samuel Huston, guardian of Sarah M. Figley, an insane person, by their attorney, the announcement of their readiness for trial, their waiver of a jury, the hearing of evidence, and the argument of counsel. It likewise discloses a finding of the court that Sarah M. Figley is an insane person and the wife of J. J. Figley, that Samuel Huston was duly and legally appointed guardian of her person, estate, and property, that he properly qualified as such guardian, and has ever since acted in that capacity. After a finding relating to the execution and delivery of the note sued on, appears the following: "The court further finds that, in order to secure the payment of said note and the interest thereon, the defendants J. J. Figley and Sarah M. Figley, by her guardian, Samuel Huston, executed, duly acknowledged,

and delivered said mortgage, as in the petition described, on the following tracts of land in Brown county, Kansas, to wit: The east half of section twenty (20), township four (4) south, of range seventeen (17) east, all containing three hundred and sixty (360) acres, and that the said described lands were the property of the defendant J. J. Figley, and the title and ownership thereof were not in said Sarah M. Figley, his wife, and that said plaintiff's mortgage is a first lien thereof. That the southeast quarter of said section 20, town. 4, range 17, is the homestead of said defendant J. J. Figley and his family." Other findings staple to all foreclosure judgments appear, and orders for the sale of the mortgaged premises, the application of the proceeds of sale, and the exclusion of the defendants from interest in the land, usual in such cases, are shown. The order of sale, however, is qualified as follows: "That as the southeast quarter of said section 20, town. 4, range 17, is a homestead as herein found, it is ordered that the northeast quarter of the said section 20, township four, range 17, and the southwest quarter of the northeast quarter of section thirty-one (31), town. 4, range 17, be first advertised, appraised, and sold, or so much thereof as may be necessary for the payment of plaintiff's claim. But if sufficient is not realized from such sale to satisfy said judgment, then the homestead, being the southeast quarter of section twenty (20), town. four (4), range seventeen (17), be appraised and advertised and sold in like manner for the payment of any balance due." The defendants, Sarah M. Figley and Samuel Huston, guardian of Sarah M. Figley, filed no motion for a new trial, and have at no time taken any steps for the modification or reversal of this judgment. The land ordered to be sold first proving insufficient for the satisfaction of the lien upon it, the so-called "homestead tract" was then sold upon an alias order of sale, and after a confirmation of the sale it was conveyed by the sheriff to the purchaser, A. L. Figley. His deed was recorded March 8, 1893. No exceptions were taken to these proceedings, and no steps have since been taken looking to their modification or reversal. Afterward, A. L. Figley executed several mortgages upon the land, which were subsequently foreclosed by suits in the United States Circuit Court for the district of Kansas, and under decrees of that tribunal the homestead tract was again sold, and was conveyed to Peter J. Clevenger, one of the plaintiffs in error in this court. In 1899, J. J. Figley died intestate, leaving as his heirs his widow, Sarah M. Figley, and five adult children. Upon May 8, 1900, Samuel Huston, as guardian of Sarah M. Figley, insane, brought an action to quiet the title of Sarah M. Figley to the undivided one-half of the homestead tract of land, which, at the time of her husband's death, she occupied with him, and which she has continued to

guardian of Sarah M. Figley, and E. H. Keller, who succeeded him, was substituted as plaintiff in the action. Upon a final hearing the court found that the land in controversy was a homestead at the date of the Johnson mortgage in 1888, and that Sarah M. Figley had never consented to the execution of that instrument. Therefore judgment was rendered declaring that such mortgage, the judgment of the district court of March 3, 1892, foreclosing it, the sale of the land to A. L. Figley, and the sheriff's deed to him, were all utterly void and of no effect whatever. It was conceded that, by the foreclosure proceeding in the federal court, Peter J. Clevenger had acquired the interest of A. L. Figley in the land as an heir of J. J. Figley, being an undivided one-tenth of the whole, and the title to so much of it was quieted in Peter J. Clevenger. But the title of Sarah M. Figley to the undivided one-half of the land, and the title of the children of J. J. Figley, other than A. L. Figley, to the remaining undivided four-tenths of it, were quieted in them to the same extent and effect as if the mortgages recited above had never been made and the court proceedings referred to had never occurred. The legal propriety of that judgment is challenged by this proceeding in error.

W. P. Todd and Jackson & Jackson, for plaintiffs in error. Buckles & Pearl, for defendants in error.

BURCH, J. (after stating the facts). In his petition the guardian of Sarah M. Figley presented to the district court a mortgage of the real estate in controversy, executed by him in pursuance of an authority conferred by the probate court having general jurisdiction of the estate of his ward, and prayed that it might be declared to be a void thing, creating no rights and no liabilities, and binding upon no person and no property whatsoever. This judgment was asked against the privies in estate of the mortgagee.

In the case of *Johnson v. Figley* the mortgagee presented the identical instrument, together with the probate proceedings upon which it was based, to the same tribunal, and asked to have it declared a valid thing, creating just obligations in his favor rightfully enforceable against Sarah M. Figley and Samuel Huston, as her guardian, who were parties to the cause, and asked to have it declared to be a first lien upon the very land involved in the present suit. In this case the ground of relief is that Sarah M. Figley had a special interest in the land which prevented the mortgage from becoming effectual for any purpose. In the former suit the ground of relief was that Sarah M. Figley had no interest in the land which prevented the mortgage from becoming effectual as security for the mortgage debt. The court,

in both suits. A decision has been rendered in each one. What difference of power in the court to pronounce its judgment is disclosed by the two cases?

By the act of bringing suit the guardian necessarily affirmed that the district court had jurisdiction to decide upon the validity of the mortgage as a lien upon his ward's land. If it had no such authority, no reason existed for invoking its action. In order to obtain a decision in his favor, however, he was obliged to importune the court to repudiate the jurisdiction it had lately entertained of the identical matter in a suit brought against him by the predecessor in interest of his present antagonist. In the last case the guardian is plaintiff, and succeeds. In the other he was defendant, and was defeated. What increment of authority did the court possess in the last case over that which it enjoyed before? If in the first case the court had declared the mortgage to be void, and had refused to order a sale of the land, would its judgment have been a nullity because of want of jurisdiction? If not, and if the court had power to make a decision, with what paralysis was it smitten when the decision commenced to fall upon the other side? These questions the guardian does not attempt to answer.

It is frankly conceded that the district court had jurisdiction to foreclose mortgages, but it is said that a court cannot give effective judgment upon a cause or subject-matter not brought within the scope of its judicial power, and the case of *Gille v. Emmons*, 58 Kan. 120, 48 Pac. 569, 62 Am. St. Rep. 609, is cited, in which it was held that a matter not presented by the pleadings was *coram non jndice*. The proposition is true, and the case was well decided. But in this case an express allegation of the petition challenged the guardian and his ward to defend any interest they might claim in opposition to the validity of the mortgage, made the question of an alienation of a homestead without the joint consent of husband and wife an issue, brought it directly to the attention of the court and within its judicial power, and invoked a decision upon the subject so submitted.

It is said that the record shows upon its face that the land was outside the scope of the district court's authority, within the purview of certain statements made in *Rogers v. Clemmans*, 26 Kan. 522. The proceedings reviewed in that case were instituted under the law authorizing the appropriation of the land of intestates to the payment of their debts. An administrator had paid the pre-emption price of certain real estate entered by the decedent, and thereby had acquired a title which, under the laws of the United States, passed to his heirs, and a patent to that effect had been duly issued. The heirs were not notified of the proceeding to sell

the land, and the court said: "No notice to the persons interested in the estate was given or published, and as notice, so far as the heirs are concerned, is jurisdictional, the order of sale, and the proceedings based thereon, being without notice, are void. *Mickel v. Hicks*, 19 Kan. 578 [21 Am. Rep. 161]." This is the substantial basis of the decision. Mr. Justice Brewer regarded the remainder of the opinion as dictum, and refused to subscribe to it. Such matter, however, without any examination of its logical ground, was made the basis of a commissioners' decision in the case of *Coulson v. Wing*, 42 Kan. 507, 22 Pac. 570, 16 Am. St. Rep. 503, and in its defense it may be said that the land of the heirs was no more subject to the payment of the decedent's debts than the land of a stranger to the family would have been. It required no investigation of facts, and the solution of no problem of law, to determine to whom the land belonged. The Land Department of the United States had forestalled any controversy over that matter. So much being settled incontestably, the question of the liability of the land for the debts of one whose estate never included it was not even debatable. The court could not follow the law and sell that land, any more than it could subject the land of the intestate to the payment of debts other than his own. The face of the proceeding disclosed this state of affairs.

In the case at bar there is nothing in the record of the first suit to show that the property was a homestead at the time the mortgage was executed. True, the court finds that the land was a homestead at the date of the judgment, but that is not sufficient. No retrospective inference is deducible from that finding. The residence of the parties might have changed many times between the date of the mortgage and the date of the judgment (see authorities cited in *City of Topeka v. Chesney*, 66 Kan. 480, 71 Pac. 843), and instead of the proceedings disclosing, at their inception, as an undisputed fact, that the subject-matter of the controversy was beyond the grasp of the court at all, they presented an issue with respect to a matter the court was compelled to investigate and decide, not as preliminary to jurisdiction, but as of the essence of the cause. Therefore the case of *Rogers v. Clemmans* cannot apply.

It is said that the district court had no power to order a sale of the land in the foreclosure suit, because its jurisdiction in that respect is fixed by the Constitution as rigidly as it is by statute with respect to the punishment which may be imposed upon persons convicted of crime, and reference is made to the cases of *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872, and *In re Nielson*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118. The doctrine of those cases was approved and followed in the case of *In re McNeil* (Kan.) 74 Pac. 1110, decided January 9, 1904,

in which a prisoner sentenced to a fine and imprisonment under a statute allowing only a fine or imprisonment was discharged by habeas corpus. But these authorities throw no light upon this case. In pronouncing sentence the court has the statute before it, and is bound by the unquestioned and unquestionable letter of its provisions. It has no investigation to make or independent conclusion to form, and any transgression of the language of the law is inoperative and void. In this case it was necessary to ascertain the fact of homestead as any other uncertain question depending upon disputable evidence, and to determine, as a serious and unsettled matter of law, what facts are essential to joint consent. Neither Constitution nor statute could dispense with an investigation of the facts, and neither Constitution nor statute could furnish the conclusion which the district court should derive when the facts were found. It was compelled to act without guide, upon its own judgment and responsibility. In the case of *Bigelow v. Forest*, 9 Wall. 339, 19 L. Ed. 696, a court, having jurisdiction of a life estate only, undertook to dispose of the fee, as if a justice of the peace with jurisdiction of causes involving no more than \$300 should undertake to render a judgment for \$1,000. The cases of *Elliott et al. v. Frakes*, 71 Ind. 412, and *Hutchinson v. Lemcke et al.*, 107 Ind. 121, 8 N. E. 71, are disposed of by the discussion of the case of *Rogers v. Clemmans*. In the case of *Love v. Blauw*, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334, the court had no authority to proceed at all. Other decisions cited on behalf of the guardian are as readily distinguishable as those just referred to, and still others afford no aid, because they are couched in those generalities which are always the refuge of vague thought.

It adds nothing to the argument in favor of the guardian's position to descant upon the mandatory, peremptory, inexorable, and inescapable character of the constitutional provision. The petition in the first action presented for the ultimate determination of the district court the questions, did it have before it a mortgage given by the joint consent of husband and wife, and did that mortgage cover premises occupied as a residence by the family of the owner? Upon a trial it so determined the facts that the interdiction of the Constitution could not fall upon its advancing to a sale and conveyance of the land. Therefore the first judgment was not open to attack in the second suit.

The guardian's case is presented, however, as if the findings of the court in the first case, when fairly construed, disclose the fact that the land was a homestead at the date of the mortgage as well as at the date of the judgment; that the language of the finding, that a portion of the land "is" a homestead, was not intended to betoken a nice discrimination of time, but that it re-

any other interpretation of the record must rest upon a quiddity. If this view of the record be adopted, the questions propounded at the beginning of this discussion again arise. The court was under the legal necessity of investigating the truth of the facts alleged in the mortgagee's petition. At the close of the investigation it was under the legal necessity of making a decision as to whether the mortgage was valid or not. The question was, did the facts found disclose joint consent of husband and wife, within the meaning of the law? Was such consent personal, or could the guardian express it? The guardian and the mortgagee were each demanding judgment. This court, by mandamus, could have compelled a decision to be made. Was the decision for the plaintiff without jurisdiction and void, while a decision for the defendants would have been with jurisdiction and valid? Such a conclusion would be utterly illogical under any rational theory of jurisdiction, and all attempts to justify it would necessarily confuse and befog the law. It could not be drawn except through an indiscriminate and misconceived use of the modern doctrine that jurisdiction is limited to power to render the particular judgment in the particular case. Such a misinterpretation of that doctrine was censured by this court in the case of *Watkins Land Mortg. Co. v. Mullen*, 62 Kan. 1, 5, 61 Pac. 385, 386, 84 Am. St. Rep. 372, in the following language: "In the opinion of the court of appeals a quotation is made from one of the notes in 12 A. & E. Encycl. of L. (1st Ed.) 247, as follows: 'There is a tendency in the later decisions in the United States to hold that jurisdiction is not only the power to hear and determine, but also the power to enter the particular judgment in the particular case.' If by this is meant that when a court invested with general jurisdiction over a particular subject-matter wrongly applies the law to a proved or admitted state of facts its judgment is outside its jurisdiction and subject to collateral review, we unhesitatingly say that no such tendency is to be observed in the later decisions, because such a tendency, instead of modifying the general rule or introducing an exception to it, would go to its absolute subversion."

The principle involved in the case at bar is precisely analogous to that upon which the case of *Randolph v. Simon*, 29 Kan. 406, 411, was determined. A debtor had been committed under an execution against the person. He was entitled to a discharge, upon terms, in case of his inability to perform the act or to endure the imprisonment. Under an application made upon notice to the execution creditor, he was given leave to go to Illinois on account of the sickness of his wife. In a suit brought upon the debtor's bond for a breach of prison bounds in going

applied to the facts? In finally deciding the case, Mr. Justice Brewer said: "Now, it is claimed that this order was void, that the inability referred to in the statute is a personal and physical inability, that no such inability was alleged, and that therefore the court had no power to act. We cannot assent to this. Power is given by the statute to the court to grant a discharge on account of inability. Application was made under this statute, notice of the application was given to the adverse party, both parties were present, a showing was made, and the court acted. There was therefore a hearing before a competent tribunal with jurisdiction of both parties, and the order made after such hearing cannot be adjudged void. Whether the court erred in its ruling upon the facts, whether the order was or was not erroneously made, can only be determined by proceedings in error. As long as there was enough to challenge judicial action, the order cannot be declared void in a collateral proceeding. *Burke v. Wheat*, 22 Kan. 722; *Bryan v. Bauder*, 23 Kan. 95; *Hodgin v. Barton*, 23 Kan. 740." In the case of *Burke v. Wheat*, referred to, the syllabus reads: "Where a court has jurisdiction over the subject-matter of an action, and over the persons in the case, no error in its exercise can make the judgment void. Mere irregularities or errors in judicial proceedings afford no ground for an injunction to restrain the collection of a judgment, nor can such irregularities or errors be revised or corrected in such an action." And, in the case of *Bryan v. Bauder*, Chief Justice Horton said: "The filing of a petition and giving notice to the heirs are jurisdictional acts. The action of the court is upon the petition. All parties interested, after due notice, are required to come in and oppose the application. The statute contemplates a hearing of parties, and an adjudication upon the subject of the petition. Whether the petition is in proper form, or sets forth sufficient facts, are matters for the determination of the court in the exercise of its jurisdiction. Of course, if a mere blank paper is filed as a petition, jurisdiction would not attach, because there would be nothing for the court to act upon; but when a petition contains sufficient matters to challenge the attention of the court as to its merits, and such a case is thereby presented as authorizes the court to deliberate and act, although defective in its allegations, the cause is properly before the court, and jurisdiction is not wanting. This principle underlies all judicial proceedings."

In the foreclosure suit it was by no means obvious that joint consent of husband and wife did not appear. It required an interpretation of the Constitution to ascertain if it permits a guardian to join his ward in a conveyance of her homestead. The law was



that it should determine the law between litigants. Hence the decision of this court in the case of *Wolfley v. McPherson*, 61 Kan. 492, 496, 59 Pac. 1054, 1055, is precisely pertinent: "In this case a judgment was rendered against a party upon a claim which she did make. In stating to the probate court the character of her claim, she appropriated in her behalf the provisions of the law assigning it to the second class. The jurisdiction of the probate court was thus invoked, not only as to the existence of the claim, but as to the priorities of classification to which it was entitled. The statute regulating the matter of classification is not plain. It required construction to ascertain its meaning, and this court, subsequently to the original order of classification made by the probate court, was called upon to construe it. *Cawood v. Wolfley* [56 Kan. 281, 43 Pac. 236, 31 L. R. A. 538]. The mistake which the probate court made in construing it was an error only. Every question of law, as well as fact, was within its jurisdiction to determine. Its determination, though erroneous, was not void." Many other cases enforce the same principle: *Hodgin v. Barton*, 23 Kan. 740; *Walkenhorst v. Lewis*, 24 Kan. 420, 425; *Prohibitory Amendment Cases*, Id. 701, 725; *Ames v. Brinsden*, 25 Kan. 748; *Meixell v. Kirkpatrick*, 28 Kan. 315; *Rowe v. Palmer*, 29 Kan. 337, 340; *Bank of Santa Fé v. Haskell County Bank*, 51 Kan. 50, 32 Pac. 627; *National Bank v. Town Co.*, 51 Kan. 215, 32 Pac. 902.

It is immaterial to the question of jurisdiction that the property was a homestead. "Where the mortgagor being sued for a foreclosure pleaded his homestead exemption, and there was a judgment of foreclosure ordering the property to be sold, upon which the property was sold, in a suit by the purchaser to recover the property it was held that the defendant, the mortgagor, was concluded, by the judgment of foreclosure, from again pleading his homestead exemption. There is no better settled principle than that the judgment or decree of a court of competent jurisdiction, directly upon the point, or necessarily involving the decision of the question, is conclusive between the parties and their privies upon the same matters coming directly in question in a collateral action in the same or another court of concurrent jurisdiction. There is nothing in the nature of the right of homestead to exempt it from the operation of the general principle." *Tadlock v. Eccles*, 20 Tex. 782, 73 Am. Dec. 213. "Judgments of courts of competent jurisdiction cannot be attacked collaterally. In court wherein judgment was rendered, question of paramountcy of defendant's homestead having been raised and decided adversely, same cannot be raised a second time in another suit brought to ascertain priorities of liens on defendant's

land." *Wolfe v. Wolfe*, 100 Mo. 249. "The circuit court has jurisdiction of the subject-matter of partition, and, where the parties are before the court, its judgment directing a sale of the homestead of the widow and children cannot be collaterally attacked." *Rolf v. Timmermeister*, 15 Mo. App. 249. "In this case the wife united in the mortgage, and was a party to the suit to enforce it, and the question whether it was a valid waiver was directly involved; and the court, in rendering the judgment, decided that the mortgage was valid, and was a waiver of the exemption, and thereby concluded that question. Such being the case, the court had no power, on the motion to revive, to go behind the judgment in inquiry into the validity of the mortgage, or to adjudge the appellees entitled to a homestead, but should have revived the judgment to sell the mortgaged property, without terms or restrictions." *Harpending's Ex'rs v. Wylie, etc.*, 76 Ky. 158, 163.

Neither does it make a difference that the decision the court was required to make involved an interpretation of the Constitution. The power and duty of the court to hear and decide was precisely the same as if the question had been one of statutory or common law. No doubt, cases of conviction and incarceration under unconstitutional statutes now form a distinct class. But, as remarked by Mr. Justice Mason in the case of *In re Jarvis*, 66 Kan. 329, 71 Pac. 576, the view that such judgments are subject to collateral attack on habeas corpus "results more from a jealous regard for the personal liberty of the citizen than from the force of the reasoning employed as applied to other subjects of litigation." And some irregularity in the development of the law of jurisdiction in civil cases has been occasioned by indiscriminate applications of the doctrine that an unconstitutional law is no law. But the question here involved is of a different character. If the foreclosure judgment was invalid, it was so because rendered upon a mortgage void as an attempt to impose a lien upon a homestead without the joint consent of husband and wife, contrary to the provisions of the Constitution. Therefore it lies within the field covered by those decisions which are to the effect that a judgment is not subject to collateral attack because rendered upon an indebtedness or cause of action created against the terms of the Constitution or other paramount law. "In an action by the old State Bank of Illinois upon a promissory note given in satisfaction of two judgments recovered upon promissory notes executed to said bank in consideration of bills of said bank which had been declared by the Supreme Court to be bills of credit emitted by the state, in contravention of the Constitution of the United States, the defendants offered to show the consideration of the judgments in bar of the action: Held,



impeached in such action. *Archien et al. v. State Bank of Illinois*, 2 Ill. 526. "Where, upon a mortgage made to the old State Bank of Illinois, a judgment had been rendered in favor of the bank upon a proceeding by scire facias to foreclose the mortgage, and the mortgaged premises had been sold by virtue of the judgment, and an execution issued thereon to a third person, and subsequently the Supreme Court had declared the act creating the bank unconstitutional, held, that the judgment was valid till reversed, and that the title of the purchaser under such judgment could not be impeached, in an action of ejectment, upon the ground that the bank was unconstitutional." *Buckmaster et al. v. Carlin*, 4 Ill. 104.

In the case of *Cassel v. Scott and Others*, 17 Ind. 514, a judgment had been rendered upon certain bonds which were void because the law providing for them was unconstitutional. In affirming an order denying an injunction against an enforcement of the judgment, the court said: "For a reversal, it is argued that the act of 1853, referred to in the complaint, is in conflict with the Constitution, and that the judgment on the bonds, having no foundation save in that act, is a nullity. The first branch of the argument is correct. We have decided the act in question to be unconstitutional. *Meshmeier v. The State*, 11 Ind. 482. It does not, however, follow that the judgment is a nullity. It was founded upon the bonds, and not on the act, and of the suit upon them the circuit court had full jurisdiction. The act being void, the bonds are simply unsupported by any valid consideration; and, this being the case, the judgment rendered upon these bonds, though it may be deemed erroneous, is not void, and must be held operative until, in accordance with the ordinary rules of procedure, it is reversed by a court of error."

In the case of *Joseph Webster v. H. T. Reid, Morris*, 467, 479, the Supreme Court of Iowa said: "Similar in character are the objections that have been raised on the ground of the unconstitutionality of the acts of the Legislature through which the indebtedness accrued and the judgments were obtained. [*In re Wellington*] 16 Pick. 87 [26 Am. Dec. 631]. Judgments rendered under an unconstitutional law are not nullities."

In the case of *McNeil v. Bright et al.*, 4 Mass. 282, 303, a judgment confiscating land had been rendered under an absentee law of Massachusetts. In an action to recover seizure of the land, it was claimed the judgment was in violation of the Constitution of the state, and in violation of a treaty of the United States with Great Britain. The court said: "If it be true that the provisional treaty is to be considered as a national contract, binding independent of the definitive treaty, that it operated a repeal of acts of

either the date of that treaty, the demandant should have brought his writ of error, established the fact, and the judgment must have been reversed. But I know of no rule of law by which, on a trial of his right to the land, he can do what is tantamount to a reversal of the judgment, which, admitting its validity, is conclusive against him. \* \* \* There is one more objection made, which is, that the acts of confiscation were virtually repealed by the adoption of the Constitution. And to prove this, the twenty-fourth article of the Declaration of Rights was cited in the argument, and, with great force and eloquence, pressed upon the consideration of the court. \* \* \* If it be admitted that the Constitution virtually repeals the law in question, it certainly follows that the judgment against Archibald McNeil is erroneous, and that it might be reversed; but it does not prove that it is therefore a mere nullity, which can be taken advantage of in this way. This would be inconsistent with all the ideas I have entertained of the solemnity and efficacy of judgments rendered by courts of competent jurisdiction."

In the case of *Northampton County v. Herman*, 119 Pa. 373, 13 Atl. 277, a sheriff settled his accounts for fees, under a statute governing the subject, with a county tribunal whose acts had the force of an adjudication. Subsequently the act relating to fees was declared to be unconstitutional, and the sheriff sued the county for a sum of money claimed to be due, but the settlement was held to be conclusive.

In the case of *Arnold v. Booth*, 14 Wis. 180, a judgment was rendered in the United States District Court under the fugitive slave law, and chattels were sold upon execution to satisfy it. In an action of replevin for the chattels, it was claimed the judgment was void because the fugitive slave law was unconstitutional. The court decided that the question went to the existence of the cause of action, and not to the jurisdiction of the federal court, and that its decision was binding. In the opinion it is said: "Obviously the cause of action in the suit of Garland against Booth was a penalty given by the fugitive slave law for a violation of its provisions. But whether there was any law in existence giving this right of action, and, if so, whether the law was valid and binding, were legitimate matters of consideration for the district court, as was the question of its violation. The court might have held that there was no cause of action because the law was void. It had jurisdiction of the case thus to decide. This it seems to me is incontestable."

An analogous principle was applied in the case of *Hartman v. Ogborn*, 54 Pa. 120, 93 Am. Dec. 679, which was in its inception an action of ejectment brought to recover land that had been sold under a judgment fore-

closing a mortgage. The court said: "Mrs. Hartman executed a bond and mortgage, in her maiden name of Mary Ann Coleman, five days after her marriage to Hartman, and that these instruments were void is not to be questioned. The disability of a married woman to incumber her separate estate for the debt of another has been declared in many cases, and was repeated, in respect to this very bond, in *Keen v. Coleman*, 3 Wright, 299. But the question upon the record has respect to the judgment upon the mortgage, rather than to the mortgage itself. \* \* \* Neither the judgment nor the proceedings under it have been questioned by a writ of error, a motion to open or set them aside, or in any other manner whatever, and the only question upon the trial of this cause was whether they could be impeached collaterally. \* \* \* And this transfer, be it observed, is made by the judgment and the sale thereon, not by virtue of the mortgage. What avails the objection, then, that the mortgage was null and void, or for any reason was inadequate as an instrument of transfer? The inadequacy of the mortgage might well have been urged against the suit by *scire facias*; but, after that has been permitted to ripen into an unquestioned judgment, the mortgage is merged in it, and is no longer open to attack."

There is no substantial dispute in the law that, if the question of homestead had not been raised at all, the judgment foreclosing the mortgage could not have been avoided in any subsequent proceeding, other than by way of error or appeal, because of that fact. "A husband against whom a decree of foreclosure of a mortgage on real estate has been duly obtained cannot, in an action of forcible entry and detainer to recover possession after the period of redemption, set up the defense that his wife, who was not a party to the former suit, has a homestead interest in the mortgaged premises; such fact, if a defense at all, being available in the former suit, must be deemed to have been adjudicated or waived." *Dodd v. Scott*, 81 Iowa, 319, 46 N. W. 1057, 10 L. R. A. 360, 25 Am. St. Rep. 402. "It is not denied—indeed, it is a fact—that the appellant, as between him and the appellees, *Lancaster, etc.*, as his creditors, was entitled to a homestead in said real estate; but his entire interest in this real estate having been sought to be sold to satisfy the demand of these creditors, and he having appeared and defended upon the merits, and having failed to set up his homestead right, which would have been a complete bar to the appellee's action, if the real estate was not worth more than one thousand dollars, and, if more than one thousand dollars, then a bar to the extent of a thousand dollars' worth of the land, his effort to set up his right to his homestead came too late. To allow a defendant to split his defenses, relying upon one until judgment is rendered upon it against him, and at the

next term open the judgment and plead another defense, and so on, would be a mockery of legal justice. Therefore it is a universal rule that the final judgment of a court of competent jurisdiction is not only conclusive of all issues actually decided, but of all that might and should have been decided by it. And there is no good reason why the assertion of a homestead right should be made an exception to this salutary rule." *Hill, etc., v. Lancaster, etc.*, 88 Ky. 338, 343, 11 S. W. 74; *Lancaster, etc., v. White*, 88 Ky. 338, 343, 11 S. W. 74, 75. "Where after a recovery in ejectment by a widow of her dower in land occupied jointly by the holder of the record title and a brother, who were joined as defendants, the widow secures a partition of the land through a suit instituted for that purpose, in which the brother and sister are made defendants, the brother cannot defend, in a second action of ejectment brought by the widow to recover the land set off to her as her dower in the partition proceedings, on the ground that he had homestead rights in the land, and that his wife was not joined as a defendant in the first ejectment suit." *Bemis v. Conley*, 95 Mich. 617, 55 N. W. 387. "Parties who have an interest in land as a homestead, and are made parties to a proceeding in the probate court to sell the land in aid of assets, and fail to set up their claim of homestead therein, cannot afterwards maintain an action for said land against the purchaser at such sale." *Haddon v. Lenhardt*, 54 S. C. 88, 31 S. E. 883. "Where a judgment has been fairly rendered against a husband and wife, with an order for the sale of land, upon which the creditor claimed a lien for the payment of his debt, the wife cannot, by subsequent suit, have such order revoked, upon the ground that it subjects the homestead to sale." *Baxter v. Dear*, 24 Tex. 17, 76 Am. Dec. 89. "Where a party sued to foreclose a mortgage founded on a vendor's lien, and recovered judgment, and purchased the property at sheriff's sale, and then sued in ejectment to recover possession, it was too late for the defendant to plead that the property was his homestead at the time the judgment of foreclosure was rendered." *Chilson v. Reeves*, 29 Tex. 275. "Where a purchaser of land sold under attachment sued in equity the attachment debtor and his wife, praying for possession of the premises, that he be adjudged the owner thereof, and that certain deeds under which the wife claimed title be declared fraudulent and void, a decree granting the relief sought, although neither it nor the pleadings made reference to respondents' homestead rights, is a bar to an action to have said decree declared void, and to restrain the execution of a writ of possession, brought on the ground that the land constituted their homestead." *Graham v. Culver*, 3 Wyo. 639, 29 Pac. 270, 30 Pac. 957, 31 Am. St. Rep. 105. In some of these cases it is apparently assumed that the doctrine of collateral attack may be expressed in terms of

one of them be well determined, there was no reason for reinvestigating the homestead controversy in the case at bar, when an issue upon the precise question had been tendered, and a judgment had been rendered respecting it, in the foreclosure suit.

Finally, it is to be noted that it makes no difference, in deciding the legal questions arising upon this record, that the party interested in maintaining the land to be a homestead free of incumbrance is insane. Any human tribunal to whose attention the circumstance is called must be saddened that a high-thoughted human life should meet with obscurity, and that blind years should merely lead this widow's unlampd feet from night to night. But for all her business affairs the law provides her a guardian, quickens his conscience with an oath, and protects her property with his bond. He must sue and defend for his ward. His conduct of litigation in her behalf is authoritative, and must be binding. Gen. St. 1901, c. 60. Neither is the liberality with which all laws relating to the homestead are construed forgotten. A high public policy looking to the welfare and good order of society requires that quarrels once composed by the judgment of a court should not again be fomented. Aside from the public disturbance and annoyance which the toleration of continued disputation over decided causes would entail, it would open fruitful fields to thrifty fraud, expose the weak to the limitless oppression of the strong, and enable the rich to wreak unchecked ruin upon the poor. The prevailing policy has been approved by the sense of order and justice in men for centuries. In the Justinian Code it is said: "Again, if an action, real or personal, has been brought against you, the obligation still subsists, and in strict law an action might still be brought against you for the same object, but you are protected by the exception *rei judicatæ*." Inst. lib. 4, tit. 13, 5. In the time of Charles II of England: "An English ship was taken at sea by a French vessel after the peace made between us and the Dutch, wherein France was left out, and the ship was carried into France, and condemned there as a Dutch ship, and afterwards the ship came into England; and in an action of trover brought by the owner of the ship against the vendee it was adjudged that, by the sentence in the court of France, though it were an unjust sentence, the property was altered; and the vendee had judgment." 2 Lord Raymond, 936. "This is a principle of general jurisprudence founded on public convenience, and sanctioned by the usage and courtesy of nations." 2 Kent, Com. 120.

In this case, after the time for a review of the judgment enforcing the guardian's mortgage had elapsed, that judgment stood as the authoritative evidence of the ascertained rights of the individuals who were parties to

versy. Since the validity and the conclusive character of the first judgment appeared upon the face of the pleadings in the second suit, the motion for judgment against the plaintiff upon the pleadings should have been sustained.

Therefore the judgment of the district court is reversed, and the cause is remanded. All the Justices concurring.

(68 Kan. 829)

#### CHOUTEAU v. KLAPMEYER.

(Supreme Court of Kansas. March 12, 1904.)

##### INDIANS—LACHES—ACTION FOR LAND.

1. A half-breed Indian not having been heard from for 10 years, his father, as his only heir, sold his land. On his return 10 years thereafter he was informed thereof, and was given the purchase money. *Held*, that his action for the land, begun 24 years later, was barred by laches.

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by Benjamin C. Chouteau against William Klapmeyer. Judgment for defendant, and plaintiff brings error. Affirmed.

L. G. Ferrel, Bird & Pope, and T. J. Maden, for plaintiff in error. J. W. Parker and John T. Little, for defendant in error.

PER CURIAM. This was an action in ejectment, brought by Benjamin C. Chouteau against William Klapmeyer and others, the present owners, to recover possession of the northeast quarter, and the northeast quarter of the northwest quarter, of section 27, township 13, range 25, in Johnson county, Kan. Judgment was for defendants.

Cyprian Chouteau, a white man, married a Shawnee Indian. The plaintiff in this action was the issue of that marriage. In September, 1856, while plaintiff was a minor, his father was adopted into and regularly enrolled as a member of the Shawnee Tribe of Indians. In 1856 and 1857, for the purpose of allotting the Shawnee lands, a tribal roll was made, upon which appears the following: "Number in family, 1. Name, Benjamin C. Chouteau. Age, 20." After this roll was completed, and in 1857, the tribal lands were allotted. The father of plaintiff caused the lands in controversy to be allotted to Benjamin. On December 28, 1859, a patent was issued to Benjamin for this land. In 1857 Benjamin left the tribe, and went to California. During the first two years of his absence he occasionally corresponded with his people, but thereafter he was not heard from, and was given up as dead. In 1867 Cyprian Chouteau, as the only heir, believing Benjamin to be dead, sold this land for \$1,200. The land has been occupied ever since by the owners, and by mesne conveyances the title thereto is now in defendants, who are in possession. The deeds executed by Cyprian Chouteau were in all re-

In 1877 or 1878 the plaintiff returned to his father's home in Jackson county, Mo. His father informed him of the land transaction, and paid him a portion of the money received therefor. Plaintiff then went to the Indian Territory, and settled near Vinita, where he has ever since resided. Cyprian died in 1879, leaving a valuable estate. His widow was the administratrix, and she testified that in 1880, when she paid the plaintiff his share of his father's estate, amounting to about \$8,700, she also paid him an additional sum of \$500, being the balance due him from the sale of the real estate in question. The present action was brought in 1901, more than 34 years after Cyprian had sold the land, 24 years after Benjamin had been informed thereof and had received a part of the proceeds of the sale, and 21 years after he had received from his father's estate the balance due from the sale of such lands.

The facts of this case bring it within the principles announced in *Dunbar v. Green*, 66 Kan. 557, 72 Pac. 243. Upon the authority of that case the judgment of the court below is affirmed.

(68 Kan. 620)

### CALNAN v. SAVIDGE.

(Supreme Court of Kansas. March 12, 1904.)  
ADMINISTRATOR—ACCOUNTING—APPEAL—BURDEN OF PROOF—SUPPORT OF MINOR CHILDREN.

1. Where exceptions have been taken to items in an annual settlement of an administrator's account after they have been allowed by the probate judge, and the probate court adheres to its former ruling, and the party excepting appeals to the district court, the allowance of the probate court is prima facie correct, and the burden of showing its incorrectness is upon the party who appeals.

2. An administrator who pays money in good faith for the purchase of necessities for the support of helpless minor children of the intestate at a time when they have no guardian, and the purchases were such as a guardian would have made if one had been appointed, the administrator cannot be made to respond again in an action by a guardian thereafter appointed.

3. An administrator is liable to the heirs of the deceased for money or other property that came into his hands, which, through his act or omission, has been lost to the estate.

(Syllabus by the Court.)

Error from District Court, Brown County; Wm. I. Stuart, Judge.

Objections of C. H. Savidge, guardian, to the account of George B. Calnan, administrator. From an order sustaining the objections, the administrator brings error. Reversed.

Ryan & Ryan, C. W. Reeder, and C. A. Calnan, for plaintiff in error. Buckles & Pearl, for defendant in error.

GREENE, J. December 19, 1897, L. A. Williams died intestate in Brown county,

ment of the present action one child died. At the time of his death L. A. Williams and his family were residing upon 80 acres of land in Brown county as a homestead. It was purchased by Williams under a contract subject to a mortgage of \$1,000. There was also a balance due on the purchase price of about \$218.30. George B. Calnan was appointed administrator of his estate. After setting apart that portion of the personal property which was exempt to the widow, the administrator sold the remainder, and collected notes and insurance aggregating \$1,590.50, with which he charged himself in his first annual settlement. The administrator was the deceased's family physician, and as such served the widow and children until his bill amounted to \$116, which amount he charged to the estate in his settlement. During the time the estate was in course of settlement the administrator furnished money from time to time to the widow and minor children to purchase the necessities of life. At the time of final settlement he had exhausted all the funds received from the sale of the intestate's property. Prior to his final settlement he had made two annual settlements, in which he charged the estate with the money he had advanced for the support and maintenance of the family. The administrator took a receipt from the widow for every item of money paid. These receipts were filed with his accounts, which were allowed at each annual settlement. The widow and family moved from the farm, and it was rented by the administrator. The rents were collected, and applied to the payment of the interest on the mortgage, taxes, and some slight repairs which were necessary on the farm. The administrator also paid from the receipts of the estate \$218.30, the balance due on the purchase price of the farm. After the family had removed from the farm, the widow concluded to trade the farm for five acres of improved land near the little town in which she lived. Finding that she could not make a title to the land, she requested the administrator and probate judge to have the farm sold, apply the proceeds to the payment of the mortgage, and invest the remainder in the tract of land she desired. With this in view, after consulting the probate judge, the administrator made application in the regular way for the sale of the farm. Notice was given as required by an order of the probate court, and upon a hearing an order was made authorizing the administrator to sell the farm. The trade which had been negotiated by the widow was consummated. In this trade the land was valued at \$2,400, less the \$1,000 mortgage, and the five-acre tract at \$2,000; \$600 of which was paid by the widow out of her own fund. \$1,400 was the actual consideration received from the

ed the sale to Mrs. Williams for \$1,400, less the \$1,000 mortgage, and charged himself with \$1,400 cash, for which he filed the receipt of the widow, and was given credit therefor. The sale was confirmed, and the deed executed and approved. It was known by the probate judge and the widow that no cash had been received. Immediately upon the consummation of this transaction the widow, with her family, moved to the five-acre tract. On November 8, 1900, the administrator made final settlement of the estate, and the record shows that he was discharged.

Prior to this time plaintiff had been appointed guardian of the minor children. On the day of the final settlement the judge entered upon the record the fact that it had come to his knowledge that some of the heirs desired to contest some of the charges allowed against the estate. He ordered that said heirs be given 15 days in which to file a list of such items. On November 20, 1900, the guardian filed in the office of the probate court exceptions to the greater portion of the items charged against the estate by the administrator in his settlements. Upon this application the cause was heard in the probate court on December 29, 1900, and the objections disallowed, from which order the guardian appealed to the district court. When the cause was reached for trial in the district court the question arose upon whom rested the burden of proof. The court held that it was upon the administrator. To this the administrator objected and excepted. After the trial the court made numerous findings of fact, among which are No. 6 and a part of No. 18, as follows: "No. 6. After the widow moved from the farm, said administrator continued to give the family medical attention from time to time, when called upon so to do, and when the same was necessary, until his bill for such services amounted to \$116.50. These services were reasonable and necessary, and the bill therefor was examined by the widow, approved, and taken credit for at her request in the report of said administrator. The widow purchased food and clothing, fuel, and medicine for the use of, and which was necessary for, herself and the children, and which was used by them from time to time, and the bills therefor, after she having examined them, were, at her request, paid by Dr. Calnan, and credited to himself in his account as administrator. He also paid the widow, for the purpose of purchasing necessities for her use and that of her children, money, from time to time, which she used for that purpose, and which the administrator took credit for in his accounts." "No. 18. The amounts paid by said administrator to Mrs. Williams and for her, except that paid to Dr. Pontius, were, with the exception of a small amount of about \$10, used by the said wid-

ow, and the amount so used was necessary for their support and maintenance, and was paid in good faith by said administrator. Receipts were taken by the administrator from the parties to whom he paid amounts as aforesaid, and receipts were taken from Mrs. Williams for herself and children, covering the amounts paid her by the administrator, including the amounts paid Dr. Pontius and the \$1,400 reported as the proceeds of the homestead." Notwithstanding these findings, the court ordered the sum of \$586 charged back to the administrator, and also \$700, or one-half the amount of cash the administrator reported as having been received from the sale of the land, and remanded the cause to the probate court with instructions to enter such orders. To reverse this order and judgment the administrator prosecutes this proceeding.

The first error of which complaint is made is that the burden of proof was upon the administrator. To determine this question reference must be had to the force given in such proceedings to the order of allowance made by the probate court in the annual settlements made by the administrator. It has been generally held that such annual settlements are judicial in their nature, and that the probate court hears, weighs, and determines the correctness of such acts as a judicial officer, and the order of allowance is, in its nature, a judicial determination, not final, but prima facie evidence of the correctness; and, if objections are afterwards made thereto, the burden of showing the incorrectness of such determination is upon the party making the objections. *Musick v. Beebe*, Adm'r, 17 Kan. 47; *Young v. Scott*, 59 Kan. 621, 54 Pac. 670.

It is contended that, notwithstanding the \$586 was paid in good faith, and for the support and maintenance of the helpless minor children of the deceased, and actually necessary for their support, the administrator is answerable over again to them therefor. Conceding that which all will concede—that it is the duty of an administrator to preserve all funds belonging to the estate, and that no excuse will be accepted from him for money wasted—should he be made to respond a second time to the heirs for money advanced for their support? At the time of the death of the father of these children the oldest was eight years of age, and without means of support except that which came into the hands of the administrator. They had no guardian. It would be very unnatural if, under such circumstances, the administrator would refuse to advance money to these helpless minor children sufficient to clothe, shelter, feed, and school them. If a guardian had been appointed, and the money had passed into his hands, what less could he have done? His duty would have been to advance such money as was necessary. The administrator hav-

ing performed these duties in good faith, it would be hard to suggest any reason in equity why he should be required to respond again. It would be a very great injustice to charge the administrator with this property as on hand when he had actually and in good faith expended it for the benefit of these heirs in purchasing for them the necessities of life. It is said in *Gillfillen's Estate* (Gillfillen's Appeal) 170 Pa. 185, 32 Atl. 585, 50 Am. St. Rep. 760: "Where a grandfather, as administrator of his son's estate, receives money belonging to his granddaughter, a minor, and deaf, mute, and spends the whole fund in having the child taught to speak and to hear, he cannot be compelled to account for the fund, although he was never appointed guardian of his granddaughter's estate; and it is immaterial in such case that the grandfather, as administrator of his son's estate, had not have been appointed guardian of his son's daughter." On page 191, 170 Pa., page 583, 32 Atl., 50 Am. St. Rep. 760, it is said: "Treating an administrator who has acted as a guardian of such a minor as if he were actually appointed as such means only holding him to such liability as he would have incurred if he had been really appointed. This judicial treatment of such a person is the most favorable to the interests of the ward, but it certainly does not follow that, if such a person makes payments out of the funds which belong to the ward, for the best interests of the ward, such as any court having jurisdiction would allow or direct him to make, he is to be denied all credit for such payments." In *Rogers v. Traphagen*, 42 N. J. Eq. 421, 11 Atl. 336, the court states the law applicable to this case as follows: "An administrator, after settling his final account, held in his hands the distributive shares of two infants, for whom (no guardian having been appointed) he had made disbursements from time to time, both before and after the passing of his final account. On a bill filed by the children after arriving at their majority against the administrator for an account, it is held that, while the payments should regularly have been made only to a guardian, yet, in the absence of bad faith, such disbursements as would have been approved had they been made by a guardian of the infants will be allowed to the administrator."

From what has been said, this cause must be reversed for further proceedings. There are some other questions concerning the sale of the farm, for which the court below charged the administrator with \$700. If, upon a retrial of this cause, it shall appear that such money has been wasted to the heirs by the unauthorized acts of the administrator, the heirs should recover for all such proceeds so lost to them.

The judgment of the court below is reversed, and the cause remanded for retrial. All the justices concurring.

(68 Kan. 737)

## LAWSON v. ROBINSON et al.

(Supreme Court of Kansas. March 12, 1904.)

## REPLEVIN—VERDICT—SPECIAL FINDINGS—HARMLESS ERROR.

1. In an action in replevin against two defendants the issues as to both were submitted to a jury. The general verdict found in favor of the plaintiff against one of the defendants without mentioning the other. *Held*, that this was a general verdict in favor of the defendant not mentioned, sufficiently definite, in the absence of any objection thereto on the part of the plaintiff, to satisfy the statute requiring the rendition of a general verdict in all cases.

2. Especially is this so where by a special finding facts were found acquitting the defendant not named of liability.

3. A technical error will not avail to reverse a case where substantial rights are not affected.

(Syllabus by the Court.)

Error from District Court, Douglas County; C. A. Smart, Judge.

Action by John W. Lawson against James Robinson and others. Judgment in favor of one defendant, and plaintiff brings error. Affirmed.

Bishop & Mitchell, for plaintiff in error. Geo. J. Barker, R. E. Melvin, and Thos. Harley, for defendants in error.

CUNNINGHAM, J. This was an action in replevin, in which the plaintiff in error, as plaintiff below, sought to recover of both the defendants in error certain articles of personal property on which he claimed to have a mortgage. The general verdict, which, in its entitling, named both defendants, was in the following language: "We, the jury in this case, find for the plaintiff against the defendant James Robinson that at the commencement of this action the plaintiff was entitled to the immediate possession of the property taken in this case, and that such defendant wrongfully detained the same, and we find the value of the property at \$1,100.00." The defense made by Elizabeth Robinson was that the mortgage was invalid as to her, because subsequent to her signing it, and without her knowledge or consent, other property had been inserted therein. As responding to this issue, the jury made a special finding as follows: "Q. Did the defendant Elizabeth Robinson ever authorize the plaintiff to insert said property in said chattel mortgage. If so, when and where? A. No." Upon this general verdict and special finding, and over the objection of the plaintiff, the court rendered judgment in favor of Elizabeth Robinson for her costs, and directed the cancellation of the mortgage as to her. Of this complaint is now made for two reasons: (1) That under section 286 of the Civil Code a general verdict is required to be rendered in all cases, and that as to Mrs. Robinson the verdict which was returned did not amount to this, and hence she was not entitled to have judgment rendered in her favor. (2) That, in any event, she was

could not be afforded in this kind of an action.

Discussing the first objection, we are of the opinion that this statute requires that a general verdict should be rendered in all cases. We are farther of the opinion that the verdict which was rendered in this case is sufficient, as to Mrs. Robinson, to satisfy the requirements of the statute, especially so when it was not objected to because of informality or want of definiteness at the time of its rendition. The issues involved were duly submitted to the jury as to both of the defendants upon evidence pro and con, and they were required to determine upon this evidence whether Mr. or Mrs. Robinson, either or both, unlawfully detained the replevied property. By the verdict the jury declared that Mr. Robinson so detained it. Being silent as to Mrs. Robinson, in view of the issue submitted to it, this verdict was by a fair and ordinary inference a declaration that Mrs. Robinson did not detain the property; at least, if there was any uncertainty upon this point, the court might well look to the special findings for its interpretation, and, thus looking, there can be no longer doubt as to the meaning of the general verdict. The Enc. of Plea. & Prac. vol. 22, p. 905, announces the doctrine as follows: "It is not necessary, as a rule, for a verdict in a civil case to name the party in whose favor or against whom it is found, as a verdict in favor of or against one party is construed to be a verdict against or in favor of the other." In C. C. & St. L. Ry. Co. v. Eggmann, 71 Ill. App. 42, where the concurrent negligence of two defendants was counted upon as a ground for plaintiff's recovery, the jury returned its general verdict against one defendant only, and in its special findings found for the other defendant. The court said: "That while the verdict should have included both defendants, yet the omission was technical, and not material, as the special findings were conclusive, and the judgment was the only one that could have been rendered even had there been a general verdict against both." In G. C. & S. F. Ry. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743, the action was one for damages against two defendants, arising out of a malicious prosecution. The verdict was in favor of the plaintiff against one of the defendants without mentioning the other. The court in respect to this said: "The verdict, by necessary implication, found in favor of the defendants Snyder and Spillans [the defendants not named in the verdict]. If they entertained any doubt as to that, it could have been corrected at the time. \* \* \* In cases where the verdict was not altogether certain it has been uniformly held in this state that it should be upheld when its meaning can be made manifest beyond doubt by reference to the entire record." In

"It seems to be equally well settled also that silence of the verdict as to one of the defendants will not vitiate it as against the others. Such a verdict is treated as a finding in favor of the defendant not named on all of the issues, on which he is entitled to a judgment that plaintiff take nothing by his action." See, also, Ryors v. Prior, 31 Mo. App. 555; Railway Co. v. Gallaher, 79 Tex. 685, 15 S. W. 694; Blue v. McCabe, 5 Wash. 125, 31 Pac. 431; Mining Co. v. Painter et al., 1 Ind. App. 587, 28 N. E. 113.

As to the plaintiff's second contention, he may technically be correct. This was not an action equitable in its nature. But how was he injured by the entry of the formal order for the cancellation of the mortgage as to Mrs. Robinson? The jury having found in her favor both in the general verdict and by the special finding, there was nothing left for the plaintiff as against her, and what might become of the mortgage so far as Mrs. Robinson was concerned was of slight moment or concern to the plaintiff.

We find no material error, and hence affirm the judgment. All the Justices concurring.

(68 Kan. 679)

#### NATIONAL OIL CO. v. RANKIN.

(Supreme Court of Kansas. March 12, 1904.)

##### SALE—CAVEAT EMPTOR—ILLUMINATING OIL —EXPLOSION—DAMAGES.

1. In the absence of an express warranty, fraud, or deceit, the rule of caveat emptor applies where a dealer sells goods on the market for retail.

2. Chapter 72a, Gen. St. 1901, makes no provisions for the recovery of damages to persons or property resulting from the explosion of illuminating oil, except where such oils are sold without having been inspected and tested.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by A. S. Rankin against the National Oil Company. Judgment for plaintiff. Defendant brings error. Reversed.

McAnany & Alden and I. J. Ringolsky, for plaintiff in error. Sutton & Sutton, for defendant in error.

GREENE, J. The plaintiff brought this action to recover damages for injuries to his wife from the explosion of kerosene oil while being used for illuminating purposes in a kerosene lamp. The petition contained two causes of action. The first was under the statute to recover damages for selling illuminating oil without having it tested; the second was a common-law action charging the defendant with having manufactured oil for illuminating purposes which was unsuitable for such purpose because of its liability to give off inflammable vapors while being so used. In both causes it was alleged that said oil was sold by the defendant to one Jehu,

a retail grocer, and by Jehu sold to the plaintiff; that while plaintiff's wife was using the oil for illuminating purposes in an ordinary kerosene lamp, the oil exploded, from which injury resulted to her.

The defendant demurred to the plaintiff's evidence in support of the second cause of action, which was overruled. This is the first material error of which complaint is made. The demurrer should have been sustained. Before the plaintiff could recover on this cause of action, he would be compelled to establish the fact that the defendant had manufactured the oil sold to Jehu and by Jehu to the plaintiff. There is not only an entire absence of any evidence tending to sustain this fact, but all the evidence offered by either party is to the effect that the defendant was a dealer in oil, and purchased from manufacturers and refiners and sold to the retail trade. The general rule of the common law is that, where a dealer sells goods on the market for retail, if there is no express warranty of the quality of the goods, and no fraud or deceit, the rule of caveat emptor applies. *Winsor v. Lombard*, 18 Pick. 57; *Mixer & Another v. Coburn*, 11 Metc. 559, 45 Am. Dec. 230; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440. There were no allegations of an express warranty that the oil was suitable for illuminating purposes, that the defendant was guilty of any fraud or deceit in selling the oil to Jehu, or that the defendant knew the oil was dangerous.

It is contended that the instructions given were inapplicable, erroneous, misleading and prejudicial. This depends upon what questions should have been submitted to the jury. If the court had ruled correctly on the demurrer to plaintiff's evidence, the instructions should have been confined to the injury to plaintiff's wife, the sale of the oil by defendant, and whether the oil had been sold without being inspected and tested as required by chapter 72a of the General Statutes of 1901. The instructions given embraced many questions other than those pertaining to the first cause of action, and were given with the view of covering the law applicable to the allegations of the second cause of action. Some of the instructions authorized a recovery if the oil sold by the defendant emitted inflammable and combustible vapors at a temperature of 110 degrees Fahrenheit, or less, when being used as described by plaintiff, whether it had been tested in good faith or not. Our statute, unlike the statutes of many states, does not give a right of action against the seller of oil for damages sustained by an explosion, except where the oil was sold without having been tested. It gives that right, however, if the oil has not been tested, regardless of what its actual test may be. The purpose of the act was to require all oils to be tested before being put on the market. In all its provisions that one idea predominates. The violation of many of its provisions are misdemeanors; as, for in-

stance, the selling of oil that has been tested and rejected. Notwithstanding it is a misdemeanor to sell such oils, the statute gives no right of action to recover damages caused by the explosion of such oils. The only civil remedy given by the statute is for damages occasioned by the explosion of oil that was not tested. It does not appear in the act that the Legislature had in mind the protection of the citizens, either in person or property, from the sale of oils which are liable to give off inflammable and combustible vapors when in ordinary use, since no civil remedy is given except in the one instance.

The first cause of action was under the statute, and drawn for the purpose of recovering damages resulting to plaintiff's wife from the explosion of kerosene oil sold by the defendant without having been tested. The instructions should have been confined to the issues raised thereon, and the evidence applicable to such issues. In going beyond this, and giving instructions upon questions not involved, and misleading the jury in the particulars herein indicated, the court committed prejudicial error.

There are some objections urged to the admission of evidence, and especially that of the witnesses who testified as experts, some of which objections appear to be well founded; but, as such questions will probably not arise on a retrial of this cause, we have not thought it necessary to discuss or decide them.

The judgment of the court below is reversed, and the cause remanded. All the Justices concurring.

(68 Kan. 663)

ARMOUR PACKING CO. et al. v. HOWE.

(Supreme Court of Kansas. March 12, 1904.)

CITY COURT—JURISDICTION—FORCIBLE ENTRY—PROCEDURE—PLEADING—VERDICT.

1. Where a city court having the jurisdiction formerly vested in justices of the peace, acting without power, makes a void order purporting to certify a case of forcible entry and detainer to the district court for trial, the jurisdiction, in legal contemplation, remains in the city court, and its exercise of jurisdiction may be resumed without the issuance or service of new process.

2. The strict and technical rules of pleading are not applied to complaints, in actions of forcible entry and detainer, before justices of the peace.

3. Ordinarily, a complaint setting forth a charge of an unlawful and forcible entry and detainer in the language of the statute will be sufficient.

4. Special findings of a jury may be viewed and interpreted in the light of the testimony and other proceedings, and those under consideration, when so viewed, are found not to be inconsistent with each other nor with the general verdict.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

\* 3. See *Forcible Entry and Detainer*, vol. 23, Cent. Dig. § 108.



Action by S. K. Howe against the Armour Packing Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Thos. J. White, for plaintiffs in error.  
Moore & Berger and L. W. Keplinger, for defendant in error.

JOHNSTON, C. J. This was an action of forcible entry and detainer, involving the possession of a part of what was an island in the Missouri river, which, by accretions, became connected with the Kansas shore. S. K. Howe claims to have taken possession of the land in 1880, and held it until December, 1895, when the Armour Packing Company and George W. Tourtellot unlawfully and forcibly put him off of the place and entered into the possession of the same. Howe brought this proceeding in one of the city courts of Kansas City, Kan., having the jurisdiction formerly vested in justices of the peace. After a futile attempt of the defendants to remove the cause to the federal court, they filed a bill of particulars alleging that the title and boundaries of real estate were in dispute, and in that way procured an order of the city court certifying and transmitting the case and papers to the district court. That court went through the forms of a trial, and, from the decision rendered, proceedings in error were instituted in this court. It was here determined that the statutory provision, authorizing the certification of cases from a justice of the peace to a district court where title and boundaries of land are in dispute, has no application to cases of forcible entry and detainer, and therefore the district court never acquired jurisdiction of the case; and, further, that there was no jurisdiction in this court to review the rulings of the district court. The proceeding was therefore dismissed. *Armour v. Howe*, 62 Kan. 587, 64 Pac. 42. When the mandate of dismissal went down to the district court, that tribunal in turn sent the papers in the case to the city court, and adjudged the costs incurred by the invalid removal of the cause to the defendants. There is complaint as to the adjudging of costs against defendants, but no proceeding in error was prosecuted from the order. The city court resumed the exercise of jurisdiction, and, on changes of venue, the cause finally reached a justice of the peace of Wyandotte county, where judgment was given in favor of the defendants. Howe took an appeal to the district court, and on a trial there, with a jury, verdict and judgment were given in his favor, and many of the rulings there made are assigned as error.

It is contended that the jurisdiction of the case was surrendered and lost at the time of the attempted certification of it to the district court. About three years elapsed from the invalid certification of the case before it was

decided that the district court was without jurisdiction, and before that court transmitted the papers back to the city court. No new process was issued or served when the papers were returned, and the parties came in upon notice that the proceedings in the case would be resumed. The defendants objected to the jurisdiction of the lower court over them at every step until the case reached the district court, and there also the same objection was urged. Jurisdiction of the case was never in fact lost by the city court. There was no power in that court to certify the case up, nor in the district court to acquire jurisdiction of it. Jurisdiction once acquired remains until a final disposition is made of the case in a manner recognized by law. Not having power to transfer the case, the pretended order of transfer was a nullity, and the original jurisdiction of the city court was never disturbed. It was somewhat like an attempted removal of a case not removable from the state to the federal court. In such a case the state court retains jurisdiction of the cause, notwithstanding the proceedings for removal may have taken the papers in the case to the federal court. *Fife v. Whitell* (C. C.) 102 Fed. 537; *Dillon on Removal of Causes*, § 143. The illegal order procured by defendants suspended the exercise of jurisdiction, but it was competent for the court at any time to renew the proceedings and the exercise of the jurisdiction, which had always remained. The fact that the papers were illegally transmitted and were out of the possession of the city court for a time, and, further, that the cause was not on the docket for about three years, did not divest the court of jurisdiction. *College v. Cary*, 35 Ohio St. 648.

The next point presented is that the complaint failed to state a cause of action because it did not sufficiently allege that Howe was in possession when the unlawful and forcible entry was made. The complaint is brief and somewhat informal. It alleges that the defendants "did unlawfully and forcibly enter upon the following described lands," describing them, and have ever since held possession of them by force, and, further, that plaintiff gave defendants a notice such as is required by law to leave the premises, and "that he was then, and ever since has been, and still is, entitled to the possession of said premises." The fact that he was in possession when the unlawful entry was made is not as fully stated as good pleading would require. The proceeding, however, is a summary one for the speedy adjustment of controversies about possession, and, as it is cognizable before justices of the peace not familiar with pleading, it would indicate that it was never intended that the strict and technical rules of pleading should not be applied to complaints in these actions. The averments in the complaint are substantially in the language of the statute. It provides that "the summons shall not issue herein

ises so entered upon or detained, and shall set forth either an unlawful and forcible entry and detention, or an unlawful and forcible detention after a peaceful or lawful entry of the described premises." Gen. St. 1901, § 5398. If this were a criminal proceeding, as it is in some jurisdictions, a complaint in the language of the statute would suffice, and it would seem that it should be enough in a civil summary proceeding before a justice of the peace, whose judgment is no bar to another action between the same parties on the same issue. Under a statute like ours the Supreme Court of Oklahoma has held that a complaint in the language of the statute was sufficient. *Richardson v. Penny*, 6 Okl. 328, 50 Pac. 231. Apart from this consideration, the objection to the sufficiency of the pleading was late. There had been several trials of the case on the complaint as it stood, and in the trial before the justice of the peace, from which the appeal was taken to the district court, where the last trial was had, the defendants below joined in a stipulation that the cause should be submitted to the justice for his decision upon the evidence introduced and transcribed by the stenographer in the first trial of the case in the district court, and the evidence included that of the plaintiff as to possession. In this stipulation the defendants in effect treated the complaint as sufficient to present the question of possession, and submitted that issue to the court. Under the circumstances, we think the demurrer to the complaint, and the objection to the admission of evidence under it, were rightly overruled by the court. The court subsequently allowed the amendment of the complaint, but, as it was originally sufficient, the questions sought to be raised under the amendment are immaterial.

Exceptions were taken to rulings made as to the admission of testimony, but they are not deemed to be important.

It is strongly urged that the evidence in behalf of Howe did not establish a *prima facie* case in his favor, and that a demurrer thereto should have been sustained. There was testimony that Howe took possession of the island in 1889, and that he has continued to occupy it and assert possession of it ever since that time. He built houses and fences, drove stakes to mark boundaries and promote accretions, and drove pilings to prevent the washing away of the land. Soon after he located on the island, others came upon it and made claims to all or parts of it. He purchased the rights of some, compromised with others, and contested in the courts over the claims of still others. The struggle to hold the land was not confined to these claimants, for sometimes the rise in

encroachments of the river and the claims of others, Howe appears to have led a somewhat strenuous life, but it cannot be successfully asserted that there was no evidence to sustain his claim of possession. The other side claimed, and offered testimony tending to show, that he was little better than an intruder and trespasser; that his possession was of a fitful and scrambling kind; and that it was not such a peaceful and actual possession as to support an action of this character. The evidence on most of the points in controversy was most contradictory and conflicting, but the jury has settled these conflicts in favor of Howe. We cannot say that error was committed in overruling the demurrer to the evidence. The case appears to have been fairly submitted to the jury, and no material error was committed in any of the rulings on the instructions.

Complaint is made that the special findings were not sustained by the evidence, and that they are conflicting with each other and with the general verdict. Some of the questions submitted appear to be of little materiality. The twelfth finding is said to be out of line with others, and such as should defeat the judgment. To the question, "Was the plaintiff, S. K. Howe, in the peaceful possession and occupancy of the land described in the complaint on the 23d day of December, 1895?" the jury answered, "No." It is said that a mistake was made in copying this answer into the record, but, assuming it to be correct, we think it is not irreconcilable with the other findings, or with the verdict when viewed in the light of the testimony and other proceedings. The eleventh finding is that Howe was in possession of the land on the 22d day of December, 1895. The thirteenth is that he had had peaceful and exclusive possession of the land west of the state line, and the fourteenth is that he had held peaceful and exclusive possession of the land from 1889 until December 23, 1895. The unlawful forcible entry was alleged to have been made on the 23d day of December, 1895, and it was shown that defendants put Howe off the land on that day and held possession themselves. From all the findings it would appear that the jury meant that Howe was in the possession of the land on the 22d day of December, 1895, and in fact from 1889 until December 23, 1895, when he was forcibly ejected from the land, and that on that day the defendants took and held the possession. Viewed in this light, there is no inconsistency with the other findings or with the general verdict, and we discover nothing substantial in the other objections to the findings.

The judgment will be affirmed. All the Justices concurring.

**JAMES v. BLACKMAN et al.**

(Supreme Court of Kansas. March 12, 1904.)

**NOTE—PRESUMPTIONS—INNOCENT PURCHASER—INDORSEMENT.**

1. A presumption that the owner of negotiable paper is an innocent purchaser does not arise until he has proved the indorsement by the original payee, where such indorsement is denied under oath.

(Syllabus by the Court.)

Error from District Court, Graham County; Chas. W. Smith, Judge.

Action by Henry B. Blackman against George James and others. Judgment for plaintiff, and James brings error. Affirmed.

H. J. Harwi, for plaintiff in error. W. B. Ham, for defendant in error.

MASON, J. In March, 1899, Henry B. Blackman owned a quarter section of land in Phillips county, upon which there was a mortgage securing a note for \$1,000, which had been due for more than five years, and was apparently barred by the statute of limitations. J. O. Lowe bought the land from Blackman, paying him \$325 for a deed. In January, 1900, Lowe asserted that he had been induced to buy the land by a representation made by Blackman that the mortgage was outlawed, whereas in fact its validity had been preserved by a written acknowledgment. Upon the strength of this assertion he demanded that Blackman restore to him the purchase price. On January 12, 1900, Blackman and his wife executed to Lowe's wife, E. J. Lowe, a mortgage upon a quarter section of land in Graham county which Blackman had purchased with the money obtained by the sale to Lowe, securing a note for \$325, due in two years. On January 20, 1900, Blackman brought an action against Mrs. Lowe asking the cancellation of such mortgage, alleging that he signed it only by reason of duress induced by the threat that unless he did so Lowe would send him to the penitentiary for his conduct in connection with the sale of the Phillips county land. In May, 1900, the plaintiff, upon a showing that the mortgage had been transferred by Mrs. Lowe to C. E. Nelson, and by him to George James, caused these assignees to be made parties defendant. On September 14, 1900, James filed an answer, in which he claimed the rights of an innocent purchaser of the note and mortgage, and alleged that he had acquired them by indorsement January 16, 1900. A duly verified reply was filed, which included a general denial. A trial was had without a jury, resulting in a judgment for plaintiff, which defendant James now seeks to reverse. The only contentions made are that there was not sufficient evidence to sustain a finding of duress, and that, in any view of the facts presented, defendant was protected as an innocent purchaser of negotiable paper.

Plaintiff testified that Lowe threatened

him with a criminal prosecution, and that he would not have signed the mortgage but for this threat. It was not admitted that he had been guilty of any criminal offense, and, if it can be said that there was evidence tending in that direction, it was certainly far from conclusive. Within the doctrine of *Heaton v. Bank*, 59 Kan. 281, 52 Pac. 876, and cases there cited, the evidence warranted the cancellation of the mortgage as against the original holder.

It is argued in behalf of plaintiff in error that there was a presumption that he was an innocent purchaser, and that this presumption was not overcome. He pleaded that he acquired the note four days before the filing of the suit, but he testified that he thought that he bought it two months later. He therefore bought with constructive notice of the plaintiff's claim, unless the negotiable character of the note exempted the purchaser of the mortgage from the ordinary effect of a pending suit relating to real estate. This question need not be determined. The allegations that the note was indorsed by the original payee and by the intermediate holder were denied under oath, and before defendant could claim that either he or Nelson, from whom he acquired it, was an innocent purchaser, it was incumbent upon him to prove at least the indorsement by Mrs. Lowe. This he wholly failed to do. Without such indorsement the note could not be transferred freed from equities.

The judgment is affirmed. All the Justices concurring.

(68 Kan. 653)

**DONNELLY v. CUDAHY PACKING CO.**

(Supreme Court of Kansas. March 12, 1904.)

**INJURY TO EMPLOYE—FELLOW SERVANTS—ASSUMPTION OF RISK.**

1. Whenever co-employees under the control of one master are engaged in the discharge of duties directed to one common end, such duties being so closely related that each employé must know he is exposed to the risk of being injured by the negligence of another, they are fellow servants, and each assumes the risk to which he has thus exposed himself.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; William G. Holt, Judge.

Action by Patrick J. Donnelly against the Cudahy Packing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Bird & Pope and T. J. Madden, for plaintiff in error. Warner, Dean, McLeod & Holden and Miller, Buchan & Morris, for defendant in error.

GREENE, J. The plaintiff brought this action to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant. The plain-

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. §§ 479, 486, 571.

tiff was what is commonly known as a "meat trucker" in the packing house of defendant at Kansas City, Kan. His duties were to remove meat from the different floors of the building to other floors. This was done by means of a truck, which was wheeled into an elevator and carried either up or down as desired. On the day plaintiff sustained his injuries the elevator was in charge of a meat trucker, and while plaintiff was being carried on the elevator it dropped, causing the injuries of which he complained. The substantial allegations of negligence were as follows: That by reason of the fact that said elevator had been carelessly and negligently abandoned by the regular operator in charge thereof, and was in charge of an inefficient and incompetent workman, who did not know how to operate the same, but let it fall with plaintiff, and of whose incompetency the defendant knew, or by the exercise of reasonable care should have known, or by reason of the defective condition of said elevator in that the same was not provided with suitable or proper safety appliances to prevent the same from falling to the bottom, as was known or should have been known to the defendant, such elevator was suddenly precipitated to the bottom of such elevator shaft while plaintiff was in the same, and by reason whereof he was injured. Defendant's answer was a general denial and contributory negligence. When the plaintiff had rested his cause the court sustained a demurrer to the evidence, and rendered judgment for costs in favor of defendant. To this order and judgment and the overruling of a motion for a new trial the plaintiff excepted and prosecutes error.

The evidence failed to prove that the elevator was not properly constructed; that it was in a defective condition, or wanting in any of the appliances necessary to properly control it. At the time plaintiff received his injuries, Patrick Rady, a meat trucker, was running the elevator, and, according to his own testimony, he did not understand how to operate it with safety. He testified, in substance, that all the experience or knowledge he had was derived from operating the elevator from 10 to 15 minutes a day for two or three weeks previous, and what Elbert, the regular elevator man, had taught him; that he had not been taught the use of a reverse lever, which, when properly used, would stop the elevator when going too fast. On the occasion of plaintiff's injuries Elbert had called Rady to run the elevator while he went on the top to oil its bearings. While the elevator was going down, it became unmanageable and dropped several feet, inflicting injuries to plaintiff, which injuries appear to have been occasioned by the negligence of Elbert in turning the elevator over to an incompetent person.

The controlling question in this case is, were the plaintiff and Elbert fellow servants? If they were, in the absence of any

evidence that the defendant had not exercised reasonable care in the employment of a suitable and competent person to run the elevator, he cannot recover. Whether two or more persons employed by the same master are fellow servants is not a question of law exclusively, nor is it entirely a question of fact. When the facts are undisputed, or are fairly proved, it becomes a question of law. In the present case, for the purpose of deciding this question, the facts which the evidence fairly tends to establish will be accepted as proved. Therefore whether the plaintiff and the other employé mentioned were fellow servants is a question of law exclusively. The facts proved that the defendant was a meat packer, operating in a building seven stories high. Rady and plaintiff were meat truckers. It was their duty to load trucks with meat, wheel them to this elevator, which carried them to the floor desired. Plaintiff knew the elevator was used expressly for this purpose. It was his custom to load a truck with meat, wheel it to the elevator, call to the operator, and direct him to the floor upon which he desired to deposit the meat. The plaintiff knew the elevator was operated by an employé of defendant, and that, if such employé was guilty of negligence in operating the elevator while he was in it, such negligence might result in injury to him. From the authorities the following rule may be deduced: That, whenever co-employés under the control of one master are engaged in the discharge of duties directed to one common end, such duties being so closely related that each employé must know he is exposed to the risk of being injured by the negligence of another, they are fellow servants, and each assumes the risk to which he is thus exposed. *Northern Pacific Railroad v. Hamby*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Naylor v. New York Cent. & H. R. R. Co.* (C. C.) 33 Fed. 801; *Bier v. The Jeffersonville, Madison & Indianapolis Railroad Company*, 132 Ind. 78, 31 N. E. 471; *Railway Company v. Triplett*, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; *Baird v. Pettit*, 70 Pa. 477; *Quincy Mining Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; *Fifield v. Northern Railroad*, 42 N. H. 225; *McAndrews v. Burns*, 39 N. J. Law, 117; *Ewan v. Lippincott*, 47 N. J. Law, 192, 54 Am. Rep. 148; *Valdez v. O. & M. Ry. Co.*, 85 Ill. 500; *C. & A. R. R. Co. v. Murphy*, 53 Ill. 336, 5 Am. Rep. 48. Plaintiff and the operator of the elevator were engaged in one common pursuit—that of curing and packing meat. Each worked in a different line of employment, but were in the same general business, and so closely related that the negligence of one was liable to inflict injury to the other. Therefore he must be held to have assumed the risk of the negligence of his co-employé who ran the elevator.

It is contended that at common law it is the duty of an employer to secure suitable and competent servants; that the defendant

was guilty of actionable negligence in permitting Rady, an incompetent person, to run the elevator. The evidence does not support this contention. There is no evidence tending to show that defendant put Rady in charge of the elevator, or knew that he was running it, or that he was incompetent. The defendant employed Elbert to run the elevator, and it is not denied that he was fully competent to perform this duty. It was the negligence of Elbert in permitting Rady, an incompetent person, to undertake to run the elevator, that resulted in injury to plaintiff. If Elbert had been acting as vice principal when he turned the elevator over to Rady, under the evidence showing Rady's incompetency the defendant might be held liable. There is no contention of this kind.

For the reasons here suggested the demurrer was properly sustained. The judgment of the court below is affirmed. All the Justices concurring.

(68 Kan. 640)

**AULTMAN, MILLER & CO. v. PRICE et al.**  
(Supreme Court of Kansas. March 12, 1904.)  
HOMESTEAD—DEATH OF HUSBAND—RIGHTS OF WIDOW.

1. The owner of 80 acres of farming land, occupied by himself and wife as their homestead, died; the widow continued to occupy it as a homestead; their children had all arrived at the age of majority, and lived in homes of their own. *Held*, that the widow was "the family of the owner," and as such was entitled to hold the homestead exempt from the payment of the debts of her deceased husband so long as she continued to so occupy it.

(Syllabus by the Court.)

Error from District Court, Douglas County; C. A. Smart, Judge.

Action by Aultman, Miller & Co. against Clara Price and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Brownell & Poehler, for plaintiff in error. John Q. A. Norton, for defendants in error.

**CUNNINGHAM, J.** Thomas B. Price owned 80 acres of farming land, and, with his wife, Clara, occupied it as a homestead. Their children had all arrived at the age of majority, and lived in homes of their own. While so occupying the land, Price died, and his wife continued in its occupation as her home. A judgment had been rendered against Price in his lifetime in favor of plaintiff in error. After his death it sought to subject the land in question to the payment of this judgment. The question is whether this can be done; whether the constitutional provision relative to homestead exemption protects this land from sale while occupied as a home by the widow only. We are clearly of the opinion that it does. This provision is as follows: "A homestead to the extent of 160 acres of farming land \* \* \* occupied

as a residence by the family of the owner, together with all improvements on the same, shall be exempt from forced sale under any process of law." The property in question is of the character named. It is occupied as a residence.

The only remaining question is, does the widow constitute the family of the owner? It would seem that the statement of the question was its sufficient answer. No one would claim that the land would be subject to forced sale while the owner yet lived and occupied it with his wife. This would be so because the wife living with him constituted his family, and thus afforded the basis for the constitutional protection. None the less true is this after the death of the owner himself. *Cross v. Benson* (Kan.) 75 Pac. 538. The cases of *Batthey v. Barker*, 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33, and *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529, are cited by the plaintiff in error as supporting its claim that the land in question is not protected from its judgment. The scope of these decisions is entirely misunderstood. In the *Ellinger Case*, Thomas, the owner of the property, had been left, by the death of his wife, occupying it alone. He, therefore, had no family; he could not be his own family; and, as the protection afforded is to the "family of the owner," the necessary basis for the exemption did not there exist. The *Batthey Case* was much nearer the debatable line. In that case the family consisted of a daughter 27 years of age; but, applying the rule adopted by the Legislature in the statute of descents and distributions for ordinarily determining the age to which children might arrive and yet be of the family in the constitutional sense, it was concluded that such a one did not constitute the family of the owner under the circumstances of that case.

In holding that the land in controversy in the case at bar could not be subjected to the payment of the judgment against the deceased husband while it was occupied by the widow, the court below was correct, and its judgment will be affirmed. All the Justices concurring.

(68 Kan. 607)

**STEINHILBER v. HOLMES et al.**

(Supreme Court of Kansas. March 12, 1904.)

BOUNDARIES—ESTABLISHMENT—ACQUIESCENCE—STATUTE OF FRAUDS.

1. Where parties by mutual agreement fix boundary lines, and thereafter acquiesce in the lines so agreed on, they must be considered as the true boundary lines between them, even though the period of acquiescence falls short of the time fixed by statute for gaining title by adverse possession.

2. The owners of adjoining tracts of land may, by parol agreement, settle and establish permanently a boundary line between their lands, which, when followed by possession according to the line so agreed upon, will be binding upon the parties and their grantees.

¶ 1. See *Boundaries*, vol. 8, Cent. Dig. § 225.

Such an agreement, followed by possession, is not obnoxious to the statute of frauds. (Syllabus by the Court.)

Error from District Court, Dickinson County; O. L. Moore, Judge.

Action by Sarah Catharine Steinhilber against Martha Ellen Holmes and John H. Holmes. Judgment for defendants, and plaintiff brings error. Affirmed.

Hurd & Hurd, for plaintiff in error. Humphrey & Humphrey, for defendants in error.

ATKINSON, J. This is an action in ejectment, brought to recover the possession of 16.53 acres in Dickinson county. In July, 1886, Frederick Eichholtz died testate. He devised to his daughters, Sarah Catharine Steinhilber and Martha Ellen Holmes, plaintiff and defendant, certain lands, of which the said tract in controversy is a part. George A. Rush, a brother-in-law of plaintiff and defendant, was appointed executor of the estate. Plaintiff, the greater part of the time for a year before and for several years after the death of her father, was absent from home, attending school. In January, 1887, she attained her majority. In March following, with the view of establishing the lines between the lands devised by the father to plaintiff and defendant, a surveyor (W. S. Anderson) made a survey. Upon the lines established by this survey, fences were constructed, and have since been maintained. In June, 1901, plaintiff caused a second survey of premises to be made. The second survey established the lines substantially the same as the first survey. Neither of these surveys followed the statutory requirements for establishing division lines. The Anderson survey gave the tract in controversy to defendant. In July, 1901, plaintiff brought this action, basing her claim to the tract in controversy upon the devise of premises to her by the will of her deceased father; the claim of plaintiff being that the will, in express terms, excepted the tract in controversy from the premises devised to defendant, and in express terms added it to premises devised to her. The defense was that the tract in controversy had not been devised to plaintiff under the will; that the division or boundary lines between the premises of plaintiff and defendant had been established by the Anderson survey; that these lines so established had been recognized and acquiesced in by plaintiff and defendant for many years; that all controversies as to them were thereby settled; and that plaintiff, for the reasons stated, could not maintain her action to recover the tract in controversy. The trial court found generally in favor of defendant, and against plaintiff for costs, from which judgment plaintiff brings error to this court.

A careful reading of the will satisfies us that the construction given to it by plaintiff is correct; that the intention of the testator was to devise the tract in controversy to plaintiff. On the trial there was evidence

offered showing the Anderson survey made in 1887, the establishing thereby of division lines, the fencing of the same, the recognition and acquiescence by the parties in the division lines thus established, and the subsequent occupancy and possession by defendant of the premises in controversy. It was also shown that defendant had, at considerable expense, cleared up a portion of the premises in controversy. The Anderson survey was made, not to determine or re-establish old lines, but to establish the division line between the premises devised to plaintiff and defendant. These lines so established were recognized and acquiesced in for a period of 14 years. Not until plaintiff was by defendant denied the right and use of travel of a private roadway over the premises of defendant, giving rise to bad feeling between the two, was the second survey caused by plaintiff to be made, and this action commenced. The weight of authorities is against the right of plaintiff to recover. Where parties by mutual agreement fix boundary lines, and thereafter acquiesce in the lines so agreed on, they must be considered as the true boundary lines between them, even though the period of acquiescence falls short of the time fixed by statute for gaining title by adverse possession. *Jones v. Pashby*, 67 Mich. 459, 35 N. W. 152, 11 Am. St. Rep. 589; *Eiden v. Elden*, 76 Wis. 435, 45 N. W. 322; *Glover v. Wright*, 82 Ga. 115, 8 S. E. 452; *Lecomte v. Toudouze*, 82 Tex. 208, 17 S. W. 1047, 27 Am. St. Rep. 870; *City of Bloomington v. Bloomington Cemetery Ass'n*, 126 Ill. 221, 18 N. E. 298.

Plaintiff on the trial offered evidence tending to show that the Anderson survey was made when she was absent from home, attending school, and that she had never authorized the survey, and in fact had no knowledge of it. As against this claim of plaintiff, evidence was offered to show that the said George A. Rush was the agent of plaintiff all during her absence; that he rented the premises for plaintiff, collected the rents therefor, and used the same where by him deemed necessary in the interest of plaintiff; that he was instrumental in having the Anderson survey made; that he paid from money in his hands one-half of the expense of this survey, defendant paying the remaining one-half; that he constructed for plaintiff one-half of the division line fence; that plaintiff, when home from school, had opportunity to see and did see and know of the established lines, and the construction of fences thereon; that after her marriage, for years before the commencement of this action, she resided upon the premises devised to her, except the tract in controversy. The disputed facts were before the trial court upon conflicting evidence. The finding of that court is conclusive here. It is claimed that the agreement as to the boundary lines, if there was any agreement between the parties, was in parol. It is contended that the owners of

mutually settle and establish boundary lines between them. The law upon that proposition is well settled. The owners of adjoining tracts of land may, by parol agreement, settle and establish permanently a boundary line between their lands, which, when followed by possession according to the line so agreed upon, will be binding upon the parties and their grantees. Such an agreement, followed by possession, is not obnoxious to the statute of frauds. The agreement is not viewed as one passing title, but is viewed as an agreement fixing the location where the estate of each is supposed to exist. *Lecomte v. Toudouze*, supra; *City of Bloomington v. Bloomington Cemetery Ass'n*, supra; *Edwards v. Smith*, 71 Tex. 156, 9 S. W. 77; *Burris v. Fitch*, 76 Cal. 395, 18 Pac. 864; *Diggs v. Kurtz*, 132 Mo. 250, 33 S. W. 815, 53 Am. St. Rep. 488.

The judgment of the court below is affirmed. All the Justices concurring.

(69 Kan. 825)

**BOWER v. SELF et al.**

(Supreme Court of Kansas. March 12, 1904.)

**MALPRACTICE—PETITION—EVIDENCE—HYPOTHETICAL QUESTION—NEW TRIAL.**

1. A petition for malpractice, alleging that defendant "is a physician \* \* \* engaged in the practice of medicine, \* \* \* and has been so engaged for several years last past," is sufficient, without alleging that he was a physician when he treated his patient.

2. It is proper, in an action for malpractice, to show the treatment received by the patient after defendant gave up the case.

3. A hypothetical question, in an action for malpractice, as to the effect of a puncture from an instrument not sterilized properly, is authorized, though the only evidence as to the instrument being in a septic condition was the fact that defendant did not immerse it in boiling water.

4. Newly discovered evidence which is merely cumulative does not authorize a new trial.

Error from District Court, Smith County; R. M. Pickler, Judge.

Action by G. W. Coffee against W. C. Bower. Judgment for plaintiff. Defendant brings error. Mary E. Self and others were substituted in lieu of said plaintiff, after his death. Affirmed.

Mahin & Mahin and Hayden & Hayden, for plaintiff in error. J. T. Reed, for defendants in error.

**PER CURIAM.** This was an action brought by G. W. Coffee, now deceased, against plaintiff in error, a physician, for malpractice. A recovery was had in the court below. There are 24 assignments of error. We will comment on those only which are considered material.

1. The petition was not defective in a failure to aver that defendant below was a physician at the time he treated his patient. The petition alleges that "W. C. Bower is a physician and surgeon engaged in the practice of

so engaged for several years last past."

2. The testimony of plaintiff below, Coffee, and Dr. Dykes, as to the length of time it took the latter to catheterize plaintiff, was not introduced to compare the skill of the two doctors. It was proper to show the treatment received by Coffee after Dr. Bower gave up the case.

3. The hypothetical question asked Dr. Slagel respecting the effect of a puncture of the urethra in the prostate region by a catheter not sterilized properly was not wholly without foundation in the evidence. The jury might have inferred, from the fact that Dr. Bower did not immerse his instruments in boiling water, that they were in a septic condition. *Roark v. Greeno*, 61 Kan. 299, 59 Pac. 655.

4. There was no error in the hypothetical question put to Dr. Relihan. The interrogatory was based on facts fairly within the history of the case, as detailed by Coffee and others. *Roark v. Greeno*, supra.

5. The court instructed the jury fairly, and narrowed the issue down to the question of negligence. We cannot say that the instructions refused worked any prejudice to defendant below.

6. The motion for a new trial was rightfully overruled. The newly discovered evidence was cumulative, merely. The matter contained in the affidavits of the jurors was not competent to impeach their verdict.

The judgment of the court below will be affirmed.

(68 Kan. 726)

**UNION PAC. R. CO. v. DAY.**

(Supreme Court of Kansas. March 12, 1904.)

**WITNESS—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.**

1. Where a person communicated to an attorney facts in detail, and the communication became important as evidence against the person making them in an action subsequently commenced in which he was a party, and the attorney, without the consent of the person making such communications, was called by the adverse party as a witness to testify to the communications so made, and the court excluded the testimony of the witness in reference thereto as being privileged communications, *held* error, where it appears the advice of the attorney was gratuitously given, and where it also appears that it was not known that the person consulted was an attorney, and the communications were not made under the seal of professional confidence.

(Syllabus by the Court.)

Error from District Court, Osborne County; R. M. Pickler, Judge.

Action by Frank Day, Jr., by his father, John F. Day, as his next friend, against the Union Pacific Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

N. H. Loomis, R. W. Blair, and H. A. Scandrett, for plaintiff in error. Smith & Nicholas, for defendant in error.



ATKINSON, J. Frank Day, a minor 19 years of age, by his father and next friend, on the 19th day of February, 1902, filed his petition in the district court of Osborne county against the Union Pacific Railroad Company to recover damages for personal injury by him sustained, resulting in the loss of his left foot. Plaintiff on the night of July 20, 1901, at North Platte, Neb., was attempting to steal a ride on the top of a baggage car forming a part of one of defendant's east-bound passenger trains. As the train was slowly passing from the station upon a siding to clear the main track for an approaching west-bound train, the front brakeman ordered plaintiff off the car, and, in getting off before the train came to a stop, he fell to the track, between the baggage car and the tender. The left foot of plaintiff was crushed beneath the moving wheels, and it was amputated above the ankle joint. The petition of plaintiff charged that defendant, by its said brakeman, was guilty of willful, wanton, malicious, and reckless conduct; that said brakeman, with a club in his hand, in an angry, threatening manner, cursed plaintiff, and threatened to club him off the car while the same was moving rapidly; that plaintiff, being much alarmed, and believing that he was in danger of bodily harm from said brakeman, endeavored to get down from the top of said car, and, in doing so, fell, sustaining the injury complained of. Defendant answered by general denial, negligence on the part of plaintiff, and that plaintiff was at the time a trespasser upon the train of defendant, stealing a ride. The jury returned a verdict for plaintiff in the sum of \$2,000, upon which judgment was entered. Defendant brings error.

The main controversy upon the trial was whether or not the conduct of the brakeman toward plaintiff was willful, wanton, malicious, and reckless, as charged in the petition. Upon this question the only direct testimony was that of plaintiff and the brakeman. The testimony of plaintiff tended to support the averments of his petition. The testimony of the brakeman was to the effect that he had no club with him; that he did not curse or threaten plaintiff; that he merely told plaintiff that he could not ride there, and must get off; that the train was at the time stopping on the siding, and had about stopped. The testimony disclosed that when plaintiff was injured he was taken at once to the county poorhouse, where his foot was amputated, and that he continued there for about six weeks. There was evidence offered tending to show that at the time he was injured, and also while at the poorhouse, he related to several persons how the injury occurred. Among others was one James M. Ray, who was a justice of the peace in the city of North Platte, and also poormaster. As such poormaster, he had charge of the poorhouse, admitting and discharging persons to and from the same. Defendant took

his deposition. The testimony of Mr. Ray in this deposition disclosed that he was a lawyer, and had practiced law in North Platte since 1889. He testified to the following conversation at the poorhouse between himself and plaintiff: "Q. Did he ever tell you how the accident occurred? A. Yes. Q. Please state what he told you about it? A. The first thing he said about it was these words: 'I ought to have a claim against the railroad.' I told him if he would tell me how he got hurt, probably I could help him, as to whether or not he had a claim. I asked him how it was he got hurt. He answered: 'I was coming down off the top of a car where the vestibule is— You know there is a vestibule on one car, and none ahead to meet it, and that left an opening, and I fell down where the vestibule is.' I next asked him why he was getting off the car while it was in motion. He answered, 'The brakeman made me get off.' I asked him, 'How did the brakeman make you get off?' He gave me no answer. I asked him, 'Where was you when the brakeman saw you?' He answered, 'On top of the car.' I asked him what the brakeman said, and he answered in these words: 'Come down off there.' I said, 'Did he say anything else to you?' He answered, 'No.' I asked, 'Did he threaten you?' He answered, 'No.' I asked, 'Did he have a stick or anything in his hand?' He answered, 'No.' I asked, 'Did he touch you at any time?' He answered, 'No.' I asked him, 'How was it you got under the wheels?' He answered that he was coming off the top of the car by the vestibule, and he fell down through the opening. I asked him if there was anybody with him that he knew. He answered, 'There was a hobo that I was with up the road, was there with me, and he got down all right, but when I came down I fell under the car.' I asked him for a description of that hobo. He described the man, and that is all the conversation we had." The court, upon the trial, over the exception of defendant, excluded this testimony from the jury, as being a privileged communication between attorney and client. "The following persons shall be incompetent to testify: \* \* \* Fourth. An attorney, concerning any communications made to him by his client in that relation, or his advice thereon, without the client's consent." Section 4771, Gen. St. 1901. Under this statute, the relation of attorney and client must exist, to make the communication privileged. In the case of *State v. Herbert*, 63 Kan. 519, 68 Pac. 236, Mr. Justice Johnston, in delivering the opinion of the court, said: "While the payment of a retainer or fee is the best evidence that the relation of an attorney and client exists, such payment is not absolutely essential. If an attorney is consulted in his professional capacity, and he allows the consultation to proceed, and acts as adviser, the fact that no compensation was paid, or that the consultation was ended



the seal of secrecy from the communications made." The case of *Sheehan v. Allen*, 67 Kan. —, 74 Pac. 245, treats this subject quite exhaustively. The witness Ray also testified that he had never been employed or retained by plaintiff; that he advised with him gratuitously, and was himself interested only to see if there was some person who could be held liable to the county for the expense of caring for plaintiff. There is nothing in the record to show that plaintiff had any knowledge whatever that Mr. Ray was an attorney, or that he was by plaintiff being consulted as an attorney. It cannot, then, well be said there existed between the witness and plaintiff the relation of attorney and client, or that the communication was made under the seal of professional confidence. The portion of the deposition excluded was material to defendant. The court committed error in excluding it.

Complaint is made by defendant of the eighth instruction given by the court, which reads: "If a person gets on a railroad car in order to ride without payment of fare, and without consent of the person in charge of the train, he may be ejected from the car prudently and in such a manner as not unnecessarily to endanger his personal safety; but if reasonable prudence and care are not exercised, and the person is thereby injured, the company will in such case be liable for such injury." This instruction does not correctly state the law as to the liability of railroads in ejecting trespassers from trains. The rule of liability in such cases is that a railroad company is liable in ejecting trespassers from its trains when in doing so it is guilty of willful or malicious acts amounting to wanton negligence. *O'Banion v. Mo. P. Ry. Co.*, 65 Kan. 352, 69 Pac. 353; *Handley v. Mo. P. Ry. Co.*, 61 Kan. 237, 59 Pac. 271; *U. P. Ry. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244; *Campbell v. K. C., Ft. S. & M. R. Co.*, 55 Kan. 536, 40 Pac. 997; *A., T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780; *K. C., Ft. S. & G. R. Co. v. Kelly*, 36 Kan. 655, 14 Pac. 172, 59 Am. Rep. 596. The law was correctly stated by the court in other instructions given, but even then the instruction complained of is objectionable in this: that it might mislead the jury, and is justly the subject of criticism. While we would not feel disposed to reverse the case upon the giving of this instruction, given as it was in connection with other instructions correctly stating the law, it should not be again given, upon a second trial of this case.

Error is also assigned in the refusal of the court to give instructions asked, and of the refusal of the court to enter judgment for defendant on the special findings of the jury. The instructions given by the court, aside from said instruction 8, appear to fairly state the law of the case. Defendant is not entitled to judgment on the special findings.

we do not deem the assignments not already referred to of sufficient importance to now warrant a special reference to them.

For error in excluding the testimony of the witness Ray, the judgment of the court below is reversed, and the case remanded for a new trial. All the Justices concurring.

(68 Kan. 659)

# MADDEN v. STATE et al.

(Supreme Court of Kansas. March 12, 1904.)

## ALIENS—TITLE TO REALTY—ESCHEAT—ESTOPPEL.

1. Under section 1 of the alien land law of 1891 (Laws 1891, p. 7, c. 3) a nonresident alien could take a title by purchase to land in this state, defeasible only at the suit of the state.

2. In an action by the state to escheat land under the alien land law of 1891 (Laws 1891, p. 7, c. 3) the heirs of a resident citizen are estopped by their ancestor's warranty deed to a nonresident alien from claiming the land conveyed or the proceeds of its sale.

3. In such an action the rights of claimants to the land, who in litigation between themselves to which the state was not a party have both been denied relief, may be investigated and determined as against the state.

(Syllabus by the Court.)

Error from District Court, Nemaha County; Wm. I. Stuart, Judge.

Action by the state and others against T. J. Madden. Judgment for plaintiffs, and defendant brings error. Affirmed.

L. F. Bird and R. M. Emery, for plaintiff in error. E. A. Berry and W. W. Redmond, for defendants in error.

BURCH, J. In October, 1895, Mark Madden, a resident citizen of this state, undertook to convey by warranty deed certain land in Marshall county to James O'Toole, then a nonresident alien. Within a few weeks from that time Mark Madden died, leaving neither wife nor child. His parents, both nonresident aliens, were already deceased. His nearest relatives were several nonresident alien brothers and sisters and the resident citizen heirs of his deceased brother, William P. Madden, who at the time of his death was a resident citizen of this state. One of these heirs is Terrence J. Madden. In December, 1895, James O'Toole was adjudged to be insane, and a guardian was appointed for him, who immediately commenced an action to set aside a will and a deed of the land purporting to be made to Terrence J. Madden, and to quiet title against those instruments. Madden defended on the ground of title under the deed and will, and also as an heir through his father, William P. Madden, and prayed that such title be quieted. Upon a trial the deed and will were found to be fraudulent. The court held that O'Toole was incapable of acquiring title to the land on account of alienage. No specific finding of fact or conclusion of law was made respecting Terrence J. Madden's claim of title through heirship, but the court denied any relief to

either party. The county attorney of Marshall county then brought an action against O'Toole and his guardian to escheat the land. Terrence J. Madden intervened, having purchased since the last litigation the supposed interests of other heirs of William P. Madden, and denied the right of the state to escheat the land. The court adjudged otherwise, and ordered the proceeds of the sale to be paid to the guardian of O'Toole. Terrence J. Madden asks that this judgment be reversed.

On behalf of the intervenor it is said that section 1 of the alien land law (chapter 3, p. 7, Laws 1891) rendered James O'Toole incapable of taking title to the land, and hence that title did not pass from Mark Madden by virtue of his deed. The material portion of the section referred to is as follows: "That a non-resident alien, firm of aliens, or corporation incorporated under the laws of any foreign country, shall not be capable of acquiring title to or taking or holding any lands or real estate in this state." This language is broad enough to sustain the propositions advanced. But it must be construed with other provisions of the same statute. By section 8 (page 9) it is clearly contemplated that nonresident aliens may acquire title to land in this state by purchase. It is there said that a nonresident alien owning land at the time the law took effect might have the right and power to dispose of it during his lifetime, and to take securities for the purchase money, "except that if he or his non-resident heirs again obtain title to the said lands or any sale thereof made by virtue of any judgment or decree of any court of law or equity, rendered in order to enforce the payment of any part of such purchase-money, he or his non-resident heirs, shall only hold the title to said lands for three years after obtaining the same." It will be noted that the word "except" refers merely to the time for which the title may be held. The character of the alien who may take is not made exceptional, the circumstances under which the taking may occur are not made exceptional, and the taking of title by a non-resident alien by purchase is treated as a matter of course. From this and other provisions of the statute it appears that the primary distinction it makes regarding the lands of aliens is between those the titles to which are subject to immediate forfeiture and those which may be enjoyed for a time under certain conditions. This interpretation of the law is in harmony with its history. The common law with reference to the rights of aliens to take and hold the title to real estate was abrogated by original section 17 of the Bill of Rights, providing as follows: "No distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment or descent of property." By the constitutional amendment of 1888 this section was made to read as follows: "No distinction shall ever be made between citizens of the state of Kansas and the citi-

zens of other states and territories of the United States in reference to the purchase, enjoyment or descent of property. The right of aliens in reference to the purchase, enjoyment or descent of property may be regulated by law." At that time the word "regulate" had been given a definite legal meaning in this state: "This court has held in *City of Emporia v. Volmer*, 12 Kan. 630, that the words 'restraint' and 'regulate' are not synonymous with 'prohibit'." *Stebbins v. Mayer*, 38 Kan. 573, 577, 16 Pac. 745. So in the case of *Wuester v. Folln*, 60 Kan. 334, 339, 56 Pac. 490, 491, it was said: "It will be observed that section 17 of the Bill of Rights, as amended in 1888, does not prohibit the taking or holding of lands by aliens, but only provides that their rights in that respect be regulated by law. The act of 1891 undertakes to regulate the rights of aliens in reference to the purchase, enjoyment, or descent of real property in Kansas." And in harmony with this theory of the constitutional amendment the case of *Investment Co. v. Trust Co.*, 65 Kan. 50, 53, 68 Pac. 1089, 1090, was decided, in which it was said: "The entire act must be read together, and from it we deduce the conclusion that the title which was or should become vested in the alien was liable to be defeated at the instance of the state by an action in its name only; that, if the state elected to waive a forfeiture by neglecting to bring an action therefor, the alien would continue to hold and enjoy the real estate; that the question of the power of such alien to take and hold such title could not be raised by a private individual. This, indeed, was the rule at common law." The controlling considerations mentioned above were not available to the Supreme Court of Illinois in the case of *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84, relied upon by the intervenor. Hence that decision is not an authority, and the rule announced in the case of *Investment Co. v. Trust Co.* will be adhered to. This being the law, James O'Toole took a title under the deed from Mark Madden forfeitable only at the instance of the state, and upon forfeiture the heirs of Mark Madden were estopped by the covenants of his warranty deed from claiming any title to the land. In the suit between the guardian of O'Toole and Terrence J. Madden the latter was necessarily adjudged to take nothing as an heir, since all his claims were denied. Title of that origin and quality was decided to be as valueless as O'Toole's deed. The purchase of other fractions of title affected with the same taint could not improve his right. But O'Toole was likewise denied relief. Therefore neither one can contest with the other over the proceeds of the sale of this land. The state, however, was not a party to that suit. It would not have been concluded by the judgment rendered in that action if it had been decided that one of the parties had an incontestable right to the land, and it is

ment must be mutual. When, therefore, the state took possession of the land to sell it, and to hold the proceeds for the true owner, who, under the statute, the court must ascertain, parties had the right to present their claims against the state, even though they could not recover from each other.

The judgment of the district court is affirmed. All the Justices concurring.

(68 Kan. 796)

In re NOLAN.

(Supreme Court of Kansas. March 12, 1904.)

BURGLARY—SENTENCE.

1. The petitioner was tried upon an information which charged him with burglary in the second degree. He was found "guilty as charged in the information." Under such information, he might properly have been found guilty of a degree less than the second. He was sentenced and committed by the court to the Industrial Reformatory for an indeterminate term, as provided by law, where he is now being held as though he had been specifically found guilty of burglary in the second degree, and sentenced for a term as long as is permissible for that offense. *Held* that, while such sentence may be irregular, it is not void, and its irregularity will not avail to procure petitioner's discharge on a writ of habeas corpus from the commitment thereunder.

(Syllabus by the Court.)

Application of James Nolan for a writ of habeas corpus. Writ denied.

Hale & Maher, for petitioner. C. C. Coleman, Atty. Gen., for respondent.

CUNNINGHAM, J. The petitioner seeks by this original proceeding to be discharged from his confinement in the Kansas State Industrial Reformatory. He was proceeded against in the district court of Wyandotte county by information charging him with burglary in the second degree and larceny. Upon his trial the jury returned a verdict in the following language: "We find the defendant guilty of burglary and larceny, as charged in the information, and we find the value of the property taken to be worth \$12." Thereafter the court sentenced him to confinement in the Kansas State Industrial Reformatory, there to remain until discharged by law. The statute then and now provides for such a sentence, and that the court ordering it shall not fix the limit or duration of the imprisonment, the time of which is to be determined by the managers of the reformatory as authorized by law, which time shall not exceed the maximum term of imprisonment provided for the crime of which the prisoner was convicted, which in this case was 10 years. The petitioner is now being held as though he had been found guilty of burglary in the second degree, and could lawfully be imprisoned for the maxi-

is this? That, inasmuch as there was necessarily included in the crime charged the lesser degrees of burglary and larceny, when the jury returned a verdict that he was guilty as charged, that verdict was so indefinite and uncertain, in not stating the degree of which he was found guilty, that it was insufficient to warrant any judgment or sentence, and therefore that his imprisonment under the sentence pronounced is void, a commitment thereunder being no sufficient warrant upon which to hold him. This contention, stated in the language of petitioner's brief, is: "That the judgment and sentence of the district court of Wyandotte county, by virtue of which the respondents pretend to hold him, is so indefinite and uncertain as to the facts of which he was convicted and sentenced as to make it void, as no one could determine as to when, under the law, petitioner's term of imprisonment would expire." This view is energetically urged, and, at great length, sustained by the quotation of numerous authorities from other states than our own. Whether these decisions were made under statutes like our own, we are unable to say. Section 671 of the Code of Civil Procedure (section 5167, Gen. St. 1901) provides: "No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody or discharge him when the term of commitment has not expired, in either of the cases following: \* \* \* second, upon any process issued upon any final judgment of a court of competent jurisdiction." In this state the writ of habeas corpus is not designed as a proceeding to review the mere errors of trial courts. We may grant that the rendition of the judgment upon the verdict was an irregularity of which the petitioner might have availed himself on appeal—such having been the holding of this court in several cases—but that it was and is wholly void we cannot admit; and, unless void, we may not inquire into the legality of the petitioner's detention thereunder in this collateral manner. The case *In re Black*, 52 Kan. 64, 34 Pac. 414, 39 Am. St. Rep. 331, is exactly in point. The court there said: "We think the record in this case shows that the district court regarded the verdict as a verdict of guilty of burglary in the first degree, and proceeded to sentence the defendant accordingly. In doing so, the court acted judicially, and judicially determined the effect of the verdict. If the court erred, the defendant had his remedy by appeal. He neglected to avail himself of that right. We do not think he can now obtain his discharge from custody because of an erroneous decision of the court as to the force and effect of the verdict." Following this case, we must deny the writ. All the Justices concurring.

¶ 1. See Habeas Corpus, vol. 26, Cent. Dig. § 26.

(68 Kan. 787)

## CITY OF ASSARIA v. WELLS.

(Supreme Court of Kansas. March 12, 1904.)

INTOXICATING LIQUORS—ORDINANCE—  
VALIDITY.

1. Where the Legislature has in express terms conferred upon municipalities power to pass and enforce ordinances for the regulation and sale of intoxicating liquors, therein prescribing what shall constitute the penalty for a violation thereof, an ordinance of a city, passed for the regulation and sale of intoxicating liquors, failing to prescribe penalties within the limits fixed by the Legislature, is void, and cannot be enforced.

(Syllabus by the Court.)

Appeal from District Court, Saline County;  
R. R. Rees, Judge.

W. D. Wells was convicted of violating a city ordinance, and from the judgment of the district court affirming the same on appeal, he appeals. Reversed.

David Ritchie, for appellant. Z. C. Millikin, for appellee.

ATKINSON, J. On July 29, 1903, a complaint was filed in the police court of the city of Assaria, a city of the third class, charging W. D. Wells in two counts with selling intoxicating liquors, and in the third count with maintaining and keeping a nuisance, in violation of an ordinance of said city. In the police court he was found guilty on all three counts, and fined \$50 on each. From this judgment of the police court he appealed to the district court of Saline county. In the district court he was found guilty on the first and third counts of the complaint, and was sentenced to pay a fine of \$100 and be imprisoned 30 days on each count. From this judgment of the district court appellant prosecuted an appeal to this court.

The complaint charged a violation of Ordinance No. 49 of the city of Assaria, entitled "An ordinance to prohibit the sale of intoxicating liquors and to prohibit and suppress places where intoxicating liquors are sold." This ordinance was passed by the mayor and council and became effective in January, 1899. Section 7 of said ordinance provided that any person violating any of its provisions should be deemed guilty of a misdemeanor, and upon conviction be fined in any sum not more than \$100 or by imprisonment not exceeding 30 days, or by both such fine and imprisonment. In 1901 the Legislature enacted chapter 232, entitled "An act relating to the sale of intoxicating liquors and the suppression of places where such liquors are sold or used or kept for sale or used contrary to law." Section 7 of said chapter 232 reads: "Cities of the first, second and third classes may provide by ordinance for the prohibition of the sale of intoxicating liquors contrary to law and the suppression of common nuisances as hereinbefore defined, and for the search of premises where such common nuisances are maintained, and the seizure and destruction of all intoxicating liq-

uor, bottles, glasses, kegs, pumps, bars and other property used in maintaining the same. Such ordinances may be enforced by imposing as a penalty for the violation of the same, a fine of not less than one-hundred dollars nor more than five-hundred dollars, and imprisonment for not less than thirty days nor more than six months for each offense, and payment of the costs, and shall provide for commitment until fine and costs are paid. \* \* \* Upon the trial of the case in both the police court and the district court defendant challenged the validity of said Ordinance No. 49, because the penalty prescribed by said section 7 of the ordinance did not come within the requirements of said section 7, c. 232 (section 2499, Gen. St. 1901). The only authority of the city of Assaria, a city of the third class, for prescribing penalties for the violation of an ordinance at the time said Ordinance No. 49 was passed, was section 86, c. 38, art. 5, Gen. St. 1897, being section 1145, Gen. St. 1901. So much of said section 86 as is necessary to be here considered reads: "For any purpose or purposes mentioned in this article the council shall have power to enact \* \* \* and to enforce all ordinances, by inflicting fines, forfeitures and penalties upon inhabitants or other persons for the violation thereof, not exceeding one-hundred dollars for any one offense." Prior to the enactment of chapter 232 of the Laws of 1901 there had been no power in express terms given to municipalities to pass and enforce ordinances regulating the sale and handling of intoxicating liquors. The fact that the state had made provision prohibiting and restricting the liquor traffic, and had not in express terms made like provision for cities, has been by this court held not to prevent municipalities from passing and enforcing ordinances for the control of the traffic within the limits of the same. In re Thomas, Petitioner, 53 Kan. 659, 37 Pac. 171, and cases cited. The authority then for the passage and enforcement of such ordinances by cities was the general welfare clause of the municipal charter (Monroe v. City of Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520, City of Topeka v. Myers, 34 Kan. 500, 8 Pac. 723, and Franklin v. Westfall, 27 Kan. 614), and the authority then for imposing penalties for their violation in cities of the third class was said section 86 (section 1145, Gen. St. 1901). The passage of the act of 1901 conferred express authority upon cities to regulate the liquor traffic. Ordinances thereafter passed and ordinances thereafter sought to be enforced by municipalities to regulate this traffic must conform to said act, and be not in conflict therewith. It is apparent that the purpose of the Legislature in conferring the express authority upon municipalities expressed in section 7 of said chapter 232 was to require a more vigorous punishment of the violators of the prohibitory law than was generally being administered in the mu-

municipalities power to pass and enforce ordinances for the regulation and sale of intoxicating liquors, therein prescribing what shall constitute the penalties for a violation thereof, an ordinance of a city, passed for the regulation and sale of intoxicating liquors, failing to prescribe penalties within the limits fixed by the Legislature is void, and cannot be enforced. The maximum punishment authorized by said section 86 (section 1145, Gen. St. 1901) is \$100 fine, with no minimum punishment expressed, and no imprisonment provided. The maximum punishment authorized by said section 7 of chapter 232 (section 2499, Gen. St. 1901) is \$500 fine and imprisonment for six months, the minimum punishment being \$100 fine and imprisonment for thirty days. The maximum punishment authorized by said Ordinance No. 49 is \$100 fine, or imprisonment not exceeding 30 days, or both such fine and imprisonment, and with no minimum punishment expressed.

It follows that said ordinance is void, and the judgment of the court below is reversed. All the Justices concurring.

(68 Kan. 734)

**JOHN S. BRITTAIN DRY GOODS CO. v.  
BERTENSHAW.**

(Supreme Court of Kansas. March 12, 1904.)

**BANKRUPTCY—ILLEGAL PREFERENCE.**

1. In an action by a trustee in bankruptcy to recover back from a creditor a partial payment of its claim made by a debtor within four months preceding the time the latter was adjudged a bankrupt, the jury found that the payment did not enable the creditor to obtain a greater percentage of its debt than the bankrupt was able to pay to his other creditors. *Held*, that there was no illegal preference, within the meaning of the bankrupt law.

(Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by John Bertenshaw, trustee, against the John S. Brittain Dry Goods Company. Judgment for plaintiff. Defendant brings error. Reversed.

J. B. Ziegler, for plaintiff in error. F. J. Fritch, for defendant in error.

SMITH, J. About March 6, 1899, Ridgeway & Co., who were conducting a general store, sold their stock of merchandise to one Meeker for \$3,000. The firm owed about \$3,900 at the time to general creditors, and, among others, was indebted to plaintiff in error in the sum of \$900. In a few days after the sale, Ridgeway & Co. paid the John S. Brittain Dry Goods Company \$366.50 on their claim. On June 10, 1899, Ridgeway & Co. were declared bankrupts. This was an action by Bertenshaw, the trustee in the bankruptcy proceedings, to recover back the payment made to plaintiffs in error, on the ground that it was a preference. In answer

the stock of goods, the latter firm did not have money and property enough to pay all of their indebtedness in full. They also found that the payment made by Ridgeway & Co. to plaintiff in error did not enable the latter to obtain a greater percentage of its debt than Ridgeway & Co. were able to pay to their other creditors. The trustee recovered a judgment in the court below, of which plaintiff in error complains.

Subdivisions "a" and "b" of section 60 of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) read: "(a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. (b) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." A person is deemed to be insolvent, within the meaning of the bankruptcy act, when the aggregate of his present property "shall not, at a fair valuation, be sufficient in amount to pay his debts." A payment of money has been held to be included within the words "transfer of property," used in section 60a. *Pirie v. Chicago Title & Trust Company*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. The question involved is whether a part payment to the Brittain Dry Goods Company of its claim was a preference, when by the receipt of the amount it did not get a larger percentage of its debt than the debtors were able to pay to their other creditors. The language of the bankruptcy act defining a preference answers the question in the negative. The theory of the national bankrupt law is to secure a distribution of the debtor's property among the creditors ratably and in proportion to their respective claims. If the insolvent debtor himself should make such distribution of his assets, the creditors receiving their equitable shares ought not to be required to restore to the trustee in bankruptcy what they have received, in order that it may be repaid to them again, less the cost of administering the trust. The end and aim of the bankrupt law is to secure payment to creditors of an equal percentage of their claims. If the insolvent person does this, we can see no reason why his creditors should contribute to pay the expenses of bankruptcy proceedings

erence, for it was clearly shown that the debtor's assets were insufficient to satisfy all they owed. *Johnson v. Wald*, 93 Fed. 640, 35 C. C. A. 522. There was a finding that the payment to defendant below prevented the remaining creditors from securing payment of their claims against Ridgeway & Co., but, in the light of other answers of the jury, this means that the payment had the effect to prevent a payment in full to other creditors. In the case of *Pepperdine v. Bank*, 84 Mo. App. 234, 242, cited and relied upon by counsel for defendant in error, the principle was recognized that if the debtor making the payment had paid, or made provision to pay, other creditors a proportionable amount, the transaction was not a preference. It is essential to a recovery in cases of this kind that the effect of the payment was to enable one creditor to obtain a greater percentage of his debt than other creditors of the same class. In *re Hapgood*, 2 Lowell, 200, Fed. Cas. No. 6,044; *Peterson v. Nash Bros.*, 112 Fed. 311, 314, 50 C. C. A. 260, 55 L. R. A. 344; *Collier on Bankruptcy* (3d Ed.) p. 342; *Luby on Bankruptcy*, p. 110, and note. The jury found that the payment of plaintiffs in error of a part of their demand did not have such effect. There is no question of the burden of proof involved, as was the case in *Baden v. Bertenshaw*, 67 Kan. —, 74 Pac. 639.

The judgment of the court below will be reversed, and, if defendant below move for judgment in its favor, its application should be granted. All the Justices concurring.

(68 Kan. 749)

**SIGEL-CAMPION LIVE STOCK COMMISSION CO. v. HASTON et al.**

(Supreme Court of Kansas. March 12, 1904.)  
HUSBAND AND WIFE—NOTE OF WIFE—CONSIDERATION—DIVERSION—FOREIGN CORPORATIONS—ACTION BY.

1. If a wife place in circulation her note, secured by a mortgage on her land, for the purpose of procuring the satisfaction of her husband's debt, which object is attained, the advantage he derives from the transaction is a consideration to her.

2. If, in such a case, the note and mortgage be given for the purpose of procuring funds to be paid by the mortgagee to the creditor in satisfaction of the debt, it will not constitute a diversion of the securities from their original purpose if the creditor takes them by indorsement and assignment from the mortgagee in lieu of the funds themselves.

3. Isolated, independent transactions in this state incidentally necessary to the business of a foreign corporation, conducted at its domicile, fully completed before action commenced, will not prevent recovery in the courts of this state by such corporation under section 1283, Gen. St. 1901, when no repetition of such acts is in contemplation, and the territory of the state is not being made the basis of operations for the conduct of any part of the corporation's business at the time the suit is begun.

(Syllabus by the Court.)

Commission Company against James Haston and others. From a judgment for defendants, plaintiff brings error. Affirmed in part.

Prigg & Williams, for plaintiff in error.  
Geo. A. Vandever and F. L. Martin, for defendants in error.

BURCH, J. Upon February 20, 1901, the Sigel-Campion Live Stock Commission Company, a corporation of the state of Colorado, commenced an action to foreclose a mortgage given by James Haston and Mary J. Haston, his wife, to the Schirmer Insurance & Investment Company, and assigned to the plaintiff. Various parties were made defendants. Mary J. Haston answered, claiming part of the land as her own; claiming that the mortgage and the note it secured were accommodation paper; that she was a surety of her husband; that she received no consideration for executing the paper; that no consideration passed for the assignment of the paper by the payee to the plaintiff; that the mortgage was void under the bankruptcy law; that a conveyance of a part of the land by her to J. M. English, one of the defendants, was void; and that the plaintiff had no right to recover, on account of failure to comply with the corporation laws of this state. Howard S. Lewis answered as trustee in bankruptcy of James Haston, claiming the note and mortgage to be void under the bankruptcy law, charging the English transfer to be void, and impeaching the right of plaintiff to recover, as a foreign corporation which had not complied with the law regulating its right to do business in this state. James Haston adopted the answer of his wife and Lewis, trustee, and pleaded his discharge in bankruptcy. The Elmore-Cooper Live Stock Commission Company and the Sattley Manufacturing Company, judgment creditors, set up liens upon the land. English made default. At the conclusion of a trial, findings of fact were made, and upon them judgment was rendered for the plaintiff, foreclosing the mortgage against the land of James Haston, but releasing the land of Mary Haston from its lien. After the satisfaction of the plaintiff's lien, the balance of the proceeds of the sale of James Haston's land, if any, was to be paid to Lewis, trustee. The deed to English was set aside, and judgment creditors were given first liens upon Mary J. Haston's land. The plaintiff asks for a reversal of so much of the judgment as denies it a first lien upon Mary J. Haston's land, and the trustee in bankruptcy asks for a reversal of so much of the judgment as enforces the mortgage against James Haston's land.

The right of the plaintiff to recover against Mary J. Haston is clear, unless she can impeach the acquisition of title to the note and

understood rule, only the findings of fact and uncontroverted allegations in the pleadings can be considered. *Shuler v. Lashborn* (Kan.) 74 Pac. 264.

In April, 1900, James Haston agreed with the plaintiff and the Schirmer Insurance & Investment Company to execute a mortgage upon his own and his wife's land to the Schirmer Insurance & Investment Company for a loan of \$10,000, out of the proceeds of which the plaintiff was to receive certain sums of money then due to it from James Haston, and be repaid other moneys, which it agreed to advance to James Haston to pay for feeding cattle. Afterward it was agreed between James Haston and the plaintiff that the amount of the advancements should be increased in order to pay judgment and other liens against the land, and to purchase other real estate to be included in the mortgage, and the amount of the mortgage was increased to \$15,000 for these purposes. At the date of these negotiations, James Haston was indebted to the plaintiff in a considerable sum. Before the execution and delivery of the note and mortgage, which were delayed for some months, the plaintiff paid out, according to agreement, for the items specified, sums of money sufficient to make up the full amount of \$15,000. After their execution the note was indorsed, and the mortgage was assigned by the payee to the plaintiff. The payee paid nothing to the Hastons for the paper, and the plaintiff paid the payee nothing for it. This fact the court expressed in the form of a legal conclusion relating to consideration, which would be incorrect as a matter of law. Taken as a statement of fact, however, it is clear and correct. Mary J. Haston was not originally a party to James Haston's agreement to give the mortgage, nor to the subsequent modifications of that agreement, increasing the amount to be advanced and to be secured, but the court expressly found that she was surety for her husband.

From this state of facts, it is plain that the plaintiff's advancement of money to James Haston was for a temporary purpose only, and that it was to be repaid as soon as the mortgage loan could be arranged. After the advancements had been made, he was indebted to the plaintiff on account in the sum of \$15,000 for money had and received. In order to enable her husband to satisfy his obligation to repay the plaintiff this money, and for her husband's benefit and accommodation in that regard, she placed in circulation her note, secured by a mortgage on her land. This she had a right to do, and the benefit he derived from the transaction was sufficient consideration to her. 7 Cyc. 723.

By means of this note and mortgage, James Haston's debt to the plaintiff was paid. His immediate liability for the repayment of the money he had received was as effectually satisfied and discharged as if the

had paid the plaintiff in cash. It was not in contemplation of the parties that the Schirmer Insurance & Investment Company should pay any money whatever to James or Mary J. Haston. It was simply to satisfy James Haston's debt to the plaintiff. How this debt was paid, if in fact it were paid, was of no concern to Mary J. Haston. If, in lieu of cash, the plaintiff were willing to accept the securities themselves, she had no right to complain. No restrictions upon the use of the paper as a means of securing the payment of her husband's debt appear. The indorsement of the note and assignment of the mortgage by the payee and mortgagee accomplished that purpose. The change in the plaintiff's situation made it a holder for value. Its knowledge of the suretyship relation between Mary J. Haston and her husband could not affect the plaintiff's right to recover. 7 Cyc. 725, 947. The transaction was free from fraud, and she is legally bound.

The findings of fact relating to the validity of the mortgage sued on, under the bankruptcy law, fail to show that its execution and enforcement would have the effect of enabling the plaintiff to obtain a greater percentage of his debt than any other creditor of the same class. In this respect the case is analogous to that of *Baden v. Bertenshaw* (Kan.) 74 Pac. 639, and *Brittain v. Bertenshaw* (just decided) 75 Pac. 1027; and the relief prayed for in the cross-petition in error of *Lewis*, trustee, on account of a supposed preference given the plaintiff, must be denied for want of sufficient facts to support it.

Regarding the right of the plaintiff to bring suit, the court found as follows: "That prior to August 1, 1899, the defendant James Haston and the plaintiff were engaged in the cattle business, as partners, in the state of Kansas; that their mode of business was for the defendant James Haston to execute mortgages to the plaintiff for the purchase price of all cattle that were turned in, and that they were engaged in business as partners up to that time: that since August 1, 1899, the plaintiff has not been in partnership with the defendant James Haston, but that, on different occasions since said date, plaintiff has purchased notes and chattel mortgages, and renewals thereof, and sent the same to James Haston, who signed the same in the state of Kansas, and, at the request of plaintiff, had the same filed of record in different counties in Kansas where the defendant lives, and where the cattle were located, but that the notes secured by said mortgages were payable to the plaintiff at their offices in Denver, Colorado." In *Thomas v. Remington Paper Co.* (Kan.) 73 Pac. 909, it was said: "In order to invoke the application against a foreign corporation of the provision of section 1283, Gen. St. 1901, forbidding the bringing of an action by a corporation

without first filing certain statements, it must be shown that the corporation in question is one doing business in this state." The findings quoted show nothing more since 1800 than fully completed, isolated, independent transactions, only incidentally necessary to the business of the corporation conducted at its domicile. They do not show that repetitions of the acts described were in progress or in contemplation at the time suit was brought, or that the territory of the state was then being made the basis of any kind of operations for the conduct of any part of the corporation's business. Therefore no bar to plaintiff's recovery appears.

The judgment in favor of the plaintiff and against Lewis, trustee, is affirmed. The judgment awarding to the Elmore-Cooper Live Stock Commission Company and the Sattley Manufacturing Company first liens upon the land of Mary J. Haston is reversed. The judgment denying the plaintiff a first lien upon the land of Mary J. Haston is reversed, and the cause is remanded, with directions to the district court to enter judgment foreclosing the plaintiff's mortgage as a first lien upon Mary J. Haston's land, and otherwise to proceed in accordance with this opinion. All the Justices concurring.

(68 Kan. 327)

**BURTISS v. LANYON ZINC CO. et al.**

(Supreme Court of Kansas. March 12, 1904.)

APPEAL — OBJECTIONS NOT MADE BELOW —  
FRAUDULENT CONVEYANCE—EVIDENCE.

1. Plaintiff, in the absence of objection to orders making a person a defendant, and requiring him to answer, may not complain thereof on appeal.

2. Where, in an action by a wife to cancel a lease made by her husband of land standing in her name, defendant claims that in fact the land belonged to the husband, and was put in the wife's name to defraud creditors, he may give evidence of judgments against the husband, and of a lease, signed by them and their daughter, of land standing in the daughter's name.

Error from District Court, Allen County; L. Stillwell, Judge.

Action by H. E. Burtiss against the Lanyon Zinc Company and another. Judgment for defendant company, and plaintiff brings error. Affirmed.

W. A. Choguill and Chris. Ritter (B. E. Clifford and C. J. Peterson, of counsel), for plaintiff in error. Campbell & Goshorn, C. E. Benton, and J. B. F. Cates, for defendant in error.

**PER CURIAM.** This action was brought by H. E. Burtiss to cancel a certain oil and gas lease on her lands, to which her name was signed by her husband, without her consent or authority. The lease was given to George A. Bowlus & Co., and assigned to the Lanyon Zinc Company. Judgment was for defendant. Plaintiff prosecutes error.

Plaintiff stated in her petition that she was

the owner of the land in question; that her husband signed her name to the lease without her knowledge or consent; that she had no information such lease had been given until within a short time before the commencement of this action; and asked that it be canceled. At the request of the defendant, the court ordered that H. M. Burtiss, plaintiff's husband, be made a party defendant. H. M. Burtiss alleged in his answer that he signed the lease at the request of one D. B. D. Smeltzer, as the agent of George A. Bowlus & Co.; that he informed Smeltzer that the land belonged to his wife, who was absent from the state, and would not return for several weeks, and that he had no authority to sign the lease; that Smeltzer insisted he sign the lease for himself and wife, and that he would use it only to induce others to execute leases, by showing he had secured a lease for the Burtiss tract, and that he would hold the lease until Mrs. Burtiss returned, and, if she would not consent to the lease, he would return it. The Lanyon Zinc Company, answering both the pleadings of the plaintiff and her husband, alleged that the property actually belonged to H. M. Burtiss; that the title was conveyed to his wife for the purpose and with the intent to hinder, delay, and defraud the creditors of H. M. Burtiss; that the lease was made by the authority of H. E. Burtiss, and that the lessee agreed to deposit in the bank for the benefit of H. M. Burtiss and wife the sum of \$50 per annum as annual rentals for such land for a period not to exceed 10 years, unless in the meantime they prospecting this land for oil and gas; that it had made such deposit each year; and that the money had been drawn out and used by H. M. Burtiss and wife with full knowledge of the transaction.

The first error of which complaint is made is the order of the court making H. M. Burtiss a party defendant. It does not appear from the record that any objections were made by plaintiff to this order, or that objections were made to the order requiring him to answer as a defendant.

The second alleged error is in the admission of testimony offered by defendant. A considerable portion of the evidence to which the plaintiff now objects was not objected to when given. Objections were, however, made to the introduction of certain receipts to which the name of H. E. Burtiss was signed by H. M. Burtiss; to a lease signed by both of them and by Maggie A. Fish, their daughter, of lands, the title to which was in their daughter; and also to certain judgments against H. M. Burtiss—all tending to show the insolvency of Burtiss, and that prior to the rendition of such judgment these parties had shifted the title to these lands, including the land in question. This evidence, though weak, was admissible for such purpose, and should be given whatever weight the court might think it entitled to.

These are the only errors of law of which



contradictory evidence on the questions as to who was the actual owner of the land at the time the lease was made, and whether H. M. Burtiss did not have authority from his wife to sign her name to this lease, and also whether the plaintiff did not know all about this lease immediately after it was made, and receive the annual rentals deposited by the lessee in the bank. The cause was tried without a jury, and this evidence was all considered by the court in its final determination of these questions, upon which the court found generally that the allegations of the answer of the defendant were true, and rendered judgment thereon for defendant.

No error of law appearing, and the court finding the facts for the defendant, the judgment must be affirmed.

(66 Kan. 776)

### WHEELER v. CALDWELL.

(Supreme Court of Kansas. March 12, 1904.)

QUO WARRANTO—JURY TRIAL—ELECTIONS—CONTEST—IDENTIFICATION OF BALLOTS—REJECTION OF BALLOT—DISTINGUISHING MARK—PROCEEDING IN ERROR.

1. A jury trial is not demandable as a matter of right in a proceeding in quo warranto.

2. At an election precinct only four of the voters were challenged, and the ballots they cast were marked so as to indicate that they were cast by challenged voters. The ballots so identified showed that all had been cast for a certain candidate. *Held*, that the identification is sufficient, and that the proof of identity of the ballots and for whom they were cast is not overcome by a showing that one of the challenged voters was accompanied to the polls by a friend of another candidate, nor by the fact that his vote was challenged by a friend of the candidate whose name was on the challenged ballots.

3. A ballot legal in form cannot be rejected merely because there is one more ballot in the ballot box than there are names written on the pollbooks, and also that it happened to be the last ballot taken from the box when the ballots were counted; and, under the facts in this case, it is *held* that the ballot to which such objections were made should have been counted.

4. Where one of the lines of a cross on a ballot is paralleled by a third distinct line, it should be regarded as a distinguishing mark, and the ballot treated as illegal.

5. The mere fact that one of the lines of a cross-mark on a ballot is shorter than the other one does not warrant the rejection of the ballot, where the shorter line actually crosses the longer one.

6. A cross-petition in error is treated as an independent proceeding, and the party complaining must take the preliminary steps giving him a right to assign error; and, before errors occurring during the trial can be made the basis of a review, they must be presented to a trial court for reconsideration on a motion for a new trial.

(Syllabus by the Court.)

Error from District Court, Cloud County; Hugh Alexander, Judge.

Quo warranto by William W. Caldwell against S. C. Wheeler. Judgment for plaintiff, and defendant brings error. Reversed.

& Larimer, for plaintiffs in error. Theodore Laing, E. V. D. Brown, Dwight M. Smith, Isaac M. Rigby, and Park B. Pulsifer, for defendant in error.

JOHNSTON, C. J. The title to the office of mayor of the city of Concordia is involved in this proceeding. An election was held on April 7, 1903, when William W. Caldwell and S. C. Wheeler were candidates for mayor, and the result, as found by the canvassing board, was that Wheeler received 809 votes, while Caldwell received 808 votes. A certificate of election was issued to Wheeler, and on April 12th he qualified and entered upon the discharge of the duties of the office. Caldwell brought this proceeding, alleging that he had received the greater number of legal votes, and was entitled to the possession of the office. Upon a trial the district court found that 1,597 legal ballots had been cast by qualified voters for mayor, of which Caldwell received 790, and Wheeler 798, and therefore gave judgment in favor of Caldwell.

A jury was demanded by Wheeler to try the facts, but the court refused the demand, and of this ruling complaint is made. Whether a jury is demandable as a matter of right in a case of quo warranto is still an open question in this state. In several cases the question was suggested and left unanswered, but in some of them a jury was granted *ex gratia*. *State v. Allen*, 5 Kan. 213; *State v. Foster*, 32 Kan. 14, 3 Pac. 534. In this state there has been substituted for the writ of quo warranto and the information in the nature of quo warranto a civil action, and under this the remedies formerly obtainable in quo warranto may be had. Civ. Code, § 652. So far as our Code is concerned, it provides that a party is entitled to a jury to try issues of fact in civil actions brought for the recovery of money or of specific real or personal property, and that all other issues of fact shall be tried by the court, unless it chooses to submit them to a jury or referee. Civ. Code, §§ 266, 267. It is contended, however, that at common law a party was entitled to a jury trial in quo warranto proceedings, and that the common-law right was preserved and continued by virtue of section 5 of the Bill of Rights, which provides that "the right of trial by jury shall be inviolate." This provision means that the right of trial by jury shall be and remain as ample and complete as it was at the time when the Constitution was adopted. *State ex rel. v. City of Topeka*, 30 Kan. 653, 2 Pac. 587. What, then, was the status of the law as to the right to a jury in quo warranto cases at that time? If the common-law rule is to control, the question arises as to what common-law rule was in effect in this respect when the Constitution was adopted. The first act adopting the common law as a rule of action in Kansas was passed by the first Legislature

held in Kansas, and so much of it as is pertinent is as follows: "Section 1. The common law of England and all statutes and acts of Parliament made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States and the act entitled, 'An act to organize the territory of Nebraska and Kansas,' or any statute law which may from time to time be made or passed by this or any subsequent Legislative Assembly of the territory of Kansas, shall be the rule of action and decision in this territory, any law, custom or usage to the contrary notwithstanding." Chapter 96, Ter. St. 1855. This act was repealed and then reenacted in substantially the same language in 1859. Laws 1859, p. 615, c. 121, § 1. According to these acts of adoption, the common law as it existed in England in the fourth year of James the First, which was 1607, became the common law of Kansas, and remained such at least until the state Constitution was adopted. *Railway Co. v. Nichols*, 9 Kan. 235, 12 Am. Rep. 494. At the date fixed in the act of adoption the common law did not award a jury trial as a matter of right in quo warranto proceedings, nor was such right given until the passage of the act of Parliament in 1730, known as 3 Geo. II, c. 25. In *Tallaferro v. Lee*, 97 Ala. 92, 13 South. 125, the Supreme Court of Alabama had under consideration the right of the jury in a quo warranto proceeding; and it was remarked that "at no period in the history of the information in England, so far as we are aware, was the relator or respondent ever regarded as entitled to trial by jury until that right was expressly conferred by act of Parliament. 3 Geo. II, c. 25." See, also, *State v. Johnson*, 26 Ark. 281; *State v. Vail*, 53 Mo. 97; *State v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253; *State v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; *State v. Moores*, 56 Neb. 1, 76 N. W. 530. Then, again, the statutory law as it existed when the Constitution was adopted did not give the suitor a right to trial by jury in cases of this kind. Even if the common law had accorded this right, it was competent for the Legislature to modify it, and to make such cases triable by the court. In 1859 the Legislature passed an act specifically providing what cases and issues should be tried by a jury, and what should be triable by the court. Laws 1859, p. 123, c. 25, §§ 274, 275. Whether the question is determinable by the common law as adopted in Kansas, or by the statute as it existed when the Constitution was framed, a jury cannot be required as a matter of right in this proceeding. If the rule of the present Code is applied, the same result will be obtained, and hence we conclude that no error was committed in denying the application of a jury.

The controversy as to the result of the

election arose over qualifications of persons who voted, ballots in excess of the number shown by the pollbooks, ballots on which it was claimed there were identifying marks, and ballots imperfectly marked by the voters. The qualifications of several of those who voted for Wheeler were challenged by Caldwell. One of them (Bagwell) made a trip to Iowa, and, though he soon returned to Concordia, there was testimony tending to show that he went to Iowa with the intention of establishing a residence there. Another was McCullough, who had been living with his mother in Concordia, but who, it was claimed, had changed his residence to the neighboring town of Clyde, and was therefore not entitled to vote. Another was Mrs. Webb, who, it was claimed, lost her right to vote by moving from one ward of the city to another; and still another was Cora Garder, who, it was claimed, was not a resident of Concordia at the time of the election. All of these had voted for Wheeler, and the court held them to be disqualified, and consequently took four votes from the count for Wheeler. The testimony as to the residence of these persons is not satisfactory, but it cannot be said that there is no testimony to sustain the findings of the trial court. Looking at the testimony as it is brought to us in the record, we strongly incline to the opinion that McCullough and Garder were legal voters, and that their votes should have been counted; but we are aware that the trial court had superior opportunities to measure the testimony, and, since it cannot be said that its findings are without support, we are bound by them.

One Creaghor, who voted in the Third Ward, was found not to be a qualified voter, and the court concluded that he had voted for Wheeler, and deducted a vote from the number credited to Wheeler. This was error, as the testimony shows that Creaghor voted for Caldwell, and, if not qualified, the vote should have been taken from Caldwell, instead of Wheeler. When his vote was challenged, he was sworn to answer as to his qualifications, after which his ballot was received. The word "Sworn" was written on the ballot, and the number opposite to his name on the pollbook should have corresponded with the number on the ballot. There was no such conformity, and, because of this discrepancy, it was impossible from the numbers alone to identify the ballot cast by Creaghor. It was otherwise identified. It appeared beyond dispute that his was a challenged vote, that his ballot was so marked, that there were only four challenged votes cast in the ward, and that every one of them showed on their faces that they were in favor of Caldwell. Under this showing, mainly record proof, there is no escape from the conclusion that Creaghor voted for Caldwell. The lack of agreement between the numbers on the pollbook and the ballot is accounted for on the theory that the ballot was given

the challenge. Then he was challenged, and some time was occupied by the challenge and the swearing in of his vote. In the intervening time others approached and voted, and one of their names was written on the pollbooks opposite the number placed on Creaghor's ballot. In that case the number on the ballot was the number reached when the ballot was handed to him, while the number opposite his name on the pollbook was the number reached when the challenge had been decided and the ballot received. The four challenged votes, one of which was cast by Creaghor, were sufficiently identified; the ballots themselves were indubitable proof that all of them were for Caldwell; and such proof is not overcome or affected by the mere circumstances that Creaghor was accompanied to the polls by a friend of Wheeler, and was challenged by a friend of Caldwell. The illegal vote should have been taken from the Caldwell count, and not from that of Wheeler.

In the Second Ward a ballot which was marked "309," and was for Wheeler, was rejected by the court. This was done because of the claim that there was 1 more ballot in the box than there were voters, as shown by the pollbooks. The court found that 312 ballots had been put into the box, while the pollbooks showed that only 311 persons had voted. It appears that 309 of the ballots had been strung upon a wire, and that 3 blank and defective ballots had been returned in an envelope. The court decided that there was an excess ballot in the box, that should not have been counted; that one must be rejected; that it must be one of the good ballots; and that it must be the last one taken from the ballot box. The one on the wire farthest from the needle was treated as the first ballot taken out, and the one nearest the needle as the last one taken from the box. That proved to be ballot 309, and to have been cast for Wheeler, and it was rejected and deducted from Wheeler's vote. This was error. Nothing in the statute, nor in reason, warranted the rejection of the last ballot that the election officers chanced to take from the box. Besides, the testimony to which we are referred does not warrant the conclusion that ballot numbered 309 was the last one taken from the box. Here, then, was a properly marked ballot, which was apparently legal in every respect; and, in the absence of a statute declaring such a rule of eliminating an excess ballot, or of proof that it was illegal, we know of no reason for disfranchising the one who cast it, or for deducting it from the count of the candidate for whom it was cast. In the absence of proof, there is as much reason to assume that the clerks erred in registering the names of voters, as that an extra ballot was wrongfully thrust into the box, and there appears to have been some discussion among the of-

ballots returned in the envelope was blank, that it had never been numbered, and that the corner had never been clipped from it. The judge in charge of the numbering said that no ballot was given out to voters that was not numbered, and there is reason to think that this blank ballot, which had not been numbered, marked, or clipped, had never, in fact, been voted. If voted, two of the judges must have failed in the performance of their duties—the one who numbered and the one who clipped the ballots—but this cannot be presumed. So it is claimed that the blank ballot was probably picked up from the table, and accidentally placed in the envelope which was returned. But whether accounted for in that way or not, there was nothing in the circumstances of the case, nor in the testimony, which justified the court in discarding ballot numbered 309, or in deducting that vote from the count for Wheeler.

The legality of a large number of defectively marked ballots was challenged. In the counting of such ballots, the court adopted what may be called a very liberal rule. It said: "Upon the trial, when the various numbered votes [those numbered by the stenographer] were taken from the wires and examined, many of them for the plaintiff, Caldwell, had crosses in the proper places, but the crosses were not always made with two single lines, and in many instances there would be one or more additional lines, but they appeared to be so made simply for a desire on the voter's part, and in the effort on his part, to make a cross with lines so distinct and plain that his vote should not be overlooked from lack of plainness; and in many instances one or more arms of the cross would extend somewhat over the circle—that is, outside—or outside the squares, whichever form of voting was used, and this was apparently due either to haste or carelessness on the part of the voter. In some instances the marks were ill made, due to nervousness, or to the fact that the hand making them trembled with age, or was unused to a pencil. What has been said in this finding with reference to ballots voted for Caldwell is equally true as to many ballots voted for Wheeler, and the number of ballots so marked was probably about equal in number, and in the character of their markings on both sides; and the court, in counting such ballots, has intended to, and did, count for the person for whom they were marked all such as showed the intention of the voter, and were marked with a cross-mark in the proper place, and the marks were not such as to be in character a distinguishing mark, and where they were clearly not made by the voter with an evident purpose to identify his ballot." Of this rule, in the abstract, there is no good reason for complaint, but we are unable to agree with the court in its application. For instance, there was

three lines, and one of the arms of the cross was substantially paralleled by a third distinct line. There is nothing to indicate that the extra line was an attempt to retrace an indistinct line, nor that it was made by one who was nervous or unused to a pencil. The departure from the prescribed form is patent, easily described, and it would be difficult to invent a better distinguishing mark. There was a like defect on ballot numbered 344, cast for Caldwell in the Fourth Ward, where parallel lines were used in making the cross. Neither of these ballots should have been counted.

Wheeler complains that ballots numbered 4 and 359, which were cast for him, and thrown out by the court, should have been counted in his favor. On each ballot, one of the arms of the cross was constituted of two distinct parallel lines; and, because they were easily described and distinguishable, they were illegal, and properly excluded by the court.

Wheeler has good reason to complain of the exclusion of ballot numbered 427, cast for him in the Fourth Ward. It was excluded because the marks opposite the names of Bowman and Blair, who were candidates on the same ticket with Wheeler, were not proper cross-marks. One of the lines of each of the cross-marks is shorter than the other, and the court stated that the mark was the shape of an inverted Y. The shorter line, however, actually crosses the longer one; and, the ballot being otherwise unobjectionable, we think it is legal, and should have been counted.

Other rulings adverse to Wheeler are complained of, but the conclusions we have already reached settle it that Wheeler has a clear majority over Caldwell for the office in contest, and a further consideration of Wheeler's claims of error are unnecessary.

A cross-petition in error has been filed by Caldwell, in which he complains of rulings made by the court against his contentions. He did not file a motion for a new trial, and thus give the trial court an opportunity to review, and, if necessary, correct, its rulings. The motion filed by Wheeler, complaining of rulings against himself, affords Caldwell no basis to obtain a reconsideration of rulings favorable to Wheeler. A cross-petition in error is treated as an independent proceeding, and the party complaining must take the preliminary steps which give him a right to assign error. Errors occurring during the trial cannot be made the basis of a review unless they have been presented to the court for reconsideration on a motion for a new trial. *Cogshall v. Spurry*, 47 Kan. 448, 28 Pac. 154. See, also, *Fowler v. Krutz*, 54 Kan. 622, 38 Pac. 808. The case of *McPherson v. State ex rel.*, 56 Kan. 139, 42 Pac. 374, is a sufficient answer to the contention that this court

the judgment of the district court will be reversed, and the cause remanded, with directions to enter judgment in favor of plaintiff in error. All the Justices concurring.

(68 Kan. 765)

#### GOODRICH v. MITCHELL.

(Supreme Court of Kansas. March 12, 1904.)  
CONSTITUTIONAL LAW—PREFERENCE OF VETERANS.

1. Section 1, c. 186, p. 359, of the Laws of 1901, which provides that those who have served in the army and navy of the United States in the War of the Rebellion, and have been honorably discharged therefrom, shall be preferred for appointment to office in every public department, and upon all public works of the state, and of the cities and towns thereof, is constitutional.

(Syllabus by the Court.)

Action by Porter Mitchell against H. K. Goodrich. Judgment for plaintiff.

David Overmyer and Thomas Dever, for plaintiff. M. T. Campbell, for defendant.

JOHNSTON, C. J. H. K. Goodrich and Porter Mitchell are each claiming the office of superintendent of the electric light plant of Topeka. The term of this office is two years, and there is a provision that all officers of the city shall hold their offices until their successors are elected and qualified. Goodrich was duly chosen as superintendent, and continued to act in that capacity until April, 1903, which was the end of the term as fixed by ordinance. He then applied to the mayor and council of the city for appointment to the next regular term, and Mitchell made a like application. These were the only applicants for the place, and it is agreed that both are men of good reputations, are equally competent to perform the duties of the office, and equally eligible for appointment, unless Goodrich has a right to be preferred because of services and honorable discharge from the army of the War of the Rebellion. Goodrich was a soldier in that war, and received an honorable discharge, while Mitchell never served in the army or navy at any time. With a knowledge of these facts, the mayor and council appointed Mitchell to this office, but the refusal to appoint Goodrich was not because he was lacking in qualifications, fitness, or eligibility, nor because Mitchell possessed any superior qualifications for the office. After Mitchell was appointed and had qualified he demanded the possession of the office, and when Goodrich declined to surrender it Mitchell took forcible possession and ousted Goodrich therefrom.

It is conceded that the result of this proceeding, and the right to the office in this contest, depends upon the constitutionality of an act spoken of as the "Veterans' Prefer-

be and is hereby amended so as to read as follows: In grateful recognition of the service, sacrifices and sufferings of persons who served in the army and navy of the United States in the War of the Rebellion and have been honorably discharged therefrom, they shall be preferred for appointment and employed to positions in every public department and upon all public works of the state of Kansas, and of the cities and towns of this state, over other persons of equal qualifications, and the person thus preferred shall not be disqualified from holding any position in said service on account of his age or by reason of any physical disability, provided such age or disability does not render him incompetent to perform the duties of the position applied for; and when any such ex-soldier or sailor shall apply for appointment to any such position, place, or employment, the officer, board or person whose duty it is or may be to appoint a person to fill such place shall, before appointing any one to such position, make an investigation as to the qualifications of said ex-soldier or sailor for such employment, and if he is a man of good reputation, and can perform the duties of said position so applied for by him, said officer, board or person shall appoint said ex-soldier or sailor to such position, place or employment." Laws 1901, p. 359, c. 186, § 1. Other provisions are that a like preference shall be given if it becomes necessary to reduce the force in any of the departments, cities, or towns of the state, and also declares penalties against those who willfully refuse or neglect to obey the provisions of the act.

The fundamental infirmity in the act is not specifically pointed out. It is said to be unequal and arbitrary in its operations; that the preference given to veterans necessarily restricts the privileges of others; and that it is given as reward for past services, without regard to the public service or the general welfare of the people. It is not contended that the act conflicts with any express provision of either the state or federal Constitutions, but, rather, that it is contrary to the implications and spirit of our Constitution. The general doctrine is that, in the absence of constitutional limitations, the Legislature may prescribe how and by whom offices shall be filled. There is no contract right or property interest in an office, and hence some of the constitutional principles invoked have no application. An office is a public agency, and an officer is a mere agent of the public, entitled to exercise the functions and perform the duties of the office for the public benefit, and not for his own. The main consideration in the selection of officers and agents is the public welfare, and the state, like any other principal, may select its agents, may determine for itself who can best accomplish its purpose, and whose ap-

or imposes a limitation, the Legislature is to that extent guided and controlled in choosing its officers, but no provision has been called to our attention which prohibits the giving of a preference to veterans of the Civil War. Constitutional limitations are prescribed with respect to eligibility and the holding of office, and among them are that a member of Congress, or officer of the state or of the United States, cannot hold the office of governor. Article 1, § 10. Neither is a United States officer eligible to a seat in the Legislature. Article 2, § 5. Justices of the Supreme Court and judges of the district court cannot hold any other office during the terms for which they are elected. Article 3, § 13. Persons who are under guardianship, have been convicted of a felony, who have defrauded the government, have given or received a bribe or offered to do so, have voluntarily borne arms against the government, with some exceptions cannot hold office. Any one who gives or accepts a challenge to fight a duel, or who carries a challenge to another, or who goes out of the state to fight a duel, is ineligible for office, and every one who has given or offered a bribe to secure his own election is disqualified from holding office during the term for which he has been elected. Article 5, §§ 2, 5, and 6. In the main, these are the provisions affecting the holding of office, and, aside from these restrictions, the whole matter is committed to the Legislature by section 1 of article 15, wherein it is provided that "all officers whose election or appointment is not otherwise provided for shall be chosen or appointed as may be prescribed by law."

It is conceded that the matter of holding office is a political privilege, but it is argued that it becomes a special privilege when a class of citizens are given a preference over all others. Our Constitution differs materially from those of many of the states with respect to the granting of privileges. The only provision we have touching the subject is found in section two of the Bill of Rights, which is: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the Legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency." In most of the states the granting of special privileges or immunities is expressly prohibited, but, as will be observed, ours seemingly contemplates that such privileges may be granted, as it provides that none shall be granted that may not be altered, revoked, or repealed. The Legislature may then exercise its judgment and discretion in the selection of officers, unhampered by restrictions, unless some are to be implied from

those expressed or from the theory of our government. As an office is a public trust, to be held and exercised for the public benefit, it is always implied, perhaps, that officers shall be chosen with a view to carrying out that purpose. So it is said that a law permitting the selection of persons unfit for the office and unable to perform its duties is defective. In *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 233, 55 Am. St. Rep. 357, it was in effect held that, in the absence of constitutional restrictions, the Legislature had power to select officers at will, or to confer power of appointment on boards or officers, but that the appointment of a person or a class in preference to all others, without inquiry or determination whether the person appointed is actually qualified to perform the duties of the office, is inconsistent with the nature of our government. It was therefore held that a statute making the appointment of veterans compulsory when the appointing power should think the applicants were not qualified to perform the duties of the office sought was invalid. If that should be accepted as the correct view, our statute is not obnoxious to such a limitation, as it only gives a preference to ex soldiers and sailors upon the theory of equality of qualifications. Nor is there any novelty in our legislation on the subject, as like preferences have been given by the Legislatures of a great many states and by the Congress of the United States, and, except where the acts have been shown so as to conflict with express constitutional provisions, they have been generally upheld. The Supreme Court of Massachusetts, in response to questions by the Governor and Council, held that the provisions of a civil service statute, giving a veteran the preference for appointments to offices that they were found competent to fill, were constitutional. And the same view was expressed with reference to a provision giving a preference in public employments. It was said: "We doubt whether a statute which purports to compel the commonwealth and its cities and towns to employ in the labor service persons who are not able to perform the labor, and to pay them wages as laborers, could be held to be either wholesome or reasonable. But if the section means that the civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and its cities and towns in preference to all other persons except women, if the veterans are found competent to perform the labor, we think the enactment is within the constitutional power of the general court." In *re Opinion*, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58. See, also, in *re Opinion*, 145 Mass. 587, 13 N. E. 15; *Com. v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566; In *re Sweeley* (Sup.) 33 N. Y. Supp. 369; *Stutzbach v. Coler*, 168 N. Y. 416, 61 N. E. 697; In *re Wortman* (Sup.)

2 N. Y. Supp. 324; *McGuire v. Byrnes* (Sup.) Id. 700; *State v. Miller*, 66 Minn. 90, 68 N. W. 732; *Townsend v. Boughner*, 55 N. J. Law, 381, 26 Atl. 808; *Troope on Public Officers*, §§ 95-98; 6 A. & E. Encycl. of L. (2d Ed.) 93.

*State v. Garbroski*, 111 Iowa, 496, 82 N. W. 959, 56 L. R. A. 570, 82 Am. St. Rep. 524, is cited as an authority against the validity of a preference to veterans. That was a case where there was an attempted exemption of persons who had served in the army and navy from paying a license tax. That act, which affected liabilities and imposed burdens, gave rise to a very different question than is presented here. It was held to be a discrimination in violation of the fourteenth amendment to the federal Constitution, and a denial of the equal protection of the laws. Even in that case it was remarked that: "Possibly a veteran soldier or sailor would be preferred, everything else being equal, for civil office, because of superior fitness, resulting from discipline of service in the war; for 'it is distinctly a public purpose to promote patriotism, and to make conspicuous and honorable any exhibition of courage, constancy, and devotion to the welfare of the state.' But the work of a peddler calls for no qualities such as a soldier or sailor acquires in the service." *State v. Shedrol* (Vt.) 54 Atl. 1081, involves the same question, and was decided in the same way.

Officeholding is a political privilege, and the matter of appointment to office is not affected by the fourteenth amendment or other provision of the federal Constitution, and as has been said, the power of the Legislature is supreme in respect to appointments, save as the Constitution has limited it. Already statutes have been enacted which limit the number from whom officers may be chosen, and necessarily puts others who might desire these offices at a disadvantage. There are boards upon which only physicians can be appointed; others to which only dentists are eligible; others where architects or skilled mechanics have the preference; others where a woman is arbitrarily appointed; and still others where political opinions enter into the qualifications of members, that is, enactments that members of boards shall be taken in certain proportions from different political parties. These acts are generally held to be within the legislative power, and the preferences and the exclusions so made to be reasonable and valid. Where the limitation from which officers shall be chosen is manifestly for the public good, and where the purposes sought and the ends attained in legislation in regard to the qualifications for office are the safety and welfare of the public, it cannot be said that the rights of any others are unduly affected or prejudiced. If we should lay aside the gratitude mentioned in the first part of the section in question for those who sacrificed and suffered in defense of the nation, there are reasonable and sub-

stantial considerations for making a preference in favor of the veterans. The love of country that induced them to fight for its existence and defend its institutions is some assurance, at least, of loyalty and fidelity in the civil service. In the nature of things the discipline of the army and navy tended to promote promptness, respect for authority and obedience to law, courage to meet difficulties and overcome selfish and sinister influences, steadiness of purpose, perseverance, and devotion to duty. These considerations may very well have appealed to the discretion and judgment of the Legislature in determining who could render the best service to the public, and we see no reason why they are not reasonable and sufficient. In the civil service laws of the country, conceded to be beneficial and valid, a preference is given because of the former experience in the public service, and why should not the public service of those who imperiled their lives in the defense of their country receive like recognition and preference? As counsel for the plaintiff has well said, "A grateful recognition of the services, sufferings, and sacrifices of persons who have served the state in war has always been recognized by all nations as the exercise of the highest public policy, as the surest guaranty of the future safety, honor, and welfare of the state." In *Keim v. United States*, 177 U. S. 200, 20 Sup. Ct. 574, 44 L. Ed. 774, the preference law enacted by Congress was considered and interpreted, but its constitutionality seems to have been conceded, as no attack was made upon its validity. Judge Brewer, in deciding it, remarked that "no thoughtful person questions the obligations which the nation is under to those who have done faithful service in its army and navy." That such service afforded reasonable grounds for preference in public offices and employments was recognized in *Brown v. Russell*, *supra*, where it was remarked that: "It may be said that, other qualifications being equal, there are reasons to believe that a veteran soldier or sailor often will make a better civil officer than a person who never has been subjected to the discipline of service in the war, and it is distinctly a public purpose to promote patriotism, and to make conspicuous and honorable any exhibition of courage, constancy, and devotion to the welfare of the state, shown in the public service. These things we assume the Legislature may take into account in providing for appointments to office, where the qualifications are not prescribed by the Constitution." The court, in *Re Opinion*, 168 Mass. 595, 44 N. E. 627, 84 L. R. A. 58, in speaking of the belief that faithful service in and honorable discharge from the War of the Rebellion developed such qualifications of character in men that it was to the interest of the commonwealth to appoint them to office in preference to others, said: "The general court may have so thought on the ground, either that such

a person would be likely to possess courage, constancy, habits of obedience and fidelity, which are valuable qualifications for any public office or employment, or that the recognition of the services of veterans in the way provided for by the statute would promote their love for country and devotion to the welfare of the state, which it concerns the commonwealth to foster. If such was the opinion of the general court, we cannot say that it was beyond its constitutional power to enact this section. Of the wisdom of such legislation we are not made the judges." Faithful service and devotion to duty in the past has always been regarded as good considerations for preference or promotion in every department of life, public and private, and it belonged to the Legislature to determine what qualifications and experience gives the best assurance of faithful, honest, and efficient public service. The case is quite unlike the one supposed of a right to office by those affiliated with a particular church or a particular party, or because of some private achievement. The preference that is made here has its basis on services to the public and experience and fidelity in the public service, and we think it was within the constitutional power of the Legislature to make such a preference.

It is conceded that the plaintiff possessed every qualification, and was entitled to re-appointment as against the defendant, who was the only other applicant for the position. The mayor and council were therefore required to give the plaintiff the preference, and, under the circumstances, had no power or authority to appoint the defendant. The plaintiff, being in the office, was entitled to continue until some one was legally appointed, and therefore had a right to bring a proceeding in quo warranto to obtain the possession of the office.

Judgment will therefore be given in favor of the plaintiff. All the Justices concurring.

(68 Kan. 759)

#### DEVER v. HUMPHREY et al.

(Supreme Court of Kansas. March 12, 1904.)  
OFFICERS — PREFERENCE OF VETERANS —  
QUALIFICATIONS — COURTS — JURISDICTION.

1. To obtain the preference given by chapter 186, p. 359, of the Laws of 1901, to soldiers and sailors who served in the War of the Rebellion, for appointment to public position or employment, it must appear, on investigation, that they possess equal qualifications for the position or employment with other available applicants.

2. Where the Legislature places the authority of making appointments upon officers and boards, and vests them with a discretion and judgment to determine who is best qualified to serve the public, the courts cannot supervise the exercise of such authority, nor control the discretion and judgment so vested.

3. The character and extent of the investigation under the veterans' preference law is not prescribed by the Legislature, but the appointing power is expected to investigate in good faith, to fairly consider the qualifications

¶ 1. See *Officers*, vol. 37, Cent. Dig. § 12.



place sought.

(Syllabus by the Court.)

Error from District Court, Geary County;  
J. L. Moore, Judge.

Quo warranto by Thomas Dever against J. V. Humphrey and others, to determine title to office. Judgment for defendants, and plaintiff brings error. Affirmed.

Thomas Dever, for plaintiff in error.  
James Humphrey and Roark & Roark, for defendants in error.

JOHNSTON, C. J. This was a proceeding to determine who was entitled to the office of city attorney of Junction City. Thomas Dever had been duly chosen and held the office for several years prior to April, 1903, when he applied to the mayor and council of the city for a reappointment, claiming the benefits of the veterans' preference law, being chapter 186, p. 359, Laws 1901. He was a soldier in the War of the Rebellion, received an honorable discharge, is a man of good reputation, who performed and can perform the duties of the office. The mayor investigated his qualifications and capabilities for city attorney, as well as those possessed by J. V. Humphrey, the defendant. As a result the mayor found and determined that plaintiff was not fully qualified to perform the duties of the office, and that he did not possess equal qualifications with the defendant, who had not been a soldier in the Civil War. Upon these considerations the mayor appointed the defendant on May 1, 1903, the appointment was confirmed by the city council, and defendant at once qualified and entered upon the duties of the office. The plaintiff thereupon instituted this quo warranto proceeding, claiming that the appointment was illegal, and the court, upon the testimony, found the foregoing facts, and concluded that he was not entitled to the office.

The plaintiff's term of office had expired, the duty to appoint his successor devolved upon the mayor, the defendant, who was conceded to be eligible and qualified for the office, was appointed, and if that appointment is not invalid the judgment of the trial court must stand. The correctness of the rulings and the validity of the judgment depend upon the constitutionality and the construction of the veterans' preference law (Gen. St. 1901, §§ 6500-6512). In *Goodrich v. Mitchell* (just decided) 75 Pac. 1034, the constitutionality of the statute was considered, and it was held to be valid.

Plaintiff contends that an ex soldier or sailor of a good reputation who can perform the duties of the office is entitled to be preferred and to an appointment, although other applicants may have superior qualifications and be better fitted for the place. The statute, as it appears to us, bases the preference

That rule is expressly declared in the first part of section 1, and must be accepted as controlling, unless it is nullified or modified by other parts of the same section. The law was first enacted in 1886, and section 1 was in these words: "In grateful recognition of the services, sacrifices and sufferings of persons who served in the army and navy of the United States in the War of the Rebellion and have been honorably discharged therefrom, they shall be preferred for appointment and employment to positions in every public department, and upon all public works of the state of Kansas, and of the cities and towns of this state, over other persons of equal qualifications, and the persons thus preferred shall not be disqualified from holding any position in said service on account of his age nor by reason of any physical disability, provided such age or such disability does not render him incompetent to perform the duties of the position applied for." Laws 1886, p. 211, c. 160, § 1. In 1901 the section was re-enacted, and at the end thereof the following was added: "And when any such ex-soldier or sailor shall apply for appointment to any such position, place or employment, the officer, board or person whose duty it is or may be to appoint any one to such position, shall before appointing any one to such position make an investigation as to the qualifications of said ex-soldier or sailor for such employment, and if he is a man of good reputation and can perform the duties of said position so applied for by him, said officer, board or person shall appoint said ex-soldier or sailor to such position, place or employment." In re-enacting the section of the law of 1886 the word "qualification" was pluralized, and the word "persons" was put in singular form, but it is clear that these changes do not affect the meaning of the statute. It is equally manifest that the Legislature did not intend to eliminate the requirement that there shall be equality of qualifications in order to obtain the preference. The clauses added by amendment provide that the appointing power shall make inquiry as to the qualifications of "such" ex soldier or sailor applying for a position, and if his reputation is good, and he can perform the duties of the place, it shall be given to him. It is true that the requirement that he should be of equal qualifications was not repeated in the latter part of the section, but obviously the person mentioned, whose qualifications are to be investigated, and who is to be appointed if found qualified and fitted for the position, is the one spoken of in the first part of the section, namely, a person who possesses qualifications equal to those of his competitors. If it had been the purpose to eliminate that feature of the former act, the Legislature would hardly have re-enacted it in the same terms in the amended section. It will be observed, also, that, in the amend-



ment providing for investigation and appointment, it refers to "such ex-soldier or sailor," that is, the one previously referred to who is of equal qualifications with others available for appointment. One purpose of the amendment was to prevent arbitrary and inconsiderate action in the making of appointments. So, in addition to providing that a veteran of equal qualifications shall be preferred, it prescribes a method of ascertaining the qualifications of those seeking preferential appointments. The different clauses under consideration, including the one providing for equality in qualifications, were chosen by the Legislature to express its purpose; they are all embraced in the same section, and, if possible, all should be given force and effect. It has been said that "it is a uniform rule of construction that one part of the statute should be construed by other parts of the same statute, so that, if possible, no clause or part shall be treated as superfluous, and especially when the two parts are parts of the same section." *Wenger v. Taylor*, 39 Kan. 754, 18 Pac. 911. Following this rule, it must be held that the equality clause was intentionally used by the Legislature to express its purpose, and the purpose manifestly was that the party given the preference provided for must possess equal qualifications for the place with those possessed by a competitor. The trial court took this view of the statute, and properly applied this interpretation to the facts in the case. In giving its opinion and judgment, it said that: "When a vacancy occurs in the office of city attorney, and an ex-soldier applies for the position, it then becomes the duty of the mayor to make an investigation as to the qualifications of such ex-soldier for the position of city attorney; and if such applicant is found to possess qualifications equal to or superior to other available applicants for the place, and is a man of good reputation, and is not disqualified on account of any physical disability or on account of age to perform the duties of this particular office, then it becomes the duty of the mayor, under his official oath, to appoint such ex-soldier applicant to the place. Any other construction to be placed on the statute would have the tendency to lessen the efficiency of the public service. A law would certainly be against public policy that would require anything less than the best available qualifications in public officials."

The duty of investigating and determining as to the qualifications of applicants for public position is placed on the appointing power—in this case upon the mayor. He did make inquiry, and did decide that the plaintiff did not possess equal qualifications for the office with defendant. That decision, which appears to have been honestly made, is not open to review or revision by the courts. The Legislature has placed the authority of making appointments mainly in the administrative officers and boards, and vest-

ed them with a discretion and judgment to determine who is best qualified to serve the public, and the general rule in such cases is that the courts cannot supervise the exercise of such authority, nor control the discretion and judgment so vested. *State v. Robinson*, 1 Kan. 188; *Emporia v. Gilchrist*, 37 Kan. 532, 15 Pac. 532; *Martin v. Ingham*, 38 Kan. 651, 17 Pac. 162; *Insurance Co. v. Wilder*, 40 Kan. 561, 20 Pac. 265; *Lynch v. Chase*, 55 Kan. 375, 40 Pac. 666; *Meffert v. Medical Board*, 66 Kan. 710, 72 Pac. 247.

In *Keim v. United States*, 177 U. S. 290, 20 Sup. Ct. 574, 44 L. Ed. 774, there was brought before the Supreme Court of the United States the action of the pension commissioner in dismissing a clerk who had been honorably discharged from the military service by reason of disability received in it. He was discharged because of a decision by the commissioner that his rating was inefficient. He claimed to be competent, and appealed to the courts. It was held, however, that an appointment to office involves the exercise of judgment; that the appointing power must determine the fitness of the applicant, whether he is qualified to discharge the public duties required of the office, and that the courts cannot interfere to direct or control the power and judgment thus vested. See, also, *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559; *Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354; *Redfield v. Windom*, 137 U. S. 636, 11 Sup. Ct. 197, 34 L. Ed. 811; *Boynton v. Blaine*, 139 U. S. 306, 11 Sup. Ct. 607, 35 L. Ed. 183; *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *De Cambra v. Rogers*, 189 U. S. 120, 23 Sup. Ct. 519, 47 L. Ed. 734.

The plaintiff insists that an unjust measure of qualifications was applied by the mayor. The character and extent of the investigation is not prescribed by the statute. The appointing power is expected to investigate in good faith, to fairly consider the qualifications, and to honestly determine the question submitted for decision. We discover nothing in the evidence or findings which impeaches the good faith of the mayor or would justify the court in treating the decision or the following appointment as nullities. Neither do we find any irregularity in the appointment of the defendant. The judgment of the district court will be affirmed. All the Justices concurring.

JOHN DEERE PLOW CO. v. JONES et al.<sup>1</sup>  
(Supreme Court of Kansas. March 12, 1904.)

APPEAL—RECORD.

1. The word "proceedings," in the recital of the case-made that it contains all the proceedings, includes the evidence.

Error from District Court, Ottawa County; R. F. Thompson, Judge.

Action by the John Deere Plow Company against R. L. Jones and another. Judgment for defendants. Plaintiff brings error. Reversed.

<sup>1</sup> New opinion substituted. See 67 Pac. 750.

J. B. Tomlinson, for plaintiff in error.  
Thompson & King, for defendants in error.

**PER CURIAM.** John Deere Plow Company, a Missouri corporation, sued R. L. Jones and Martha J. Jones upon a note. A demurrer to plaintiff's evidence was sustained, and this proceeding is brought to review that ruling. If the pleadings and evidence presented in the record here are the same as those upon which the trial court acted, it is evident that the demurrer was sustained merely because there was no showing that plaintiff had complied with the statutory requirements with respect to foreign corporations doing business in this state. If this is true, the judgment complained of was erroneous, for since its rendition this court has held that noncompliance with the statute in this regard is matter of defense. *Northrup v. Wills*, 65 Kan. 769, 70 Pac. 879. But defendants in error contend that the case-made does not show that it contains all the pleadings and evidence. Its recital is that it contains all the "proceedings." This term, as thus used, includes the evidence. *Lindsay v. Commrs. of Kearney Co.*, 58 Kan. 630, 44 Pac. 603. Whether it also includes the pleadings need not be determined, since to review the question presented it is not necessary that the record should contain all of the pleadings. The case-made here sufficiently shows that it contains the pleadings upon which the trial was had, and that is enough for present purposes.

The judgment is reversed, and a new trial ordered.

(68 Kan. 822)

#### ABBOTT v. ABBOTT.

(Supreme Court of Kansas, March 12, 1904.)

##### SALE OF LAND—GROWING CROPS—INSTRUCTIONS.

1. The only part of a crop in question being the landlord's portion, and this being understood by the jury, an instruction that a sale of land without any reservation as to growing crops carries with it crops is not misleading, though at the time of sale the land was occupied by a tenant.

Error from District Court, McPherson County; M. P. Simpson, Judge.

Action by L. Fern Abbott against Handsel A. Abbott. Judgment for plaintiff. Defendant brings error. Affirmed.

Frank O. Johnson, G. A. Vandever, and F. L. Martin, for plaintiff in error. Grattan & Grattan, for defendant in error.

**PER CURIAM.** This action was brought by Cora Belle Abbott and L. Fern Abbott against Handsel A. Abbott to recover 400 bushels of wheat, or \$200, its value. Before the cause was finally submitted, Cora Belle Abbott dismissed the action as to herself without prejudice, over the objection of the defendant. L. Fern Abbott recovered judgment, and defendant prosecutes this error.

This action was brought and prosecuted,

up to the time Cora Belle Abbott dismissed, upon the theory that Cora Belle Abbott was the owner of the west half of the southwest quarter of section eighteen (18), township twenty-one (21), range one (1) west, in McPherson county, and L. Fern Abbott was the owner of the east half of the southeast quarter of the same section; that this land had been rented in 1889 for a share of the crop, and the wheat in question was the landowner's share of this crop. Cora Belle Abbott failed to establish her ownership of the land claimed by her, and before final submission dismissed her action. The cause was tried, and the jury returned answers to the following questions: "(1) How many bushels of wheat, if any, did the defendant Handsel A. Abbott get off of the east  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 18 in question?" "400 bushels." "(2) Was there a contract with the tenant on the E.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of Sec. 18 as to share of wheat landlord was to have of the wheat harvested in 1900?" "Yes." "(3) If you answer question 2 in affirmative, then what was such share under said contract?" "One-third ( $\frac{1}{3}$ )."

"(4) How many bushels of wheat was the landlord entitled to under such contract?" "400 bushels." Judgment was rendered for plaintiff L. Fern Abbott.

The first error is predicated upon the order of the court dismissing the action as to Cora Belle Abbott without prejudice. Such procedure is authorized by subdivision 1 of section 4846 of the General Statutes of 1901, when done before final submission to the court or jury. *Ashmead v. Ashmead*, 23 Kan. 262. Both parties claimed through G. B. Abbott; the plaintiff as the owner of the land through a conveyance from him, the defendant as a purchaser of the wheat from G. B. Abbott. There is no evidence in the record tending to show that defendant had made such purchase. The deed to L. Fern Abbott was signed and acknowledged March 14, 1887, and recorded October 6, 1899. The crop in question was that harvested in 1890. There was some question as to the time of the delivery of the deed, but it appears to have been delivered before recorded. On the question as to whether growing crops pass with the title to the land in the absence of a special reservation, the court instructed the jury as follows: "Upon the question of ownership of growing wheat while it is growing upon the land, I instruct you that a sale or transfer of the title to the land without any reservation as to the growing crops carries with it the ownership in the crops growing thereon at the time of the transfer of the title to the land." It is argued that this instruction is misleading, and not applicable to this case, for the reason that the lands were occupied by a tenant when the deed was delivered; therefore the rule stated does not apply. The only part of the crop in question was the landlord's portion. This was understood by the litigants and the jury, and it could not have misled the jury as to that portion. The instruction correctly states the

law. There was no error in the admission or exclusion of evidence, and the jury found all of the disputed facts on sufficient evidence for the plaintiff.

The judgment is affirmed.

(68 Kan. 824)

**ABBOTT v. ABBOTT.**

(Supreme Court of Kansas. March 12, 1904.)

**ACTION BY NEXT FRIEND.**

1. Judgment for plaintiff in an action commenced in the name of an infant by her mother, designated in the title as "guardian," will not be reversed, though there was no allegation or proof that she had been appointed guardian, because she was not formally designated as next friend.

Error from District Court, McPherson County; M. P. Simpson, Judge.

Action by Laura Beatrice Abbott against Hansel A. Abbott. Judgment for plaintiff. Defendant brings error. Affirmed.

Frank O. Johnson, Geo. A. Vandever, and F. L. Martin, for plaintiff in error. Grattan & Grattan, for defendant in error.

**PER CURIAM.** In this case the action was commenced in the name of a minor by her mother, designated in the title as "guardian," and, it was said, by another person called an "attorney in fact." No appointment as guardian was alleged or proved. The mother, however, was a natural guardian, and assumed all the duties and liabilities and became subject to all the obligations and restraints of a next friend. The action was for the benefit of the infant, and the mother was as substantially a next friend, so far as the conduct of the cause was concerned, as if she had been so described; and, since the trial court has accepted the offices and approved the conduct of the party who in fact bore to the infant the relation of next friend, this court will not now overturn a verdict and judgment for lack of a formality in name which could have been supplied, if necessary, at any time either before or after judgment.

The admissions of the defendants removed from the controversy the question of ownership of the land by the infant's grantor. It was also admitted that the wheat sued for was rent wheat, and the amount and values were agreed upon. There could be no controversy, therefore, but that the wheat was a share of the crop, which, under the statute, belonged to the landowner and passed by his deed.

None of the claims of error are of substantial merit, and the judgment of the district court is affirmed.

(68 Kan. 670)

**HANSON v. KREHBIEL.**

(Supreme Court of Kansas. March 12, 1904.)

**LIBEL—CONSTITUTIONAL LAW—RETRACTION—DUE COURSE OF LAW.**

1. Chapter 57b, Gen. St. 1901 (chapter 249, p. 499, Laws 1901), relating to libel, is unconstitutional and void, being in conflict with section 18 of the Bill of Rights, in this: that it denies the right in certain cases to one injured in his reputation to have remedy therefor by due course of law.

2. "Remedy by due course of law," as used in section 18 of the Bill of Rights, means the reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure, after a fair hearing.

3. The right to a remedy by due course of law is not satisfied by the requirement contained in a statute to make specific reparation for the injury done, which reparation is the same in all cases, and bears no relation to the injury suffered, nor has been decreed by a tribunal after ascertainment of the extent of such injury.

4. While one part of a statute may be unconstitutional and void, and another part good, this is the case only where the portions are clearly separable and susceptible of separate enforcement, but when it is apparent that the entire faulty enactment is designed to constitute a complete whole, and that one part would not have been enacted except in connection with the other, if a part is found to be bad the entire statute must fall.

5. A false publication, charging that one had been arrested accused of an assault and in attempting to collect a bill he threatened violence with a pistol, is libelous per se, and the libeled one may have general damages, without alleging or proving specific injury.

(Syllabus by the Court.)

Error from District Court, McPherson County; M. P. Simpson, Judge.

Action by John F. Hanson against William J. Krehbiel. Judgment for defendant, and plaintiff brings error. Reversed.

John F. Hanson, in pro. per. P. J. Galle, for defendant in error.

**CUNNINGHAM, J.** Plaintiff's action was for the recovery of damages occasioned by the publication of an alleged libel. The question of greatest moment involved is as to the constitutional validity of chapter 57b, Gen. St. 1901, being chapter 249, p. 439, Session Laws 1901, which reads as follows:

"Section 1. That before any civil action shall be brought for the publication or circulation of a libel in any newspaper in this state, the plaintiff shall at least three days before filing the petition in such action, serve notice on the publisher or publishers of such newspaper, at the principal office of publication, specifying the statement in said article which is alleged to be false or defamatory. If it shall appear on the trial of such action that said article was published in good faith, that its falsity was due to mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein contained alleged to be erroneous was published in the next regular issue of said newspaper, if a weekly or monthly, or, in case of a daily paper, within three days after such mistake or misapprehension was brought to the knowledge of such publisher or publishers, in as conspicuous a place and type in such newspaper as was the article complained of as libelous, then the plaintiff in such case shall recover only actual damages: provided,

¶ 4. See Statutes, vol. 44, Cent. Dig. § 52.

that the provisions of this act shall not apply to the case of any libel against any candidate for a public office in this state unless the retraction is made editorially, in a conspicuous manner, at least ten days before election, in case such libelous article was published in a daily paper, and in case such libelous article was published in a weekly or monthly paper, at least fifteen days before the election: provided further, that nothing in this act shall be held to apply to any libel published of or concerning any female person.

"Sec. 2. The words 'actual damages,' in the foregoing section, shall be construed to include all damages which the plaintiff shall show he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages whatever."

This is assailed as being violative of section 18 of the Bill of Rights, which is: "All persons for injuries suffered in person, reputation or property shall have remedy by due course of law and justice administered without delay."

It will be noted that the questioned statute limits the right of recovery in cases of libel to actual damages, where, after service of the notice provided in the first section, the publisher of the newspaper in which the libelous matter has appeared shall make a full and fair retraction of the libelous matter, coupled with a showing upon the trial that the same was published in good faith, under a misapprehension of the facts; and defines that class of damages to be such as the plaintiff has suffered in respect to his property, business, trade, profession, or occupation. So that in such cases the libeled party may not recover all his damage, but he is confined to the narrow class designated and defined in the act as "actual damages." The common law recognizes two classes of damages in libel cases—general and special. General damages are those which the law presumes must naturally, proximately, and necessarily result from the publication of the libelous matter. They arise by inference of law, and are not required to be proved by evidence. They are allowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss had in fact resulted; and are designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation, consequent upon the malicious publication of the false and libelous matter. The injury for which this class of damages is allowed is something more than merely speculative. While not susceptible of being accurately measured in dollars and cents, it is a real one, and more often than otherwise more substantial and real than those designated as actual, and measured accurately by the dollar standard. In short, it is such an injury to the reputation as was contemplated in the

Bill of Rights. The law presumes that this class of injuries resulted necessarily from the publication of the libelous matter, and the damages therefore were recoverable without special assignment. Special damages were also recoverable when properly pleaded and shown, and were such damages as were computable in money, and may be said to be fairly embraced in the list of actual damages as given in the statute referred to. This was the condition of the law at the time of the adoption of our Constitution, and is now, and these the injuries to reputation for which it provided that there should be "remedy by due course of law."

It requires no argument to demonstrate that the act in question does deny remedy for a portion of these injuries. Unless the one libeled has suffered in the particular manner pointed out in the statute, he is remediless. For that other large class of persons and still larger class of injuries no remedy is found. From the writings of the world's wisest man we have the assurance "that a good name is rather to be chosen than great riches." Yet the possessor of this thing of greatest value, being despoiled of it, is left entirely without remedy for its loss by the statute in question, except in such rare cases as he shall be able to show some exact financial injury in the particulars named. We could not excuse ourselves for holding that reputation is less valuable than property, or that it is less protected from spoliation by the quoted provision of the Bill of Rights.

It is suggested, however, that the retraction required by the act to be published is a fair compensation for the injury done, and a reinvestment of the libeled one with his good name. This being done, all has been accomplished that would be by a verdict of a jury, and hence that the retraction required by the legislative enactment is, if not "due course of law," an ample substitute for it. It is not an easy task to deduce either from reason or the authorities a satisfactory definition of "law of the land" or "due course of law." We feel safe, however, from either standpoint, in saying these terms do not mean any act that the Legislature may have passed if such act does not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or having been deprived of either does not afford a like opportunity of showing the extent of his injury, and give an adequate remedy to recover therefor. Whatever these terms may mean more than this, they do mean due and orderly procedure of courts in the ascertainment of damages for injury, to the end that the injured one "shall have remedy"—that this proper and adequate remedy—thus to be ascertained. To refuse hearing and to deprive for injury after its infliction is small compensation from infliction of penalty before and without hearing.

In *Hoke v. Henderson*, 15 N. C. 1, 15, 41 Am. Dec. 688, Chief Justice Ruffin, in spe-

of the land (or due course of law) do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be 'taken, imprisoned, disseised of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed; and be deprived of his property, his liberty, and his life'—without crime? Yet all these he may suffer if an act of assembly simply denouncing those penalties on particular persons, or a particular class of persons, be in itself a law of the land within the sense of the Constitution." Mr. Webster, in the Dartmouth College Case, has this definition: "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. \* \* \* Everything which may pass under the form of an enactment is not, therefore, considered to be the law of the land." *Dartmouth v. Woodward*, 4 Wheat. 519, 4 L. Ed. 629. See, for other definitions, *People ex rel. Witherbee v. Supervisors*, 70 N. Y. 228; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *State v. Billings*, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525; *Burdick v. The People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557.

The retraction required by the act in question may or may not be full reparation for the injury suffered. It might the rather aggravate the injury already inflicted than mollify it. It is sufficient to say, however, that all these are questions for the courts upon proper notice to all parties, and may not be determined arbitrarily by an act of the Legislature.

We find that courts of last resort in two states have passed upon the constitutionality of acts like the one here discussed. In *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544, the Supreme Court of Michigan, holding against the constitutionality, says: "We do not think the statute controls the action, or is within the power of constitutional legislation. This will, in our judgment, appear from a statement of its effect if carried out. It purports to confine recovery in certain cases against newspapers to what it calls 'actual damages,' and then defines actual damages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases the proof of any damages in this sense would be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, profession, or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worst cases of libel. A woman who is slandered in her chastity is, under

ever. A man whose income is from fixed investment or salary or official emolument, or business not depending upon his repute, could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. If contradicted soon, there could be practically no risk of this. And the same is true concerning most business losses. The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be directly traced to the mischief. There could never be any loss when employers or customers know or believe the charges unfounded. The statute does not reach cases where a libel has operated to cut off chances of office or employment in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced without the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable. There is no room for holding, in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief." This case has subsequently been specifically approved by the same court in *McGee v. Baumgartner*, 121 Mich. 287, 80 N. W. 21, where the court holds: "The right to recover in an action of libel for damages to reputation cannot be abridged by statute." A contrary view was adopted by a divided court in *Allen v. Pioneer Press Co.*, 40 Minn. 117, 41 N. W. 936, 3 L. R. A. 532, 12 Am. St. Rep. 707. The conclusion of the court in this case is based largely upon the reasoning that the retraction being required, as it is, to be published as widely and to substantially the same readers as the original, is usually a more complete redress for the injury inflicted than would be a judgment for damages. This, however, is merely an assumption, and may or may not be true; but, even if true, this would not be "remedy by due course of law," as contemplated in the Constitution, as we have already determined. We are well persuaded that the criticised act takes from the libeled person the right of remedy by due course of law for an injury suffered in his reputation, and hence is invalid under the quoted constitutional provision.

The questions in this case arise upon the sustaining of defendant's general demurrer to plaintiff's petition. That petition contained no statement of the service of the notice as provided in the criticised act, and it is

now claimed, admitting the constitutional invalidity of this act, because it denies remedy by due course of law, still the Legislature would have a right to require the service of this notice as a step in the procedure in prosecuting an action for the recovery of damages occasioned by libel; this in order to give the publisher opportunity of retraction for the purpose of mitigating general damages and relieving himself from punitive damages. We do not deny that the Legislature might do this. It seems to us, however, that such was not its purpose and object, but rather that the service of this notice was but a step in the procedure to relieve publishers from all general damages. That object having been found unconstitutional, these ancillary matters must go with it.

It is further suggested that the subject-matter of the alleged libel was not libelous per se, and hence that the demurrer was properly sustained, the petition containing no allegation of special damage. The libelous matter set out was in the following language: "A second case was called late this afternoon, in which John F. Hanson, of Marquette, is accused of assault on M. A. Fosberg and Louise Fosberg. It is claimed that in attempting to collect a bill he threatened violence with a pistol. The latter parties are the complaining witnesses. The decision of the case will be announced later." A libel, in order to be actionable per se, and permit a recovery without allegation and proof of special damages, must contain imputations which tend to subject the libeled one to disgrace, ridicule, or contempt. We are of the opinion that the words here counted upon are such. To threaten violence with a pistol might fairly be held to be a charge at least of an assault, maybe of a crime of greater gravity.

We find that the court was in error in sustaining defendant's demurrer; hence direct that this ruling be reversed, and the case remanded for further proceedings. All the Justices concurring.

(68 Kan. 732)

#### PING MIN. & MILL. CO. v. GRANT.

(Supreme Court of Kansas. March 12, 1904.)

##### MINORS—CONTRACTS—PERFORMANCE.

1. A contract with a minor, under which he performed personal services for an employer, is not to be regarded as inoperative or void, merely because of minority, or that the consent of his parents was not first obtained. Payment to the minor is a full satisfaction for such services, and the parents or guardian cannot recover therefor.

(Syllabus by the Court.)

Error from District Court, Cherokee County; A. H. Skidmore, Judge.

Action by B. W. Grant, a minor, against the Ping Mining & Milling Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Edward E. Sapp, for plaintiff in error.  
Finch & Wheatley, for defendant in error.

JOHNSTON, C. J. This was an action brought by B. W. Grant, a minor, to recover from the Ping Mining & Milling Company for personal services rendered as bookkeeper. He recovered \$213.60, and of some of the rulings made the company complains.

There is a contention that a recovery was not warranted because Grant was a minor. The petition alleges, and the record discloses, that he was about 20 years of age when the contract was made and the services performed. The mere fact of minority, however, does not bar a recovery or defeat the judgment. While the parents are the natural guardians of the infant, and ordinarily control him and his services, binding contracts may be made by the infant. Contracts for his benefit may be upheld, and among these are contracts for necessities, as well as contracts of service. As a contract of service may be beneficial to a minor, it would, generally speaking, be binding upon him, and, as between the infant and a third person, such a contract is not to be regarded as void, merely because the previous consent of the parent may not have been given. Here no claim was made by the parent, and the record does not show that either of the parents of the minor are living, or, if living, that they have not relinquished their right to his services and time. It is shown that the contract for service was made with the minor, and with him alone; that the services have been rendered in accordance with the contract; and, under the statute, the mining company is fully protected in a payment of the services to him. In section 4185, Gen. St. 1901, it is provided that: "When a contract for the personal services of a minor has been made with him alone, and those services are afterwards performed, payment made therefor to such minor in accordance with the terms of the contract is a full satisfaction for those services, and the parent or guardian cannot recover therefor."

The amended petition fairly states that the claim for services was due when the action was commenced, and the objection made to the pleading is not good. The proof sufficiently establishes the claim for services, and the objections made to the admission of testimony are not substantial.

Judgment affirmed.

(68 Kan. 612)

#### KENNEDY et ux. v. GIBSON.

(Supreme Court of Kansas. March 12, 1904.)

##### MORTGAGE—CONSTRUCTION—OPTION IN NOTE—DEFAULT IN INTEREST—LIMITATIONS—DEFENSES.

1. Where a promissory note provides that default in the payments of interest shall mature the whole debt, at the option of the holder, and a mortgage given to secure payment of the note provides that defaults shall mature the debt, but makes no mention of an option in the holder, the provision in the note will control.

not exercise the option and declare the debt due, the statute of limitations will not begin to run until the expiration of the time originally fixed for the payment of the note.

3. An answer alleging illegality and fraud in the inception of a note sets up a defense, and the presumptions in favor of the right and title of the holder are overcome; and, to meet such a defense, it devolves upon the holder to show that he or some antecedent holder took the note before maturity, in good faith, for value, and in the usual course of business.

(Syllabus by the Court.)

Error from District Court, Ellis County; Lee Monroe, Judge.

Action by Charles E. Gibson against David Kennedy and Maggie Kennedy. Judgment for plaintiff, and defendants bring error. Reversed.

Action by Charles E. Gibson to recover on a promissory note for \$600 executed by David Kennedy and wife in favor of L. N. Bessette, and to foreclose a mortgage given to secure its payment. The note and mortgage were transferred to one Jenness, and by him to Gibson. The note contained a stipulation that if default was made in payment of interest, or there was noncompliance with the requirements of the mortgage, the principal and interest should all become due and payable at once, at the option of the holder. The mortgage, on the other hand, contained a provision that if default was made in the payment of interest or taxes, or if the insurance was not kept up, the mortgage should become absolute, and the whole of the debt should become due and payable. A demurrer to the petition was presented, which raised the question whether or not the action was barred by the statute of limitations, but it was overruled. The answer was: First. A general denial. Second. That the notes were without consideration and void, as the defendants were never indebted to Bessette, Jenness, or Gibson when the notes were executed, nor since that time, in any sum of money. Third. "That the said notes were obtained from the said defendants by and through the fraud, false representations, oppression, and coercion of one E. C. Waldo, who was the agent of the said L. N. Bessette mentioned in plaintiff's petition filed herein at the time the said notes purport to have been given by these defendants, and taken in the name of the said L. N. Bessette, and that the said notes were procured by the fraudulent means and false representations of the said E. C. Waldo, agent as aforesaid, in this, to wit: That prior to the time of the alleged giving of the notes sued upon in this action, on, to wit, during the months of July and August, 1892, the said defendants sought to secure an extension of the time of payment upon a then existing mortgage upon the premises described in the plaintiff's petition, which said mortgage and the note, the

became due and payable on the 1st day of September, 1892. That the said E. C. Waldo claimed to represent the then reputed owner and holder of the said note and mortgage last above mentioned, one John Leighton, of Portsmouth, New Hampshire, and to whom they had, before that time, paid the interest on the note which the last above mortgage was given to secure. That the said E. C. Waldo represented to these defendants that he had heard from their man, John Leighton, and requested them to come into his office in Ellis, Kansas, and sign up papers to complete said extension; and that said request was made at or after the time the said note and mortgage became due and payable. That said defendants, relying upon said representations of the said E. C. Waldo came at the time and place appointed by the said E. C. Waldo, for the purpose of extending the time of payment of the mortgage aforesaid, and for no other purpose. That the said E. C. Waldo then presented these defendants with the note and mortgage sued upon in this action, and that these defendants then and there objected to signing the same for the reason that they were not made payable to the said John Leighton, who was represented to be the then owner and holder of the note and mortgage, the payment of which was sought to be extended by these defendants. That these defendants then and there, and before that time, told the said E. C. Waldo, agent as aforesaid, that they wanted an extension of the time of payment on the old note and mortgage, and nothing else, and to contract for the same with the said John Leighton, and no other person, as he was represented by the said E. C. Waldo to be the owner and holder of the said note and mortgage, the payment of which was sought to be extended; and these defendants then and there refused to contract with the said L. N. Bessette. Thereupon the said E. C. Waldo represented to these defendants that the said L. N. Bessette was a partner of the said John Leighton, who lived in Portsmouth, New Hampshire, and that he, the said L. N. Bessette, was interested in the old mortgage, and assured these defendants that by contracting with the said L. N. Bessette they were contracting with the said John Leighton, which representations were wholly false and untrue, as the said E. C. Waldo well knew at the time, and were so willfully and falsely made by the said E. C. Waldo for the purpose of procuring the notes and mortgage sued upon in this action, and that, at the time the notes sued upon in this action purport to have been given by these defendants, they did not receive the return of the old note and mortgage, nor any release thereof, nor any money or any other consideration from the said L. N. Bessette, nor at any other time. That, shortly after the said fraudulent procurement of the notes and mortgage sued upon in this action, these defendants

learned that the said representations of the said E. C. Waldo were wholly false and untrue, and that the said L. N. Bessette was the cashier of the Merchants' State Bank of Ellis, in Ellis county, Kansas, and was in the bank at the time said notes and mortgage were procured, but never revealed his whereabouts or identity to these defendants. That, when these defendants learned the same, and that the aforesaid representations of the said E. C. Waldo were wholly false and untrue, they went to the said E. C. Waldo and the said L. N. Bessette, at the Merchants' Bank of Ellis, and told them, as they had done all along, that they did not want to contract, and would not contract, with any person connected with said bank, or any other person other than the said John Leighton, and demanded the return of the notes and the mortgage sued upon in this action, and other papers connected with the transaction. That said E. C. Waldo and L. N. Bessette refused to return said notes and mortgage and other papers, and thereupon these defendants then and there notified the said E. C. Waldo and L. N. Bessette that, by reason of the aforesaid fraud, misrepresentations, and want of consideration, they would never pay a cent of said note. That said defendants gave notice to all parties concerned, including the plaintiff herein, that said notes and mortgage were procured by fraud, misrepresentation, deceit, and were without consideration and void, and that payment of the same would be resisted. That said defendants did not owe L. N. Bessette the said amount named in said notes sued upon in this action at the time said notes purport to have been given by these defendants, and did not receive any consideration therefor, and do not owe him, nor David Jenness, nor the plaintiff herein, the said sum of money sued for on said notes, or any other sum whatever." The fourth defense related to the alleged invalidity of the assignment of the note and mortgage, and the fifth pleaded the statute of limitations. The sufficiency of the second and third defenses of the answer was challenged by a demurrer, which was sustained by the court. Upon a trial had, the court found in favor of the plaintiff, and gave judgment against the Kennedys for the amount of the note and accrued interest, and decreed a foreclosure of the mortgage.

David Rathbone, J. P. Shutts, and J. T. Nolan, for plaintiffs in error. W. E. Saum, for defendant in error.

JOHNSTON, C. J. (after stating the facts). The first contention is that, under the averments of the petition, the action was barred by the statute of limitations, and therefore the demurrer should have been sustained. The note was dated September 1, 1892, and was payable September 1, 1897. According to the date fixed for maturity, the statute

would not bar the note until September, 1902, and this action was brought in May, 1900. The contention, however, is that maturity was accelerated by the stipulations as to the effect of default in the payments of interest. The default occurred on March 1, 1893, and it is claimed that the cause of action accrued at that time. The note provided that a default should mature the entire debt, at the option of the holder, while the provision in the mortgage was that a default made the whole debt due, regardless of an election by the holder. Which of these provisions should control? In the absence of an option clause in the note, the stipulation in the mortgage would have operated to have matured the whole debt upon a default, and the mortgagors could have taken advantage of the stipulation. *National Bank v. Peck*, 8 Kan. 660. The stipulation in the note as to default, however, conflicts with that of the mortgage, and, of necessity, the former controls. The note contains the obligations of the mortgagors, and the mortgage, concurrently executed, is an incident to and security for the note. The stipulation in the note must therefore prevail, and, unless the holder exercised the option and elected to declare the whole debt due, the statute would not run earlier than the time originally fixed for the maturity of the note. *Hutchinson v. Benedict*, 49 Kan. 545, 31 Pac. 147; *Keys v. Lardner*, 55 Kan. 331, 40 Pac. 644; *Investment Co. v. Mitchell*, 6 Kan. App. 317, 51 Pac. 57; *Wilcox v. Eadie*, 65 Kan. 459, 70 Pac. 338. As the holder did not exercise the option to declare the whole debt due, the statute did not begin to run until September 1, 1897, and hence the bar was not complete when the action was brought.

The sustaining of the demurrer to the defenses set up in the answer is assigned as error. The effect of the allegations is that there was fraud in the inception of the note and mortgage, and the verified answer put in issue the averments as to the transfer of the paper. While the defenses are not clearly and tersely stated, they do set forth that the execution was obtained by false representations and fraud. In substance, it was averred that the makers were indebted to one Leighton, who had been represented by Waldo. At the request of Waldo, the Kennedys met him for the purpose of securing an extension of the Leighton debt. Waldo represented that he had authority from Leighton to make the extension, and they relied on his representations. When he presented a note and mortgage for execution, they noticed that it was made out in favor of Bessette, and declined to execute them, as their purpose was to make papers in extension of the old note and mortgage held by Leighton. Waldo then said that Bessette was a partner of Leighton, and was interested with him in the old note and mortgage, and that in dealing with him they were in fact dealing with Leighton. On those representations the



note and mortgage in question were executed, but the statements were all false, and were fraudulently made for the purpose of procuring the Kennedys to make the note and mortgage in question. The old notes and mortgage were not returned to them, nor were they released, nor was any money or other consideration given them for the notes in suit. Shortly after the notes were so fraudulently procured, the Kennedys learned that the representations of Waldo were wholly false; that Besette was not connected with Leighton, but was connected with a bank in which the notes were executed, and, although present when executed, he did not reveal his identity. They at once went to Waldo and Besette, and challenged their fraudulent action, demanded the return of the note and mortgage, and warned them and all parties concerned that, on account of the fraud and lack of consideration, the note and mortgage were void, and would not be paid by them. The averments are to the effect that the note and mortgage were obtained from them by deception and fraud, in the belief that they were extending an indebtedness already existing. This belief was induced by the representations that there was authority from the holder of the debt to extend the credit by the execution of the new note and mortgage. These representations were false, there was no such authority, the old note and mortgage were not surrendered or canceled, and the makers received no consideration whatsoever. As the note was obtained by fraud, it devolved upon the holder to show that he received it bona fide, in the usual course of business, and under circumstances which create no presumption that he knew any facts which impeached its validity. *Brook v. Teague*, 52 Kan. 119, 34 Pac. 347. Having stated facts which, if proven, establish fraud in the inception of the note and mortgage, the presumptions in favor of the holder's right and title were overcome, and a defense was made out. To meet such a defense, it will be incumbent on Gibson to show that he or some antecedent holder took the paper before maturity, in good faith, for value, and in the usual course of business. The plaintiff did not acquire the note and mortgage until 1890, long after maturity. Then, again, the allegations of the transfer of the paper before maturity were denied; and there was an averment that all of the interested parties were warned of the invalidity of the note and mortgage, and that other acts were done tending to show an absence of negligence by the Kennedys. Whatever the facts may be, as developed by the testimony, the averments set up in the answer as defenses are sufficient, we think, to repel the demurrer.

The other objections are not material, and do not require special attention; but, for the errors mentioned, the judgment will be reversed, and the cause remanded for further proceedings.

(68 Kan. 821)

## MAXWELL et al. v. COFFEYVILLE MINING &amp; GAS CO.

(Supreme Court of Kansas. March 12, 1904.)

## ESCAPING GAS—NEGLIGENCE—EVIDENCE.

1. Evidence merely that defendant maintained a gas well 50 feet from plaintiff's premises, and that gas accumulated in plaintiff's cellar, causing an explosion, and that gas was found in water wells within a radius of 200 feet of the gas well, is insufficient to warrant a conclusion that the gas came from defendant's well, or that defendant was negligent.

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by A. S. Maxwell and others against the Coffeyville Mining & Gas Company. Judgment for defendant. Plaintiffs bring error. Affirmed.

A. B. Clark and J. D. Brown, for plaintiffs in error. H. C. Dooley and J. B. Ziegler, for defendant in error.

PER CURIAM. The action of plaintiff in error, who was plaintiff below, was for the purpose of recovering damages caused to a stock of goods owned by him, and occasioned by the explosion of natural gas in the cellar of a building in which he was doing business. The court sustained a demurrer to plaintiff's evidence, which action is his claimed ground of error. The allegations of the petition were substantially that the defendant had constructed and was maintaining a gas well about 50 feet from the premises occupied by the plaintiff; that, in so constructing and maintaining, it was guilty of negligence, in not properly casing the well, and in capping the casing and confining the pressure of gas so that it escaped through the faulty casing into and through the crevices in the earth, and thereby accumulated in the cellar, where, upon being ignited, it exploded, and caused the injury of which plaintiff complained. In support of this petition, the evidence showed that the defendant bored and was maintaining this well, which was within 50 or 60 feet of the premises occupied by the plaintiff; that three wells of water within a radius of some 200 feet from the gas well, subsequent to its boring, became impregnated with gas so as to become unfit for use; that gas had at various times prior and subsequent to the explosion escaped from some source into the cellar under the building occupied by plaintiff; that gas escaped along the curb of the street in front of the plaintiff's place of business. This was substantially all of the evidence going to show any negligence on the part of the defendant, or leading to the conclusion that the gas which caused the explosion came from the well maintained by it. There was no effort made to show any fault in the casing of the well, of other defect, nor that there were no other gas wells in the immediate vicinity of the premises from which gas might have escaped. In short, nothing except the fact that defendant maintained

this gas well, and that gas accumulated in the cellar, and was found in the water wells, as above stated, was shown. We do not think that this showing warranted the conclusion either that the gas which caused plaintiff's injury came from defendant's well, or that the well had been negligently constructed or was being negligently maintained. Therefore the court correctly sustained the defendant's demurrer to the evidence.

The judgment will be affirmed.

(68 Kan. 791)

#### In re DAVIES.

(Supreme Court of Kansas. March 12, 1904.)

HABEAS CORPUS—QUESTIONS DETERMINED—  
GRAND JURY—EVIDENCE—PUBLIC POLICY.

1. A grand juror was discharged by the court from the panel because it appeared that a criminal prosecution was pending in the same court against him. Another juror was ordered summoned to fill the place. The jury was then sworn and charged. *Held*, that the grand jury was at least a de facto body, and that its legality was not the subject of attack or inquiry in a habeas corpus proceeding.

2. It is not against public policy to require a banker to disclose the amount of a depositor's balance, nor are the transactions between a banker and depositor privileged or confidential in a legal sense.

(Syllabus by the Court.)

Action by William E. Davies for a writ of habeas corpus. Denied.

At the November, 1903, term of the district court of Clay county, a grand jury was impaneled, charged, and sworn. It entered on the performance of its duties, and was investigating the conduct of one John Bellringer to determine whether he had committed perjury in making a return under oath to the assessor of Highland township in said county in June, 1903, in omitting to set forth all personal property which by law he was required to list for the purpose of taxation. To ascertain the amount of money Bellringer had on deposit on March 1, 1903, the petitioner, William E. Davies, was called before the grand jury, and, being sworn, testified that he was the cashier of the Bank of Green, and that John Bellringer, a citizen of Highland township, was a customer of the bank. This question was then propounded to the witness: "I will ask you to state, Mr. Davies, the amount of money Mr. John Bellringer had on deposit in the Bank of Green March 1, 1903." The petitioner objected to answering on five grounds. Those relevant to this proceeding were: "Third. I object, protest, and refuse to disclose any matters pertaining to the business relations between the bank and its patrons and customers, for the reason that the grand jury is without authority in law to require any officer of the bank to make a disclosure of such matters. Fourth. I object and refuse to disclose any matters pertaining to the business relations between the bank, of which I am an officer, and its customers and patrons, for the reason that

the making of such disclosures would be destructive of the bank's property and its assets, and would destroy public confidence in the bank, and for the further reason that all such matters are privileged communications, and I have no right or authority in law to disclose the relations that are privileged. Fifth. I object to the question, and refuse to answer the question, and refuse to disclose any of the business relations between the bank, of which I am an officer, and its patrons and customers, for the reason that the demand upon me to do so is violation of my rights and the rights of the bank of which I am an officer, and of the customers and patrons of the bank, as declared by the Constitution of the state of Kansas in section 15 of the Bill of Rights, and of the Constitution of the United States as contained in article 4 of the amendments to the United States Constitution." The grand jury submitted to the court in writing the question asked, together with the objections of the witness. The court held that the question was a proper one. Petitioner was again called before the grand jury, and again interrogated. On his refusal to answer he was brought before the court, adjudged guilty of contempt, a fine of \$25 imposed, and he was ordered by the court to stand committed to jail until the amount was paid. In the journal entry of the proceedings is the following recital: "And it appearing to the court that said Ernest Lindner is defendant in a certain criminal action now pending in said court, he was discharged from further attendance as a grand juror." On the order of the court another person was summoned to fill the place of the excused juror. Thereupon a foreman was appointed by the court, and the jury sworn and charged. This is a proceeding in habeas corpus for petitioner's discharge from imprisonment for the contempt as above set forth.

F. L. Williams, for petitioner. R. C. Miller, for respondent.

SMITH, J. (after stating the facts). 1. Counsel for petitioner contends that the discharge of the grand juror Lindner was an arbitrary act of the court, without justification in law, and that the substitution of another person in his stead divested the grand jury of jurisdiction to inquire concerning crimes committed in the county, or to indict persons therefor. It is unnecessary to discuss the question further than to say that the grand jury, when it propounded the question which the petitioner refused to answer, was a de facto body at least. *The State v. Marsh*, 13 Kan. 396; *In re McElroy*, 10 Kan. App. 348, 58 Pac. 677; *The State ex rel. Dunn v. Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, 41 Am. St. Rep. 45; *In re Gannon*, 69 Cal. 541, 11 Pac. 240; *Ex parte Haymond*, 91 Cal. 545, 27 Pac. 859. The four cases last cited hold to the doctrine that the legality of a de facto grand

jury cannot be inquired into on habeas corpus proceedings for discharge from commitments based on indictments found by such body, under the rule that the acts of de facto officers cannot be questioned collaterally. See, also, *Andrews v. Swartz*, 156 U. S. 272, 15 Sup. Ct. 389, 39 L. Ed. 422.

2. It is next insisted that the petitioner should be discharged, because the matter concerning which he was interrogated was privileged, and that to require a disclosure by a banker of the amount standing to a depositor's credit on the bankbooks would be against public policy. Counsel thus contending frankly admits that he has found no adjudicated case which sustains his position. The relation of debtor and creditor exists between a depositor and banker. By the inquiry in this case it was sought to ascertain how much the bank owed Bellringer on March 1st. The ordinary debtor would hardly stop to assert a privilege in his behalf to protect him from disclosing the amount owing by him to another. Again, it is argued that, to permit grand juries or courts to inquire into such private affairs of business men would cause withdrawal of deposits from banks annually for many weeks preceding the 1st of March—some to escape taxation, others to avoid publicity. It is a sufficient answer that annoyance to depositors, or the loss to banks predicted by counsel, has never appealed to courts or legislatures with enough force to work a change in the rules of evidence. In the case of *Loyd v. Freshfield*, 2 C. & P. 325, decided in 1826, it was held that a banker was bound to answer what a party's balance was on a given day, as it was not a privileged communication. The rule finds approval in the text-books. 2 *Taylor on Evidence*, § 915; *Greenleaf on Evidence* (15th Ed.) § 248. See, also, *Mackenzie v. Taylor*, 6 L. C. J. 83; *Hannum v. McRae*, 18 Ontario P. R. 185. That to compel a disclosure from the witness would be an unreasonable search for and seizure of the depositor's property is untenable. To obtain information from a witness of the amount and location of another's money or property cannot come within the constitutional inhibition against unreasonable searches and seizures. There was nothing confidential, in a legal sense, between Davies, the banker, and his depositor, which would allow the former to assert that the business transactions between them were privileged.

The writ of habeas corpus will be denied, and the prisoner remanded. All the Justices concurring.

(66 Kan. 642)

**WURTENBERGER v. METROPOLITAN  
ST. RY. CO.**

(Supreme Court of Kansas. March 12, 1904.)

**INJURY TO EMPLOYEE—DEMURRER TO EVIDENCE—CONTRIBUTORY NEGLIGENCE.**

1. A workman, while operating a hydraulic jack, expressed fears to the foreman in charge

of the work that further pressure would cause an iron bar standing between the jack and a steel beam on which one end of the jack rested to fly out, and asserted that the arrangement was not safe. The foreman assured him to the contrary, and directed him to go ahead with the work. The workman was inexperienced in the use of such appliances, and testified that he believed the foreman. On resuming work the renewed pumping of the jack caused the end next the beam to turn the iron wedge, which flew out and injured the workman. Held that, in an action for damages by the latter against a corporation in whose service the foreman was employed, a demurrer to the evidence interposed by the company was improperly sustained.

2. Where a master orders a servant into a situation of danger, and, in obeying the command, he is injured, the law will not charge him with contributory negligence, or with an assumption of the risk, unless the danger was so glaring that no prudent man would have encountered it, even under orders from one having authority over him.

Smith, J., dissenting.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by William Wurtenberger against the Metropolitan Street Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

This was an action for personal injuries. Plaintiff below (plaintiff in error here) and three other men were taking down and removing machinery from an unused power house of the street railway company. They were common laborers. The work was done under the orders of Charles Voght, a division superintendent, and Richard De Groff, a foreman. At the time Wurtenberger was hurt, he, with the others, was attempting to remove a large wheel from its shaft by forcing the shaft through the wheel by the aid of a hydraulic jack. The wheel was first securely fixed in place. One end of the jack was then rested against the end of the shaft, and the other against a steel beam. When pressure was applied to the jack, the shaft did not move, but the beam, or a steel bar between it and the jack, against which the end of the jack next to the beam was resting, deflected from its original position. Plaintiff below and one of his fellow servants were working the lever on the jack. While they were resting, one of the men said to the foreman: "That business ain't safe." The foreman looked at it and laughed, saying: "There is a greenhorn, and he be afraid the thing ain't safe! \* \* \* That beam stands against anything." He further said: "Why, this hydraulic jack would raise a hundred tons, and there isn't fifty thousand pressure." The language of the foreman was given by the plaintiff below, further on in his examination, as follows: "That beam stands most anything, and it will stand fifty ton, and we ain't got force for fifty ton. Go ahead and do your work." Plaintiff testified

¶ 2. See *Master and Servant*, vol. 34, Cent. Dig. §§ 650, 782.

that he was afraid to work; that he had had no experience with a hydraulic jack before; that he believed what the foreman told him. After this, while pumping the jack, the renewed force caused the end resting against the beam to turn the iron wedge, which flew out and struck plaintiff on the head. On cross-examination, Wurtenberger testified: "Q. Now, I understand you to say that when you noticed it, that the jack coming against it in that way, and this iron bar in there, the top of the iron bar, was loose—that is, a space—now you say it come right against it like that? A. Yes, sir; like that. Q. Now, you say that this part was away? A. Away; and then, when De Groff said we should take a little time, it was leaning like that. It left room in there. Q. Was this iron bar bent at that time? A. No, sir. Q. The pressure on the iron bar, then, was being lessened, and the greater pressure was at the bottom. Is that right? You say it got loose here at the top? A. Yes, sir. Q. And the pressure at the bottom was greater at that time? A. Yes, sir; it teetered like that—like there was about two inches of space—when I saw it. Q. Two inches of space in here? A. Yes, sir; right on the top of it, where it should be tight, it was about like that—two inches off. Q. And the lower part of the jack was still pressing the lower part? Was the jack still pressing against the lower part of the iron? A. Yes, sir. Q. Was this iron put in the widest way up and down? A. Yes, sir. Q. The widest way up and down, and the lower part was still pressing on it, but the upper part was loose; that is, it was a space in there? A. Room; yes, sir. Q. Well, now, you noticed that? A. Yes, sir. Q. You noticed that it was getting loose there in that way? A. Yes, sir. Q. And you were the first one that did notice it, were you not? A. Well, I guess at the same time the other man noticed it at the same time, and then it was the same like one man—I said, and what they call 'Little Will' said, 'That business ain't safe.' Q. You said that? A. Yes, sir; I said it, too, and Little Will said it, and Mr. De Groff, he looked at it and laughed then. First he said, 'There is a greenhorn, and he be afraid the thing ain't safe.' He said, 'That beam stands against anything.' \* \* \* Q. Well, you said it was not safe, but it looks as though it would fly off and hit some one? A. Well, it looked that way to any man that was there; not only to me, but to any man that was there—that that wedge could fly off. Q. That was apparent to anybody that looked at it, wasn't it? A. Yes, sir. \* \* \* Q. He said, 'Go ahead and work,' and you went right back and went to putting on the lever on your press again? A. I don't have to go back; I was standing on the place when I said so, and the other men commenced to work, and I followed them to work then. Q. Now, did you go to work with your levers again, putting pressure on? A. Yes, sir. Q.

How long did you work after that, before this thing flew out as you thought it would? A. Just one forcing on the lever, and that was the last. After we said, 'It ain't safe,' we give one more motion. Q. Just one more push of the lever, and the thing flew out? A. Yes, sir. Q. Just as it appeared to you it would do if you put on any more pressure? A. Yes, sir. Q. It did just what you thought it would do, did it? A. Well, it flew out. Q. Well, it flew out just as you thought it would do? A. Yes, sir." The court below sustained a demurrer to the evidence. Plaintiff in error complains.

McGrew, Watson & Watson and J. L. Smalley, for plaintiff in error. Miller, Buchan & Morris, for defendant in error.

SMITH, J. (after stating the facts). It will be noticed from the testimony of plaintiff below, set out in the statement, that he and his fellow workmen asserted that the arrangement of the hydraulic jack rendered it unsafe when it was exerting force against the iron beam. They hesitated to go on with the work, but were directed by the foreman to proceed. The foreman knew the forcing capacity of the jack, and the workmen were ignorant of it. It cannot be held that knowledge of plaintiff below of the probable injurious result to him, and the risk incurred from an obedience to the foreman's command, was obvious and apparent. *Railway Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253. He was a common workman, without experience in handling such appliances. His expressed fears that more pressure would cause the iron bar to fly out were overcome by the assurance of the foreman of its safety. The two were not on an equal footing. A reliance on the superior knowledge of the master, under the circumstances, was to be expected. The direction by the foreman to the men to go ahead and work was the best evidence to them then obtainable that the jack was adjusted safely. As to the apprehended danger, the master and servant did not agree. In *Harder & Hafer Coal Min. Co. v. Schmidt*, 104 Fed. 282, 285, 43 C. C. A. 532, 535, it is said: "Whatever may be the exemption of the employer from liability for injuries caused by a danger that is obvious to the injured, such exemption will not be accorded where the nature of the menace is so uncertain as to cause discussion between the employes and the employer, with the result that the employer dissuades the employe of his apprehension; and especially so where the particular employe injured is without any knowledge of its existence." In the circumstances of the present case there was a difference of opinion between Wurtenberger and the foreman with respect to the danger attendant on a further use of the jack, after the employe had doubted its safety. In view of this disputed question of safety, it was proper that the jury should determine

whether the workman was negligent. *Miller v. Union Pacific Ry.* (O. C.) 12 Fed. 600. It must be remembered that the hydraulic jack was a mechanical device of great dynamic energy, which could not be readily known to a common laborer working with it for the first time. Its capacity and power were known to the foreman of defendant below. In *Seeds v. Bridge Company*, 67 Kan. —, 75 Pac. 482, a workman was told by a foreman to remain in a dangerous place and adjust a rope used for hoisting. He was injured. The court said: "We must further remember that he had just been hurried to the work, and had been violently chided for too great haste in getting away from this place of danger, had been told to remain there until sure that the fastening was secure, and had been informed by the foreman that he would tell the plaintiff when to get away. All this would have a strong tendency to make the plaintiff less observant of the dangerous surroundings, less critical as to unsafe conditions, and less competent to judge of danger to which he was exposing himself, growing out of these surroundings and conditions." See, also, *Stephens v. Hannibal & St. J. Ry. Co.*, 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336. Plaintiff below testified that he believed what the foreman told him respecting the safety of the jack. The rule is that if the master orders the servant into a situation of danger, and in obeying the command he is injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him. The degree of prudence exercised by the plaintiff below was a matter for the consideration of the jury. The demurrer to the evidence ought to have been overruled.

The judgment of the court below will be reversed, and a new trial granted.

JOHNSTON, C. J., and CUNNINGHAM, GREENE, BURCH, MASON, and ATKINSON, JJ., concurring.

SMITH, J. (dissenting). The testimony of the injured person, in my judgment, shows that he had knowledge of the danger which menaced him, and that he assumed the risk. It is only by holding that plaintiff below did not mean what he said on cross-examination that he can be excused from remaining in a place of imminent peril until he was hurt. What he expected happened. He knew from the working of the jack that it was exerting great force. This was apparent to any one, though not an expert. He testified: "A. Well, I didn't have to examine the beam. I just see that beam, and then I say, like the other man, 'That ain't safe.' Q. Yes, you knew it was not safe? That is the principal thing that you knew about it? A. That is the first thing I know; yes, sir. Q. That

was all that was said by Mr. De Groff, was it? A. Well, he said: 'That beam stands most anything, and the hydraulic jack got a forcing ton, and we ain't got forcing for fifty ton. Go ahead and work.' Q. He said, 'Go ahead and work,' and you went right back and went to putting on the lever on your press again? A. I don't have to go back. I was standing on the place when I said so, and the other men commenced to work, and I followed them to work then. Q. Now, you did go to work with your levers again, putting pressure on? A. Yes, sir. Q. How long did you work after that, before this thing flew out as you thought it would? A. Just one forcing on the lever, and that was the last. After we said, 'It ain't safe,' we give one more motion. Q. Just one more push of the lever, and the thing flew out? A. Yes, sir. Q. Just as it appeared to you it would do if you put on any more pressure? A. Yes, sir. Q. It did just what you thought it would do, did it? A. Well, it flew out. Q. Well, it flew out just as you thought it would do? A. Yes, sir." Plaintiff below cannot be excused for his exposure to danger by saying that he relied on the statement of the foreman that the appliance was safe, when his testimony shows that he was convinced to the contrary, and that he knew that another turn of the lever would cause the iron wedge to fly out. It is said that the knowledge of the foreman was superior to that of Wurtenberger. The latter, however, did not so testify. His knowledge of the dangers of the situation, if we believe his statements, was as ample as that of the foreman. I think the demurrer to the evidence was properly sustained. *Clark v. Mo. Pac. Ry. Co.*, 48 Kan. 654, 29 Pac. 1138; *Walker v. Scott*, 67 Kan. —, 64 Pac. 615, and cases cited; *Rush, Adm'r. v. Mo. Pac. Ry. Co.*, 36 Kan. 129, 12 Pac. 582; *A., T. & S. F. R. Co. v. Schroeder*, 47 Kan. 315, 27 Pac. 965; *S. K. Ry. Co. v. Moore*, 49 Kan. 616, 31 Pac. 138.

(68 Kan. 586)

ATCHISON, T. & S. F. RY. CO. v. ATCHISON GRAIN CO.

(Supreme Court of Kansas. March 12, 1904.)

LIMITATIONS—EXCEPTIONS—FRAUD—EVIDENCE.

1. The enumeration by the Legislature of specific exceptions to a statute of limitations by implication excludes all others.

2. The provision in subdivision 3 of section 18 of the Civil Code, that a cause of action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud, has no application to an action founded on contract.

3. An action to recover for the violation of a verbal agreement in which there was a stipulation against discriminations accrues within three years after the agreement has been violated, and an averment that the "defendant succeeded in concealing the fact of such dis-

¶ 1. See *Limitation of Actions*, vol. 23, Cent. Dig. § 13.

crimination from plaintiff until less than eighteen months prior to the filing of the petition" shows no ground for postponing the operation of the statute of limitations.

Johnston, C. J., dissenting.  
(Syllabus by the Court.)

On rehearing. Modified.

For former opinion, see 70 Pac. 933.

A. A. Hurd and Robert Dunlap, for plaintiff in error. H. J. Hamlin, Henry Elliston, Geo. A. Vandever, and F. L. Martin, amicus curiæ, for defendant in error.

JOHNSTON, C. J. A rehearing of this cause was allowed mainly for a further consideration of the application of the statute of limitations to the causes of action stated in the petition. Counsel for the parties have presented the question again with marked ability and a full citation of authorities. In the former opinion the averments of the petition were set out at length, and a repetition here is unnecessary. *Atchison, Topeka & Santa Fé Railway Co. v. The Atchison Grain Co.*, 70 Pac. 933. They disclose that the causes of action set up were founded on violations of an oral contract, and cannot be classed as actions for relief on the ground of fraud. It is true there is an allegation that the railway company covertly and fraudulently entered into arrangements, with other shippers, whereby it gave them rates of transportation so much lower than those given to plaintiffs as to absolutely bar them from handling grain. This, however, was only a statement that an express contract between the parties was broken, the breach of which was counted on for a cause of action. Since the gist of the action was the violation of a contract, it is manifest that it does not fall within the third subdivision of section 18 of the Civil Code, viz., "actions for relief on the ground of fraud," wherein is added the express exception that "the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." On our first consideration the conclusion was reached and stated that: "Concealment and fraud constitute an implied exception to the statute of limitations, and a party who wrongfully conceals material facts, and thereby prevents a discovery of his wrong, or the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong and fraud." Counsel for plaintiff in error press upon our attention the question whether, where the Legislature having confined the exception to "actions for relief on the ground of fraud," there is any reason or warrant for applying to it other causes of action. It is insisted that the court cannot imply or create exceptions additional to those specifically provided in the statute. The Legislature declared that "civil actions, other than for the recovery of real property, can only be brought within the following periods after the cause of action shall have accrued, and

not afterwards." Among others enumerated is the one involved here: "Within three years: An action upon a contract not in writing, express or implied." The Legislature then declares certain exceptions in addition to the one appended to the cause of action for relief on the ground of fraud. In section 19 of the Civil Code an exception is made in favor of a person under a legal disability at the time a cause of action accrues. Another exception is made in section 21 of the Civil Code, where the defendant is out of the state, or has absconded and concealed himself. Another is created in section 22, where the cause of action arose in another state or country. In section 23 an exception is made in case of a reversal or failure of an action otherwise than upon the merits. In section 24 provision is made for starting the statute anew by a payment or acknowledgment of indebtedness. These exceptions—and we do not know that all have been stated—show that the attention of the Legislature was directed to exceptions to the general rule, and the question is whether the court can add to those provided by the Legislature, and, in effect, amend the Code. The effect of making an exception to an act of limitation was considered in *Swickard v. Bailey*, 3 Kan. 507. It was there said: "This action shows conclusively that the legislative mind was directed to the subject we are considering. The provision is not as broad as in the judgment of many it should be, but the fact that any exception at all was made is strong evidence that no other or greater one was intended. At all events, according to the most familiar of the canons of interpretation, the court is bound to say that, having mentioned one exception, all others were intended by the Legislature to be excluded." See, also, *Perry v. Wade*, 31 Kan. 428, 2 Pac. 787, and *Stinson v. Aultman, Miller & Co.*, 54 Kan. 537, 38 Pac. 788. In *State Bank of Alabama v. Dalton*, 9 How. 522, 13 L. Ed. 242, in the matter of ingrafting on a statute of limitation exceptions not found therein, the court said that: "The Legislature having made no exception, the courts of justice can make none, as this would be legislating. In the language of this court in the case of *McIver v. Ragan*, 2 Wheat, 29 [4 L. Ed. 175]: 'Wherever the situation of the parties was such as, in the opinion of the Legislature, to furnish a motive for excepting him from the operation of the law, the Legislature has made the exception. It would be going far for this court to add to those exceptions.' The rule is established beyond controversy." The Supreme Court of Tennessee, in discussing the matter of exceptions to a statute of limitations where the Legislature had made none, remarked that it was "well convinced that this court has no such power; that it is our duty to administer the law regardless of particular cases of hardship, and that it belongs exclusively to the Legislature to alter the law if it is oppressive or incon-

venient. It is believed that such has been the course of the decisions, with slight aberrations, in reference to acts of limitations for centuries." *Cocke v. McGinnis*, Mart. & Y. 361, 17 Am. Dec. 809. The same question was before the Supreme Court of Wisconsin in *Woodbury v. Shackleford*, 19 Wis. 55, and it was said that: "In the construction of statutes of limitations general words are to have a general operation, and, where there cannot be found in the statute itself some ground for restraining it, it cannot be restrained by arbitrary addition or retrenchment. No exceptions can be claimed in favor of particular persons or cases unless they are expressly mentioned." There may be strong reasons for making an exception where there is concealment of a cause of action, or where the element of fraud enters somewhat into the breach of the contract upon which an action is brought. The Legislature, however, after considering the subject, did not deem it wise to make such exception, but, on the other hand, positively declared that concealed fraud shall operate to toll the statute in the single action brought for relief on the ground of fraud. While concealment is alleged, and wrongs charged akin to fraud, by the grain company, it does not ask that the contract be set aside because of the fraud, but, relying on that contract, asks to recover the loss sustained by its breach. The fraudulent concealment that a right of action for the breach of a contract exists does not change the nature of the action, nor shift it into the class named in subdivision 3 of section 18 of the Civil Code. In fact, the petition in this case did not allege a fraudulent concealment of the cause of action, but only went so far as to say that "defendant succeeded in concealing the fact of such discrimination from plaintiff until less than eighteen months prior to the filing of the petition." How it succeeded in concealing the fact is not stated. Whether it was by silence, misrepresentation, or some affirmative action, is not pleaded, nor is there any averment as to what diligence was used by the grain company in uncovering the discrimination, or that the means of discovery were not within its reach all of the time. As soon as the grain company found itself unable to ship grain, or compete with others engaged in the same business, it suggested an inquiry, and, if inquiry had developed the discrimination, it cannot assert a want of knowledge. Ordinarily, a means of knowledge is equivalent to knowledge. Even if the facts constituting fraudulent concealment had been specifically set out, it could not have affected this action for the reason that it is not founded on fraud, and therefore not subject to the statutory exception. In *Perry v. Wade*, supra, it was said: "Of course, the mere concealment of a cause of action, or the concealment that a cause of action had ever accrued, does not of itself bring the case within the above-quoted pro-

visions of subdivision 3, § 18, of the Civil Code, nor does it prevent the statute of limitations from running." In *Stinson v. Aultman, Miller & Co.*, supra, it was held that the provision with reference to the accrual of a cause of action upon the discovery of the fraud of the defendant has no application to an action based on a contract. In discussing the claim that the fraudulent conduct of the defendant prevented the plaintiffs from enforcing their contract, it was said: "What they do claim is that his fraudulent conduct prevented them from knowing that they had a claim which they might enforce against him—prevented them from collecting the amount of the Newman note from Stinson himself. The concealment by Stinson of the fact that they at one time had a cause of action which they might have enforced against him does not alone, and of itself, constitute a legal fraud. As the plaintiffs' cause of action is founded solely on a written instrument upon which an action might have been brought more than five years before the commencement of this action, it is barred by the statute of limitations." In some of the states fraudulent concealment of a cause of action is made to extend the time of bringing the action for the period of limitation after the discovery that a cause of action exists. But the Code of this state makes no such provision, except as to actions for relief on the ground of fraud. So far as actions founded upon agreements or contracts are concerned, the operation of the statute depends upon the nature of the cause of action, and not upon the time that a plaintiff discovers that he has a right of action. The action accrues when the contract is violated, and not at the time when the plaintiff learns that it has been violated. In the absence of a statute making concealment an exception to the statute of limitations, the courts cannot create one, however harsh and inequitable the enforcement of the statute may be. *Fee's Adm'r v. Fee*, 10 Ohio, 469, 36 Am. Dec. 103; *Lathrop v. Snellbaker*, 6 Ohio St. 276; *Howk v. Minnick*, 19 Ohio St. 462, 2 Am. Rep. 413; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; *Smith v. Bishop*, 9 Vt. 110, 31 Am. Dec. 607; *Peak v. Buck*, 3 Baxt. 71; *Troup v. Smith's Ex'rs*, 20 Johns. 33; *Allen v. Mille*, 17 Wend. 202; *Exhorn v. Exhorn* (Sup.) 37 N. Y. Supp. 68; *Miller v. Wood*, 116 N. Y. 351, 22 N. E. 553; *Board of Chosen Freeholders v. Veghte*, 44 N. J. Law, 509; *Mast v. Easton*, 33 Minn. 161, 22 N. W. 253; *Jacobs v. Frederick*, 81 Wis. 254, 51 N. W. 320; *Blount v. Parker*, 78 N. C. 128; *Wood on Limitations* (3d Ed.) § 274. The action accrued when the alleged wrongs were committed and the contract was violated. The fact that the contract relations between the parties were to continue for a year did not operate to extend the starting of the statute. When the wrongs were consummated which made it impossible for

the grain company to continue business under the contract, the contractual relations were practically broken off, and the statute of limitations then began to run.

Attention is called to *McMullen v. Association*, 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924, 91 Am. St. Rep. 236, as an authority in favor of an implied exception. In that case a fiduciary relation existed between the parties, McMullen being in fact an agent. He had control of the business and funds of the association, and his position made it easy for him to cover up the fraudulent conversion of the funds. It was his duty to speak, and disclose the actual condition, but because of his fraudulent acts and concealment the association did not learn of the breach of trust and the wrongs done for a considerable time. The relation of trust and confidence placed that case in another class, wherein the general rule of equity applies that the statute of limitations does not begin to run until the breach of trust or default in performance of duties is brought to the knowledge of the principal.

It follows from what has been said that the district court was in error in sustaining the petition of the grain company.

SMITH, CUNNINGHAM, GREENE, BURCH, and ATKINSON, JJ., concurring.

JOHNSTON, C. J. (dissenting). The writer is unable to reach this conclusion. As the court has decided that there are no exceptions to the statute of limitations except those expressly enumerated in the statute itself, and as that is to be the rule hereafter in Kansas, an elaborate exposition of the opposite view would serve no useful purpose. Briefly stated, it may be said that the doctrine of *McMullen v. Association*, supra, and the view first announced in this case (70 Pac. 933), is the most satisfactory to the writer. There is a radical difference of judicial opinion upon the subject, and on which side the numerical majority of the cases may be is difficult to determine, and may not be very important. One who fraudulently conceals the wrong inflicted, and thus prevents another from beginning an action, ought not to be allowed to avail himself of his wrong, and thus defeat the action of the injured party. This doctrine was announced in the early case of *Voss v. Bachop*, 5 Kan. 59, where it was held that a party may be estopped by his own acts from setting up the statute of limitations, and that, where the delay in bringing an action is caused by the wrong of the defendant, and not by the laches of the plaintiff, the defendant cannot claim the protection of the statute. In the other Kansas cases cited the point we have here was not directly drawn in question nor determined, except in *McMullen v. Association*, supra. There, in an action on a written obligation, it was held that fraudulent concealment of the wrong

postponed the running of the statute till the plaintiff discovered or should have known of the wrong. The averments in the petition in this case are sufficient, as against a demurrer, to charge a fraudulent concealment. It was alleged that the discriminations against the plaintiff were covertly and fraudulently made, and that they were concealed by plaintiff until less than 18 months before the commencement of the action. The averment of the ultimate fact of concealment implies affirmative action by the defendant. Where the wrong alleged against the defendant necessarily operates as a fraud upon the plaintiff, it is sufficient as a charge of fraud, and is not made stronger by expressly characterizing it as a fraud. A general averment, such as was made in the petition, is sufficient. *Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467; *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93. There is great force in the argument that the making of some exceptions by the Legislature indicates that no others were contemplated. Nevertheless, exceptions not mentioned in the statute are recognized and applied. No exceptions are named where the state is a party, and yet the statute of limitations will not avail as against an action brought by the state. Other exceptions are implied where parties are disabled by law from instituting an action. To hold that the fraudulent concealment of a wrong done by defendant will prevent him from claiming the protection of the statute of limitations cannot be regarded as the creation of an exception to the statute. It is rather a rule of interpretation, by which it is held that the Legislature did not contemplate that one who committed a wrong and fraudulently concealed it should invoke the protection of a statute designed to prevent fraud. It is the application of the principle that no one can avail himself of his own wrong and fraud to obtain an advantage over another in a court of justice; a principle applicable in the enforcement of all statutes and in the use of all remedies. Speaking of that statute, the Supreme Court of Rhode Island said that: "It was clearly not intended to thwart the fundamental maxim that no one may take advantage of his own wrong. Hence, if one by fraud concealed the fact of a right of action for six years, it is not ingrafting an exception on the statute to say he is not protected thereby, but it is simply saying that he never was within it, since the protection was never designed for such as he. But whether this be taken as an exception or only a limitation of the statute, it rests upon sound reason and just policy. Such a construction also has been so frequently applied that it is now said to have the weight of authority in its favor, although it must be admitted there are strongly expressed opinions the other way." *Reynolds v. Hennessy*, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639. There is a general agreement of the authorities that the fraudulent conceal-



ment of a cause of action on the part of the defendant will prevent the running of the statute in his favor when a proceeding is brought against him in a court of equity, and no reason is seen why the same rule shall not apply in all actions in this state. The distinction between actions at law and suits in equity has been abolished, and statutes of limitation are to be interpreted and applied according to equitable principles, whatever the character of the action, because such statutes operate upon the cause, and not upon the form, of action. So it was said in *McMullen v. Association*, *supra*, that the general trend of authority in this country and in England is to apply the rule to actions at law as well as suits in equity, and that to hold that a party could plead a statute of limitations to protect a wrong committed and concealed by him until the period of limitation had expired would be to make a law designed to prevent fraud the means by which to make it successful and secure. It is true the statute of limitations is not prolonged by a mere want of knowledge that an action in favor of a party has accrued. But there is a wholly different situation where ignorance that a right of action exists results from the wrong and fraud of the defendant. There the law does not permit him to set up and take advantage of his own wrong. Some of the authorities tending to sustain these views are: *Bree v. Holbech*, Doug. 654; *Granger v. George*, 5 B. & C. 549; *Gibbs v. Guild*, L. R. 8 Q. B. 296; *Id.*, L. R. 9 Q. B. 50; *Clark v. Houham*, 2 Barn. & Cress. 149; *Short v. McCarty*, 3 B. & Ald. 626; *Sherwood v. Sutton*, 5 Mason, 140, Fed. Cas. No. 12,782; *Turnpike Co. v. Field*, 3 Mass. 201, 3 Am. Dec. 124; *Homer v. Fish*, 1 Pick. 435, 11 Am. Dec. 218; *Welles v. Fish*, 3 Pick. 74; *Bishop v. Little*, 3 Greenl. 405; *Cole v. McGlathry*, 9 Greenl. 131; *McKown v. Whitmore*, 31 Me. 448; *Thurston v. Lowder*, 40 Me. 197; *Bank v. Forster*, 8 Watts, 12; *Bricker v. Lightner's Executor*, 40 Pa. 199; *Pennock v. Freeman*, 1 Watts, 401; *Jones v. Conoway*, 4 Yeates, 109; *Morgan v. Tener*, 83 Pa. 305; *Lewey v. H. C. Fricke Coke Co.*, 166 Pa. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. Rep. 684; *Persons v. Jones*, 12 Ga. 371, 58 Am. Dec. 476; *Snodgrass v. Branch Bank*, 25 Ala. 161, 60 Am. Dec. 505, and note; *Alvis v. Oglesby*, 87 Tenn. 181, 10 S. W. 313; *Herndon v. Lewis* (Tenn. Ch. App.) 36 S. W. 953; *Peck v. Bank*, 16 R. I. 710, 19 Atl. 369, 7 L. R. A. 826; *Reynolds v. Hennessy*, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639; *District Township v. French*, 40 Iowa, 601; *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93; *Carrier v. Railway Co.*, 79 Iowa, 80, 44 N. W. 203, 6 L. R. A. 799; *Cook v. Railway Co.*, 81 Iowa, 551, 46 N. W. 1080, 9 L. R. A. 764, 25 Am. St. Rep. 512; *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582; *Bonner v. McCreary* (Tex. Civ. App.) 35 S. W. 197; *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636; *Rosenthal v. Walker*, 111 U. S. 185, 4

Sup. Ct. 382, 28 L. Ed. 395; *Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 487; *Aultman, Miller & Co. v. Loring*, 76 Mo. App. 66; *Farris v. Coleman*, 103 Mo. 352, 15 S. W. 767; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410; *Angell on Limitations* (6th Ed.) c. 18, § 186; 19 A. & E. Encyl. of L. (2d Ed.) 245, and cases cited; 33 Cent. Dig. § 511. The rule established by the court, however, determines the insufficiency of the first count of the petition, and therefore the decision first made as to the ruling on that count will be set aside. Without any difference of opinion the court held, and still holds, the averments of the second and third counts of the petition to be insufficient.

The result of our determination is that our former judgment will be modified as to the first count of the petition, and that the judgment of the district court will be reversed, and the cause remanded for further proceedings.

MASON, J. (concurring specially). I agree with the conclusion reached by the court, but desire to add that I do not think the allegations of the petition in this case are such as to raise the question whether the operation of the statute of limitations may be postponed by the fraudulent concealment by defendant of circumstances without knowledge of which plaintiff could not know of the existence of his cause of action.

(68 Kan. 755)

#### STEWART et al. v. BANK OF INDIAN TERRITORY.

(Supreme Court of Kansas. March 12, 1904.)

#### COUNTY WARRANTS—FRAUD—CONCEALMENT—LIMITATIONS.

1. One who buys a county warrant which is invalid because issued to the payee to cover the discount to which such warrants were subject on the market ordinarily, has at once a right of action against the vendor for the amount paid. In the absence of any actual intention to conceal the nature of the transaction, the facts that the warrant purports on its face to have been issued for a valid consideration, and that it was issued upon a verified account, the corresponding item of which was fair on its face, the overcharge, however, being manifest upon a consideration of the entire account, do not constitute such a fraudulent concealment as to suspend the operation of the statute of limitations until the discovery of the invalidity of the warrant by its holder.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; D. M. Dale, Judge.

Action by the Bank of the Indian Territory against W. A. Stewart and others. Judgment for plaintiff, and defendants bring error. Reversed.

Stanley, Vermillion & Evans, for plaintiffs in error. Conly & Conly, for defendant in error.

MASON, J. Stewart Bros., on March 15, 1894, sold to the Bank of the Indian Terri-

tory, for \$206.66, a warrant for \$266.66, which had been issued to them by Noble county, Okl., a short time before. The bank held the warrant some three years, and then brought action upon it against the county. In this action the warrant was held to be fraudulent and void because issued to make up the difference between the face value and the market value of a warrant issued to Stewart Bros. for the full amount due them upon a contract to build three jail cells. The bank then, on July 20, 1900, brought an action against Stewart Bros. for the amount it had paid for the warrant, and recovered judgment, which the defendants seek by this proceeding to reverse. The only question which it is necessary to determine is whether the action was barred by the statute of limitations. The theory of plaintiffs in error is that a cause of action accrued, if at all, immediately upon the sale of the warrant, and that the statute then began to run. If this is correct, the judgment must be reversed. The claim of defendant in error is that the operation of the statute of limitations did not begin until (in June, 1900) the bank received notice of the invalidity of the warrant by the filing of the answer in the action brought against the county. It contends that up to that time the facts which rendered the warrant void had been fraudulently concealed by defendants. This contention is based upon the facts that the warrant upon its face purported to have been issued "on account of jail cells for county and costs," and that it was issued upon a verified account, the corresponding item of which was the sum of \$266.66, charged for "freight and costs of erecting in place," referring to the jail cells. It may be sufficient to say that this case falls within the rule announced in *Atchison, Topeka & Santa Fé Railway Co. v. Atchison Grain Co.* (decided at this session of the court) 75 Pac. 1051. But the doctrine of that case need not be invoked to determine this. The evidence, so far as it affects the question under discussion, was all in writing, and deductions are to be made from it by this court independently of the conclusions reached by the trial court. There is no claim of any oral misrepresentation made by defendants to effect the sale of the warrant, or of any fraud or concealment, except such as may be implied from the facts already stated as to the purported consideration for the warrant shown by its own recital and by the voucher upon which it was issued. The testimony of the defendants contains an explanation of these facts that is entirely consistent with actual good faith on their part. There being nothing to contradict this testimony, it must be given some effect. It is, in sub-

stance, that defendants made a written contract with Noble county to erect jail cells and corridor for the county jail for \$2,450 cash, or its equivalent in county warrants at their market value; that before the completion of the work it was stopped by an injunction; that upon the dissolution of the injunction the county commissioners decided to issue to the contractors warrants for the contract price (including the discount to which the warrants were subject on the market), less the equivalent of \$200 in cash, which was to be held until the full completion of the contract, as a guaranty of such completion and of the payment of freight bills; that warrants were subject to a discount of 25 per cent. The voucher or verified account presented to the county was made up of three items: First, the full contract price, \$2,450; second, the "cash equivalent in warrants at market value," \$550; third, "freight and cost of erecting in place," \$266.66. This distribution of the amounts corroborates the statement of defendants that the \$266.66 item was separated from the others as the equivalent of \$200 in cash, representing either an estimate of the freight and the cost of completing the work, or a sum deemed security against any default of the contractor as to these matters. It is true that this amount seems to have been carved out of the allowance made to cover the discount, and that all warrants issued upon the contract in excess of \$2,450 were necessarily void under the statute forbidding the allowance upon any demand of more than the amount due thereon, dollar for dollar. But there was no actual fraud or concealment on the part of defendants. Except as they may be held accountable for the language of the voucher, they are not shown to have had anything to do with the wording of the warrant. The plaintiff did not see the voucher before buying the warrant, and could not have been misled by its language if he had seen it. The very fact that it made a charge in terms covering the discount to which warrants were subject on the market, and included in one item the full amount of the contract price, conclusively shows that, however unlawful the proceeding may have been, the voucher was not framed with the intention of misleading the county board, or any one else. We conclude that no such fraudulent concealment was shown as to toll the statute of limitations upon any theory of the law, and that the claim sued upon was therefore barred prior to the commencement of the action.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the Justices concurring.

(44 Or. 501)

## ZORN et al. v. LIVESLEY et al.

(Supreme Court of Oregon. March 28, 1904.)

CHattel Mortgages—RECORDING—EFFECT—SALE BY MORTGAGOR—RIGHTS OF MORTGAGEE—ESTOPPEL—WAIVER OF LIEN—PAYMENT—PRESUMPTION—EVIDENCE—PLEADINGS—DEPARTURE—CONCLUSIONS OF LAW.

1. A record of a mortgage of hops conclusively imputes notice of its contents, and of the mortgagees' rights thereunder, irrespective of the question of actual notice.

2. An allegation that plaintiffs "waived and surrendered their alleged claim of the mortgage lien upon the said hops" is a conclusion of law.

3. An answer alleging that plaintiffs delivered possession of mortgaged hops to the mortgagor, and authorized him to sell them to defendants discharged from plaintiffs' mortgage lien, and to receive the price, stated a complete defense, so that defendants were not injured by striking out a further averment that plaintiffs waived their lien as against defendants.

4. Mortgagees of a crop of hops, whose mortgage is recorded, can rely on the notice conveyed by the record, and are not obliged, in order to preserve their lien, to take immediate possession of the hops after they have been harvested and baled, but can allow them to remain in possession of the mortgagor.

5. In order to estop a mortgagee of a crop to assert his rights against a purchaser by any act of the mortgagor, unless he acts as the mortgagee's agent for the sale of the crop, the mortgagee must have had knowledge of the mortgagor's intention, and the purchaser must have relied thereon in ignorance of the truth.

6. Where a complaint for conversion by mortgagees of crops against a purchaser from the mortgagor alleged the giving of the mortgage to secure a note and money already advanced and further advances, and the answer denied that the mortgage was given to secure any greater sum than a certain sum alleged to have been paid by the mortgagor, a reply alleging the advancement by plaintiffs to the mortgagor of the sum stated in the answer prior to the date of the mortgage, and the agreement on that date to advance a further sum, and the making of the note and mortgage to secure the past and future advances, was not a departure from, or abandonment of, the complaint, but merely a new assignment, making definite the allegation of the complaint, so as to meet the attempted defense of the answer.

7. An authorization and request by mortgagees to haul the mortgaged hops to a warehouse does not make the person so authorized the mortgagees' agent to ship the hops and take the shipping receipt therefor, or charge the mortgagees with such person's knowledge in reference thereto.

8. Where the mortgagees testified that they never gave the mortgagor or any other person any authority to sell the mortgaged crop, and such evidence was uncontradicted, and there was no evidence of any intent on the part of the mortgagees to allow the crop to get beyond their control, or permit the sale thereof, the issue of consent by the mortgagees to the sale by the mortgagor was properly withdrawn from the jury.

9. Any presumption of payment of a crop mortgage from possession of the crops by the mortgagor is overcome by evidence showing that the mortgagor got possession of the crops from the mortgagees' warehouse, and shipped them without the mortgagees' knowledge or consent.

10. In an action for conversion by mortgagees of crops against a purchaser from the mortgagor, evidence held sufficient to establish prima facie nonpayment of the mortgage.

Appeal from Circuit Court, Marion County; George H. Burnett, Judge.

Action by John Hoefer and Casper Zorn, partners as Hoefer & Zorn, against T. A. Livesley and John J. Roberts, partners as T. A. Livesley & Co. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is an action to recover damages for the alleged conversion by the defendants of 52 bales of hops. It is averred in the complaint, in substance, that on August 2, 1902, Sing Boo gave plaintiffs a chattel mortgage on all his interest in 23 acres of growing hops, to secure the payment of a promissory note of even date therewith for \$2,000, with interest at 6 per cent. per annum, due 10 days from date; that the mortgage was also given "for money already received from said plaintiffs, Hoefer & Zorn, and also for further advances to be paid at hop-picking time for picking, drying, baling, and other necessary expenses connected with the harvesting of the same"; that the hops were to be cultivated, picked, cured, and baled by Sing Boo, and delivered at the dryhouse on the premises, in good, merchantable order, to the plaintiffs, who were to hold and sell them as their property for the payment of the note at maturity; that, in case Sing Boo should attempt to sell or dispose of the hops without first obtaining the written consent of the plaintiffs, it should be lawful for them to take immediate possession thereof and sell the same; that between the 25th of January and the 10th of October, 1902, plaintiffs furnished and paid to Sing Boo, in money and supplies, \$2,220.23, on account of the debt secured by the mortgage; that Sing Boo failed and neglected to pay the note at maturity, or any part thereof, except the sum of \$974.72 paid on October 10, 1902, and there is now due and owing thereon the sum of \$1,054.61 and interest; that, by reason of the failure of Sing Boo to pay the note as agreed upon, the plaintiffs became, and are now, the special owners of the hops, and entitled to the immediate possession thereof; that, after the harvesting and baling of the hops, 56 bales were sold by Sing Boo, and the net proceeds thereof, after deducting the advances made by the plaintiffs for picking and other harvesting expenses, were credited on the promissory note; that on December 13, 1902, the defendants wrongfully and unlawfully took possession of the remainder of the hops, consisting of 52 bales, of the aggregate weight of 9,956 pounds, and of the reasonable value of \$2,500, and unlawfully and wrongfully converted the same to their use, to plaintiffs' damage in the sum of \$1,300. Defendants moved to make the complaint more definite and certain, by requiring the plaintiffs to allege the amount advanced by them to Sing Boo at the making of the note, the amounts previously received by him from the plaintiffs, and which is alleged to have been a part of the consideration for the mortgage, the dates and amounts of all other advances

¶1. See Chattel Mortgages, vol. 2, Cent. Dig. § 346.

made since the execution of the mortgage, and the amount received by Sing Boo for the sale of the 56 bales of hops sold by him on the 10th of October, and also the items and particulars of the alleged advances made by plaintiffs for picking and other harvesting expenses. This motion was overruled, but the plaintiffs served upon the defendants a bill of particulars showing all the information sought by the motion. Thereafter they answered, admitting the making of the note and mortgage by Sing Boo to plaintiffs, the conditions of the mortgage as set out in the complaint, and the amount of money advanced and paid by plaintiffs to Sing Boo on account of the debt secured by the mortgage, as alleged, but denying that the mortgage was given to secure any greater sum than \$627.22, the alleged payment upon the note by Sing Boo, the balance alleged to be due plaintiffs, and that plaintiffs are entitled to the possession of the hops, or that defendants wrongfully or unlawfully took possession of them, or converted them to their own use. For further and separate defenses, it is alleged: (1) That the only consideration for the promissory note mentioned in the complaint was the sum of \$627.22, and that the note was paid in full by the proceeds of the 52 bales of hops sold by Sing Boo. (2) That on or about the 10th of December, 1902, the plaintiff surrendered and delivered the hops now in controversy to Sing Boo, and authorized him to sell the same as their agent, free from the mortgage lien, and gave him authority to deliver the hops to the defendants, as the purchasers thereof, and to receive the purchase price; that on or about the 6th of December, the defendants, in good faith, and for a valuable consideration, contracted to buy the hops of Sing Boo, and the hops were delivered to them on the 15th of December, at which time they paid Sing Boo the agreed price therefor. (3) That the plaintiffs ought not to be permitted to allege, as against the defendants, that they have a prior lien upon the hops by virtue of their chattel mortgage, because they failed and neglected to take immediate possession thereof after the harvesting, or to sell the same, as stipulated and agreed in the mortgage, but, on the contrary, allowed the hops to remain in the possession of Sing Boo, with authority to sell, long after the maturity of the debt; that they allowed and permitted Sing Boo to sell and deliver the hops to the defendants free from the mortgage lien, and consented and permitted him to remove them from the plaintiffs' farm, where they had been grown, in order that he might deliver them to the defendants; that Sing Boo, with the knowledge, consent, and authority of the plaintiffs, sold and delivered the hops to the defendants, and that plaintiffs failed and neglected to advise the defendants of their mortgage lien, but consented and allowed the sale to be made; and that the defendants, relying upon the possession of the hops by Sing Boo, and that

he claimed to be the owner thereof, bought them in good faith, and for a valuable consideration, without any notice or knowledge of the plaintiffs' mortgage, except such as the record thereof might give. A motion to strike out parts of the first separate defense and a demurrer to the third were sustained. The plaintiffs replied, denying the material allegations of the answer, and further alleging that during the year 1902 Sing Boo was engaged in the cultivation and raising of a crop of hops on their farm; that on or prior to the 8d of August of that year they had advanced to him, in money and supplies, \$627.22, and on the last-named day agreed to advance and pay to him, as he might require for picking, curing, and caring for the hops, a sum which, with the amount already advanced, would make \$2,000; that, to secure the payment of the amount already advanced and future advances, Sing Boo made, executed, and delivered the promissory note and mortgage mentioned in the complaint; that, in pursuance of such agreement, plaintiff advanced and furnished to Sing Boo, in money and supplies, between the 25th of January, 1902, and the 10th of October of that year, the sum of \$2,220.32, no part of which had been repaid, except the sum of \$220.32 advanced over and above the sum of \$2,000, and the sum of \$974.72, paid on the 10th of October, 1902, and credited on the \$2,000 note. A motion to strike out portions of the new matter in the reply, because "immaterial, irrelevant, and redundant," and a demurrer to the whole thereof on the ground that it did not state facts sufficient to constitute a reply to defendants' answer, were overruled, and the cause came on for trial before the court and jury.

Mr. Hoefler was called by plaintiffs as a witness, and produced and identified the chattel mortgage and note referred to in the complaint, which were admitted in evidence without objection. The bill of particulars furnished by the plaintiffs to the defendants before their answer was filed was also produced, identified by the witness, and admitted without objection. The witness testified that, of the hops raised on the plaintiffs' farm by Sing Boo in the year 1902, he was entitled to 108 bales; that, of this amount, 56 bales were contract hops, and were hauled to Gervais and sold by Sing Boo, and the proceeds collected by the plaintiffs, \$974.72 thereof credited on the promissory note on October 10th, and the remainder applied to the payment of the amount advanced by plaintiffs to Sing Boo, over and above the \$2,000 secured by the mortgage; that plaintiffs never in any manner consented to the defendants' taking the 52 bales of hops, or to the shipping thereof; that on Sunday, November 23d, the witness gave to a Chinaman, to be delivered to Mr. Becker, a tenant of his, an order as follows: "Champoege, Nov. 24, 1902. Mr. C. Becker, You will haul Sing Boo hops to the River Warehouse and charge to us, 52 bales.

[Signed] Hoefer & Zorn;" that the warehouse referred to in the order belonged to the plaintiffs, and it was the intention that the hops should remain in the warehouse until sold with the plaintiffs' knowledge; that plaintiffs never authorized the Chinaman or any one else to sell the hops. Mr. Roberts, one of the defendants, testified that he contracted with Sing Boo for the hops in controversy on the 6th of December, 1902, and that they were received by the defendants on the 15th, being shipped by river boat; that defendants received a shipping receipt for the hops from Sing Boo, which they exchanged with the Southern Pacific Company for a warehouse receipt. Charles Becker, a witness for the defendants, testified that he was a tenant of the plaintiffs; that he received the order referred to by the witness Hoefer from a Chinaman who worked for Woh Sing; that he hauled the hops to the river, as requested, and put them in the warehouse; that the hops were loaded on the boat on the same day, and that the witness was present at the time; that plaintiffs paid him for hauling the hops. The witness was then shown the shipping receipt issued by the steamboat company to Sing Boo for the hops shipped to the defendants, and was then asked if he got the receipt, or had possession of it, on the day he hauled the hops to the river, but objection to the question was sustained on the ground that the witness was not shown to have any authority from the plaintiffs to ship the hops or take a receipt therefor.

This is, in substance, all the evidence on the hearing material to any question presented on the appeal. At the close of the testimony both parties moved for a directed verdict. The plaintiffs' motion was sustained, and the defendants appeal.

W. M. Kaiser and W. T. Slater, for appellants. George G. Blingham, for respondents.

BEAN, J. (after stating the facts). 1. There was no error in sustaining the motion to strike out parts of the defendants' first separate answer, and in sustaining the demurrer to the third. The motion was directed to an allegation that defendants had no knowledge or notice of plaintiffs' mortgage at the time they bought the hops, except the constructive notice which the record imputed to them, and a conclusion of law that, by reason of certain facts pleaded, the plaintiffs "waived and surrendered their alleged claim of the mortgage lien upon the said hops." The mortgage was of record, and the record conclusively imputed notice to the defendants of its contents, and of plaintiffs' rights thereunder. It was therefore no defense that at the time they purchased the hops they did not have actual notice of the mortgage. If the plaintiffs had, by their acts or conduct, waived their rights under the mortgage, the waiver came from the facts pleaded, and not

from the conclusion drawn by the pleader therefrom. It is alleged that plaintiffs delivered possession of the hops to Sing Boo, and authorized him to sell them to the defendants free and discharged from the mortgage lien, and to receive the purchase price thereof. This, if true, constituted a complete defense, and there could be no injury to the defendants in striking out the averment that they thereby waived and surrendered their lien as against the defendants. Nor were defendants denied the right to give any competent evidence on the trial they might have, supporting the defense.

The third defense was substantially the same as the second, and was not sufficient to constitute an estoppel. The plaintiffs were not obliged, in order to preserve their lien, to take immediate possession of the hops after they had been harvested and baled, although they had the right to do so under the mortgage. If they allowed the hops to remain in the possession of the mortgagor, it would not evidence an intention to release their lien. The mortgage was of record, and they could safely rely upon the notice conveyed by the record. In order to estop the plaintiffs by any act of Sing Boo, unless he was their agent for the sale of the hops, they must have had knowledge of his purpose and intention, and the defendants must have relied thereon in ignorance of the truth. "Before it can be claimed," said Mr. Justice Thayer in *Page & Co. v. Smith*, 13 Or. 410, 10 Pac. 833, "that a party shall not be permitted to falsify even his own declaration, act, or omission, it must be shown that he thereby intentionally and deliberately led the other party to believe a particular thing true, and to act upon such belief. And his answer to a pleading in a case must show that such was the fact." The defendants' answer falls far short of this requirement. There is no averment that the plaintiffs, by their acts or conduct, intentionally and deliberately led the defendants to believe that the hops belonged to Sing Boo, or that, relying thereon, the defendants were misled and deceived. The allegation is that the plaintiffs allowed the hops to remain in the possession of Sing Boo with authority and permission to sell and dispose of them free from the lien of the mortgage, thus setting up in substance the same defense as the one already pleaded.

2. The new matter alleged in the reply is not a departure from the cause of action set up in the complaint. There is some uncertainty in the complaint as to whether the note, for the security of which the chattel mortgage was given by Sing Boo to the plaintiffs, was intended to include the money already received by him from the plaintiffs and future advances, or whether such money and advances were to be in addition to the note, and a defense is sought to be made on this ground. The reply, in answer to this defense, and in support of the complaint, sets out the same matter more in detail. It is not

repugnant to, nor an abandonment of, the cause of action set up in the complaint. It was merely designed to affirm the averments of the complaint and make them more certain, and was but a new assignment of the cause of action alleged, and therefore not a departure. *Mayes v. Stephens*, 38 Or. 512, 63 Pac. 760, 64 Pac. 319; *Crown Cycle Co. v. Brown*, 39 Or. 285, 64 Pac. 451; *Kiernan v. Kratz*, 42 Or. 474, 69 Pac. 1027, 70 Pac. 506.

3. No error was committed in sustaining the objection to the question propounded to the witness Becker in referring to his possession and knowledge of the shipping receipt issued by the steamboat company to Sing Boo. He was not the agent of the plaintiffs for the purpose of selling and shipping the hops, or doing anything with them, unless it was to haul them to the plaintiffs' warehouse. All the evidence shows is that the plaintiffs authorized and requested him to haul the hops to the warehouse; but that would not make him their agent for the purpose of shipping them and taking a shipping receipt therefor, or charge the plaintiffs with his knowledge in reference thereto. Nor was there any evidence upon which to submit to the jury the question of Sing Boo's authority to sell the hops. The plaintiff Hoefer testified that he never gave Sing Boo or any other person any authority to sell the hops, and this evidence stands uncontradicted. There is no doubt that the sale of a chattel by the mortgagor with the consent of the mortgagee, and with the intent on his part to relinquish the lien, would convey a good title to the purchaser, free from the lien. 2 *Cobbey, Chattel Mort.* § 637. But there is no evidence to bring this case within the rule. The order to Becker was nothing more than the consent of the plaintiffs that the hops might be removed to their warehouse, and there stored until sold with their knowledge. They were not to be removed from the warehouse without their consent. There is no evidence of any intent on the part of the plaintiffs to allow the hops to get beyond their control, or to permit the sale thereof; and, without some such evidence, there was nothing for the jury.

It is argued that, because the hops were in the possession of Sing Boo after they had been hauled by Becker to the river, there is a presumption that the mortgage had been paid; but, if so, it was overcome by the testimony, which shows that Sing Boo got possession of the hops from plaintiffs' warehouse and shipped them without plaintiffs' knowledge or consent.

It is also argued that it was not shown by the plaintiffs that the note and mortgage executed by Sing Boo to them had not been paid and settled in full. Conceding that this was an issue in the case, and that the burden was upon plaintiffs, there was sufficient prima facie evidence of that fact. The note and mortgage were produced by the plaintiffs, their execution proven, and they were

admitted in evidence. In addition, the bill of particulars which was furnished the defendants, and which shows in detail all the transactions between the plaintiffs and Sing Boo, was also admitted without objection. It purports to show an itemized statement of all the money paid and advanced by the plaintiffs, and all credits and payments made by Sing Boo, and it does not appear that special attention was called to the alleged defect in the evidence upon the question of the nonpayment of the note and mortgage.

The judgment of the court below will therefore be affirmed.

(45 Or. 85)

#### Ex parte STACEY.

(Supreme Court of Oregon. March 28, 1904.)  
HABEAS CORPUS PROCEEDINGS—SCOPE OF INQUIRY—REMEDY TO CORRECT INFORMATION—JURISDICTION OF PERSON—PRESUMPTION ON APPEAL—CIRCUIT COURTS—JURISDICTION OF FELONIES.

1. On a writ of habeas corpus to inquire into the imprisonment of one convicted of a crime, the only question to be considered is whether or not the judgment, or commitment issued thereunder, is void.

2. Under Const. art. 7, § 9, the circuit courts of Oregon have exclusive original jurisdiction of all felonies committed therein.

3. On appeal from a judgment remanding the prisoner in habeas corpus proceedings, the bill of exceptions did not disclose that he interposed a plea of not guilty to the information under which he was convicted. *Held*, that as the return to the writ is traversable in this state, under B. & C. Comp. § 640, if such plea was not entered it was his duty to show such fact, and, not having done so, it will be presumed that the court had jurisdiction of his person.

4. The question whether the facts averred in an information render it vulnerable to a demurrer cannot be considered, except on appeal; and, if any error was committed in this respect, the judgment is only voidable, and not void, and, this being so, habeas corpus will not lie to correct it.

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Jr., Judge.

Habeas corpus to inquire into the cause of the imprisonment of Bert Stacey. The prisoner was remanded, and he appeals. Affirmed.

P. C. Dormitzer, for appellant. A. M. Crawford, Atty. Gen., for the State.

MOORE, C. J. This is a special proceeding to inquire into the cause of the imprisonment of Bert Stacey. A writ of habeas corpus having been issued and directed to W. A. Storey, as sheriff of Multnomah county, he, as a return thereto, certified that Stacey had been convicted in the circuit court of that county of the crime of robbery, and, having been sentenced to imprisonment in the penitentiary for the term of two years, was committed to his custody, to be taken to the place of incarceration; setting out a copy of the judgment in pursuance of which he held the prisoner, whom he also produced. The

¶ 1. See *Habeas Corpus*, vol. 25, Cent. Dig. § 25.

return not having been controverted in any manner, the court proceeded to examine into the facts stated therein, and, having concluded that the restraint was legal, remanded the prisoner, from which judgment he appeals.

It is contended by his counsel that the information under which he was convicted is fatally defective, and, this being so, the court erred in not discharging him from custody. The bill of exceptions does not contain a transcript of the information, but respondent's brief sets out what purports to be a copy thereof, as follows: "Bert Stacey is accused by the district attorney of the Fourth Judicial District of the state of Oregon, for the county of Multnomah, by this information, of the crime of robbery, committed as follows: The said Bert Stacey on the 24th day of December, A. D. 1902, in the county of Multnomah and state of Oregon, then and there being, did then and there unlawfully and feloniously take, steal, and carry away a certain watch, of the value of \$40, of the personal property of one H. F. Copland, from the person of said H. F. Copland, and against his will, by violence to his person, and by assault then and there made by him, the said Bert Stacey, upon the said H. F. Copland, and by putting him, the said H. F. Copland, in fear of some immediate injury to his person, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon." This information is based on a violation of the following provision of the statute: "If any person, not being armed with a dangerous weapon, shall by force and violence, or by assault, or by putting in fear of force and violence or assault, rob, steal, or take from the person of another any money or other property which may be the subject of larceny, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than five years." B. & C. Comp. § 1769. It is argued by appellant's counsel that the element of force prescribed by the statute is omitted from the information, which charges violence and fear of violence, and, as the accusation must be direct and certain, as it regards the particular circumstances of the crime charged, when they are necessary to constitute a complete crime (B. & C. Comp. § 1306), the theft of the watch could only have been accomplished either by violence, "or" by fear of violence, but the averment that it was taken by violence "and" by fear of violence contravenes the express provision of the statute, and that the particular circumstances of the crime charged are so repugnant as to render the information fatally defective. Whether the point insisted upon would be sufficient on appeal to reverse the judgment, it is not necessary to inquire, but on a writ of habeas corpus the only question to be considered is whether or not the judgment, or the commitment issued thereunder, is void.

Ex parte Tice, 32 Or. 179, 49 Pac. 1038. In Barton v. Saunders, 16 Or. 51, 16 Pac. 921, 8 Am. St. Rep. 261, Mr. Chief Justice Lord, discussing this subject, says: "Errors or irregularities which render proceedings violable, merely, the writ of habeas corpus cannot reach, but only such defects in substance as render the process or judgment absolutely void." In Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650, Mr. Chief Justice Marshall says: "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous."

The circuit courts of this state have exclusive original jurisdiction of all felonies committed therein. Const. art. 7, § 9; State v. Gardner, 33 Or. 151, 54 Pac. 809. The bill of exceptions does not disclose that Stacey interposed a plea of not guilty to the information, but, as the return to a writ of habeas corpus is traversable in this state (B. & C. Comp. § 640), if such plea was not entered it was his duty to show that fact, and, not having done so, it will be presumed that the court had jurisdiction of his person. Ex parte Howe, 26 Or. 181, 37 Pac. 536. In Ex parte Harlan, 1 Okl. 48, 27 Pac. 920, it was held that, where the trial court acquired jurisdiction of the subject-matter of an indictment and the person of the accused, the judgment of the court on the question whether the indictment sufficiently charged the crime of perjury can only be reviewed on appeal or writ of error, and habeas corpus will not lie. In deciding the case, Mr. Chief Justice Green, speaking for the court, says: "As the trial court had jurisdiction of the subject-matter of the indictment and of the person of the petitioner, it was a question of law for that court to determine whether or not the facts averred in the indictment constituted the crime of perjury; and, if the trial court erred in its judgment upon that question, such error can only be corrected by appeal, or writ of error, in this court, and not by writ of habeas corpus."

The question whether the facts averred in the information render it vulnerable to a demurrer cannot be considered except on appeal, and, if any error was committed in this respect, the judgment was only voidable, and not void, and, this being so, habeas corpus will not lie to correct it. It follows that the judgment must be affirmed, and it is so ordered.

(44 Or. 511)

BRETT v. WARNICK et al.

(Supreme Court of Oregon. March 28, 1904.)

BENEFIT INSURANCE—ASSIGNMENT—VALIDITY—SUBSTITUTION OF BENEFICIARIES—NECESSITY—ENFORCEMENT IN EQUITY—WAGERING CONTRACT—QUESTION OF FACT FOR COURT—INSURABLE INTEREST.

1. A complaint sought specific performance of an alleged agreement by beneficiaries named in a benefit certificate to surrender the same to plain-

tiff on the payment by him of the dues and assessments which they had paid under an agreement by them with the assured, plaintiff having fulfilled, as he claimed, the other conditions of his agreement in providing a home for assured and paying the dues and assessments since forming the compact, and at the same time to prevent the beneficial association from paying the fund to the beneficiaries, and to require payment to plaintiff. *Held*, that the remedy in equity adopted by plaintiff alone adequately afforded the relief sought, as a judgment in an action at law against the beneficiaries might prove unavailing if they were found insolvent.

2. The lack of actual substitution as beneficiary in a benefit certificate pursuant to the constitution and by-laws of a beneficial association does not affect an agreement by which a person not named therein is to receive the insurance, and deprive him of his equity to claim the same as against the beneficiaries named therein, the association not insisting on it, and paying the fund into court to be awarded to the contestant entitled thereto.

3. A member of a beneficial association, with the consent of beneficiaries named in his certificate, who have acquired a vital interest therein by the payment of dues and assessments, can contract with a third person, whereby the latter may obtain a vested interest in the fund designated in the certificate, provided the contract is not contrary to public policy.

4. Though a cousin of a member of a beneficial association has not a sufficient blood relationship to give him an insurable interest in the member's life, he may enter into an agreement with him, the beneficiaries consenting, and the rules of the order not inhibiting it, for an assignment of the certificate as security for any advance made on the faith of such agreement; and, if the transaction is conceived in good faith, and not with a view to avoid the inhibition of the law against wagering contracts, the agreement will give him the entire interest in the certificate, when such is the intention of the parties.

5. It is a question of fact for the court to determine whether an agreement sought to be enforced in equity, by which the interest in a benefit certificate is to belong to a person not having an insurable interest in the life of the assured, falls under the ban of the law as a wagering contract, and therefore entitles him to recover only his outlay made in pursuance thereof, or whether it is entered into in good morals, and in consequence entitles him to recover the entire proceeds.

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Action by George R. Brett against Robert Z. and John W. Warnick and the Grand Lodge of the Ancient Order of United Workmen of Oregon to compel the delivery to plaintiff of a benefit certificate by the defendants Warnick, and to recover of the defendant lodge the sum named therein. On payment of the money into court, the latter was discharged, and from a decree on the pleadings dismissing the complaint as to the other defendants, plaintiff appeals. Reversed.

In 1880 the Grand Lodge of the Ancient Order of United Workmen of Oregon issued to J. F. Warnick a certificate entitling him to participate in the beneficiary fund of the order to the amount of \$2,000, payable at his death to his wife. On May 10, 1898, his wife having died prior thereto, Warnick procured the issuance of a new certificate, substituting the defendants R. Z. Warnick and J. W. Warnick, his brothers, as the beneficiaries. Plain-

tiff alleges that the substitution was procured on the part of J. F. Warnick, in consideration that the beneficiaries would thenceforth pay the dues and assessments accruing to the order, and would provide him with a home during the remainder of his life; that the beneficiaries accordingly paid such dues and assessments, and provided him with a home until October, 1900, when it was mutually agreed by and between the plaintiff, the assured, and the beneficiaries that the plaintiff, who was a cousin of the Warnicks, should henceforth provide the assured with a home, pay his dues and assessments to the order, and at his death pay his funeral expenses, and, when convenient for him to do so, repay to the beneficiaries the amount of dues and assessments which they had previously paid to the order, being the sum of \$90; and that in consideration thereof and upon repayment of said sum the defendants Warnick should deliver to plaintiff the beneficiary certificate, and relinquish to him all their right and title thereto, and all benefits to be derived therefrom. Plaintiff further alleges that in pursuance of said agreement he brought the assured to his home, cared and provided for him, and paid all his dues and assessments to the order until his death, which occurred April 13, 1903, and thereafter paid his funeral expenses; that prior to April 7, 1903, plaintiff paid to the defendants Warnick \$50, and on that date tendered to them the balance due, being \$40, on condition that they surrender to him the said beneficiary certificate, which they refused to do, and that they now claim that the sum named in the certificate is due from the order to them. Proof of death is shown, and a decree is prayed, requiring defendants Warnick to deliver the certificate to plaintiff, and that he recover from the order the sum named therein. The answer puts in issue the allegations of the complaint touching the payment of the dues and assessments by the defendants Warnick subsequent to their substitution as beneficiaries and prior to October, 1900, the agreement between plaintiff and the Warnicks, and the performance thereof on the part of the plaintiff, and further alleges the conditions upon which the change of beneficiaries could be had under the constitution and by-laws of the order; that the assured never at any time since the date of the certificate in question changed the beneficiaries; that due proof of the death of the assured was made, and that the claim under the certificate was duly audited to the defendants Warnick, payable \$1,000 to each, and that the grand lodge had no notice of the claim of plaintiff until after the death of the assured, or until after the date of the filing of the death report. The defendant order answered that it had no beneficial interest in the fund, paid the same into court, and asked a discharge, and was, by order of the court, accordingly released. The contention being thus left to proceed between the plaintiff and



the defendants Warnick, the latter moved for a decree upon the pleadings dismissing the complaint at the cost of the plaintiff, which motion was allowed, and a decree given and rendered accordingly, from which plaintiff appeals.

Danson & Huneke and J. R. Stoddard, for appellant. Wm. Reid, for respondents.

WOLVERTON, J. (after stating the facts). Two questions are presented: (1) Whether the complaint states a cause entitling plaintiffs to equitable relief, and (2) whether the agreement relied upon for recovery is subject to the objection that it is essentially a wagering contract, and therefore void, as in contravention of public policy.

As to the first, we are clear that the real purpose of the complaint is to require a specific performance of the alleged agreement to surrender the certificate upon the completed payment by Brett to the defendants Warnick of the sum of \$90, which it is averred that they had formerly paid of the dues and assessments under an agreement by them with the assured, Brett having fulfilled, as he claims, the other conditions of his agreement in providing a home for the assured and paying his dues and assessments since forming the compact, and at the same time to prevent the order from paying the fund over to the defendants Warnick and to require its payment to the plaintiff. The relief is such that equity alone can adequately grant. An action against the defendants Warnick could not have met the purpose, as they had not as yet received the fund, and a judgment against them might prove unavailing if they were found to be insolvent; so that the remedy at law cannot be considered as adequate as the one adopted for equitable relief. The complaint is therefore not objectionable on the ground that it discloses a want of equity. Nor does the lack of the actual substitution of plaintiff as beneficiary in the certificate in the stead of the defendants Warnick in the manner provided in the constitution and by-laws of the order for making such a change affect the agreement, and deprive the plaintiff of his equity, seeing that the company does not insist upon it, and has paid the fund into court to be awarded to the contestant entitled to it in the controversy, which is now wholly between the plaintiff and the defendants Warnick. *Pennsylvania Railroad Company v. Wolfe*, 203 Pa. 269; 52 Atl. 247; *Swedish Christian Mission Soc. of Minneapolis v. Lawrence* (Minn.) 81 N. W. 756; *Benard v. Grand Lodge A. O. U. W.*, 13 S. D. 132, 82 N. W. 404. It has been held that, where a person becomes a member of a mutual benefit association, under an agreement with the beneficiary named in the certificate that he, the beneficiary, shall pay all the assessments, and they are so paid accordingly, the beneficiary thus acquires a vested interest in the certificate, so that the

member cannot afterward make another designation without the consent of the beneficiary. *Maynard v. Vanderwerker* (Sup.) 24 N. Y. Supp. 932. This case, it should be noted, was reversed on appeal. The error, however, related solely to a question of fact, leaving the principle here announced unaffected. *Id.*, 76 Hun, 25, 27 N. Y. Supp. 714. So, if a member by valid contract assumes to dispose of his interest in the beneficial fund of the order, virtually the proceeds of the certificate of insurance, and agrees not to change the beneficiary, in consideration of the payment by the beneficiary of all dues and assessments against such member, if not in conflict with the lawful conditions upon which the order grants the insurance, it is effectual as against the subsequent attempt of the member to annul it. *Clarke v. Police, etc., Ins. Board*, 123 Cal. 24, 55 Pac. 576. The doctrine appeals to us as reasonable and sound, and, being so regarded, there is nothing to hinder the member, with the assent of the beneficiary, from contracting with a third party, whereby the latter may obtain a vested interest in the fund designated in the certificate, provided that the contract is not such as the law will not recognize because contrary to public policy. Such is the condition here, as shown by the allegations of the complaint. Brett's contract or agreement is not only with the member, but the beneficiaries designated in the certificate, or policy, it may be termed; and, if his allegations are true that he has acquired at least a substantial interest in the fund, if the agreement is otherwise lawful, his remedy in equity is clear. This result does not impinge upon the doctrine announced in the case of *Independent Foresters v. Keliher*, 36 Or. 501, 59 Pac. 324, 1100, 60 Pac. 563, 78 Am. St. Rep. 785. The question there presented was whether a change in the beneficiary had been accomplished aside from any contract or agreement between the parties, and depended upon whether there had been a substantial observance of the regulations in the constitution and by-laws of the order relative to the subject.

With relation to the second question presented, the defendants urge that Brett was without an insurable interest in the life of deceased, and hence that the alleged agreement was unlawful, as being contrary to public policy. It is beyond cavil that a person may take out a policy of insurance on his own life, and make it payable to whomsoever he pleases, he being the moving spirit, and assuming the responsibility of meeting the premiums or assessments. It would seem to follow logically from this that he might also, having effected a valid insurance upon his life, dispose of the policy, or assign it to whomsoever he desires, if the transaction is contrived in good morals, and not as a shift or cover for illegitimate purposes. But before one can be permitted to take out a policy of insurance upon the life of another

for the former's benefit he must have an insurable interest in the life of the latter. If he has not such an interest, and procures the policy notwithstanding, the law denominates it a "wagering contract," and, being in contravention of public policy, the holder will not be permitted to profit by his investment. "To have an insurable interest in the life of another," says Mr. May in his valuable work on Insurance, "one must be a creditor or surety, or be so related by ties of blood or marriage as to have reasonable anticipation of advantage from his life." 1 May, Ins. (3d Ed.) § 102a. Speaking upon the same subject, in *Warnock v. Davis*, 104 U. S. 775, 779, 28 L. Ed. 924, Mr. Justice Field says with more elaboration: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor or of surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured; otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy." See, also, *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251; *Loomis, Adm'r, v. Eagle Life & Health Insurance Co.*, 6 Gray, 396. The rule seems to be stated generally by a line of authorities that all the objections against taking out a policy of insurance upon the life of another, without an insurable interest in such a life, exist with equal force and potency against the holding of such a policy by mere purchase and assignment to another. *Warnock v. Davis*, supra; *The Franklin Life Insurance Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 318; *Kessler v. Kuhns* (Ind. App.) 27 N. E. 980. In the latter case are collated all the principal authorities supporting the doctrine. Undoubtedly, if the policy was procured in the first instance by one without an insurable

interest, its assignment to another without such an interest could not help the matter, as both transactions would be alike tainted with illegality. But where the policy is procured by one upon his own life, or by one upon the life of another in which he has an insurable interest, and therefore perfectly legitimate in its origin, another line of authorities holds that it may be assigned to one without such an interest, subject to the condition and restriction that it is not made as a cloak or cover for wagering purposes, or for mere speculation upon the life of the person upon whom the policy has been issued. It is easy to see how a contract, apparently valid in its inception, might be rendered invalid when coupled with a contract of assignment, where the purpose is eventually to procure a policy upon the life of another in whom there exists no insurable interest. For instance, a husband may take out a policy upon the life of his wife, in which, by all the authorities, he has an insurable interest. If now the policy be at once assigned to a third person without an insurable interest in the wife's life, on condition merely that he pay the premium, nothing more, with a view to his obtaining the insurance at the death of the wife, the transaction would be indicative of an intendment to effect insurance contrary to public policy. It would be tantamount to procuring insurance indirectly which the law will not tolerate to be done directly, and the evil would be the same. A like inference would also be deducible where the consideration or insurable interest to support the assignment was merely nominal. It would be apparent that the transaction was intended as a cover only to conceal the real device—that is, to secure insurance upon the life of another without having at the time an insurable interest in such life—which is the vice that the law will not tolerate. It does not necessarily follow, however, that, where a policy is taken out upon one's life for the benefit of another, and is assigned to a third party, who pays the premium, it stamps the transaction as a wagering device, but it depends upon the good faith of the transaction; that is, whether the policy was in fact intended to be what it purports to be, or whether the form was adopted as a cover for a mere wager. *Bliss, Life Ins. (2d Ed.) § 26*. "The rule," says Mr. Justice Earl in *Olmsted v. Keyes*, 85 N. Y. 593, 600, "as gathered from these authorities, is that where one takes out a policy upon his own life as an honest and bona fide transaction, and the amount insured is made payable to a person having no interest in the life, or where such a policy is assigned to one having no interest in the life, the beneficiary in the one case and the assignee in the other may hold and enforce the policy if it was valid in its inception, and the policy was not procured or the assignment made as a contrivance to circumvent the law against betting, gaming, and wagering policies. It follows, therefore,

that one may, with the consent of the insurer, deal with a valid life policy as he could with any other chose in action, selling it, assigning it, disposing of it, and bequeathing it by will, and it has been well said that, if he could not do this, life policies would be deprived of a large share of their utility and value." There is abundant authority for holding that a life policy valid in its inception may be assigned to one not having an insurable interest in the life of the assured when not used as a cloak for a wager or mere speculation in the life of another. The exigencies attending such a transaction are strongly set forth in *Murphy v. Red*, 64 Miss. 614, 618, 1 South. 761, 60 Am. Rep. 68, where the court say: "A man may have the best of reasons for wishing to dispose of the policy on his life. The exigencies of business or absolute necessity may require him to do so. He may have paid large sums in premiums and afterward become unable to pay more, and, if he is not allowed to sell or assign on the best terms he can make, the policy may be lapsed and lost. To impair the value and utility of his policy, or require him to lose it on the ground that, if he were to sell or assign it, the assignee or purchaser would have a motive to kill him, or that any sale or assignment he might be able to effect with one who had no insurable interest in his life would be tainted with the vice of gambling, is, as matter of law, extremely fanciful and unsatisfactory." Such, also, is the reasoning in *Bursinger v. The Bank of Watertown*, 67 Wis. 79, 30 N. W. 290, 58 Am. Rep. 848. See, also, *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; *Stevens, Adm'r, v. Warren, Adm'r*, 101 Mass. 504; *Mutual Life Insurance Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Rittler v. Smith, Adm'r*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; and a comparatively recent case from *Indiana (Nye v. Grand Lodge A. O. U. W. [Ind. App.] 36 N. E. 429)*, ably and exhaustively considered; where the learned jurist announcing the opinion differentiates the *Warnock, Hazard, and Kessler Cases*. The reasoning of this line of authorities impresses us as cogent and sound, and we feel free to adopt the doctrine thus announced as more salutary, and better calculated to serve the ends of justice, than that which seems to have been promulgated by the authorities herein first alluded to, if there is any real distinction when the cases are properly considered with reference to the facts that control them. Now, to apply the doctrine to the case in hand. Brett was a cousin of the assured, which was not a sufficient blood relationship to give him an insurable interest in the life of the latter. It was legitimate for him to take an assignment of the policy, the rules of the order not inhibiting it, for security for any advance made on the faith of it (*Gilman v. Curtis*, 66 Cal. 110, 4 Pac. 1094; *Insurance Co. v. O'Brien*, 92 Mich. 584, 52 N. W. 1012), and, if the transaction was conceived in good faith, and not with a view

to avoiding the inhibition of the law against wagering contracts, the alleged agreement for the assignment of the policy by the assured, the beneficiaries consenting, would be valid to carry the entire interest in the policy to Brett. But, if not so contrived, it would, at any rate, be sufficient for Brett's reimbursement for all outlays made upon the faith of it, such as a reasonable expenditure for bringing the assured to his home at Spokane, providing him with a home, and the payment of the dues, assessments, and funeral charges, and the defendants Warnick would be entitled to the balance. The complaint is sufficient in either view, and it is a question of fact for the court to determine whether the alleged agreement falls under the ban of the law as a wagering contract, and therefore entitling Brett to recover only his outlay made in pursuance thereof, or whether the agreement was entered into in good morals, and in consequence he should recover the entire proceeds of the policy.

The decree of the trial court will be reversed, and the cause remanded for such other proceedings as may seem meet, not inconsistent with this opinion.

(44 Or. 525)

#### KEENE v. SMITH et al.

(Supreme Court of Oregon. March 23, 1904.)  
GARNISHMENT—STATE OFFICERS—STATUTES—  
REPEAL—EFFECT.

1. No statute having been enacted to authorize suits against the state under the authority conferred by Const. art. 4, § 24, a garnishment proceeding was not maintainable against the Secretary of State to attach funds in his hands, as a state officer, alleged to be due to plaintiff's debtor.

2. The fact that a bill passed by the State Legislature in 1903, making state officers liable to answer in garnishment proceedings, was vetoed by the Governor, after which B. & C. Comp. § 259, providing that no state or other public officer shall be liable to answer as garnishee for moneys in his possession, as such public officer, belonging to or claimed by any judgment debtor, was repealed, could not confer the right of garnishment against state officers for state funds in their hands, in the absence of a statute permitting the state to be sued.

Appeal from Circuit Court, Marion County; George H. Burnett, Judge.

Action by R. G. Keene against Z. T. Smith and F. I. Dunbar, as Secretary of State, garnishee. From an order dismissing the garnishment, plaintiff appeals. Affirmed.

Frank Holmes, for appellant. A. M. Crawford, Atty. Gen., for respondents.

WOLVERTON, J. The plaintiff, having recovered a judgment in the justice's court against the defendant Z. T. Smith, procured an execution to be issued upon it, by virtue of which a notice of garnishment was served upon the Secretary of State, with a view of attaching any sum that might be found due Smith from the state, he being an employé

¶ 1. See Garnishment, vol. 24, Cent. Dig. § 38.

thereof. The Secretary moved for a discharge of the garnishment, upon the ground that he is not amenable thereto, which motion having been allowed, the plaintiff appealed to the circuit court, and, the judgment of the justice's court having been affirmed, plaintiff now appeals to this court.

There is but one question involved, which is indicated by the motion to discharge the garnishment. Under the state Constitution (article 4, § 24) provision may be made by general law for beginning suit against the state as to all liabilities originating after or existing at the time of its adoption. Up to the present time the Legislature has not, in pursuance of the power thus delegated, deemed it important or advisable to authorize or permit the state to be sued, and such is the condition of the law that no suit or action can be instituted or maintained against it except with its consent and consequent submission to the jurisdiction of the court. *Sallem Mills Co. v. Lord*, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832. The principle is elementary, and so well settled that the further citation of authority is unnecessary. Indeed, we do not understand it to be seriously controverted. A garnishment proceeding as at present authorized by statute partakes of the nature of, and is in all essentials, a separate action or suit against the person garnished. If the latter answers satisfactorily, obviously that is the end of the controversy; but if he contests the right of garnishment, or his liability, then the suit, perhaps more properly denominated an "action," is proceeded with as between the parties plaintiff and the garnishee, and is a separate proceeding from the original action, although auxiliary thereto. It is said by Mr. Waples, in his work on Attachment, and quoted as authoritative in *Case v. Noyes*, 16 Or. 329, 19 Pac. 104, that "the plaintiff virtually sues the garnishee, for a debt due the defendant, by the process of garnishment. He takes the shoes of the latter, and asserts the rights which the latter has against a third person. He has to make out the case against the garnishee (when he is permitted to do so), unless the indebtedness to the defendant be admitted by the garnishee." Waples, *Attch.* (2d Ed.) § 472. At another section (470), he says of the proceeding that it "is a judicial cause between parties; it is begun by a summons or its equivalent, and results in a judgment, with all the other characteristics essential to a lawsuit." So Mr. Justice Strahan concludes, in the case just cited, that "under the Code the plaintiff in the original action, by the process of garnishment, becomes a plaintiff or actor against the garnishee. If the certificate which the garnishee is required to give proves unsatisfactory to the plaintiff, thereafter the proceedings by the plaintiff are in the nature of an action, and strictly adversary." In another case (*Smith v. Conrad*, 23 Or. 206, 212, 31 Pac. 398, 399), Mr. Justice Bean says: "By the service on the garnishee of a copy of the

writ of attachment and notice as provided by law, the plaintiff obtains the right, if the certificate is unsatisfactory, to maintain an action against him upon a liability existing in favor of the defendant in the original action. He thereby becomes, as it were, subrogated to the rights of action which the defendant has against the garnishee, and entitled to sue thereon in his own name." And we said, in a still later case (*Burns v. Payne*, 31 Or. 100, 103, 49 Pac. 884, 885): "The proceeding, it is true, is ancillary and subsidiary to the main action, and is undoubtedly dependent for its utility upon the final results attained in that action; but the garnishment in effect subrogates the plaintiff to the rights of the defendant in the main action, and empowers him to sue the defendant's garnished debtor. He takes the shoes, and asserts the rights of the defendant against the garnishee." Such being the essential nature and effect of the proceeding, it follows irresistibly that the state is not subject to garnishment without its consent. The purpose of the garnishment is to reach eventually the funds of the state, although the Secretary is the person garnished, and the proceeding is therefore adversary to or against the state. We are not without authority elsewhere upon the subject. In *Lodor v. Baker, Arnold & Co.*, 39 N. J. Law, 49, it was held that, as a state cannot be sued in its own courts without its consent, a creditor cannot lawfully attach money, due his debtor, in the hands of the State Treasurer. If such a thing might be permitted, "it must logically follow," say the court, "that he [the creditor] may resort to the means provided by the attachment act to compel the garnishee to appropriate the money attached to the payment of his claim, otherwise it would be a nugatory and fruitless proceeding. The law cannot be guilty of the inconsistency of inviting the suitor to attach funds of this nature, and at the same time deny him every remedy to enforce his lien." So it was held, in *Divine v. Harvie*, 18 Am. Dec. 194, that a state cannot be made a garnishee, nor can the Auditor and Treasurer be made parties, in the place of the state, to obtain a warrant and money from the Treasurer. See, also, *Rood, Garn.* § 25. These authorities—and we have been referred to none to the contrary where the state is concerned—determine the controversy in favor of an affirmance of the judgment.

Counsel make another contention, however, which is that, by repealing section 259, B. & C. Comp., reading as follows: "No state or county treasurer, sheriff, clerk, constable, or other public officer, shall be liable to answer as garnishee for moneys in his possession as such public officer, belonging to or claimed by any judgment debtor"—the Legislature has manifested an intention to make such officers liable under the process. But, as it respects state officers, at least, they never were liable to garnishment, and the statute was

only declaratory of the rule then prevailing, and its repeal could not be construed into positive law to the contrary.

It is further suggested that for the purpose of construction we should look into the legislative journals, where it would be found that a law was passed, at the session of the Legislative Assembly of 1903, making state officers liable to answer in such a proceeding, which was vetoed by the Governor, and that the intention of that body to make them liable by the repeal would thus become manifest. It is impossible that this should help the plaintiff. By reason of the Governor's veto the act referred to never became a law, and the fact that the Legislature intended by that act to make the state officers liable to garnishment can afford no criterion by which to determine that it intended to accomplish the same purpose by the repeal of another statute then existing, unless such repeal would be effective to put in force some other rule of law making them liable. We have seen that such is not the effect of the repeal, and hence the contention is without merit.

The judgment of the circuit court will therefore be affirmed, and it is so ordered.

(44 Or. 543)

WHIGHAM v. SUPREME COURT I. O. F.

(Supreme Court of Oregon. March 28, 1904.)

INSURANCE — BENEFIT SOCIETIES — APPLICATIONS — WARRANTIES — BREACH — ESTOPPEL.

1. Where none of the officers or members of a subordinate lodge of a benefit society knew what answers decedent made to questions in his application for a benefit certificate, and the physician before whom the answers were made did not know decedent personally, and forwarded the application to the head office of the order without its being examined by the subordinate branch, the order was not estopped to declare a forfeiture for breach of warranty, consisting of the false statements so made, by reason of the fact that the officers of the subordinate branch had knowledge of decedent's intemperate habits, and, with such knowledge, accepted him as a member, and continued to receive assessments paid by him on his certificate.

Appeal from Circuit Court, Multnomah County; A. L. Frazer, Judge.

Action by Marie Stewart Whigham against the Supreme Court of the Independent Order of Foresters. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The Supreme Court of the Independent Order of Foresters is a fraternal and beneficial society organized and incorporated under the laws of the Dominion of Canada, and having its head office in the city of Toronto. It may and does establish subordinate courts or lodges elsewhere; such local courts being the means by which the society secures its members, and collects the dues, fines, and assessments upon which it relies to pay death claims and expenses. One of its principal purposes is to establish a benefit fund

by periodical assessments upon its members, from which, upon satisfactory proof of the death of a member, who has complied with its rules and regulations, a sum not exceeding \$3,000 shall be paid to the widow or other beneficiary whom the member may designate. By the rules of the order it is provided that any eligible person desiring to become a member of an existing court must make an application for membership on a form provided by the supreme court, and that the application shall be referred to a committee consisting of three members of the local court, whose duty it shall be to investigate as to the character and habits and health of the applicant, and report their findings to the local court. Section 133 of the constitution and laws of the order provides that all applicants for membership, in addition to the other requirements, shall "not be of bad character, nor lead a dissolute life, nor have been convicted of felony, nor be a frequenter of bad company, nor addicted to intoxication, nor of quarrelsome behavior, and must be in good, sound mental and bodily health." Section 180 provides that "any member who shall obtain membership or try to obtain any benefits by false representation in his application, or medical examination, or by other fraudulent means, or by concealing his true age, or by concealing any mental or physical infirmity, or by not disclosing any material fact relating to himself or his family, shall ipso facto forfeit all payments he may have made and all benefits whatsoever that he or his heirs or his representatives or his beneficiaries would otherwise have been entitled to receive." The rules further provide that all applicants for beneficial certificates shall submit to a medical examination, which shall consist of: "(a) The full, explicit and correct answers, in writing, by the applicant to all the questions regarding his personal and family history propounded in the medical examination paper, and the signature of the applicant, in the presence of the examining physician, to the agreement and warranty contained in the said medical examination paper. (b) The physical examination of the applicant by the court physician or other duly authorized examining physician, and the physician's confidential report of the physical condition of the applicant on form No. 3, signed by such physician. (c) The review of such medical examination by and the action thereon of the medical board through its secretary or by a duly authorized assistant secretary." The medical board referred to consists of three physicians, to be elected at each regular session of the supreme court. Section 218 provides that, should the death of a member be caused by or be due, directly or indirectly, to intemperance or immoral conduct, all claims of whatsoever nature he or his beneficiaries might otherwise have had upon the supreme court shall ipso facto lapse and become null and void, and his beneficiary or beneficiaries shall not be entitled to receive

and shall not be paid any benefit whatever by the supreme court, or by any other court of the order.

In June, 1898, William Whigham, the plaintiff's husband, made application for membership to a local court of the defendant at Portland, and in his application agreed and warranted that "all the statements and representations in this application and in my medical examination paper, whether written by me or by another, or by the examining physician, and being material to the contract, are each and every one full, complete and true, and that I have not withheld any circumstance or information material to the contract concerning the past or present state of my health, habits of life, or medical treatment; I agree that the said statements and representations and this warranty shall form the basis of the contract between the Supreme Court of the Independent Order of Foresters and myself and of my membership in the said order; I agree that if I have made any concealment, misrepresentation or untrue statement, or if I shall become suspended or voluntarily sever my connection with the said order, that the benefit certificate issued on this application and my membership in the order shall be null and void, and all moneys paid thereon shall be forfeited to the said the supreme court." On June 28th the committee on character appointed by the local court reported favorably, and on June 30th Whigham was examined by the court physician. His examination was reduced to writing and signed by him, and contains the statement that his answers to each and all the questions contained therein, and also those made to the medical examiner, are true and correct, and "that no intentional omission, concealment, or mental reservation has been made of any material fact or circumstances relating to my past or present health, habits, or condition, or to my family history, and I agree that the questions and answers herein contained shall form a part of my contract with the Supreme Court of the Independent Order of Foresters." In the paper as so reduced to writing and signed by Whigham appear the following questions and answers: "Q. For what diseases have you consulted or been attended by a physician during the past five years? A. None. Q. If you have had any of the above, or any other disease, give full particulars as to character, date, duration, and whether you have fully recovered, and the name of the physician who attended you. A. Never been sick. Do you drink wine? A. No. Q. Do you drink spirits? A. No. Q. Do you drink malt liquors? A. No. Q. State the daily average amount. A. Don't use it. Q. Have you been intoxicated within the past five years? A. No. Q. How often within the last year? A. Not at all. Q. What has been your habit in this respect during life? A. Temperate." The medical examination paper was forwarded to the head office of the defendant, at Toronto,

and there approved by the medical board on July 5th. On July 26th Whigham was regularly initiated into the local court at Portland, and on August 26th a beneficiary certificate, signed by the head officers of the defendant, was issued, by which the defendant agreed to pay to plaintiff, on the death of Whigham being established to the satisfaction of the executive council, the sum of \$2,000, "in consideration of the application for membership and of the agreements and statements therein contained, and of the statements, representations and declarations contained in the medical examination paper (in so far as the said agreements, statements, representations and declarations are material to the contract); and in consideration also of the warranty of the applicant that the same, being material to the risks, are in all respects true and correct; and in consideration also of the provisions of the constitutions and laws enacted by the Supreme Court of the Independent Order of Foresters, and of any and of all amendments thereto adopted from time to time by the said the Supreme Court, and in consideration also of the declarations and promises contained in the obligation taken by initiates in subordinate courts (each of which, the said application for membership, the medical examination paper, the constitutions and laws and the said obligation, are hereby referred to by the parties hereto and made a part of this contract); and upon the faith and credit of all and each of which agreements, statements, promises, representations, provisions and declarations, and in consideration of the payment by the applicant at the times required of any and of all the assessments, dues, fees, capitation tax and fines, required by the said constitutions and laws to be paid on account hereof." On September 14th Whigham received and accepted the certificate, and signed a statement thereon expressly agreeing to the conditions and covenants therein contained, and that the constitutions and laws enacted by the defendant, as well as any and all amendments thereto which may be adopted from time to time, should be a part of the contract. Whigham remained a member of the order, paying regularly all assessments due and fines charged against him, and otherwise complying with the rules and regulations, until his death, in February, 1902. Due proof of death was made to the defendant, but it refuses to pay the claim on the grounds, (1) that the answers of Whigham in the medical examination paper that he did not drink wine, spirits, or malt liquors, had not been intoxicated for five years, had not been sick or attended by a physician for that length of time, and that his habits were temperate, were false and fraudulent, and, as a matter of fact, he was accustomed at intervals to excessive drinking, and had been repeatedly sick with alcoholism, and attended by a physician; and (2) that his death was caused

by intemperance. The trial resulted in a verdict and judgment for the plaintiff, and defendant appeals.

John H. Hall, for appellant. H. E. McGinn and V. K. Strode, for respondent.

BEAN, J. (after stating the facts). The plaintiff admits in her pleadings that the answers of Whigham on his medical examination were false, but she alleges that the officers and members of the local court had full notice and knowledge thereof, notwithstanding which they admitted him, and continued to recognize him as a member of the order in good standing, and collected assessments and dues from him, and therefore the defendant ought not to be permitted to assert the false warranty as a defense to the action. The subordinate court or lodge of a fraternal society, or an officer thereof, whose duty it is to perform some service for and on behalf of the supreme lodge, is generally regarded as an agent of the governing body, for the purpose of receiving members and collecting assessments and dues. *Kerr, Ins. § 89; Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73, 60 L. R. A. 620; Patterson v. United Artisans, 43 Or. 333, 72 Pac. 1095; Knights of Pythias v. Withers, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762; Modern Woodmen of America v. Tevis, 117 Fed. 369, 54 C. C. A. 293; Grand Lodge A. O. U. W. v. Lachmann, 199 Ill. 140, 64 N. E. 1022; Schlosser v. Grand Lodge, 94 Md. 362, 50 Atl. 1048; Grand Lodge v. Brand, 29 Neb. 645, 46 N. W. 95; Bragaw v. Supreme Lodge, 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602.* And if, with full knowledge of an applicant's false answers or statements, a local lodge receives and admits him as a member, or if, after his admission, the officer whose duty it is to collect his assessments learns of the false statements, and thereafter receives the assessments and remits them to the supreme order, the society will, as a general rule, be held estopped from pleading the false statements or representations as a defense to an action on the benefit certificate. *Niblack, Ben. Soc. (2d Ed.) § 300; Supreme Lodge K. of H. v. Davis, 26 Colo. 252, 58 Pac. 595; Order of Foresters v. Schweitzer, 171 Ill. 325, 49 N. E. 506; Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915; Mee v. Bankers' Life Association, 69 Minn. 210, 72 N. W. 74; Alexander v. Grand Lodge A. O. U. W. (Iowa) 83 N. W. 508; Ball v. Aid Association, 64 N. H. 291, 9 Atl. 103; Supreme Tent v. Volkert, 25 Ind. App. 627, 57 N. E. 203.* But, before there can be an estoppel or waiver, it must appear that the local court or society, or some officer thereof, charged with the performance of some act for the benefit of the supreme order, knew or had notice of the falsity of the answer or warranty contained in the application or examination paper at the time the deceased was received as a member, or when his subsequent assessments were received and collected. In the nature of things, there can be no waiver or estoppel without

knowledge of the facts upon which it is based. The waiver of a right presupposes a knowledge of the right waived, and, therefore, before defendant can be held to be estopped or to have waived any of its rights by reason of the conduct of a subordinate lodge or its officers, it must be shown that it or they had knowledge of the facts. *Kerr, Ins. § 235; Niblack, Ben. Soc. (2d Ed.) § 300; Lewis v. Phoenix Mutual L. Ins. Co., 44 Conn. 72; Moerschbaeher v. Royal League, 188 Ill. 9; Robertson v. Metropolitan L. Ins. Co., 88 N. Y. 541; Bennecke v. Insurance Co., 105 U. S. 355, 26 L. Ed. 990; Ellerbe v. Faust (Mo.) 25 S. W. 390, 25 L. R. A. 149.*

Now, turning to the record in this case, there was no evidence, as we read it, given or offered on the trial, that the local lodge, or any member or officer thereof, knew at the time Whigham was admitted to the order that his answers to the medical examination were false; nor was there any evidence that knowledge of that fact was brought home to the local lodge or its officers after Whigham's admission. The medical examination paper which contained the questions and answers was not submitted, so far as the evidence shows, to the local lodge; nor were its contents known by the lodge. It was addressed to the executive council of the defendant, and was forwarded direct to the head office, at Toronto. Dr. Fenton, the court physician, never saw Whigham until he applied for examination, and knew nothing about his personal habits or history prior to his becoming a member of the order, except as disclosed by the examination. In August, 1899, about a year after Whigham joined the order, the doctor was called to attend him for alcoholism, and again for the same disease in May, July, October, and December, 1900, and January, 1902, but there is no evidence that he knew or had notice that the answers previously made on his medical examination were false. Mr. Sigel, the employer of Whigham, testified that in the spring of 1898 a committee from some society (he did not know what) called upon him to make inquiry about Whigham's character and habits; that he told the committee that he had known Whigham ever since he came to Portland, in 1892; that he was an honest, upright man, of good character, except that he would occasionally go on a spree; that he would sometimes go for a month, and sometimes for over a year, without taking a drink, and then he would be off duty for a few days; that when he was drinking he would not attend to business, and would not go to work until he was all right; that he was perfectly sober for the year and a half prior to that time, so far as the witness knew. David Phillips, the member of the order that indorsed Whigham's application, testified that at the time he was a subordinate officer in the court; that he knew Whigham for about six months or a year before his application was made, and knew that he had been ac-



customed to going on sprints occasionally; that he so informed quite a number of the members, some of whom belonged to the examining committee, but told them that Whigham had taken the Keeley cure and stopped drinking, or otherwise he would not have recommended him for membership; that the matter was discussed in the lodgeroom at the time, but not officially in the lodge; that, after Whigham joined the order, it was known by the members that he got drunk occasionally; that he never drank to such excess as to injure him physically, to the knowledge of the witness; that at one time, while Whigham was the chief officer of the local court, he was in the lodgeroom while under the influence of liquor; that he (the witness) thought that, if Whigham in fact stopped drinking at the time he made application for membership, he was entitled to join the order, and therefore recommended him; that neither the witness nor any other member of the local court had any knowledge as to what Whigham's answers were to the questions propounded by the medical examiner. Other witnesses were called to show Whigham's habits while a member of the order, but this is all the testimony bearing on the question of waiver, and, as it does not show that the local lodge or its officers had notice or knowledge at any time of the falsity of the warranty in the application and medical examination papers, there is nothing upon which to base a defense of waiver or estoppel. As it is admitted that under the contract the false statements made by Whigham will prevent a recovery unless they were waived by the defendant, the motion for a nonsuit should therefore have been sustained.

Considerable was said at the argument and in the brief about the court physician and some of the officers of the local lodge knowing of Whigham's being repeatedly intoxicated after he became a member of the order, and not reporting such facts, as the rules required; but, as Whigham's conduct while a member is not relied upon as a defense, it is not necessary to inquire at this time as to the effect on the defendant of such knowledge by the officers of the local lodge.

It is argued that the defendant cannot insist upon a breach of the warranty, and claim a forfeiture of the policy from the beginning, without returning the money received by it from Whigham as assessments; but the contract and the rules of the order provide that in case of any concealment, misrepresentation, or untrue statement made by Whigham, all moneys paid by him should be forfeited to the defendant.

It follows that the judgment of the court below must be reversed, but, as the defect in the testimony may be overcome on another trial, the cause will be remanded for such further proceedings as may be proper, not inconsistent with this opinion.

(32 Colo. 176)

# JEFFERSON MIN. CO. v. ANCHORIA-LELAND MIN. & MILL. CO.\*

(Supreme Court of Colorado. Feb. 1, 1904.)

MINES AND MINING—PATENTS—CONCLUSIVE—  
NESS—PRIOR LOCATION—CONFLICTING  
CLAIMS—EXTRALATERAL RIGHTS—NEW  
TRIALS—SURPRISE.

1. Under the United States statute governing application for mining patents, and providing for notice which is equivalent to a summons in a judicial proceeding, owners of a claim overlapping on the surface, having a portion of the apex on the same vein, who fail to make any protest or adverse to the application, are concluded by the patent issued by the land department, as fully as if an adverse had been filed and suit in support thereof had been brought and determined against the adverse.

2. Where defendant, over objection from plaintiff, was permitted to go behind the patents to show the date of the location of the respective claims, which the patents did not disclose, it could not complain of rebuttal oral testimony introduced by plaintiff showing that its location was in fact senior.

3. Surprise from plaintiff's attack on the discovery of defendant's claim is not ground for new trial, where it is not shown that in case of such trial defendant would be able to fortify or strengthen the case made on the first trial.

4. The legal end lines of an original discovery vein are the end lines of all veins within the surface boundaries with respect to extralateral rights.

5. Where there are two conflicting lode locations, each having a portion of the apex of the same vein, and there is a conflict with reference to the dip rights within the surface rights of the two locations, the senior location must prevail, and the junior locator cannot claim rights in the lap under the doctrine of extralateral rights.

Appeal from District Court, Teller County; Edward C. Stimson, Judge.

Action by the Anchoria-Leland Mining & Milling Company against the Jefferson Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

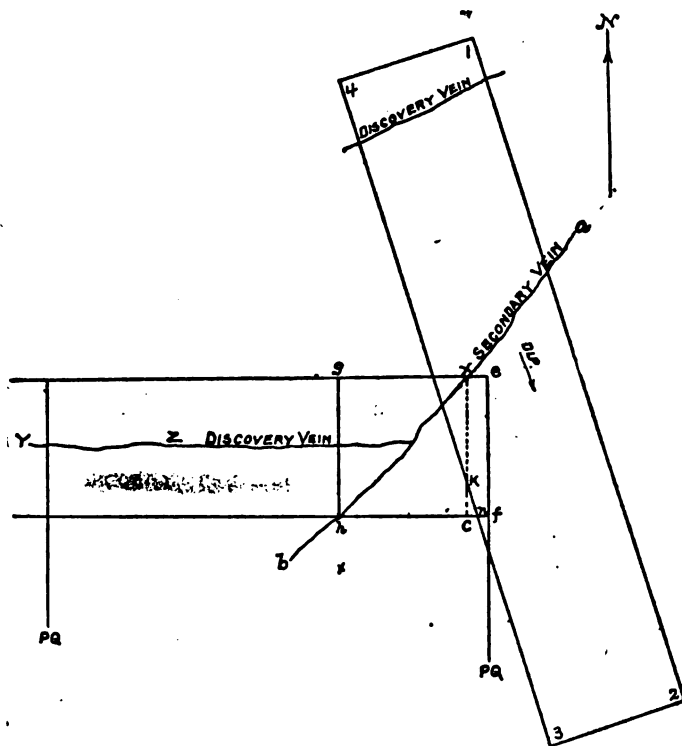
The Anchor and the Mattie L. are both patented lode mining claims, and, as originally located, overlapped on the surface, as shown by the accompanying diagram. The appellee, plaintiff below, the Anchoria-Leland Mining & Milling Company, is the owner of the Anchor, and the Jefferson Mining Company, appellant and defendant below, owns the Mattie L. claim. The Anchor went first to patent October 5, 1894, without adverse or protest by the owners of the Mattie L., and the patent includes the entire surface in conflict. A patent was issued for the Mattie L. November 3, 1896, in which the conflicting surface ground is expressly excepted from the grant. The Mattie L. as actually located is across, instead of along, the course of the discovery vein, as subsequent developments of the claim show, so that what its locators believed to be, and so designated as, its end lines are in law its side lines, and its side lines are its end lines, so far as concerns extralateral rights. The Anchor location was along the course of its discovery vein, so that its located end lines are the legal end

\*Rehearing denied March 7, 1904.



lines for all veins that have their apex within its boundaries. The relative positions of the two locations, and the patented area of each, and the segment of the vein in controversy, are shown with sufficient accuracy by the following diagram:

across both of the locations. In following this vein on its dip the owners of the Mattie L. (the Jefferson Mining Company) ran a drift under the north side line of the Anchor lode, and within the parallelogram, c, x, e, f, in which are found the ore bodies in con-



There is no material conflict in the testimony. The case was tried by the court without a jury, upon an agreed statement of facts, which was supplemented by documentary evidence and oral testimony produced by both parties. From the agreed statement, in addition to the facts already recited, it appears that what is called in the record a secondary vein, as distinguished from the discovery vein, and delineated on the diagram as a-b, enters the exterior boundaries of the Mattie L. across the easterly boundary line thereof about 510 feet southerly from corner No. 1 of that location, and thence continues, substantially parallel with the discovery vein (which is near the northern boundary), on a southwesterly course across its patented surface, and thence across the Anchor claim, entering it at the north, and departing from it at the south side line. This vein has a dip to the southeast, and the ore in controversy is situated in that segment of the vein, a-b, under the surface of the Anchor claim, and within vertical planes drawn downwards through its side and end lines.

This vein, a-b, has a portion of its apex within the patented surface of each, and the outcrop appears throughout its entire course

across both of the locations. In following this vein on its dip the owners of the Mattie L. (the Jefferson Mining Company) ran a drift under the north side line of the Anchor lode, and within the parallelogram, c, x, e, f, in which are found the ore bodies in con-

trovery, and began to extract and remove ore from such segment of the vein; whereupon this action was brought by the Anchoria Company, as the owner of the Anchor claim, to restrain the Jefferson Company, the owner of the Mattie L., from continuing such work. Further reference is made in the opinion to the evidence introduced by both parties supplementing the agreed statement of facts.

The court made findings of fact in favor of the plaintiff company, establishing the seniority of the Anchor claim, and permanently enjoined defendant from removing any ore lying beneath the surface of the Anchor claim and within vertical planes drawn downwards through its side lines and end lines.

D. P. Howard and Morrison & De Soto, for appellant. Gunnell, Chinn & Miller and Wolcott, Vaile & Waterman, for appellee.

CAMPBELL, J. (after stating the facts). The positions taken by the parties may thus be stated: Appellant's contentions are, first, that, in law and in fact, the Mattie L. is senior to the Anchor, and therefore entitled to the ore in controversy because of its priority under the doctrine governing its intra-

liminal rights; second, that, regardless of the question of seniority, as to the secondary vein, a-b, the Mattie L. has extralateral rights southerly on the dip of that vein between what its locators considered its parallel side lines, but which in law are parallel end lines, and this covers the segment in dispute; third, that the Anchor claim, although it has within its exterior boundaries a portion of the apex of this particular vein, is not entitled to the ore in controversy within the parallelogram, c, x, e, f, but the same belongs to the Jefferson Mining Company, the owner of the apex of the vein, a-b, northeasterly from x. Each of these propositions is controverted by appellee, and we shall discuss them, but not in the order pursued by counsel in their briefs.

It is to be observed again that a-b is not the discovery vein of either location, but the parties seem to agree that, under the facts of this case, their respective rights thereto, whether intraliminal or extralateral, are not different from what they would be were both locations based upon it as such.

1. In one branch of the argument of appellant's learned counsel they say that the question as to which is the senior location is the vital one in the case. This is so because there are surface outcroppings of the same vein within the boundaries of two lode mining claims which conflict on the surface. In such circumstances appellant asserts, and appellee concedes, that the claim first located necessarily carries the right to work the vein, and they both cite and rely upon: *Argentine M. Co. v. Terrible M. Co.*, 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140; *Tyler M. Co. v. Sweeney*, 54 Fed. 284, 4 C. C. A. 329; *Last Chance M. Co. v. Tyler M. Co.*, 61 Fed. 557, 9 C. C. A. 613; s. c. 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 850; *Tyler M. Co. v. Sweeney*, 79 Fed. 277, 279, 24 C. C. A. 578.

In the last case it was said that the ore body in dispute is on the dip of the lode or vein within the extended vertical planes of the end lines of the Tyler claim, and also within the side lines of the Last Chance claim, and on the dip of the vein as it passed through that claim, and it was there said that "the question as to which claim was first located necessarily determines the rights of the respective parties." Applying this principle to the present case concretely, it may be said that the ore in controversy here is on the dip of the lode, a-b, between the extended vertical planes of the legal end lines of the Mattie L. claim. It is also within the side lines of the Anchor claim, and on the dip of the vein as it passes through that claim. If the reasoning and conclusion in the Tyler-Sweeney Case, *supra*, are right—and both parties here agree that they are—then it seems logically to follow that the senior location is entitled to the ore in controversy. It may be that the facts of this case differentiate it from those cited, and that the principle therein established does not apply here.

And while it may not be necessary for us to rest our decision solely upon the question as to the seniority of the respective locations, yet, as both parties deem it vital, we first inquire which is the older location?

These claims overlap on the surface. The Anchor applied for, and first received, its patent, and no protest or adverse was made thereto by the owners of the Mattie L. The United States statute governing such applications provides for ample notice, which is equivalent to a summons in a judicial proceeding, and he who fails to heed it has no right to complain that his rights are concluded by it, and if, in such a case, a patent is issued in pursuance of an application regularly made, all persons are concluded. Had the owners of the Mattie L. protested the application for patent of the Anchor, and brought their suit in support of such adverse claim, and the judgment of the court in which the suit was pending had been in favor of the Anchor, this would have been a conclusive determination that the latter is the senior location. Such a judgment of the court would be no more conclusive than the determination by the officers of the land department, in the absence of such protest, that the Anchor was entitled to a patent for all of the territory within its surface boundaries, including the strip covered by both locations. *Last Chance M. Co. v. Tyler M. Co.*, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 850; *Bunker Hill, etc., M. & C. Co. v. Empire State, etc., Co.*, 109 Fed. 538, 48 C. C. A. 665. It may be true, as appellant contends, that, to protect the apex rights of such subsequent locator, no protest is necessary where the junior location is made on the apex of a vein on the dip of which the senior patented location is based, and there is no surface conflict; but in this case the Anchor senior location has a portion of the apex of the same vein, and there was a conflict in the surface between the two locations, and the rule invoked by both parties is applicable to the present case.

Upon the trial, however, appellant, over the objection of appellee, was permitted to go behind the patents to introduce evidence upon the question of the date of the location of the respective claims, since the patents on their face do not disclose the dates of such location, and to rebut this testimony appellee introduced oral testimony. Appellant, therefore, cannot complain if from this showing, as well as from the adjudication of the officers of the land department in granting a patent to the Anchor claim, which we hold conclusive, it appears that the Anchor is the senior location. It was a perfected mining location not later than the 10th of September, 1891, and the Mattie L. does not relate back farther than the 14th of October of the same year, because it did not have a valid discovery until that time, and until after the location of the Anchor was made. It is true that the trial court disregarded all

the evidence, documentary and oral, produced at the trial, with respect to the date of location of these claims, except that pertaining to the patents themselves, apparently basing its decision solely upon the effect of the patent proceedings; but if the other evidence admitted, but not considered, is competent or material to the issue of priority, it quite conclusively shows the seniority of the Anchor location. The complaint of appellant that the trial court improperly refused to grant it a new trial on the ground of surprise in the attack made by appellee upon the discovery of the Mattie L., if at all important here, is wholly untenable for the reason that the proof as to the alleged surprise is altogether insufficient under our practice; and, even if appellant were surprised, there is no showing that, in case of a second trial, it would be able to fortify or strengthen its case as made upon the first.

2. The second contention of appellant is that if the seniority of the Anchor claim be admitted, nevertheless the ore body in dispute belongs to the Mattie L. This is the argument: The discovery vein of the Anchor crosses both end lines of that location. Its dip right thereon is to follow the vein at right angles to the side lines, and its owner may not follow any vein, either discovery or secondary, on the dip at any other angle. Referring again to the diagram, counsel say that the owner of the Anchor may follow the discovery vein, *y-z*, wherever found within the exterior lines of the survey, and upon its dip between the planes, *PQ*, being the planes of the end lines, and may follow the secondary vein, *a-b*, between vertical planes drawn, parallel to the planes of the end lines, at the points *x* and *h*, where the vein *a-b* departs from the side lines of the location, and within such planes, represented by the parallelogram, *x, c, h, g*, may follow the vein, *a-b*, to its south side line, either on its strike or dip, at any point west of *x*, but may not follow it east of *x*, because the apex of the vein, *a-b*, between *x* and *a*, belongs to the owner of the Mattie L. claim, which by its patent has the right to follow such vein on its dip between vertical planes drawn parallel to and coincident with the legal end lines (that is, the located side lines) of the Mattie L. location, and this includes the vein under the surface of the Anchor within the parallelogram, *c, x, e, f*.

It is now settled law that the legal end lines of the original or discovery vein are the end lines of all veins within the surface boundaries with respect to extralateral rights. While appellant expressly disclaims that the present case involves the doctrine of extralateral rights, nevertheless in argument its counsel virtually asks to have the principle of that rule applied to the facts. That doctrine does not fit the facts of the case, for the legal question is one strictly of intraliminal rights. Neither can we, by analogy,

apply to the facts the principles of that doctrine, as we proceed to show.

The ore bodies in dispute within the parallelogram, *c, x, e, f*, except the triangle, *k, c, n*, to which appellant can make no claim, are within the surface lines of the Mattie L., and the entire parallelogram is wholly within the surface lines of the Anchor. The doctrine of extralateral rights refers to that part of a vein which, on the dip, lies outside of the side lines of the location within whose surface lines the apex of the vein appears, and not to any part of such vein, either the outcrop or segments on, the dip thereof, which lie wholly within planes drawn downwards coincident with its surface boundaries. In other words, the extralateral rights of a locator of a lode mining claim do not attach until after, in pursuit of his vein on its dip, he crosses the side lines of his location. Here, as we have said, in pursuing the vein, *a-b*, from its apex, which is within the surface lines of the Mattie L., thence downward on its dip, its owner has encountered a segment thereof inside the side lines, and also the end lines, of the Mattie L., which is also within the surface lines of the senior Anchor location. This segment, too, has a part of the apex of the same vein within the surface boundaries of the Anchor. It will not do to say that such segment is outside of the side lines of the Mattie L., because it is also within the boundaries of the senior Anchor, and, though the Mattie L. does not own the conflicting ground, still this very ground is actually physically within its surface boundaries. The fact that it belongs to another person, and is within the surface boundaries of another location, does not change its position on the ground with reference to legal boundary lines of the respective locations.

To make the point, if possible, still clearer, suppose that the Mattie L. patent had included all the ground which its original survey encompassed. This would embrace the strip in dispute patented by the Anchor. In other words, suppose the Anchor was out of the case entirely, and we were required to ascertain the nature and extent of the rights of the Mattie L. to all the veins found within its surface lines. On the assumption that it has the apex of the vein, *a-b*, then the rights of the locator are defined by section 2322, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1425]. The property rights conferred by a lode location thereunder are twofold (1 Lindley on Mines [2d Ed.] § 549), intraliminal, and extraliminal or extralateral. The first embraces all within its boundaries down to the center of the earth; the second, while depending for its existence upon something within such boundaries, may nevertheless be exercised, under certain conditions, beyond those boundaries. Now, the segment of the vein in dispute here is wholly within the surface lines of the Mattie L. as they were run

upon the ground. The property rights of the owner thereto are therefore strictly intraliminal, and in no sense referable to the law governing property rights of the second class. There would seem to be no doubt of this conclusion in the hypothetical case. Instead of the supposed case, however, we have one where two locations cover the same ground, and where the strip common to both is expressly excepted from the Mattie L. patent because it had been previously segregated from the public domain and conveyed by the United States to the owner of the older Anchor location. Neither this exclusion from the Mattie L. patent of the disputed strip, nor the projection of the Anchor into its territory, nor both combined, operate to change the boundary lines of the Mattie L. location. They are still to be traced on the ground as they were first run, and the ground in controversy is just as much within the existing surface lines, both side lines and end lines, of the Mattie L. as when such lines were first laid. Manifestly, therefore, now, as always, whatever property rights, if any, which the owner of the Mattie L. has in the veins found in this particular area, are derived, and must spring, from section 2322 of the Revised Statutes [U. S. Comp. St. 1901, p. 1425], and that section confers no right whatever if such ground has been previously patented to another.

It is not logical to hold that the extralateral rights with respect to this disputed strip are to be defined as though it was territory beyond the Mattie L. side lines, and within the planes of its end lines, when it so clearly appears that it is wholly within the surface lines of that claim, though covered by a senior conflicting location. The law does not require that the bounding lines of a location be laid wholly upon its own territory, and so as to include only the surface ground actually belonging to it, but they may be laid along or across other and senior locations belonging to another, though, of course, the prior rights of the latter may not thereby be injuriously affected. The courts cannot make a location or change the boundaries as made by the locator himself. But if the Mattie L. was permitted to draw in its boundaries so as to include therein only the ground actually belonging to that location, and so as to exclude all that belonging to the Anchor, the position of the appellant would not be strengthened. On the contrary, it would be left without the vestige of an extralateral right. For then the westerly legal end line (the located westerly side line) of the Mattie L. would be coincident with the northerly side line, the easterly end line, and the southerly side line of the Anchor claim for a certain distance, and thus would be not a straight, but a broken, line, and the westerly end line of the location, as thus laid, would not be parallel with its easterly legal end line, and from a claim thus irregularly located extralateral rights are withheld. The

law is that it is the end lines alone, not they and some other lines, which define the extralateral right, and they must be straight lines, not broken or curved ones. *Walrath v. Champion Co.*, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170.

To hold that the disputed strip is, legally speaking, outside the side lines of the Mattie L. location, would be not only contrary to the physical fact, but would be putting a premium on an unlawful act. It is clear that if the locators of the Mattie L. had observed the statute, and not attempted to include within their location previously located ground, and had so drawn its westerly legal end line as to take in only public domain, it would have acquired, by such compliance with the law, no right whatever to the ore bodies now claimed. And while, if the Anchor owner made no objection, the boundary lines of the Mattie L. might be laid on the surface of the Anchor, still the latter's superior right might not thereby be jeopardized. In neither of these cases could extralateral rights be asserted. Can it be said that, because the Mattie L. has so run its surface lines as to include therein property already located by another, that it thereby has enlarged its rights beyond what it would have secured had it obeyed the provisions of the statute under which its rights are obtained, and by which they are defined? In other words, may a locator of a mining claim acquire greater rights by disobeying, than by observing, the statutes of the United States, from which all his rights are derived? Until a higher authority so commands, we shall not so decide.

Extralateral rights, as to the ore bodies in dispute, might be exercised if they are outside the side lines of the Mattie L. But this situation can exist only if its westerly legal end line be drawn in to exclude the conflicting territory. In that event, appellant may not go westerly beyond that boundary, for it could not, in pursuing its vein on the dip, pass beyond the planes drawn vertically through the end lines of its location. Such planes would constitute a barrier beyond which the owner of the Mattie L. could not go, and would exclude from the exercise of its extralateral right the easterly portion of the Anchor claim which is here in controversy.

The doctrine of extralateral rights, therefore, does not apply; neither does it by analogy fit this case. The intraliminal rights of the respective parties govern, and since those rights of the junior Mattie L. claim conflict with, and are interrupted by, the senior intraliminal rights of the Anchor, the latter prevails, as we have hereinabove said in discussing another contention of appellant.

Counsel rely chiefly upon *Colo. Cent. M. Co. v. Turck*, 54 Fed. 262, 4 C. C. A. 313, wherein it was said that, where the apex of a vein passes out of the side line of a claim into an adjoining claim, the latter, though

junior in date, gives to its owner the right to follow the vein on its dip underneath the senior location. That is the case most nearly in point, but it does not, in our judgment, apply to the facts of this case. Here in the case at bar the segment of the vein claimed by appellant has not on its dip passed out of the side line of the Mattie L. claim, but is wholly within its surface boundaries. In the Turk Case the Circuit Court of Appeals did not deny to a senior location so much of the vein underground as it had the apex of. That decision, as we understand it, so far as it is analogous to this case, was that one who locates upon the apex of a lode may, within planes drawn through the end lines of the location, follow the vein outside of its side lines, and underneath the boundary lines of an adjoining proprietor, when the latter has no part of the apex, though he holds under a senior patent. But here, as we have said, the vein has not on its dip passed beyond the side lines of the junior Mattie L. location, but the ore body in question is wholly within the surface lines of the junior Mattie L., and also inside the surface lines of the senior Anchor, location. Necessarily, therefore, it seems to us that the senior claim has the right to it.

A fundamental error of appellant consists in the attempt to apply the doctrine of extralateral rights to a case which is governed by the law of intraliminal rights; in seeking to apply the limitations which are applicable to outside parts of veins—that is, veins outside the side lines—to the parts of veins wholly within such lines. This we believe is contrary to section 2322, and opposed to the authorities hereinabove cited. Appellee is not here asserting extralateral rights to the secondary vein, but bases its claims thereto solely on the ground that it is the owner of the senior location, and for that reason owns the ore found within its surface boundaries.

But if the doctrine of extralateral rights does govern, then by the decision in *Walrath v. Champion Co.*, 72 Fed. 978, 19 C. C. A. 323, the end lines, and no other lines, of the Anchor location bound its extralateral rights in the vein, a-b; hence the owner of the Anchor would be entitled to all ores of such vein found within planes drawn downward through its end lines, PQ, and would not be limited, as is attempted to be done here by appellant, by planes drawn parallel to the end lines at the points x and h. This case was affirmed by the Supreme Court of the United States under the same title (171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170), and as to this point was referred to with approval in *Montana M. Co. v. St. Louis M. & M. Co.*, 102 Fed. 430, 42 C. C. A. 415. We are aware that considerable criticism has been made of this decision. In *Ajax G. M. Co. v. Hilkey* (Colo. Sup.) 72 Pac. 447, 62 L. R. A. 555, we decided that planes drawn parallel with the end lines, and at points where the vein passed through the side lines of a location,

bounded the extralateral rights. We so limited the rule because that was the extent of the claim made by the owner of the extralateral rights. But the Supreme Court of the United States has gone further, and said that these bounding planes must be coincident with the planes of the end lines, and if this case demanded the application of that rule it would be our duty to follow it if we believed the facts of this case are such as to bring it within the principle there announced, notwithstanding the adverse criticism of the decision by the learned author of *Lindley on Mines* (2d Ed.) § 593 et seq. Its application would give the ore bodies in dispute here to the Anchor claim as the owner of the senior extralateral right.

Our conclusion is that where there are two conflicting lode locations, each having a portion of the apex of the same vein, and there is a conflict, as here, with respect to the dip rights within the surface lines of the two locations, the senior location must prevail.

To avoid, if possible, misunderstanding, we further observe that in this case a portion of the secondary vein, a-b, is within the surface boundaries of the senior Anchor lode, as the stipulated facts show. The owner of that claim, to say the least, certainly owns all the mineral of such vein within planes extended vertically downwards coincident with its end lines and side lines to the extent, at least, of the length of the apex found within its surface boundaries. The case has not been argued, certainly not exclusively, upon the proposition that each of these parties owns a definite portion of the ore found within the parallelogram, c, f, e, x, to each belonging such part of the vein as it has the apex of, but, if it had been, there is not sufficient data in the record to show what portion, or how much, each party is entitled to, even if we should hold that the Mattie L. owns such portion of the ores within that parallelogram as it has the apex of easterly of x. The case has been submitted rather upon the proposition that each party owns all the ores found within this parallelogram.

In thus disposing of this action, we have not overlooked, though we do not pass upon, the contention of appellee that the Mattie L. can, in no circumstances, have any right, intraliminal or extralateral, to the secondary vein, a-b, because it is substantially parallel with the discovery vein, and more than 300 feet distant therefrom, and under section 2320 [U. S. Comp. St. 1901, p. 1424] such other vein is therefore excluded from the operation of the patent, though it may be within the surface lines of the claim as surveyed and located on the ground. There are other contentions by appellee which, in the view we have taken of the case, are not discussed.

In addition to the authorities already cited, we refer to the following, among others, which in principle uphold the conclusions here reached: *Iron Silver Mining Co. v. El-*

gin M. & S. Co., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72.

The judgment of the district court being in accordance with our conclusion, it is affirmed. Affirmed.

(19 Colo. App. 435)

**CITY OF DENVER v. STROBRIDGE.**

(Court of Appeals of Colorado. March 14, 1904.)

**MUNICIPAL CORPORATIONS — NEGLIGENCE — SIDEWALKS—ACTION — VARIANCE — APPEAL — OBJECTION — INSTRUCTIONS — EXCEPTION — SUFFICIENCY—QUESTION FOR JURY.**

1. In an action against a city for injuries sustained by a pedestrian owing to a defective sidewalk, *held*, that the evidence was sufficient to render the question of negligence one for the jury.

2. In an action against a city for injuries sustained by a pedestrian owing to a defective sidewalk, *held*, that the evidence was sufficient to render the question of notice to the city one for the jury.

3. In an action against a city for injuries sustained by a pedestrian owing to a defective sidewalk, *held*, that the question of plaintiff's contributory negligence was for the jury.

4. An objection that there was a variance between the pleadings and proof cannot be made for the first time on appeal.

5. Court Rule 11 (64 Pac. xiv) provides that when the error alleged is to the charge of the court, the part of the charge referred to shall be quoted totidem verbis in the specifications; provided, where the charge is divided into separate instructions, which are numbered, and error is assigned as to one or more entire instructions, it shall be sufficient to designate the part of the charge referred to by giving the number prefixed to each instruction so assigned for error. *Held*, that an exception that the "court erred in giving instruction No. 1" is insufficient, where error is alleged only as to a portion of the instruction.

Appeal from District Court, Arapahoe County.

Action by Hannah M. Strobridge against the city of Denver. From a judgment for plaintiff, defendant appeals. Affirmed.

J. M. Ellis, G. L. R. Stevick, H. A. Lindsley, Dist. Atty., and S. W. Belford, for appellant. C. M. Garwood and D. V. Burns, for appellee.

**MAXWELL, J.** This action was brought in the court below by appellee, against defendant city, to recover damages for injuries resulting from a fall upon the sidewalk of Fifteenth street, near Platte street, in the city of Denver. The owners of the property adjacent to the sidewalk were made parties defendant to the suit. Upon demurrer, they were dismissed therefrom.

The complaint alleged that, for several years prior to the accident, the defendant maintained a sidewalk of stone flagging on the street in question; that at the place where the accident occurred there was a space of 8 or 10 feet from which the flagging had been removed, or which had never been paved, for the purpose of affording a driveway across the line of the sidewalk to the

rear of the premises adjacent to the street at that point, or for the purpose of affording a drain to carry off the flow of water from such premises to the gutter of the street; that the adjacent premises were higher than the street; that this driveway or drain was eight or ten inches lower than the surface of the sidewalk; that, for many days prior to the accident, snow and ice had been allowed to accumulate in this driveway, on the line of the sidewalk, to a depth of six or seven inches, and that by reason of the same thawing, melting, and freezing again, and being tramped upon, ice had been formed in such driveway, which became, and was at the time of the accident, in such condition as to form an obstruction, and render the sidewalk at that point unsafe for pedestrians; that, to facilitate drainage, the center of the driveway or drain was lower than the sides; that a light fall of snow covered the accumulated ice, and hid the slippery condition from view; that on the day of the accident the plaintiff, while passing along the sidewalk, without negligence upon her part, stepped from the flagging into the driveway, and upon the accumulated ice and snow, when she slipped, fell, and sustained the injuries complained of. The answer was a general denial.

The character and extent of the injuries suffered by appellee were established by competent evidence, and are practically conceded. The accident happened to appellee about 8 o'clock of the morning of January 30, 1899, at which time she was pursuing her way to a nearby store. As she stepped from the flagging onto a step in the driveway she slipped, fell, and sustained the injuries. The appellee alone testified as to the accident. From her testimony it appears that for a week or so prior to the accident she considered conditions safe enough; that the ice was on top of and covered the step; that she stepped on the ice; that she took but one step off the flagging, and, as she was about to put her left foot down, the right foot went from under her. It appears from other testimony that the driveway had existed for six or seven years prior to the accident, and was used as a private alley by the occupants of the adjacent premises; that the sidewalk and street were quite steep; that snow and ice in the driveway or drain had been allowed to accumulate, and had there existed for at least two weeks prior to January 30th; that the driveway or drain had snow and ice in it most of the time that winter; that across the driveway a plank walk was laid; that there was a wooden step on either side of the driveway, upon which pedestrians stepped to reach the surface of the drain, and upon which appellee stepped when she slipped and fell, the step at that time being covered with ice and snow. One of the witnesses testified that on the 27th of January, three days prior to this accident, he slipped and fell at the same place where appellee

met with her accident. Other witnesses testified that the accumulated snow and ice covered and concealed the step on the morning of January 30th, and that there had been a light fall of snow the preceding night. On behalf of defendant, the official in charge of the Denver office of the United States Weather Bureau testified that from the 2d to the 26th of January, inclusive, there had been practically no snow, and that from the 27th to the 30th, inclusive, there had been 8 or 9 inches of snow, which leads to the conclusion that the accumulation of ice and snow in the driveway was largely due to the construction of the same, and its use as a drain for the abutting premises. A witness for defendant, an officer of the city attorney's office, testified that the plaintiff told him that she slipped off the flagging before reaching the driveway. This plaintiff denied.

The trial resulted in a verdict and judgment in favor of appellee for \$2,200. At the close of the testimony the defendant requested the court to instruct the jury to return a verdict for the defendant, which was refused. Exception saved, and error assigned thereon.

In view of the testimony, no error was committed in this ruling. Under the authorities and the testimony, the questions of contributory negligence, the nature and character of the alleged defect, actual or constructive notice thereof upon the part of defendant, and its negligence in relation thereto, should have been submitted to the jury, under proper instructions.

It is said that there is a fatal variance between the allegations of the complaint and the testimony, in that the complaint alleged that the accident was caused by the snow and ice in the driveway, whereas the testimony of plaintiff showed that she stepped on the ice on the step. The step was at the end of and below the flagging, in the driveway, and a part of it. This point does not seem to have been called to the attention of the court below, no advantage taken of it, no attempt made to have the pleadings amended, if that was necessary—which we do not decide—and, after verdict and judgment; should not have been urged here. *Railroad Co. v. Conway*, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537; *Denver v. Baldasari*, 15 Colo. App. 157, 61 Pac. 190.

Exceptions were saved to each instruction given at the request of the plaintiff. Following each instruction is substantially this exception: "To the giving of which instruction the defendant, by counsel, then and there excepted." Each of the instructions to which the above exception is saved contained more than one proposition of law. It is not contended that there is not a correct statement of the law upon some one or more of the propositions therein contained; in other words, it is not contended that the instructions to which the above exceptions were saved are bad in their entirety. The rule is stated by the Supreme Court in *Beals v. Cone*,

27 Colo. 473, 488, 62 Pac. 948, 954, 83 Am. St. Rep. 92, as follows: "At the conclusion of the instructions given by the court of its own motion, which embraced the one under consideration, an exception in this form was preserved: 'To the giving of which instructions, and to each and every thereof, the plaintiff, by his counsel, then and there duly excepted.' This is equivalent to saving an exception to each instruction separately, but it cannot avail as against any instruction to which it is directed which contains a correct statement of the law, because it is insufficient to point out that which is incorrect from that which is correct." And also in *French v. Guyot*, 30 Colo. 222, 227, 70 Pac. 683, 684: "Moreover, the exceptions taken by the defendant to the instructions claimed to have been given, in no way called the attention of the court to any objectionable matter. The instructions, with one or two exceptions, which are unimportant, contain more than one proposition of law; and it has been held by this court that a general exception to an instruction which contains more than one proposition of law is not an exception which entitled the party to have the alleged error reviewed in this court." The assignments of error predicated upon the above exceptions were as follows: "That the court erred in giving instruction No. 1 asked by plaintiff." Rule 11 of this court (64 Pac. xiv) provides: "When the error alleged is to the charge of the court, the part of the charge referred to shall be quoted totidem verbis in the specifications: provided, where the charge is divided into separate paragraphs or instructions, which are each duly numbered, and error is assigned as to one or more entire paragraphs or instructions it shall be sufficient to designate the part of the charge referred to by giving the number prefixed to each paragraph or instruction so assigned for error." The assignment of error in this form is sufficient when the objection is to the entire instruction; but, when error is alleged to a portion only of the instruction, it is necessary, under this rule, to set forth the portion objected to totidem verbis. For the foregoing reasons, the assignments of error based on the instructions cannot be considered.

For the reasons above given, we are compelled to affirm the judgment. Affirmed.

(19 Colo. App. 441)

# CITY OF DENVER v. BRADBURY.

(Court of Appeals of Colorado. March 14, 1904.)

MUNICIPALITIES — DEFECTIVE STREETS — NOTICE OF INJURY — SUFFICIENCY — JUDGMENT — AMENDMENT AFTER APPEAL.

1. Acts 1893, p. 233, c. 78, art. 9, § 9 (Denver City Charter), providing that within 30 days after injuries are received the mayor or city council shall be given notice in writing of such injuries, stating when, where, and how received, and the extent thereof, is sufficiently complied with when the notice gives to the city

such information as will enable it to investigate the cause of the injuries relied on in the complaint in the action against it.

2. A notice giving the date and the place where an injury occurred, and the cause thereof as a hole into which the person injured fell, meets the requirements of a city charter requiring that notice of injuries, stating when, where, and how received, shall be served on the city.

3. A judgment may be amended so as to conform to the verdict after an appeal has been taken.

Appeal from District Court, Arapahoe County.

Action by Carrie C. Bradbury against the city of Denver. From a judgment for plaintiff, defendant appeals. Affirmed.

H. A. Lindsley, Samuel W. Belford, J. M. Ellis, Guy Le R. Stevick, and N. B. Bachtell, for appellant. T. H. Hood, *amicus curiae*. J. Warner Mills, for appellee.

GUNTER, J. Action for personal injuries. Judgment for plaintiff. Defendant appeals.

1. The charter of the city of Denver (Acts 1893, p. 233, c. 78), art. 9, § 9, provides that within 30 days after injuries are received the mayor or city council shall be given notice in writing of such injuries, stating when, where, and how received, and the extent thereof. The notice served herein is said to be fatally defective in departing from the evidence and complaint in its statement of how the injury occurred. The position, in effect, is that as to the cause of action stated in the complaint no notice was served advising defendant city as to how the injuries occurred.

This section has been construed. *City of Denver v. Saulcey*, 5 Colo. App. 420, 423, 38 Pac. 1098, turned upon the proper service of the notice, but in the course of the opinion the court pertinently said: "The object of the statute is to advise the executive officers of the city of the fact of the injury and of the claims made by the injured person, that they may investigate the matter, and, while the circumstances are fresh and the evidence easily acquired, ascertain what, if any, responsibility ought to be assumed by the city." In *Denver v. Barron*, 6 Colo. App. 72, 77, 78, 39 Pac. 989, the notice stated as the cause of the injury, or how it occurred, that the ground over a sewer recently laid gave way when plaintiff drove her horse upon it. The evidence was that for probably 24 hours before the accident there had been at that point a hole in the street resulting from the sinking of the earth in the trench where the sewer was laid, and that plaintiff's horse stepped into it. It was urged that there was a fatal variance between the evidence and the notice. The notice was held sufficient to admit evidence that the cause of the accident was the hole in the street, the court saying that the city could not have been misled by the notice. The principle announced

is that if the notice so advises the city of the cause of the injury that, guided thereby, it can investigate the question of liability, then the notice is sufficient. In *Stoors v. City of Denver* (Colo. App.) 73 Pac. 1094, upon demurrer to the complaint the notice was held insufficient. The notice stated that the claimant slipped and fell upon a public highway of Denver. The cause of the fall was not given. The court held that the purpose of such notice is to advise the city recently after the accident of its cause, so that an investigation can be made and liability determined. The cases there cited are upon this principle.

This statute is in derogation of common-law rights, and should be strictly construed in favor of such rights. "It should not be construed with liberality against the right of an injured party to maintain an action against the city, but, on the other hand, should receive a reasonably strict construction." *Tattan v. City of Detroit*, 128 Mich. 650, 87 N. W. 894; *Born v. City of Spokane*, 27 Wash. 719, 68 Pac. 386; *Bell v. City of Spokane*, 30 Wash. 508, 71 Pac. 31; *Reno v. City of St. Joseph*, 169 Mo. 642, 70 S. W. 123; *Lowe v. Inhabitants of Clinton*, 133 Mass. 526; *Dalton v. City of Salem*, 136 Mass. 279. We conclude that, if the notice gave to the city such information as to enable it to investigate the cause of the injuries relied upon in the complaint, then it is sufficient.

When the complaint is looked to, its gist as to the cause of the injury is a covered hole or pitfall in a sidewalk of defendant city. If plaintiff could prove in any manner the existence of this pitfall, the negligence of defendant in permitting it, and that it was the proximate cause of plaintiff's injury, her case as to this feature is made out. Defendant's liability was dependent upon whether this hole existed through its negligence. If the notice served was sufficiently full as to the cause of plaintiff's injury that, guided by it, the defendant could investigate its liability as charged in the complaint, then the notice is sufficient. The notice gives date and place of the accident, and its cause a pitfall into which the plaintiff stepped. If defendant city, guided by this notice, had in good faith investigated the cause of plaintiff's injuries, it could have ascertained whether the hole existed and whether there was negligence in its maintenance. This investigation would have enabled it to determine the liability charged. We think the notice sufficient. This is the point urged in oral argument, and the one chiefly relied upon in the briefs.

2. It is said there is error in instructions 2, 3, and 4, and that the verdict is against the law and the evidence. The instructions, taken together, clearly and fully state the law applicable to the case. The jury could not have been misled. The evidence is abundantly sufficient to sustain the verdict.

3. As to assignment of error No. 8, no reason is stated, or authority cited, why this assignment is well made, and we know of

¶ 2. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1702.



none. It involves the question of amending a judgment to conform to the verdict after an appeal taken from the judgment. The amendment was permissible. *Kindel v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538. Judgment affirmed. Affirmed.

(19 Colo. App. 453)

CURRIER et al. v. JOHNSON et al.

(Court of Appeals of Colorado. March 14, 1904.)

PROCEEDINGS IN ERROR—COSTS—LIABILITY OF ESTATE.

1. The costs of proceedings in error successfully prosecuted to reverse a holding that the district court was without jurisdiction, and that plaintiff's complaint, charging defendants with breaches of duty as testamentary trustees, failed to state a cause of action, cannot be taxed to the estate.

Error to District Court, Weld County.

Action by Virginia W. Currier and others against Bruce F. Johnson and others. Judgment for defendants, and plaintiffs prosecuted error. On motions for apportionment of costs, and to require payment of costs out of the estate represented by defendants in error. Motions denied.

H. N. Haynes, for defendants in error Bruce F. Johnson and Charles H. Wheeler. Ralph Esteb and John R. Wolff, for defendant in error Horace G. Clark.

PER CURIAM. This is a motion by Johnson, Wheeler, and Clark, three of defendants in error in *Currier et al. v. Johnson et al.* (Colo. App.) 73 Pac. 882, for an order directing defendants in error Mayher and Tuckerman, as acting executors and acting testamentary trustees under the will of Warren Currier, deceased, to pay the costs of this proceeding on error out of the income fund of said estate, and, in the event this cannot be done, then for an order directing in what proportion the several defendants in error shall pay said costs. If we have the power to make an order directing the payment of these costs out of the income fund of the estate, we have not sufficient information as to the merits of the action upon which to exercise such discretion. The district court held that the amended complaint failed to state a cause of action against either Johnson, Wheeler, or Clark, and that it was without jurisdiction of the action. The case came here on error, and we held that the complaint stated a cause of action against each of said parties, and that the court had jurisdiction. The complaint stated a cause of action against each of said parties for breach of their duties as testamentary trustees. So far as we are advised by the record, these allegations may be true. If so, we ought not to compel the estate, had we the power, to pay the costs incurred in maintaining such cause of action against the defendants. We have no information which would justify us in ordering the costs of this proceeding on error to be

taxed against the estate. We likewise have no information upon which we could intelligently act in apportioning the costs among the several defendants in error.

The motion to apportion the costs is denied. Denied.

(19 Colo. App. 421)

LITCH v. PEOPLE ex rel. TOWN OF STERLING.

(Court of Appeals of Colorado. March 14, 1904.)

INTOXICATING LIQUORS—PROHIBITIVE ORDINANCES—CONSTRUCTION—MUNICIPAL CORPORATIONS—POWERS—REGULATION OF LIQUOR TRAFFIC.

1. An ordinance providing, "All persons are hereby prohibited from selling intoxicating \* \* \* liquors, \* \* \* and all persons are hereby prohibited from giving away any such intoxicating \* \* \* liquors," not only prohibits the selling, but also the giving away, of liquor.

2. Under Mills' Ann. St. §§ 2833, 4403, subd. 18, giving incorporated towns the exclusive right to license or prohibit the selling or giving away of intoxicating liquor within certain limits, an incorporated town may enact an ordinance prohibiting not only the sale, but also the giving away, of liquors.

3. Where the meaning of a statute is plain, the law must be carried into effect according to its language.

Appeal from Logan County Court.

M. Litch was convicted before a police magistrate of violation of a liquor ordinance, and appealed to the county court, where he was again convicted, and again appeals. Affirmed.

Allen & Webster and H. E. Munson, for appellant. Geo. E. McConley, for appellee.

MAXWELL, J. Appellant was prosecuted before the police magistrate of the town of Sterling for the alleged violation of an ordinance prohibiting the selling or giving away of intoxicating liquors within the corporate limits of the town, found guilty, fined, and appealed to the county court, where a jury trial resulted in a verdict of guilty and the assessment of a fine of \$150, upon which judgment was rendered, and this appeal taken therefrom.

The title of the ordinance is, "An ordinance concerning the selling or giving away of intoxicating, malt, vinous, mixed or fermented liquors." Pertinent sections of the ordinance are:

"Section 1. All persons are hereby prohibited from selling intoxicating, malt, vinous, mixed or fermented liquors, within the corporate limits of the town of Sterling or within one mile of the outer boundaries thereof, except as hereinafter provided; and all persons are hereby prohibited from giving away any such intoxicating, malt, vinous, mixed or fermented liquors, in any street, alley, public park, hotel, boarding house, eating house, saloon, restaurant, place of traffic or place of public resort, or upon any vacant lot within the town of Sterling, or within

one mile of the outer boundaries of said town."

Section 2 relates to permits to druggists for selling liquor for medicinal purposes only, upon the prescription of a physician, which prescription shall designate the name of the person for whom the liquor is prescribed, and the kind of liquor prescribed, by its usual and ordinary name in the English language, and provides for the keeping of a book in which every prescription shall be posted, which book shall be open at all times during business hours for examination by any and all adult residents of the town.

"Sec. 3. Any druggist or other person who shall sell or give away any intoxicating, malt, vinous, mixed or fermented liquors, within the corporate limits of said town or within one mile of the outer boundaries thereof contrary to the provisions of this ordinance shall, on conviction thereof be fined, for each offense not less than fifty (\$50.00) dollars nor more than three hundred (\$300.00) dollars and costs of suit."

Upon the trial it was proven that appellant conducted a place of business on Main street, in the town of Sterling, where he sold cigars, tobacco, fruit, confectionery, "soft drinks," etc.; that across the rear end of the room in which this business was conducted a cloth curtain was stretched on a wire which hung several feet from the ceiling: that on the birthday of appellant he had a keg of beer in the room, back of this curtain; that a number of persons there present, invited and uninvited, including the person named in the complaint, in the presence and upon the invitation of appellant, partook of beer drawn from the keg; that the beer was free to all who desired to partake of it, and was given by appellant as a treat to his friends. It also appears that previous to the alleged violation of the ordinance the appellant consulted the police magistrate, and was by him advised that his proposed entertainment would be a violation of the ordinance, and subject him to the penalty imposed thereby. Appellant did not testify at the trial.

Appellant requested the following instructions, which were refused:

"(1) You are further instructed, that if you find the defendant guilty of giving away some beer to witness Howard Huffman on or about the 22d day of July, A. D. 1899, it then devolves upon you to find whether or not this was given away by defendant herein for the purpose of gain. If not, then you should find the defendant not guilty.

"(2) You are further instructed that the mere giving away of intoxicating liquors for the purpose of a treat to one's friends is not a violation of the ordinance, and is not to be considered as a violation of the ordinance, unless it is given as a trick, device, or subterfuge to evade the provisions of the statute."

The court instructed the jury, in substance,

that the ordinance introduced was valid; that if the jury believed from the evidence that the defendant, having no permit or license therefor, on or about the date named in the complaint, at his place of business, within the town of Sterling, gave away beer to the person named in the complaint, they should find him guilty.

The only serious contention of appellant is that it clearly appears that the act complained of was a "treat" upon his birthday to his friends, without any thought of gain or profit, or any attempt or intent to evade the law, he not being engaged in the liquor traffic; that the "giving away" of the beer by him as shown by the testimony was not within the meaning or intention of the ordinance, and that therefore he was not guilty of a violation thereof; that the instructions given were erroneous; and that the instructions refused should have been given. In support of appellant's position counsel have cited a number of authorities.

In *Wood v. Territory*, 1 Or. 223, Wood was indicted for selling liquor without a license. Section 6 of the act relating to the granting of licenses to sell spirituous liquors provides "that if any person or persons shall barter, sell or dispose of, in any manner, any spirituous liquor, without first having obtained a license," etc., "shall be fined," etc. On the trial the defendant asked the court to instruct the jury "that if the liquor was gratuitously given, without consideration, the defendant could not be convicted," which instruction the court declined to give, but instructed them, "If the liquor was given gratuitously, it would sustain the indictment, equally as if it had been sold and paid for." The Supreme Court said: "We think there was error in the refusal of the court to instruct the jury as asked, and also in the instruction given. The statute was intended to regulate the traffic in spirituous liquors. 'To dispose of liquor in any manner' might, unqualified by anything else, mean the giving of it away; but, in view of the whole statute, we think it means to part with it for some consideration, or with some motive of gain. Clearer and stronger language is necessary to make it a crime for one man to give another a glass of spirituous liquor. Where it is intended to prohibit the giving of a thing as well as the selling, the word 'give,' or some equivalent term, is employed. \* \* \* The expression 'to dispose of in any manner' seems intended to reach those cases where persons by some artifice or indirection attempt to cover up a sale, and so evade the penalties of the law."

In *Albrecht v. People*, 78 Ill. 510, the facts were that defendant was the owner and operator of a brewery; that he did not keep a dramshop, nor did he sell his beverage to be drunk on the premises; that the person to whom it is alleged he sold or gave one or more glasses of beer came to see him while he was in ill health, lying on the lounge in

his house, apart from his brewery, for the purpose of transacting business with him; that while there defendant sent to the brewery for beer and proffered it to his visitor as an act of hospitality. The act under which defendant was prosecuted was entitled "An act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors," the sixth section of which provides that "whoever by himself or his agent or servant, shall sell or give intoxicating liquor \* \* \* to any person intoxicated, or who is in the habit of getting intoxicated, shall, for each offense, be fined," etc. Some testimony was introduced to show that the person to whom the beer was given was intoxicated. The court held that the act complained of was not within the intent and meaning of the Legislature, and that the testimony failed to prove that the person to whom the beer was given was intoxicated, and upon these grounds reversed the case.

*Cruse v. Aden*, 127 Ill. 231, 20 N. E. 73, 3 L. R. A. 327. This was a civil action to recover damages for the death of the husband of plaintiff, alleged to have been caused by his intoxication, to which intoxication defendant contributed. The action was prosecuted under and by virtue of the provisions of section 9 of "An act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors." It appeared from the evidence that defendant was not in any way engaged in the liquor traffic; that he met the husband of plaintiff, who was not then intoxicated, at or near a polling place on election day, and gave him two drinks of whisky out of a flask which he carried; that the party to whom the whisky had been given subsequently became intoxicated, and met his death by reason of a fall from his horse while on his way home. After an elaborate discussion of the statute involved, and the citation of numerous authorities, held, that the above-entitled act did not apply to persons who are not either directly or indirectly, or in any way or to any extent, engaged in the liquor traffic, and that the right of action given by section 9 of said act is not intended to be given against a person who in his own house or elsewhere gives a glass of intoxicating liquor to a friend as a mere act of courtesy and politeness, and without any purpose or expectation of pecuniary gain or profit.

In *State v. Standish*, 37 Kan. 643, 16 Pac. 66. It appears that Standish was engaged in the boot and shoe business; that two or three other persons "chipped in" and purchased one or two kegs of beer; that the beer was kept in a back room or wareroom of the store building used by Standish; that the beer was used by Standish himself, and was also given away to several persons. There was no evidence to show, or tending to show, that Standish ever sold or bartered any beer or other intoxicating liquor at the place named in the indictment, or anywhere else,

or that any other person sold or bartered beer or other intoxicating liquor in his store or wareroom. There were three counts in the indictment. The second count charged "that on or about the month of May, 1887, defendant did unlawfully aid, assist, and abet in keeping and maintaining a place and room in which intoxicating liquors were received for the purpose of use, barter, and to give away as a beverage, without having a permit." The court instructed the jury, among other things, as follows: "The giving away of intoxicating liquor to be used as a beverage is an unlawful selling, within the provisions of the laws of Kansas." And also "that if you find beyond a reasonable doubt that defendant, at the place mentioned in the second count of the indictment, did assist and abet in keeping and maintaining a place and room in which intoxicating liquors were received and kept for the purpose of use, barter, or to be given away as a beverage, without having a permit to sell the same, you will find him guilty upon the second count." Counsel for Standish requested the court to instruct the jury that "any one in the lawful and bona fide possession of beer may use it himself or may give it away without being guilty of a violation of the law, provided he does not give it away to evade any of the provisions of the prohibitory law," and also that "the bona fide and honest giving away of intoxicating liquors by one who is lawfully in possession of the liquors is not a violation of the law." These last instructions were refused, and nothing similar to them was given. Defendant was convicted, and in reversing the judgment the Supreme Court says: "The instructions in this case, however, were not sufficiently limited to embrace the offense attempted to be described in the second count of the indictment, under the provisions of section 16 of the prohibitory act. They allowed the jury to find Standish guilty if he used the beer himself, or gave it away, although not done in violation of the statute, nor to evade any of the provisions thereof."

In *Reynolds v. State*, 73 Ala. 3, the defendant was indicted and convicted under a statute which made it "unlawful for any person or persons (except upon the written prescription herein provided for) to make, sell or otherwise dispose of any spirituous or malt liquors or other intoxicating drinks within the counties of Dale and Henry, state of Alabama." The testimony was that the defendant, at his private residence, in Dale county, gave to a guest two or more drinks of spirituous liquor, to wit, whisky. No point was made in the case on the question of a written prescription. The presiding judge instructed the jury that this constituted disposing of spirituous liquors within the statute. Held, that the act shown in evidence was not the disposing of liquor, within the contemplation of the Legislature.

In *State v. Jones*, 39 Vt. 370, defendant

was indicted for selling, furnishing, and giving away intoxicating liquor in violation of the statute. The statute is not given in the opinion of the court. The proof was that defendant kept a hotel, and in connection therewith a bar; that he gave to a domestic servant at the bar three drinks of whisky. Held not to be within the statute, as the servant was a member of defendant's family. It also appeared from the evidence that "at divers times" defendant furnished whisky to musicians whom he had hired to play at dances given at his hotel. Held that, as the musicians were not part of defendant's family, these acts were within the statute. Judgment of the court below was reversed, however, for the reason that the words "at divers times" were omitted from the indictment, and the prosecution, over the objections of defendant, was allowed to introduce testimony tending to show a number of different offenses.

The only authority cited by appellant, arising under a prohibitory law, wherein the facts are at all analogous to the facts in the case under consideration, is *State v. Standish*, supra. In that case it was in evidence that defendant kept the beer which he used himself and gave away in a back room or ware-room of a store building, and not in "a place of traffic or place of public resort." In all of the cases cited by appellant, the statutes under which the prosecution was had, so far as they appear in the opinions of the courts, used the words "give," "give away," "dispose of," in connection with the words "barter," "sell," or "exchange"; showing an evident intention upon the part of the lawmaking power to anticipate any attempt to evade the provisions of the law which those engaged in the liquor traffic might by any ingenuity invent. In the ordinance under consideration, the words "selling" and "giving away" are wholly disconnected from each other, and each is coupled with an absolute prohibition, disclosing an evident intention upon the part of the lawmaking power to not only prohibit the selling of liquor within the limits of the town, but also to prohibit the giving away of liquor in certain designated places in the town, which intention was expressed in language which requires no construction or interpretation.

The court committed no error in his rulings upon the instructions given and refused.

Counsel for appellant contend that the ordinance was void because on its face it attempted to enlarge the powers of the corporation beyond those conferred by the statute. In construing section 2833, *Mills' Ann. St.*, and section 4403, subd. 18, *Mills' Ann. St.*, in *People v. Ralms*, 20 Colo. 480, 492, 493, 39 Pac. 341, 342, the Supreme Court said: "The above statutes give to an incorporated town 'the exclusive right to license, regulate or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor within the limits of the town or

within one mile beyond the outer boundaries thereof, except where the boundaries of two towns adjoin.' No authority need be cited to the effect that the regulation of the liquor traffic is purely a legislative power, and that it is also clearly within the power of the Legislature to delegate to the municipal authorities the power to regulate, license or prohibit the sale of liquor within their own limits. \* \* \* The Legislature, having the right absolutely to prohibit such sales as defendant was making, has also the right to confer, and did confer, upon the county and upon the town, the same power of prohibition." See, also, *Black on Intoxicating Liquors*, § 39, where it is said: "And we may here remark that, if the state has power to prohibit the sale of liquor, it has also power to prohibit the giving of liquor by one person to another. The evil to be avoided is the communication from one to another of an article which may be injurious to the recipient, or which by its general use may demoralize or harm the whole community. It is not attempted to restrain a man's private indulgence in drink. But that is because law deals, not with the isolated individual, but with men in their relations to each other. Upon the delivery of a noxious substance from one to another, a relation is established of which the law may take cognizance. And it is perfectly immaterial whether the transfer be by sale, barter, or gift." In *Powers v. Commonwealth*, 90 Ky. 167, 13 S. W. 450, the defendant was convicted under an act of the Legislature of Kentucky which provides: "It shall be unlawful for any person or persons to sell, barter, give, loan or traffic in spirituous, vinous or malt liquors in any quantity whatever within the county of Rowan." In the course of the opinion the court said: "He next contends that the statute is unconstitutional in so far as it deprives a person of the right to give liquor to another, because by so doing it denies him the use of his property. If the sale may be forbidden, equally so may the gift of it. The law has the public welfare in view, and one may be as injurious to the public as the other. It has long been the recognized and unquestioned law of this state that one can not give liquor to a minor. The Legislature may, looking to the public health, or its peace or morals, and in the exercise of the police power, forbid not only the sale, but the gift, of any article calculated to injure these public interests. The citizen acquires his property subject to this right upon the part of the lawmaking power. The individual right is thus qualified to secure the protection of the public." Under the above authorities, it is manifest that the enactment of the ordinance was clearly within the authority delegated the town by the Legislature. Statutes should be interpreted according to the most natural and obvious import of their language, without resorting to subtle or forced conclusions for the purpose of either limiting or extend-

ing their operation. Dwarris on Statutes, 144. When the meaning is plain, the law must be carried into effect according to its language, or the courts would be assuming legislative authority. The words of the ordinance, the absolute prohibition of "selling" within the limits of the town, the absolute prohibition of "giving away" in certain designated places, including places of traffic and public resort, the manifest effort to prevent evasion upon the part of druggists, the penalties imposed, the inclusion of any and all intoxicating liquors, afford undoubted evidence of the design of the authorities of the town to make it a strictly prohibition town, according to the express terms of this ordinance, and according to the plain language thereof, which language cannot be misunderstood by any one of ordinary or reasonable intelligence. If the construction of the ordinance, as contended for by appellant, under the facts disclosed by the evidence, should be adopted, every "place of traffic or public resort" in the town, upon the plea of hospitality or for the purpose of celebration, could be converted into a free barroom or dramshop, and intoxicating liquors dispensed without let or hindrance. Such construction would render the ordinance a nullity.

Perceiving no error in the record, the judgment will be affirmed. Affirmed.

(19 Colo. App. 433)

**LITCH v. PEOPLE ex rel. TOWN OF STERLING.**

(Court of Appeals of Colorado. March 14, 1904.)

**SHERIFFS—PREJUDICE—PERFORMANCE OF DUTIES BY CORONER.**

1. Mills' Ann. St. § 869, providing that whenever any party shall make and file with the clerk of the proper court an affidavit of prejudice against the sheriff of the county the clerk shall direct the original or other process to the coroner, is mandatory, and does not give the court discretionary power to grant or refuse a motion to have the coroner summon the jury, where counter affidavits are filed by the opposing party.

Appeal from Logan County Court.

M. Litch was convicted before a police magistrate for violation of a liquor ordinance, and appealed to the county court, where he was again found guilty, and again appeals. Reversed.

Allen & Webster and H. E. Munson, for appellant. Geo. E. McConley, for appellee.

MAXWELL, J. The appellant was prosecuted before the police magistrate of the town of Sterling for the violation of "An ordinance concerning the selling and giving away of intoxicating malt, vinous, mixed or fermented liquors." He was convicted, fined, prosecuted an appeal to the county court; where the case was tried to a jury, and he was again found guilty, and a fine of \$50 assessed by the jury, upon which judgment was rendered, from which this appeal.

In the county court, before the jury was summoned, appellant filed his motion to have the coroner summon the jury, and supported such motion by his affidavit, in which he swears that he believes, is informed, and states the fact to be, that the sheriff of the county is so partial, biased, and prejudiced, and has such an interest in the case, that it would be impossible for him (appellant) to have an impartial jury selected by the sheriff. The attorney for appellee and the sheriff filed counter affidavits. The court overruled appellant's motion, to which ruling an exception was saved, and error is assigned thereon. Mills' Ann. St. § 869, provides: "Whenever any party, his agent or attorney, shall make and file with the clerk of the proper court an affidavit stating that he believes that the sheriff of such county will not by reason of either partiality, prejudice, consanguinity or interest, faithfully perform his duties in any suit commenced or about to be commenced in said court, the clerk shall direct the original or other process in such suit to the coroner, who shall execute the same in like manner as the sheriff might or ought to have done." It is said that, appellant having filed his motion addressed to the court, supported by his affidavit, therefore appellee might meet the same by counter affidavits; that the court might then, in the exercise of its discretion, grant or refuse the motion, and this court should not review the exercise of such discretion. We do not agree with this contention. The foregoing statute is mandatory, and in this respect differs from like statutory provisions to the effect "that where it shall appear" that the sheriff is prejudiced the court may order the summons or other process to be served by the coroner. The affidavit required by the statute having been filed with the clerk, it was his duty to issue the process (venire) to the coroner.

The court erred in overruling the motion of appellant, and for this error the judgment will be reversed. Reversed.

(142 Cal. 377)

**In re NEWLOVE'S ESTATE. (L. A. 1,374.)**  
(Supreme Court of California. March 3, 1904.)

**ADMINISTRATION OF ESTATE—SALE OF REAL ESTATE—AUTHORITY TO ORDER—NECESSITY OF SELLING ENTIRE TRACT—FINDINGS ON APPLICATION—SUFFICIENCY—DISCRETION OF COURT.**

1. The title to land of a decedent vests in his heirs or devisees at his death, subject only to such powers to order a sale in the course of administration as are then possessed by the court, and these vested rights cannot be impaired or affected by subsequent legislation giving a power of sale for new purposes, different from and greater than those conferred by the law in force at that time.

2. Code Civ. Proc. § 1542, prior to the amendment of 1893, provided, in effect, that if, on the hearing of a petition for the sale of land of a decedent for the payment of debts, legacies, and expenses of administration, it appeared necessary to sell a part of the real estate, and it should further appear that, after a sale of any

such part as might be required to raise the necessary money, "the residue would be of such a character, with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interests of all concerned that the same should be sold," the court might order the sale of all the real estate. *Held*, that this did not mean that a sale of the whole could be ordered only when the sale of a part would cause the remainder to become unfit for disposition among those interested, but that a sale of the entire real estate could be ordered thereunder whenever the remainder after the sale would be of itself, and irrespective of the effect of a sale of a part, of a character that would make it difficult or impossible to dispose of it among the interested parties, and so render it to their interest to have it sold also.

3. The court, in determining whether all of a decedent's land should be sold, found that, "owing to the uncertainty of the distribution of the oil, and as to its location, quantity, and quality in said real estate, it is impossible to make a fair and equitable partition of the entire tract," and that "the water on said parcel of land is limited to two places, which renders it impracticable to make an equitable partition of said tract." *Held*, that it was a necessary implication from such findings that a remainder after the sale of any part would be impossible of partition.

4. On an application for an order to sell real estate of a decedent the court found that enough money could be raised by mortgage on the land, but it did not appear that any of the heirs had property or means other than their interests in the estate. Besides this, the income produced by the land was manifestly insufficient to pay legal interest on the amount of the loan required, and the distributees must inevitably have lost the entire property, unless before default and foreclosure they could make a sale. *Held*, in view of these conditions, that the court did not err in finding that a sale was necessary.

5. A finding and evidence that the residue of a decedent's real estate could not be partitioned after a sale of a part was sufficient to sustain an order to sell the whole, without aid from a finding that a sale of a part would injure the residue.

6. The determination as to whether a sale of a decedent's real estate is inadvisable, owing to the pendency of a suit involving a small part of the tract in question, is a matter largely within the discretion of the court to which application is made.

Department 1. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Proceedings for the sale of real estate belonging to the estate of John Newlove, deceased. From an order therefor the Mercantile Trust Company, an interested party, appeals. Affirmed.

Richards & Currier, for appellant. B. F. Thomas, for respondent.

SHAW, J. This is an appeal from an order for the sale of the real estate belonging to the deceased. The appeal is by the Mercantile Trust Company, a corporation, which has succeeded to the interest of Frank H. Newlove, one of the heirs of the deceased, and a devisee under the will. The principal question presented upon the appeal is whether or not, under the facts shown, the court is justified in ordering the sale of the entire real estate of the deceased, instead of a part thereof only.

The entire real estate of the deceased consisted of a tract of 2,945 acres of farming land. The petition alleges that it was of the value of \$750,000, and that the debts, expenses of administration, and legacies, with interest, amounted to \$51,650. The reason given for asking a sale of the entire tract instead of only a part was that it was to the advantage and benefit of those interested that the whole be sold, because, it is alleged, a considerable portion of the land contained oil and asphalt deposits of great value, which were not evenly distributed over the whole of it; that it was impossible to determine what portion of the land contained such deposits, and that the location, extent, and quality of the same was so uncertain that an equitable partition could not be made. The prayer was for an order to sell the whole tract, or such parts thereof as the court should judge necessary or beneficial. The appellant appeared and contested the petition, denying the allegations above mentioned, and averring, in addition thereto, that a suit was pending involving the title to a strip of land two or three chains wide along the south boundary of the tract; that this impaired the value of that portion of the land, so that it was not advisable, until the litigation was settled, to offer the same for sale; and, further, that the amount necessary to pay the debts, expenses of administration, and legacies could be raised by a mortgage upon the property, so that a sale of any part thereof was unnecessary. The court found in favor of the petitioners, and thereupon made an order for the sale of the entire tract.

The deceased died in 1889, and therefore the court had no power to proceed under the amendments of 1893 to sections 1536, 1537, 1542, 1543, Code Civ. Proc., authorizing a sale to be made when it appears to be for the advantage, benefit, and best interest of those interested. The title to the land vested in the heirs at his death, subject only to such powers to order a sale in course of administration as were then possessed by the court. These vested rights could not be impaired or affected by subsequent legislation giving a power of sale for new purposes different from and greater than those conferred by the law in force at the death of the deceased. *Est. of Packer*, 125 Cal. 396, 58 Pac. 59, 73 Am. St. Rep. 58; *Brenham v. Story*, 39 Cal. 179; *Pryor v. Downey*, 50 Cal. 409, 19 Am. Rep. 656. The only power under which in this case the court could order a sale of more land than was necessary for the payment of debts, legacies, and expenses of administration was that given by section 1542, Code Civ. Proc., as it stood prior to the amendment of 1893. It then provided, in effect, that if upon the hearing of a petition for sale it appeared necessary to sell a part of the real estate, and it should further appear that after a sale of any such part as might be required to raise the necessary money "the

residue would be of such a character with reference to its future disposition among the heirs or devisees as clearly to render it for the best interests of all concerned that the same should be sold," the court might order the sale of all of the real estate. There is nothing in the language of this part of the section implying that the "character (of the residue) with reference to its future disposition" is something that must be produced or caused by the proposed sale and consequent severance of a part. It does not mean that the sale of the whole can be ordered only when the sale of a part would cause the remainder to become unfit for disposition among those interested. The sale of the entire real estate may be ordered, under this part of the section, whenever the remainder that would be left after the sale of any proposed part would be of itself, and irrespective of the effect of the segregation of the part sold, of a character that would make it difficult or impossible to dispose of it among the interested parties, and so render it to their interest to have such residue also sold. It is the character of the remainder itself that is to render it for the interest of the parties to have such remainder sold, and not the effect of the sale of the other part thereon. This distinction is important to the decision of the present case, for here the particular fact that makes the residue, after the sale of any possible part, unfit for disposition among the interested parties, is that the entire tract contains mineral oil, or is supposed to contain it, and is very valuable for that reason, and comparatively worthless for any other purpose; and that the oil is not developed, nor its location, quantity, and quality in the respective parts of the land ascertained, and for that reason no equitable or intelligent partition among the heirs and devisees could be made of it. But this condition is that of the land as a whole and also of every part of it, and it cannot be said that the segregation of any part by a sale would render the remainder either more or less divisible than it was before. It would have no effect whatever upon the divisibility of the remainder, and, if the sale of the part must be the cause of the indivisibility of the remainder, then the sale would be unauthorized. But it is sufficient that after the sale of a part the remainder would, from any cause, be indivisible, so that it could not be successfully and beneficially disposed of among the heirs and devisees without a sale, then the sale of the whole would be within the power of the court. It appears both from the recitals embraced in the order as entered and from the evidence in the case that the entire tract was of the character above described; and that after the sale of any part of it the residue, because of its original condition, would be of such a character that a partition of it could not be made so as to give each his just proportion of the value, and therefore the case comes clearly within

the provisions of the part of the section above quoted. The court, under such circumstances, was authorized to make the order for the sale of the entire tract. The court does not expressly find that the remainder, after the sale of any part, would be impossible of partition, but this is necessarily implied from the findings that, "owing to the uncertainty of the distribution of the oil, and as to its location, quantity, and quality in said real estate, it is impossible to make a fair and equitable partition of the entire tract," and that "the water on said parcel of land is limited to two places, which renders it impracticable to make an equitable partition of said tract." These findings are fully sustained by the evidence.

The appellant contends that the finding that it is necessary to sell any part of the land to pay the debts, expenses, and legacies is not sustained by the evidence. This contention is based on the evidence and finding of the court that enough money for that purpose could easily be raised by mortgage on the land. This is not conclusive. The court is not bound to refuse an order of sale whenever it appears that the required money can be obtained by a mortgage. It may inquire into the wisdom of mortgaging the property, and the means of payment thereof possessed by the heirs. In the present case it does not appear that any of the heirs have any property or means other than their interests in the estate. The land produces an income of not more than \$2,000 a year, and it is manifest that if a loan of \$50,000 were made with no other means of payment, the estate could not even pay legal interest thereon, and the distributees must inevitably lose the entire property, unless at some time before default and foreclosure they could make a sale of the property. In view of these conditions the court did not err in finding that a sale was necessary.

It is not necessary to consider the objection that the finding that a part of the land could not be sold without detriment to the remainder is unsupported by the evidence. The finding and evidence on the proposition that the residue could not be disposed of among the heirs and devisees by partition is sufficient, as above shown, to sustain the order, without aid from the finding that a sale of part would injure the residue.

It is further contended that the sale should not have been ordered, because it appeared that a suit was pending involving the title to a part of the tract consisting of a narrow strip along the southern line thereof including some 56 acres, and that this would impair the value of the land to such an extent as to render a sale inadvisable. We think this was a matter largely within the discretion of the court. The evidence taken concerning the merits of the action tended strongly to show that it had not been instituted in good faith. Of course, the merits could not be tried in this proceeding, but, in

view of all the circumstances of the case, we cannot say that the pendency of the suit was sufficient cause for refusing to make the order to sell. There are no other points that require discussion.

The order appealed from is affirmed.

We concur: VAN DYKE, J.; ANGEL-  
LOTTI, J.

(142 Cal. 391)

**HARVEY v. BOARD OF TRUSTEES OF  
WHITTIER STATE SCHOOL.**  
(L. A. 1,203.)\*

(Supreme Court of California. March 7, 1904.)  
CORPORATION—POWER OF TRUSTEES—LEASE.

1. A lease executed by "the parties of the second part," \* \* \* as constituting the board of trustees of the reform school, "was a contract of the corporation, binding on the successors of the trustees, though scrolls for seals were improperly used opposite their signatures.

2. Under St. 1889, p. 111, c. 108, §§ 3, 14, authorizing the trustees of the Whittier State School to receive and hold property, real and personal, in the name of the corporation, such trustees have power to take a lease of land, binding on their successors in office.

'Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by Lucy I. Harvey against the board of trustees of the Whittier State School. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., and Geo. A. Sturtevant, Dep. Atty. Gen., for appellant. Anderson & Anderson, for respondent.

SMITH, C. The suit was brought to recover damages for breach of the defendant's covenant, in a lease from the plaintiff, to keep the leased premises in good order and condition. The plaintiff recovered judgment, and the defendant appeals. The only points made by the appellant are: (1) That the lease was not the contract of the defendant, but of the original trustees; or (2) if otherwise construed, that it was ultra vires.

The first point is answered by the terms of the lease. The land was leased, it is expressly covenanted, to be used by the defendant for its own appropriate purposes, in which the trustees, as individuals, had no interest, and "for no other"; and the lease was executed by "the parties of the second part," not as individuals, but "as constituting the board of trustees of the reform school," etc. The use of the plural in referring to the corporation is without significance. This is in accordance with a very common usage, by which corporations are spoken of either as plural or singular, as, e. g., in the Civil Code (section 465, subds. 5, 8, 9, 11; sections 481, 482, 586); and, indeed, the same usage prevails with regard to collective names generally. Here, by section 3 of the

act, "the trustees" are declared to "be a body corporate"; and they are referred to throughout the section, and elsewhere in the act, in the plural. The name given to the corporation in the act, or at least one of the names, is, therefore, like that of the United States, plural in form; and hence it may be spoken of with equal propriety, either as plural or singular. The language used in the lease in describing the party of the second part is, therefore, quite appropriate; nor is it less clear than if it had been described as "the board of trustees." Nor is the use of scrolls for seals opposite the names of trustees of any considerable significance. This was doubtless improper. But the circumstance is of too light a weight to overcome the plain and unmistakable intention of the parties, as shown by the circumstances of the case, and appositely expressed in the language used.

The second point is equally untenable. The powers conferred upon the trustees by section 3 of the act are of the most ample nature, and, we do not doubt, included the power to make the lease, which, indeed, was "necessary for the successful discharge of the duties devolved by law" on the trustees, and especially of the duty imposed on them by section 14 of the act.

We advise that the judgment be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

(142 Cal. 373)

**In re LYNCH'S ESTATE.** (Sac. 1,145.)  
(Supreme Court of California. March 3, 1904.)  
WILLS—DEVISE OF REAL ESTATE—VALIDITY—  
UNCERTAIN DESCRIPTION.

1. A clause in a testator's will was as follows: "I give and bequeath to D. L., my nephew, all that certain lot, piece or parcel of land, lying and being in T. County, State of California, and described as follows, to wit: the S.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of Sec. 1, T. 21, R. 27 E." This land was not owned by the testator, but the devisee sought by striking therefrom the letter "S." and the letters "N. W." to apply the description to the west half of the southwest quarter of the same section, which belonged to testator, and was otherwise undisposed of. Held, that this would violate the rule of Civ. Code, § 1276, requiring wills to be entirely in writing, and would still leave it entirely uncertain as to which half or which quarter was referred to, and that it presented a case of a description so uncertain as to be wholly void, and not subject to correction under the sections of the Civil Code applicable thereto.

Department 1. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Proceedings to distribute the estate of Dennis Lynch, deceased. From an order denying a petition for partial distribution, Dennis Lynch, the petitioner, a nephew of the deceased, appeals. Affirmed.

\*Rehearing denied April 2, 1904.



Chas. G. Lamberson and Roth & McFadzean, for appellant. Bradley & Farnsworth, for respondent.

SHAW, J. This is an appeal by Dennis Lynch, nephew of the deceased, and claiming to be a devisee under his will, from an order denying his petition for partial distribution of the estate of said deceased, and declaring that he is not entitled to any of said estate under the provisions of the will. Omitting the provisions giving other legacies and devises, the portion of the will material to the right of appellant is as follows: "In the name of God Amen. I, Dennis Lynch, of the County of Tulare, State of California, \* \* \* do make, publish and declare this my last will and testament, in the manner following that is to say: \* \* \* Seventhly: I give and bequeath to Dennis Lynch, my nephew, all that certain lot, piece or parcel of land lying and being in Tulare County, State of California, and described as follows, to wit: the S.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of Sec. 1, T. 21, R. 27 E." It will be observed that the land described in the seventh clause of the will was the south half of the northwest quarter of section 1. The appellant's petition for distribution asked that there be distributed to him the west half of the southwest quarter of said section. The appellant's contention is that the will must be construed to describe the west half of the southwest quarter, instead of the south half of the northwest quarter. Upon the hearing of the petition it was admitted by all the parties in interest that the deceased never did own any land in section 1 aforesaid except the west half of the southwest quarter, and that he never owned the south half of the northwest quarter. Upon this evidence the appellant insists that it cannot be presumed that the deceased intended to devise property which he did not own, and, consequently, that the will must be construed so as to describe the property which he did own, and that the portions thereof which constitute a false description of the property which he owned must be rejected. In support of this contention he cites the provisions of the Civil Code, as follows: Section 1340: "When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declaration of the testator as to his intentions cannot be received." Section 1317: "A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." Section 1318: "In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which

it was made, exclusive of his oral declarations." Section 1325: "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative." Section 1326: "Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." He also cites in support of his proposition the following authorities: Patch v. White, 117 U. S. 219, 6 Sup. Ct. 617, 29 L. Ed. 860; Estate of Callaghan, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689; Bruck v. Tucker, 32 Cal. 426; s. c. 42 Cal. 346; Pocock v. Reddinger, 108 Ind. 573, 9 N. E. 473, 58 Am. Rep. 71; Decker v. Decker, 121 Ill. 341, 12 N. E. 750; Huffman v. Young (Ill.) 49 N. E. 570; Chambers v. Watson, 60 Iowa, 339, 14 N. W. 336, 46 Am. Rep. 70; Seebrock v. Fedawa (Neb.) 65 N. W. 270; Stewart v. Stewart (Iowa) 65 N. W. 976. By the application of these principles it is contended that the seventh clause must be changed by striking therefrom the letter "S." and the letters "N. W." and, thus altered, with the application of the fact that the deceased owned but one tract of 80 acres in the section, it would follow that the devise carried the particular half-quarter section which he owned within that section. This proposition, however, violates one fundamental rule with respect to the making of wills, which is that the will of a deceased must be entirely in writing. Civ. Code, § 1276. There must be sufficient in the will, after striking out the false terms, to designate with reasonable certainty the particular tract which the testator intended to dispose of thereby. In this case this essential element is lacking. If we strike out the false words of the description, it will then read thus: "I give and bequeath to Dennis Lynch, my nephew, all that certain lot, piece or parcel of land lying and being in Tulare county, state of California, and described as follows, to wit, the one-half of the one-quarter of section one," etc. The effect of this would be nothing more than to state that he gives to the devisee the half of a quarter section within that section, but leaves it entirely uncertain as to which half or which quarter is referred to. There are four quarter sections within the section, each of which can be divided into halves in four different ways, so that there are sixteen descriptions of land to which this language could apply with equal certainty; and, if the will is so construed, it would be absolutely uncertain and ineffective for that reason. It is not a case of an imperfect description which can be made certain by the application of extrinsic facts to such description as there is, which is the condition contemplated by section 1340, Civ. Code, but a case of a description so uncertain that it is wholly void. In all the cases to which the appellant refers in support of his proposition, except Chambers v. Watson, it will be found on examination that, in addition to the language of the particular de-

scription, which, if the false calls are omitted, would be left uncertain, as in this case, there is some general description which points out with certainty the property intended to be described. Thus, for illustration, if in the present case the testator had declared in his will that he gave to Dennis Lynch "my land, being the south half of the northwest quarter of section one, township 21, range 27 east, in Tulare county, California," or if there had been other words showing an intention to devise his own land, and it had been shown by evidence that the testator, at the time of making the will, owned but one tract of 80 acres within the section, and that this tract was the west half of the southwest quarter, and not the south half of the northwest quarter, the words "my land," in the description, or other words of like import in the will, would remove the uncertainty, identify the tract devised, and control the false part of the description. There would then be enough in the will, after excluding the false part of the description, to identify the land intended to be disposed of. But where, as in this case, the will is absolutely devoid of any general description, and does not, by its own terms, indicate an intention to dispose only of land owned by the testator, the court cannot insert words in the will to express that intention and thereby make the will certain. The will must be wholly in writing, and the written words, with the aid of the extrinsic facts to which they may be held to apply, must be sufficient to identify the property. It is true that a testator is usually presumed to dispose only of his own property, and not to intend the idle ceremony of making a devise of property over which he has no control. But this presumption is no part of a will, and the court cannot insert it in the will by construction, in order to make it operative. There must be words in the will itself indicating such intention. These propositions are supported by the authorities cited by the appellant above mentioned, and also by the following: *Estate of Young*, 123 Cal. 337, 55 Pac. 1011; *Zirkle v. Leonard* (Kan.) 60 Pac. 318; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 605; *Bingel v. Volz*, 142 Ill. 214, 31 N. E. 13, 16 L. R. A. 321, 34 Am. St. Rep. 64; *Sturgis v. Work* (Ind. Sup.) 22 N. E. 996, 17 Am. St. Rep. 349; *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739. We think the court below was correct in refusing to construe the will as prayed for by the petitioner.

The order is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

(142 Cal. 368)

LANGLEY v. HEAD. (L. A. 1,398.)

(Supreme Court of California. March 3, 1904.)

ELECTION CONTEST—BALLOTS—DISTINGUISHING MARKS—APPEAL—BILL OF EXCEPTIONS—QUESTION NOT RAISED BELOW.

1. Supreme Court Rule No. 25 (64 Pac. xi), providing for the inspection of an original pa-

per, where such an inspection is shown to be necessary to a correct decision of an appeal, does not justify the abandonment of all attempt to describe disputed ballots in a bill of exceptions on an appeal from the judgment in an election contest; but, in such case, whenever the question in relation to a ballot is such that its condition may be shown in the bill, it should be done, so as to avoid the production and examination of the originals.

2. Pencil marks on the face of election ballots, so minute and light as not to be readily observable, cannot serve as distinguishing marks, justifying their exclusion from the count.

3. An alleged seal on the back of election ballots, which was apparently only a drop of candle grease that had fallen thereon after they were voted, does not justify their exclusion.

4. Ink marks on the back of an election ballot, and a blot on another, if not serving as distinguishing marks, do not justify their exclusion.

5. Where there is an erasure clearly apparent on the face of an election ballot, it should not be counted.

6. An objection to an election ballot will not be considered on appeal unless it is first made in the superior court.

7. The tearing of a ballot by an election officer does not justify its exclusion from the count.

8. Placing two crosses opposite the name of a candidate is a distinguishing mark which would have justified the exclusion of a ballot under the law prior to its amendment by St. 1903, p. 149, c. 134 (Pol. Code, § 1211).

Department 1. Appeal from Superior Court, Orange County; J. S. Noyes, Judge.

Contest of an election by E. T. Langley against H. C. Head. From a judgment in favor of the latter, the former appeals. Affirmed.

J. Howard Bell, A. Y. Wright, and Edwin A. Meserve, for appellant. Victor Montgomery and Homer G. Ames, for respondent.

ANGELLOTTI, J. This is an election contest, involving the office of district attorney of the county of Orange. Upon the canvass of the returns of the general election held November 4, 1902, the board of supervisors declared H. C. Head elected to said office. The contestant, E. T. Langley, who was the opposing candidate for the office, thereupon instituted this contest, and, upon a recount of the ballots in the superior court, it was determined that Head had received 1,781 votes, and Langley 1,763 votes. The count having been completed with this result, the contestant rested his case, whereupon the contestee moved for a nonsuit. The court granted the motion and ordered the action dismissed, and thereupon judgment of dismissal was entered. The contestant appeals from said judgment.

The only grounds of contest specified in the statement were, first, illegal votes; and, second, mistakes of the boards of election in the counting, tallying, and returning of votes. Upon the trial, contestant confined his case to a recount of the ballots, and the only complaint made by him on this appeal is that the trial court erred in numerous rulings upon ballots; excluding many that should have been counted for him, and counting for

¶ 8. See Elections, vol. 18, Cent. Dig. § 167.

the contestee, Head, many that should have been excluded. The contestee has incorporated in the bill of exceptions his exceptions to certain rulings of the court in the counting of the ballots; complaining that the court excluded many ballots that should have been counted for him, and counted for Langley many ballots that should have been rejected.

Copies of the disputed ballots are not contained in the bill of exceptions, and such ballots are made a part of the bill only by the following reference, viz: "Each and all of the exhibits mentioned in this bill of exceptions are by reference made a part hereof, and exhibits hereto." Under an order made by this court on the application of the contestant, all of the disputed ballots have been forwarded to us for inspection. There are 1,201 of these ballots. It is earnestly contended by respondent contestee that there is no warrant for the production of the original ballots, or for the examination thereof by this court, and that copies thereof should have been inserted in the bill of exceptions. This court has on several occasions ordered that certain original ballots, concerning which a dispute existed, be produced for inspection by this court on the hearing of the appeal. In these cases it was doubtless recognized that in some instances it was practically impossible to so exactly reproduce the original ballot as to properly show the question presented, and that an inspection of the original was therefore essential to a determination of that question. Rule 25 (64 Pac. xi) of this court provides for the inspection of an original paper where such an inspection is shown to be necessary to a correct decision of the appeal. It was, however, never contemplated that this should lead to a practice that has been adopted in this case, viz., the abandonment of all attempt to describe the disputed ballots in the bill of exceptions, and the bringing to this court of all of the ballots objected to. Where the question in relation to a ballot is such that the condition of the ballot may clearly be exactly shown in the bill of exceptions, it devolves upon the person seeking the judgment of this court thereon to so show it. Nearly one-fourth of the ballots in this case presented the single question as to the effect of the placing of a cross by the voter after the words "No Nomination." This question might have been presented by half a dozen lines in the bill of exceptions, and there could not be any necessity for an examination of those ballots by this court. The same is true of the great bulk of the disputed ballots in this case. While the practice here adopted has doubtless lightened the labors of counsel, it has added materially to the labor of this court, and its practical effect has been to convert the court into a canvassing board. Waiving all questions as to the right of this court to examine the original ballots, and as to whether it should countenance the practice here followed, to the extent of making

such an examination, an inspection of those ballots discloses the fact that the appeal is without merit.

Disregarding those ballots which were objected to on the ground that two or more crosses had been made thereon after a candidate's name, which will be hereinafter noticed, we find 12 errors against Langley, and 12 errors against Head. Certain ballots were excluded on the ground that they had on the face thereof pencil marks, serving as distinguishing marks. Of these, defendant's exhibits 145, 149, 151, 155, 180, 181, and 182, cast for Langley, and plaintiff's exhibits 230, 231, 232, 233, and 234, cast for Head, should have been counted. The alleged pencil marks on these ballots were so minute and light that they are not readily observable, and could not have served as distinguishing marks. Defendant's exhibits 395 and 618, excluded on the ground of an alleged seal on the back, defendant's exhibit 483, excluded on the ground of blots, and defendant's exhibit 16, excluded on the ground of ink marks on back, should all have been counted for Langley. The alleged seal on the back of the two ballots was apparently only a drop of candle grease that had fallen on the ballot after it had been voted, and the ink marks on the back of one ballot, and the blot on the other, were such that they could not have served as distinguishing marks.

The objection to plaintiff's exhibit 522, counted for Head, should have been sustained. An erasure was clearly apparent on the face thereof. On the other hand, plaintiff's exhibits 171, 417, and 551, excluded by the trial court, should have been counted for Head. None of these ballots was open to the objection stated in the lower court, and it is well settled that an objection to a ballot will not be considered unless it is first made in the superior court. *People v. Campbell*, 138 Cal. 22, 70 Pac. 918. Plaintiff's exhibits 96 and 187, excluded on the ground that they were torn, should have been counted for Head. In each case it was plain that the tear was made by the election officers. Plaintiff's exhibit 240, excluded on the ground of an erasure on the face of the ballot, should have been counted for Head. It contained no erasure that we have been able to discover. The correction of these errors would give each of the candidates 11 additional votes, still leaving Head with a majority of 18. There are 10 ballots (plaintiff's exhibits 47, 55, 87, 88, 245, 423, 443, and 525, and defendant's exhibits 71 and 390) presenting debatable questions, which we do not deem it necessary to discuss. Of these, 2 were Langley ballots, excluded by the court, and 3 were Head ballots, counted by the court. The other 5 were Head ballots that were excluded. If it be conceded that none of the 3 Head ballots should have been counted, and that the 2 Langley ballots should have been counted, it would result in a gain of 5 votes

to Langley, leaving Head with a majority of 13.

In all other respects, except in the case of objections to ballots on the ground that the voter had placed two crosses opposite the name of a candidate, the rulings of the trial court were correct.

Under the statute relating to distinguishing marks, as it existed in November, 1902, and the decisions of this court relative thereto, many ballots that were counted by the trial court should have been excluded upon the objection made to the effect that the voter had placed two or more crosses opposite the name of a candidate. As the Legislature at its last session amended the law in this respect (section 1211, Pol. Code; St. 1903, p. 149, c. 134), it would serve no useful purpose to here discuss the former decisions of this court relating to this matter. It is sufficient here to say that a careful examination of the ballots objected to on this ground develops the fact that both Langley and Head ballots objected to on this ground were erroneously counted, but that the number so counted for Langley exceeded the number counted for Head. It also further appears that 3 Langley ballots (defendant's exhibits 122, 319, and 452) and 5 Head ballots (plaintiff's exhibits 237, 378, 385, 422, and 426), excluded on this ground, should have been counted. Deducting from the vote of the respective candidates the ballots which should have been excluded on account of the double crosses, and adding the ballots improperly excluded, would still further increase the majority of the contestee.

Upon the showing made in the trial court, the contestee was entitled to a judgment confirming his election. Section 1122, Code Civ. Proc. Such is the practical effect in this case of the judgment of dismissal.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

#### Modification of Opinion.

(March 11, 1904.)

It is ordered that the opinion filed herein on March 3, 1904, be modified by adding after the words, "Its practical effect has been to convert the court into a canvassing board," the following: "It is due to counsel in this case to state that the record shows that the ballots, immediately upon being counted in court, were again sealed up, and that it is stated by counsel for appellant that they were not thereafter allowed to inspect the same for the purpose of preparing their bill of exceptions. There can be no doubt that opportunity for such an inspection as may be necessary to properly present the questions raised should be afforded counsel in such cases." ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

(142 Cal. 337)

#### PEOPLE v. ZEIGLER. (Cr. 1,031.)

(Supreme Court of California. Feb. 29, 1904.)

#### HOMICIDE—INSANITY AS DEFENSE—INSTRUCTION—ERROR.

1. Where the sole defense in a prosecution for homicide was insanity at the time of the commission of the crime, and the evidence on the subject of sanity at the time of the homicide was not specifically directed to his condition at the time of the trial, and no importance was attached to his mental condition at such time, it was not cause for reversal of a conviction for the court to charge the jury: "You are not to consider whether or not the defendant is insane at the present time, but you are to consider him as now sane. A person charged with crime cannot be legally tried for such crime unless he be sane at the time of the trial. The defendant has presented the issue to you that at the very time of the alleged commission of the homicide he was insane. As I have already told you, the burden of proving his insanity at that time by a preponderance of the evidence rests upon him, because the law presumes he was then sane."

Beatty, C. J., dissenting.

In Banc. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Amos K. Zeigler was convicted of murder in the first degree, and appeals. Affirmed. See 67 Pac. 754.

John H. Leonard, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and Benj. K. Knight, Dist. Atty., for the People.

McFARLAND, J. Defendant was convicted of the crime of murder in the first degree, and was sentenced to suffer the penalty of death. He appeals from the judgment and from an order denying his motion for a new trial.

The sole defense of appellant was insanity. The only point in the case which seems to call for a discussion is raised by appellant's objection and exception to the thirteenth instruction given by the court at the request of the prosecution, which is as follows: "You are not to consider whether or not the defendant is insane at the present time, but you are to consider him as now sane. A person charged with crime cannot be legally tried for such crime unless he be sane at the time of the trial. The defendant has presented the issue to you that at the very time of the alleged commission of the homicide he was insane. As I have already told you, the burden of proving his insanity at that time by a preponderance of evidence rests upon him, because the law presumes he was then sane." If this instruction must be construed as telling the jury that in determining whether or not the appellant was insane at the time of the commission of the alleged crime they could not consider any evidence tending to show that he was insane at the time of the trial it is erroneous. It is the well-established rule that in determining whether at a certain date a person was insane a jury may consider his acts, conduct,

appearance, etc., prior to and after the said date, and that, if he is on trial for a crime alleged to have been committed at such date, evidence of his insanity at the time of his trial may be considered. 1 Greenleaf on Evid. § 14 (1); *People v. Farrell*, 31 Cal. 576; *Estate of Toomes*, 54 Cal. 516, 35 Am. Rep. 83; *People v. Lee Fook*, 85 Cal. 300, 24 Pac. 654. But an instruction in the exact language of the one above quoted was held not to be cause for reversal by this court in at least three cases—*People v. Schmitt*, 106 Cal. 48, 39 Pac. 204; *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073; and *People v. Donlan*, 135 Cal. 489, 67 Pac. 761. And it was held in those cases that the instruction related only to the question whether or not the defendant was in a proper condition—as to his present sanity or insanity—to be put on his trial for the main offense. It is provided in the Penal Code (section 1367 et seq.) that a person while he is insane cannot be tried for a public offense, and that if when an action is called for trial there is no doubt as to the present sanity of the defendant the court must suspend the main trial and submit the question of his present sanity to a jury called for that special purpose. And in the cases above cited it was held that an instruction similar to the one now under review referred only to those provisions of the Code, and merely informed the jury that it was for the court to determine whether the defendant was in a condition to be tried, and that, for the purpose of proceeding with the trial, he was to be considered as at present sane. In *People v. McCarthy*, supra, the court said that the instruction should be regarded “as doing no more than informing the jury that the issue submitted to them was that of defendant’s sanity at the date of the homicide, and that for the purposes of the trial he was to be considered sane, since only a sane man could be competently put upon trial for an offense.” While, therefore, the instruction in question is not to be commended, and might as well have been omitted, still, following the views expressed in the cases above cited, we do not think that giving it calls for a reversal. The evidence of appellant on the subject of sanity at the time of the homicide was not specially directed to his state of mind at the time of the trial, and it does not appear that any importance was attached to his mental condition at the latter period; for his counsel did not ask the court to instruct the jury that evidence tending to show his insanity at the time of the trial should be considered by them in determining whether he was insane at the time of the homicide.

There are some other points made by appellant, but no one of them is available for a reversal, and they do not call for special notice. It is enough to say that there was no error in giving the fifth, tenth, and eleventh instructions asked by the people, or in refusing the sixteenth, thirty-fourth, forty-second, forty-fourth, fifty-fourth, and fifty-

sixth instructions asked by appellant, or in modifying what is called in the brief the fifty-fifth instruction asked by him, and found at folios 756 and 759 of the transcript, or any substantial error in any ruling on the admissibility of evidence or on any other subject.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

BEATTY, C. J. I dissent. It is hardly correct to say that the instructions “held not to be ground for reversal” in the Cases of Schmitt, McCarthy, and Donlan were in the “exact language” of the thirteenth instruction of the superior court in this case. It is true that in the Schmitt Case, as in the McCarthy Case, an instruction was given in the “exact language,” but other instructions were given along with it which were held to qualify it, and to prevent it from being understood in an injurious sense; and in the Donlan Case the substance of these qualifying instructions was incorporated with the other so as necessarily to be read in connection with it. Moreover, the instruction as so qualified was not approved, but merely tolerated or excused for reasons totally wanting in this case—the principal of which was that no suggestion was made during the trial that the defendant was insane, nor any witnesses examined as to his sanity at that time. *People v. Schmitt*, 106 Cal. 50, 39 Pac. 204. In this case there was more than a suggestion that the defendant was insane at the very time of the trial—insane, that is to say, in the sense of having a diseased brain—a condition which, though it might leave him ordinarily in possession of his memory and reasoning faculties, and therefore liable to be put upon trial for an offense (*Ex parte Buchanan*, 129 Cal. 330, 61 Pac. 1120, 50 L. R. A. 378), would nevertheless predispose him to violent outbreaks of insane fury when wrought upon by a keen sense of injury. There was evidence, unimpeached and uncontradicted, strongly tending to prove that he was the victim of inherited epilepsy, and that he exhibited symptoms of that malady in his conduct and appearance before and at the trial. This being so, it was of vital importance to his defense that the jury should not be so instructed as even to leave them in any doubt as to their duty to consider the evidence of present insanity as corroborative of other evidence of chronic cerebral disorder. The circumstances, in short, were such as to emphasize the impropriety of giving an instruction never approved in any case, and only condoned in particular instances upon grounds which have no existence here.

The error of the court in giving this instruction is made more striking by the fact that the district attorney requested in behalf of the state an instruction copied from that

given in the Donlan Case, 135 Cal. 493, 67 Pac. 761, and containing the qualification to which so much importance has always been attached in holding the instruction as here given "not cause for reversal." This instruction, so qualified, and to that extent less objectionable, was refused in favor of the unqualified proposition quoted in the opinion of the court, where in terms of mild disapproval it is held not to be ground for reversal. In my opinion the instruction even in its qualified form should never have been excused, and in the form it appears in this case should be unhesitatingly condemned.

(142 Cal. 350)

**TOWN OF SUISUN CITY v. DE FREITAS.**  
(S. F. 3,193.)

(Supreme Court of California. March 2, 1904.)

**WATER COURSES—OBSTRUCTION—USE—IRRIGATION—EVIDENCE—FINDINGS—DECREE.**

1. In an action to enjoin defendant from obstructing the flow of water from certain springs which flowed over defendant's land, and thence onto plaintiff's land, evidence held to support the findings as to the existence and number of springs on defendant's land, and as to his use of the water for domestic and irrigation purposes.

2. Where, in an action to restrain the obstruction of the flow of water from certain springs on defendant's land, which flowed onto plaintiff's land, it appeared that defendant had used such water only twice in a number of years for domestic purposes, and had used a portion of it to irrigate six acres during February, March, and April, and practically all of it during the months of May, June, July, and August, a decree allowing the defendant the use of the water for domestic purposes at all times, and to use such part of it as was necessary for irrigation of such land during February, March, and April, and all of the water from June to August, inclusive, and restraining him from otherwise obstructing the flow, was not prejudicial to defendant.

Commissioners' Decision. Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by the town of Suisun City against Manuel L. De Freitas. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Geo. A. Lamont and E. L. Webber (Webber & Rutherford, of counsel), for appellant. O. R. Coghlan, for respondent.

**CHIPMAN, C.** Action to enjoin defendant from obstructing the flow of water from certain springs situated on defendant's lands to the lands of plaintiff. Plaintiff had judgment perpetually enjoining defendant from obstructing or diverting "the flow of the waters from the three or four springs situated on" defendant's lands, " \* \* \* except so much of said waters as defendant may necessarily use for domestic purposes, and also so much of said waters as defendant may have need of in irrigating the six acres of berries, fruits, and vegetables during the months of February, March, and April, and all of the waters of said springs during the

months of May, June, July, and August, of each year, which are cultivated by defendant on his said land." Defendant appeals from the judgment, and from the order denying his motion for a new trial.

Plaintiff and defendant are owners of contiguous tracts of land situated on the mountain side, north of Suisun. The land of plaintiff is used as a site for waterworks to supply the town of Suisun, and several springs situated on this land were developed, and form the principal water supply for the town. The springs on defendant's land were higher up on the mountain side, and the court found (finding 3) "that three or four springs of fresh water have their rise and exist on, and from time immemorial have existed on, said tract of land owned by defendant, and the waters of said springs have collected together on said tract, and from time immemorial have flowed through a natural channel to and upon the tract owned by plaintiff"; that defendant and his grantor have dug out and straightened this channel, but it has not prevented or diminished the flow of water from said springs. Finding 4 is that defendant and his predecessor for more than 25 years continuously used so much of the waters of said springs during the months of February, March, and April as was necessary for domestic purposes and irrigation, and that during the months of May, June, July, and August of each year they used the whole of the water for the purpose of irrigating about six acres of land planted to berries, fruit trees, and gardens; that, except as used for domestic purposes and for irrigation as aforesaid, all the waters flowing from said springs flowed uninterruptedly (except as afterwards found by the court) through said natural channel to plaintiff's land, and helped to feed the springs that exist on plaintiff's land, and since 1897 have helped to feed the tunnels, drains, and other works of plaintiff connected with its waterworks. Finding 5 is that in December, 1898, defendant obstructed the flow of water through said channel, and diverted and still diverts some of said waters from flowing to plaintiff's land through said natural channel. Finding 7 is that defendant and his grantors have not for 25 years or at all appropriated and used all the waters of said springs on defendant's land, and that they have used said waters only as found above.

1. It is claimed that the evidence does not support finding 3. The point made in the brief seems to be that the court was not warranted in finding "that three or four springs of fresh water have their rise and exist on" defendant's land, because the evidence did not warrant the court in fixing this as the definite number of springs; that the complaint alleged that there were "numerous springs" on the land, and, as the judgment enjoined defendant from obstructing "the three or four springs situated on defendant's land," he could not determine which of the

"numerous springs" he was to abstain from obstructing, and hence might find himself in contempt of court. Defendant admitted in his answer "that numerous springs" had their rise on his land, as alleged in the complaint, but denied the allegation that the waters of these springs flowed "at any time in a natural or well-defined channel, or any channel, uninterruptedly or in any other manner, or at all, to or upon the tract of land described in" plaintiff's complaint. The number of springs on defendant's land was not made an issue. The issue was that the waters from these springs did not flow by a defined channel to plaintiff's land. It is the obstruction of this channel by defendant that the action and the decree aim to prevent. The springs form a single group, and, while the evidence is not definite as to their exact number, there is no mistaking that the evidence related to this group of springs, and that the court referred to all of them whose surplus waters flowed to plaintiff's lands through the channel referred to.

2. It is further contended that finding 4 is unsupported by any evidence, namely, that defendant and his predecessors have at all times during the months of February, March, and April used so much of the waters of said springs as were necessary for domestic purposes, etc., and during the months of May, June, July, and August used all the waters of said springs, etc. Plaintiff claimed in its complaint that all the waters of said springs were accustomed to flow to plaintiff's lands until obstructed by defendant. This was denied in the answer; defendant's claim being that all the said waters are necessary for domestic purposes and for irrigation, and had been used by him and his predecessors for over 25 years last past. There was evidence that defendant "commenced irrigating about May, and continued until the rains fell, sometimes a little earlier or a little later," and that "there would be very little water running into the channel" when "irrigating his berries." There was also some evidence that recently there had been some irrigating done in February and March. Defendant's son testified: "The only two times we have got water from the ditch for the house was those two times, four or five years ago last year; and I remember back quite a number of years." It appeared that there was a spring in the corral, from which water for the house was obtained, and defendant's wife testified: "When this spring in the corral went dry (which was in recent years) we got water from the ditch that comes through the blackberry patch." There was evidence that, "when defendant was not irrigating, the water would always come down through the channel into the town land," and a witness who had known the land for 30 years testified to the existence of a channel from defendant's springs to the town land ever since he could remember. As we understand the decree, defendant is allowed, first, at all

times to use the spring water for necessary domestic purposes; second, to use so much of the water as is required to irrigate the six acres of berries, fruits, and vegetables during February, March, and April; and, third, all of the water for any and all purposes during the irrigating season of June to August, inclusive. We think the decree was as favorable to defendant as the evidence would warrant, and, so far as it protects the rights of plaintiff, is sustained by the findings, which find support in the evidence.

It is advised that the judgment and order be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

(142 Cal. 354)

PEOPLE v. SUESSER. (Cr. 983.)

(Supreme Court of California. March 2, 1904.)

MURDER—DECREE—INSANITY OF ACCUSED—EVIDENCE—BURDEN OF PROOF—REMOVAL OF CAUSES—ARRAIGNMENT.

1. Under Pen. Code, § 187, defining murder as the unlawful killing of a human being with malice aforethought, an information that the defendant did "willfully, feloniously, and of his malice aforethought, kill" another, was sufficient, though it omitted the word "unlawfully."

2. Any irregularity in an arraignment, in delivering the copy of the information to the attorney for the accused, instead of the accused himself, was waived by failure to object thereto in the trial court.

3. Under a statute providing that, on a proper showing in a criminal action, an order must be made "transferring the action" to the court of another county, the court to which the action is transferred acquires jurisdiction on the making of the order, without regard to the transmission of the records as required by Pen. Code, §§ 1036, 1038.

4. Though Pen. Code, § 1036, provides that, on the removal of a criminal action, the clerk must transmit to the court to which the action is transferred, a certified copy of the order of removal, record, pleadings, and proceedings in the action, and contemplates the retention of the original papers in the court from which the transfer is made, yet the irregularity in transmitting the original records as required by Code Civ. Proc. § 399, for the transfer of civil cases, is waived by failure to object thereto in the trial court.

5. Code Civ. Proc. §§ 226, 227, provide that where jurors have not been drawn, or there are not enough jurors present to form a panel, the court may either order a sufficient number drawn and summoned, or direct the sheriff to summon as many as may be required. *Held*, that it was no abuse of the court's discretion, after a drawn jury had been charged and dismissed, to refuse another drawn jury, and to order the sheriff to summon jurors, though the trial was for the murder of a "brother sheriff."

6. Under Code Civ. Proc. § 1870, permitting an intimate acquaintance of a party to give in evidence his opinion of the party's sanity, a ruling of the trial court as to whether a witness is an intimate acquaintance of the party will not be disturbed unless clearly wrong.

7. Evidence that certain persons had procured the arrest of the accused, and that he had

determined to take their lives, and was starting out for that purpose when he met the sheriff, who interfered with him, and whom he thereupon shot and killed, was admissible on a trial for the murder of the sheriff.

8. Though a killing, to be murder in the first degree, must have been deliberate and with premeditation, it is not essential that there should be any appreciable time between the intent to kill and the act of killing.

9. In a criminal case the burden is on defendant to prove by a preponderance of the evidence the defense of insanity.

10. Where one deliberately intended to kill one person, and, in attempting to do so, took the life of another, whom he mistook for the intended victim, he is none the less guilty of murder in the first degree.

In Banc. Appeal from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

George Suesser was convicted of murder in the first degree, and appeals. Affirmed.

See 64 Pac. 1095.

B. A. Herrington, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was informed against in the superior court of Monterey county for the murder of Henry R. Farley. His motion for a change of place of trial having been denied, he was tried in Monterey county, convicted of murder in the first degree, and sentenced to death. This court held on an appeal that the motion for a change of place of trial should have been granted, and reversed the judgment, with direction to the superior court of Monterey county to grant said motion. *People v. Suesser*, 132 Cal. 631, 64 Pac. 1095. In accordance with the mandate of this court, and by the consent of the parties, an order was thereupon made by the superior court of Monterey county transferring the case to the superior court of Santa Clara county. A trial was then had in said last-named court, resulting in a verdict of guilty of murder in the first degree, without recommendation, and the defendant was adjudged to suffer death. He appeals from the judgment, and from an order denying his motion for a new trial.

1. It is urged that the information against defendant is fatally defective, in that the word "unlawfully" is omitted from the charging part thereof, which, so far as material, is as follows, viz., "did then and there willfully, feloniously, and of his malice aforethought, kill and murder one Henry R. Farley, a human being, contrary to the form, force, and effect of the statute," etc., and, further, that it is insufficient to sustain a verdict of murder in the first degree, in that it does not charge that the homicide was deliberate or premeditated. Our statute (Pen. Code, § 187) defines murder to be "the unlawful killing of a human being with malice aforethought"; and murder, so defined, includes both degrees. It is sufficient to charge the crime of murder in the language of the

statute defining it (*People v. Hyndman*, 99 Cal. 1, 33 Pac. 782), and this is substantially done by an information which charges a willful and felonious killing with malice aforethought, contrary to the form, force, and effect of the statute. An information guilty of a similar omission of the word "unlawfully" was held sufficient in *People v. Davis*, 73 Cal. 355, 15 Pac. 8.

2. It is claimed that defendant was never arraigned under the information; the basis of this contention being that the copy of the information required by statute to be delivered to him was not delivered to him personally, but to the attorney appointed by the court to defend him, who was present at the arraignment, and acted for him therein. No objection was made by defendant to such delivery being made to his attorney. Defendant was, upon motion of his attorney, granted two days to plead. He subsequently, through such attorney, moved the court to set aside the information, and thereafter he entered a plea of not guilty thereto. So far as appears, the objection as to the delivery was never made in the lower court. If there was any irregularity in delivering the copy to the attorney, instead of to the defendant personally, which we do not admit, it was waived. *People v. Lightner*, 49 Cal. 226. It would seem, however, that a delivery of the copy of the information to the attorney representing the defendant, where no objection is made by the defendant, should be held to be a delivery to the defendant, within the meaning of our statute. It may also be stated that the fact that defendant was "duly arraigned" is established by the bill of exceptions.

3. Our statute relative to the removal of criminal actions provides that the order of removal must be entered upon the minutes of the court, and that the clerk must thereupon transmit to the court to which the action is transferred a certified copy of the order of removal, record, pleadings, and proceedings in the action (section 1036, Pen. Code), and contemplates the retention of the original papers in the court from which the transfer is made, for it provides that, if it becomes necessary to have them in the court to which the transfer is made, an order must be made for their transmission by the court from which the action was transferred. Section 1038, Pen. Code. Instead of following the procedure plainly pointed out by the statute, the method designed for the transfer of civil causes was pursued. Code Civ. Proc. § 399. A certified copy of the order of removal was forwarded to the superior court of Santa Clara county, and there filed; but, instead of certified copies of the other papers in the cause, all of the original pleadings, papers, and files were forwarded, and no certified copies thereof were retained in Monterey county. It is further claimed that the transcript does not show that the alleged copies of the minutes of the Monterey court showing the ar-

¶ 10. See Homicide, vol. 26, Cent. Dig. § 23.



raignment and plea were certified to be correct copies by the clerk, or that the information against defendant was ever filed in the superior court of Monterey county. No suggestion as to any of these matters appears to have been made in the trial court, but the claim is made for the first time on this appeal that by reason of these matters the superior court of Santa Clara county never acquired jurisdiction to try the cause. We are of the opinion that, under the language of our statute, the superior court of Santa Clara county acquired jurisdiction of the cause by reason of the making and entry of the order of removal. The statute provides that an order must be made "transferring the action," and, when such an order is legally made, the court making it has no jurisdiction to proceed further in the cause, so long, at least, as that order remains unrevoked. The certified copies to be forwarded to the court to which the action has been transferred are but evidence of the order of transfer, and of the proceedings in the court from which the transfer has been made. There is nothing in the statute which makes the furnishing of such evidence essential to the "jurisdiction" of the court to which the transfer is made. Just as in the matter of service of a summons or a notice of appeal, it is the fact of service rather than proof thereof, that gives jurisdiction, so here it is the fact of the making of the order, rather than the proof thereof, that transfers jurisdiction. Due proof of the making of the order of transfer would doubtless be required by the court to which a transfer is made, and also by this court on appeal; but that was fully furnished, as shown by the transcript, in the method prescribed by law, viz., by the certified copy of the order transferring the action filed in the Santa Clara county court. A view contrary to the conclusion we have reached appears to have been taken by the appellate courts of two or three of our sister states. *Hudley v. State*, 36 Ark. 237; *Fawcett v. State*, 71 Ind. 590; *Williamson v. State*, 64 Miss. 229, 1 South. 171. In the Mississippi case the objection was made before trial, and the rulings in Indiana were apparently due to the peculiar language of the statute. In the latter state, where the courts have gone to the utmost limit of strictness in favor of defendants, it was held in *Burrell v. State*, 129 Ind. 294, 28 N. E. 699, that any mere informality is waived by appearance and submission without objection to jurisdiction. Although the superior court of Santa Clara county had jurisdiction of the cause by reason of the order of transfer, the defendant was entitled to have the certified copies forwarded as provided by the statute. If he had in any way suggested the defect, or objected to any proceedings being had until they were furnished, and the court had overruled his objection, a different question would be presented. The court actually had jurisdiction, and defendant made no complaint

as to the insufficiency of the records and papers forwarded. We cannot see how any substantial right of the defendant could have possibly been affected by what was at most a mere informality. What appears to be the minutes of the arraignment and plea is in fact certified to be a "copy of minutes"—rather informally, it is true, but sufficiently in the absence of objection; and the bill of exceptions shows that the original information forwarded had been filed in the superior court of Monterey county on October 9, 1899, and that, having been duly arraigned thereon, defendant on October 13, 1899, pleaded not guilty thereto.

4. The case having been set for trial on September 23, 1901, defendant on September 21, 1901, filed a written demand for a drawn jury. The case came on for trial September 24, 1901, and defendant challenged the panel of jurors then present, which, so far as appears, was a drawn jury. The challenge was allowed, and the jury excused. Defendant then demanded that a jury be drawn from the jury box of the county, in which were the names of 470 talesmen regularly selected by the supervisors. The court denied the request for a drawn jury, and, there being no regular jury in attendance, ordered a special venire of 60 jurors for the trial of this cause to be summoned by the sheriff. The special venire was returned and the trial commenced on the same day, September 24, 1901; the jury being selected from such panel so summoned by the sheriff. No reason was assigned to the court for the request for a drawn jury, and no showing made, and it was not suggested that the sheriff was in any degree disqualified. It is, however, now contended that there was ample time for the procuring of a drawn jury, and that, inasmuch as the deceased was sheriff of Monterey county, it was an abuse of discretion to allow a "brother sheriff" to select the jury. There is nothing in this contention. While this court has in several cases suggested that it is more in accord with the spirit of the law pertaining to the subject to select jurors by drawing names from the jury box, than to allow the sheriff to select the individuals who shall act, the trial court unquestionably has the power, under the provisions of section 226, Code Civ. Proc., whenever a jury is needed, and jurors have not been drawn or summoned, to either order a sufficient number drawn and summoned, or direct the sheriff, if he is not disqualified, to summon so many good and lawful men as may be required to serve as jurors. It has the same power under section 227, Code Civ. Proc., when there are not competent jurors enough present to form a panel. With the exercise of that power by the trial court this court cannot interfere, unless, perhaps, the circumstances of the case are such as to show a gross abuse of discretion by the trial court. In *People v. Davis*, 47 Cal. 93, the entire jury was selected from a venire selected by the

sheriff, and this court said that the objection of defendant to the method pursued was fully answered by section 226, Code Civ. Proc. See, also, *People v. Vincent*, 95 Cal. 425, 30 Pac. 581. It has repeatedly been held that a jury may be completed in this manner, notwithstanding the presence of names in the jury box of the county. *People v. Schorn*, 116 Cal. 503, 508, 48 Pac. 495; *People v. Durrant*, 116 Cal. 179, 195, 48 Pac. 75. In *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341, cited by defendant, the question was as to the propriety of the appointment of an elisor to select jurors to complete a grand jury. The record shows no abuse of discretion by the trial court in this regard.

5. It was claimed that defendant was insane at the time of the killing. Complaint is made that the trial court erroneously held certain witnesses not to be "intimate acquaintances" of defendant, and, on that ground, sustained objections to questions addressed to them calling for their opinions as to the mental sanity of defendant, and that it allowed certain witnesses for the prosecution, who had not shown themselves to be intimate acquaintances, to give their opinions on this subject. The determination of the question as to whether a witness is an "intimate acquaintance," and therefore competent, under subdivision 10 of section 1870, Code Civ. Proc., to give an opinion as to the mental sanity of another, is peculiarly within the discretion of the trial court. The statute does not prescribe any measure of proof in such a matter. In *People v. McCarthy*, 115 Cal. 255, 258, 46 Pac. 1073, this court said: "In the determination of this question, as in that of any other fact from oral evidence, he [the trial judge], of necessity, must be conceded to be the best judge of what the evidence shows, since he has before him many elements of fact which cannot be transmitted to paper, but which enable him to more correctly weigh the evidence, and exercise a wiser discrimination as to what it shows, than one who reads but a naked statement of the evidence, without the presence of the witness. And so it has been held, and wisely, that the trial judge is to be accorded wide discretion and latitude in this respect; and his ruling will not be disturbed except where the evidence is so lacking as to leave no just room for question that the discretion has been improperly exercised." See, also, *People v. Hubert*, 119 Cal. 216, 221, 51 Pac. 329, 63 Am. St. Rep. 72. We have carefully examined the testimony of each of the witnesses relative to the rulings complained of, and find no warrant for holding that error was committed in regard thereto.

6. The killing of deceased occurred in the city of Salinas on the evening of September 18, 1889, about 10 o'clock, on a street adjoining the home of defendant. There was evidence tending to show that as the deceased, who was sheriff of Monterey county, was proceeding along the street with two compan-

ions, the defendant came from his house into the street, carrying a shotgun, and declaring to some of his relatives, who were endeavoring to dissuade him, his intention "to kill them; \* \* \* to kill the old s—— of a b——." The deceased accosted him by name, and told him to stop, and asked him if he knew him, and the defendant answered: "Yes; I do. I will kill you too. Stand back." The deceased advanced a few steps toward defendant, and, while they were between 20 and 25 paces apart, the defendant shot and killed the deceased. One witness testified that when deceased said, "George, do you know who I am?" the defendant answered, "I do, you s—— of a b——!" and immediately shot him. One of the companions of deceased at once ran over to where the deceased lay, whereupon the defendant ordered him to stand back, or he would shoot him, pointed the gun at him, and endeavored to shoot him, but the cartridge failed to explode. The theory of the prosecution was that defendant had determined to kill one Delaney and one Allen, and had started from his home armed for that purpose, and, when deceased endeavored to prevent him from proceeding on his mission, deliberately killed him to get rid of his interference. The prosecution was allowed to show that Delaney had sworn out a warrant against the defendant a few days before, and that Allen, who was a constable, had arrested him thereon one or two days before; that, on the afternoon of the day of the homicide, Allen told defendant that he had another warrant for his arrest, which, it appeared, on cross-examination, had also been sworn out by Delaney for threats against his life; that defendant was very bitter against both Delaney and Allen, and during the same evening went to Delaney's house, assaulted him, and threatened his life; that to several people during the evening he threatened that he would kill both Delaney and Allen; that he subsequently procured a rifle, and after telling two or three people that he was going to Delaney's house and settle it with him, and that, if Allen continued to follow him, he would shoot him, also, did go there and fire several shots into Delaney's room; that he was discovered in the vicinity of Delaney's house by Allen, who went there upon hearing the shots; that, when Allen advanced upon him, he ran back in the direction of his own house, from which he again came almost immediately with the shotgun, and encountered and shot the deceased. All of the occurrences of the evening were testified to as having taken place within about two hours, and, so far as defendant is concerned, appear to have been parts of one continuous transaction, having for its ultimate object the doing of violence to Delaney and Allen, and incidentally resulting in the killing of deceased. We have no doubt as to the admissibility of this evidence. It is, of course, true that evidence as to difficulties with or threats against persons other

than the deceased, or as to other offenses, is not admissible against a defendant unless there is a sufficient connection between the facts sought to be proved and the particular act under investigation. Where the proffered evidence is relevant to the issue being tried, the mere fact that it shows threats against or quarrels with persons other than the deceased, or the commission of other offenses by the defendant, is no legal objection to its admission. This is recognized by all the authorities, including those cited by defendant; one of them stating that, "while threats against the deceased are admissible in evidence to show malice, threats against another person are only admissible under circumstances which show some connection with the injury inflicted on the deceased." *People v. Bezy*, 67 Cal. 223, 7 Pac. 643. The evidence here admitted comes fully within the views of this court as enunciated in *People v. Miller*, 121 Cal. 343, 53 Pac. 816. There, as here, there was no evidence of any prior ill will on the part of the defendant against the deceased; and there, as here, the only possible motive for the killing was the fact that the deceased obtruded himself between the defendant and the object of his vengeance, and was endeavoring to prevent the accomplishment by defendant of his purpose to kill another. In that case, evidence that Mrs. Ryan had, two days before, had the defendant arrested on a charge of disturbing the peace; that on the day of the homicide he went to the home of a mutual acquaintance, and asked her, on some pretext, to send for Mrs. Ryan; that, when Mrs. Ryan came, and found defendant there, she at once left; that defendant pursued her and began shooting at her; that she ran into a house occupied by deceased, crying for protection; and that thereupon deceased endeavored to prevent defendant entering the house, whereupon the killing occurred—was held admissible. It was there said that, if defendant had not intended to kill Mrs. Ryan, it was not likely that he would suddenly have formed the purpose to kill deceased, and that the purpose or intention of defendant in the pursuit of Mrs. Ryan was therefore material and important evidence. The evidence admitted here related entirely to the defendant's state of mind toward certain persons who were the objects of his hostile mission when he left his home with a shotgun and encountered deceased, and to his intention in regard to such persons. It was material to the determination of the question as to the character of the act by which Farley, who interrupted him in his mission, was killed, and to this purpose it was carefully limited by the court in its instructions. See, also, *People v. Craig*, 111 Cal. 460, 44 Pac. 186; *People v. McKay*, 122 Cal. 630, 55 Pac. 594. Something is said about the admission of certain testimony relative to defendant's setting fire to Delaney's straw stack, but, if

it be conceded that the same was inadmissible, it was volunteered by the witness, and was immediately stricken out by the court. The fact that he had been arrested for larceny was elicited by defendant's attorney in the cross-examination of a witness, and no motion was made to strike it out.

7. Complaint is made as to the instructions defining the difference between murder in the first degree and murder in the second degree. The trial court very fully instructed upon this question, but in no place erroneously to defendant's prejudice. It is well settled that, to constitute murder in the first degree, it is not essential that there should be any appreciable space of time between the intent to kill and the act of killing; i. e., any interval "capable of being appreciated or duly estimated." The intent to kill must be formed deliberately and with premeditation, but, when so formed, there need be no appreciable space of time between the intent and the act. As the trial court told the jury, "They may be as instantaneous as successive thoughts of the mind," and "It is sufficient that the killing was done with reflection and conceived beforehand, although the deliberate purpose to kill and the act of killing follow each other as rapidly as an act can follow intent conceived by the mind." These instructions have been repeatedly approved by this court. If a portion of another instruction, apparently given at defendant's request, is inconsistent with the instructions already noted, and states the rule more favorably to defendant than it should have done, he has no ground of complaint.

8. The instruction as to the care with which the defense of insanity is to be examined is in all essentials the same as the instruction approved in *People v. Pico*, 62 Cal. 50, and *People v. Larrabee*, 115 Cal. 158, 46 Pac. 922. That the giving of such an instruction will not, in view of the prior decisions of this court, be held error, was declared in *People v. McCarthy*, 115 Cal. 255, 261, 46 Pac. 1073. It was there stated, however, that it would be better if such instruction were omitted altogether, and in that statement we concur. The danger therein lies in the fact that a jury may take such an instruction as an intimation by the judge of his opinion of the case on trial.

9. The court instructed the jury that a person is presumed to be sane until the contrary is shown by a preponderance of evidence, that the burden of proving insanity is upon the defendant, and that, to entitle defendant to a verdict upon the issue of insanity, the evidence "must be such in amount that, if a single issue of the sanity or insanity of the defendant should be submitted to you in a civil case, you would find that he was insane." These instructions were strictly in accord with the settled law of this state. *People v. Ward*, 105 Cal. 335, 38 Pac. 945, and cases there cited; *People v. Barthleiman*, 120

Cal. 11, 52 Pac. 112; *People v. Plyler*, 126 Cal. 383, 58 Pac. 904. Cases from other courts, in whose jurisdiction a different rule exists, cannot be considered as authority here.

10. The court instructed the jury as follows, viz.: "If you find from the evidence that the defendant deliberately and premeditatedly intended to willfully, unlawfully, and with malice aforethought kill and murder one Charley Allen, or any other human being, and that in making such unlawful attempt to take the life of Charley Allen, or any other person, the defendant intentionally killed Henry R. Farley, the defendant is, under such circumstances, just as guilty of the crime of murder, and of the same grade of offense, as if he had unlawfully, deliberately and premeditatedly and with malice aforethought killed Charley Allen, or the person whom he intended to kill, instead of Henry R. Farley. Under such circumstances, the crime is as complete as though the person against whom the intent to kill was directed had been in fact killed." This instruction was called forth by the fact that there was some testimony tending to show that the defendant claimed that he mistook Farley for Allen, whom he intended to kill, and fired the fatal shot under the belief that he was firing at Allen. The defendant claims that, to constitute murder in the first degree, there must exist in the mind of the person who slays another a specific intention to take the life of the person slain, and if he, with premeditated intention to slay one person, against his intention slay another, it will not be murder in the first degree. He therefore claims that the court erred in giving the foregoing instruction, and in refusing his requested instruction 29, based on his theory of the law, which requested instruction was as follows, viz.: "You are further instructed that the malice essential to constitute murder of the first degree must exist towards the person actually killed, and if it appears that the defendant entertained no malice or ill will towards the deceased at the time of the killing, but that he did entertain malice and ill will towards Charley Allen, and that he shot the deceased upon the erroneous belief that it was Allen, it would constitute murder of the second degree only." Decisions cited from Tennessee and Texas appear to sustain defendant's contention. *Bratton v. State*, 10 Humph. 103; *Musick v. State*, 21 Tex. App. 69, 18 S. W. 95. The overwhelming weight of authority is, however, the other way. It is said in 21 Am. & Eng. Ency. of Law (2d Ed.) p. 165: "There is some conflict of authority as to whether or not the homicide can constitute murder in the first degree, where the intent was to kill a third person, but by some accident or inadvertence the deceased was killed, instead of the person intended. The better doctrine is that a homicide so committed is as much murder in the

first degree as it would have been, had the fatal blow reached the person for whom intended." Citing the following cases, which uphold the rule stated to be the "better doctrine," viz.: *State v. Raymond*, 11 Nev. 98; *State v. Murray*, 11 Or. 413, 415, 5 Pac. 55; *State v. Payton*, 90 Mo. 220, 2 S. W. 394; *Com. v. Eisenhower*, 181 Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670; *State v. McGonigle*, 14 Wash. 594, 45 Pac. 20. In 1 McClain on Cr. Law, at section 223, it is said: "In determining the criminality of the act of killing, it will be immaterial whether the intent was to kill the person killed, or whether the death of such person was the accidental or otherwise unintended result of the intent to kill some one else—the criminality of the act will be deemed the same." In 1 Wharton Cr. Law, § 120, it is said: "A., looking for B., sees C., whom he mistakes for B., and whom he kills. This is murder, because the intent to kill, however mistaken his reasoning, was really pointed at C." See, also, section 318 of the same work; also Kerr on Law of Homicide, § 99; Bishop's New Cr. Law, § 328. In *State v. McGonigle*, supra, the following instruction, viz.: "I also instruct you, where a person purposely and of his deliberate and premeditated malice attempts to kill one person, but by mistake or inadvertence kills another instead, the law transfers the felonious intent from the object of his assault, and the homicide so committed is murder in the first degree"—was held correct. The exact question here presented does not appear to have ever been decided by this court (see, however, *People v. Craig*, 111 Cal. 470, 44 Pac. 186; *People v. Olsen*, 80 Cal. 126, 22 Pac. 125; *People v. Keefer*, 18 Cal. 636), but we are satisfied that, under our statute, the law is as stated in the instruction quoted above from *State v. McGonigle*. The court therefore did not err in refusing defendant's instruction on this subject. We see nothing in the contention that the instruction on this subject given at the request of the people, invaded the province of the jury. No other objection that demands notice is made thereto, and, so far as we can see, it correctly stated the law upon the subject under discussion.

11. Defendant complains of the action of the court in modifying some requested instructions and in refusing others. We have already discussed the refusal of his requested twenty-ninth instruction. We have examined the others, and find no error. Some were not pertinent, and the others did not correctly state the law, except in so far as they were given after modification, or fully covered by other portions of the charge.

It is earnestly urged that the evidence in this case was not such as to justify or sustain a verdict of guilty of murder in the first degree. We have thoroughly examined and considered the evidence set forth in the record, and can find no warrant therein for

the setting aside of the verdict of the jurors who tried the case, and the decision of the judge who denied the motion for a new trial.

The judgment and order are affirmed.

We concur: McFARLAND, J.; SHAW, J.; VAN DYKE, J.; HENSHAW, J.

LORIGAN, J., having presided at the trial in the lower court, did not participate.

(34 Wash. 299)

BALL et al. v. CLOTHIER et al.

(Supreme Court of Washington. Marsh 12, 1904.)

DECEDENTS' ESTATES—SALES OF PROPERTY—JURISDICTION OF PROBATE COURT—NOTICE TO MINORS—APPOINTMENT OF GUARDIAN—SETTING ASIDE SALES—JURISDICTION OF SUPERIOR COURT—SUCCESSOR OF PROBATE COURT—ESTOPPEL—RIGHTS OF PURCHASERS—IMPROVEMENTS.

1. Ballinger's Ann. Codes & St. § 5153, enacted in territorial days, authorizes the superior court in which a judgment has been rendered to vacate or modify the same, for error in a judgment shown by a minor, within 12 months after arriving at full age, and for other causes. On the adoption of the Constitution, the superior court was vested with probate jurisdiction, and the probate court abolished. Const. art. 27, § 10, provided that all records and proceedings of the probate court should pass into the jurisdiction of the superior courts, and such courts should proceed to judgment or other determination as the territorial probate courts might have done. *Held*, that the superior court has jurisdiction to vacate judgments or orders of the territorial probate courts in the cases specified in section 5153.

2. Independent of any statute giving the territorial probate court jurisdiction to set aside decrees, the superior court, as the successor of the probate court, and as a court of general equity jurisdiction, has power, by bill of review, to vacate and set aside decrees rendered by the probate court, for errors apparent on the record or for fraud.

3. Code 1881, §§ 1494, 1495, provided that the probate court, on the filing of a petition to sell real estate, should make an order for a hearing, which should be personally served on all persons interested in the estate, or published in a newspaper; and section 1497 provided that, if any devisees or heirs of the deceased should be minors, a copy of the order should be served on the guardian, if they had one, and, if not, the court should appoint a guardian to appear for them. *Held* that, before minor beneficiaries under a will could be divested of their title, it was necessary that the probate court acquire jurisdiction over their persons by service on their guardian, or the appointment of a guardian ad litem for them if they had no guardian.

4. Ballinger's Ann. Codes & St. § 6474, enacted in 1890, and curing irregularities in executors', administrators', and guardians' sales where it appears that the executor, etc., was ordered to make the sale by the probate court having jurisdiction of the estate, that he gave a bond approved by the judge, that he gave notice of the time and place of the sale, and that the premises were sold accordingly by public auction, and the sale confirmed, did not cure a sale by an administrator which was void because of want of jurisdiction of the probate court to order the sale, by reason of absence of notice to minor heirs, and failure to appoint a guardian ad litem for them, as required by Code 1881, §§ 1494, 1495, 1497.

5. Where the final account of an administrator, involving a sale, had been settled during the minority of the heirs, it was not necessary for the administrator de bonis non to include such sale in his final account, nor proper for the court to open up the same; and hence the heirs, on reaching majority, were not precluded from impeaching the administrator's sale by joining in the petition for the discharge of the administrator de bonis non, and distribution of the remaining estate.

6. Where heirs, on accepting a part of the estate after reaching majority, were not informed and did not know of their rights, and there was no evidence that they intended to accept the part in lieu of the whole, nor any showing of any deception on their part, or changed relation to the property on the part of the purchasers thereof on account of the acts of the heirs, they were not estopped to impeach the sale of the property to such purchasers.

7. On setting aside an administrator's deed for want of jurisdiction in the probate court to order the sale; purchasers in good faith should be allowed the purchase price, and have a lien on the property for sums paid by them for taxes, but should not be allowed for permanent improvements, since, under Ballinger's Ann. Codes & St. § 5511, the value of permanent improvements is allowed only as a set-off against damages.

Appeal from Superior Court, Skagit County; Jeremiah Neterer, Judge.

Action by Anthony W. Ball and others against Harrison Clothier and others. From a judgment for plaintiffs, defendants appeal. Modified.

Thos. Smith, Million & Houser, and Gable & Seabury, for appellants. E. W. Taylor and Govnor Teats, for respondents.

MOUNT, J. This appeal is prosecuted from a decree of the lower court adjudging certain probate proceedings in the estate of J. B. Ball, deceased, void, and setting aside an administrator's deed for the south half of the northeast quarter and the north half of the southeast quarter of section 24, township 35 north, of range 4 east. Defendants claim title to different parts of said real estate under said deed. The facts shown by the record are substantially as follows: Jesse B. Ball died on February 4, 1889, leaving an estate in Skagit county and other places. His widow, Caroline Ball, survived him. Also three minor children survived him, as follows: Anthony W. Ball, then aged nine years; Zula Matilda Ball, then aged seven years; and Zenora Kate Ball, then aged five years. This latter-named child died the same year. Deceased also left two grown children by a former marriage, viz., Emma Welsh and Warren T. Ball. A few days prior to his death, Mr. Ball made his will, by the terms of which he gave to Emma Welsh \$5; to Warren T. Ball certain real estate in Vancouver, B. C.; to his widow, Caroline Ball, certain personal property; and to his three minor children all the remainder of his property, share and share alike. He directed that all his debts be paid from the portion de-

¶ 7. See Executors and Administrators, vol. 22, Cent. Dig. §§ 1533-1535.

vised to said minors, and that "if at the time of his death the said minor children be not twenty-one years of age the legacy given to them except so much thereof as shall be necessary for their support and education shall be retained by said executors upon trust to be paid to them when the youngest shall have attained the age of twenty-one years, and in case of the death of one of said minor children prior to said division the portion bequeathed to said child shall be divided among the two remaining." J. E. Smith and A. T. Marshall were named as executors, and \$300 was bequeathed to each as compensation for acting as such executor. On February 18, 1889, the will was admitted to probate by the probate court of Skagit county, in the then territory, and the executors named in the will were appointed to carry out the provisions thereof. They were required to file a bond in the sum of \$12,000. A joint and several bond was executed and filed by said executors, which bond was by order of the probate court approved and entered of record. The executors thereupon qualified by taking oath of office, and letters testamentary were issued to them, and they entered upon the discharge of their duties. The estate was thereafter appraised, showing some \$7,200 of personal property, and real estate of the value of \$5,641. But the real estate in question in this action does not appear in the appraisal. Notice to the creditors was published. On September 24, 1889, a semiannual account of the executors was filed, showing the moneys collected to that time, and the claims allowed. No order appears to have ever been made by the court upon this report. On November 18, 1889, Mr. Marshall, one of the executors, filed with the probate court his resignation, without attempting to comply with the statute, and on the same day the said court entered an order accepting the resignation, and discharging Mr. Marshall as executor, and releasing the sureties on his official bond. Thereafter, on December 5, 1889, the other executor, Mr. Smith, filed his resignation, and published a notice thereof as required by law, to the effect that he had filed his account as executor, and resignation of his trust, and that the same would come on for hearing on January 28, 1890, at 2 o'clock p. m., "and all persons interested in said estate are notified to appear and show cause why the said account shall not be settled and said resignation accepted." On the 28th day of January, 1890, no one objecting, the resignation was accepted, and Mr. Smith discharged as executor, and the sureties on his official bond released. At the same time and place Caroline Ball filed her petition asking the appointment of said Smith and one Harrison Clothier as administrators of the estate. No notice of this application was given to any one, and the court, in the same order which discharged Mr. Smith as executor, appointed him, together with Mr. Clothier, as administrators

de bonis non, and fixed their bonds as such administrators at \$12,000. A joint and several bond was filed and approved by the court. Thereafter, on March 25, 1890, these administrators presented their petition, containing allegations substantially as required by statute, for the sale of the real estate now in question. On the next day the probate court issued an order directing all interested parties to appear on April 23, 1890, and show cause why the said real estate should not be sold. A copy of this order was published four times in a newspaper, but four weeks' time did not elapse between the first publication and the date of the hearing. A copy of the notice was served on the widow. No notice was given to the minors, and no guardian ad litem was appointed for them. On April 23, 1890, at the time set for the hearing, no one appearing to contest the petition, an order was made directing the sale of the real estate. No time or place for the sale was fixed by the order. The administrators thereupon fixed the time, and due notice thereof as required by law was given. The sale was held on May 20, 1890, at public auction, and the property was sold to John P. Millett, one of the appellants, for \$9,100. A return of the sale was made and filed in the probate court on the 24th day of May, 1890, which was on Saturday. An order was made on the 26th day of May, 1890, confirming the sale. Thereupon an administrator's deed was executed and delivered to the purchaser. The purchase price was paid and accounted for to the estate. After Mr. Millett purchased the property, he conveyed the same to Mr. Murdock, one of the appellants, who platted a part of the land into town lots, and afterwards conveyed it to the Grand Junction Land Company, which company sold some of the lots to the other defendants who improved them, and are now in possession thereof. In 1891 the administrator J. E. Smith died, and thereafter the surviving administrator, H. Clothier, administered upon the estate until September 18, 1897, when his final account was approved and he was discharged. E. C. Million was thereupon appointed administrator in his stead. Mr. Million appears to have done nothing with the estate until March 29, 1901, when, upon his petition, after the minor heirs had become of age, he was discharged, and all that remained of the estate was distributed to the respondents Anthony W. Ball and Zula Matilda Ball Manning. Up to March 1, 1893, no guardian ad litem was ever appointed for the said minors, Anthony W. Ball and Zula Matilda Ball. They were not served with any notice of any of the petitions, or any of the proceedings in the course of administration up to that time, although during all of said times they were residents of Skagit county, were named as minor heirs, and were the sole beneficiaries of the real estate being administered upon. Subsequent to March 1,

1893, they were represented in all proceedings by a guardian ad litem appointed by the court. After becoming of age, and on May 10, 1901, these heirs executed a power of attorney to Warren T. Ball, authorizing him "to grant, bargain, sell, convey, mortgage, or dispose of any and all real estate within the state of Washington in which we may have any interest." The said Warren T. Ball, acting under said power of attorney, joined in the petition of Million for a discharge as administrator, and for a distribution of the estate. Mr. Million was thereupon discharged, and the estate distributed to the respondents, who brought this action within one year after arriving at their majority, seeking to review the orders and errors of the probate court in directing a sale of the land in question. They allege, in substance, that the executors were wrongfully discharged; that the administrators were not legally appointed; that no notice of any of the proceedings in the probate court was ever given to them, and no appearance was made by them; that the administrators conducted the sale fraudulently, and in all their dealings with the estate, up to and including the sale of the real estate in question and the confirmation of the sale, the administrators acted in fraud of the rights of plaintiffs; and that the probate court had no jurisdiction to make the orders complained of—all of which orders are set out in the complaint. They prayed that the order of sale and all proceedings had thereunder be set aside and held for naught, and that they be decreed to be the owners of the property, free from any claims of defendants by reason of their purchase and possession of the property. After motion to make the complaint more definite and certain and to strike certain portions thereof and demurrers had been overruled, defendants answered separately, denying generally the allegations of the complaint, and alleging that the probate court proceedings were regular; that the administrator's sale in all respects complied with the law; that Millett, the purchaser of the land at administrator's sale, conveyed the property to William Murdock; that Murdock thereafter platted a half of it into town lots, streets, and alleys, known as "Grand Junction Land Company Addition to Woolley," and that all the defendants are bona fide purchasers, and claim title through Murdock; that the full purchase price at administrator's sale, viz., \$9,100, was paid, and the amount accounted for in the due course of administration of the estate, and that said sum was the reasonable value of the land at that time; that since said time defendants have made valuable improvements on the lands, and have paid the taxes thereon since 1890; that in June, 1901, after becoming of age, the plaintiffs joined in a petition to discharge the administrator acting at that time, and are therefore estopped to maintain this action; and that the sale of the property, even if irregular, is valid under the curative

act of 1890. Defendants pray for a dismissal of the case, but, in the event that the sale be declared void, that they be subrogated to the rights of creditors to the extent of the purchase price of the property, together with the amount paid for taxes, assessments, and improvements. The reply denied generally all the allegations of the answer. Upon a trial the lower court refused to find actual fraud on the part of the administrators, but found and concluded that the appointment of Smith and Clothier as administrators of the estate was void; that the order of sale of the real estate was made without jurisdiction; that the order confirming the sale and the administrator's deed of the property were void; that the plaintiffs are the owners in fee simple and entitled to the possession, and are entitled to a decree quieting their title against the defendants; and refused the relief prayed for by defendants.

Many questions are presented on this appeal. They are all argued at length in the voluminous briefs filed herein. We pass all of them by without further notice, except such as we deem material and necessary to a determination of the case.

Appellants' first point is that the complaint fails to state a cause of action, for the reason that there is no provision in our statute authorizing an action by a minor after reaching his majority to review alleged errors and irregularities in orders and decrees in a judicial proceeding carried on during minority. It is argued that, since there is no statutory authority for such proceeding, therefore this must be held to be an action to remove a cloud and quiet title, and, since one of the indispensable allegations in an action to quiet title is that plaintiffs are either in possession of the premises, or that the same are unoccupied and vacant, and since the complaint shows that plaintiffs are out of possession, of the real estate, and exclude plaintiffs herein therefrom," the demurrer should have been sustained. Section 5153, 2 Ballinger's Ann. Codes & St., clearly authorizes an action to vacate or modify a judgment or order of the superior court, and sections 5156 and 5157 provide the form and procedure in such actions. Section 5153 is as follows: "The superior court in which a judgment has been rendered, or by which or the judge of which a final order has been made, shall have power, after the term [time] at which such judgment or order was made, to vacate or modify such judgment or order: \* \* \* (5) for erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record nor error in the proceeding; \* \* \* (8) for error in a judgment shown by a minor, within twelve months after arriving at full age." Appellants contend that this section relates exclusively to the superior court, and has no relation whatever to the proceedings in inferior courts or to a proceeding in



probate, and that proceedings to review an erroneous order or judgment must be brought in the court in which the order was entered. This statute was enacted in territorial days, when the probate court was an independent inferior court. The orders complained of were made by the territorial probate court. When the Constitution was adopted, the superior court was vested with general jurisdiction such as was exercised by the territorial district courts, and also with jurisdiction in probate matters; and the probate court, as an independent tribunal, was abolished. It follows, if appellants' position is correct, that there is now no tribunal which has jurisdiction to review erroneous orders entered in the old probate court. This position cannot be maintained. The Constitution, at section 10 of article 27, provides that, when the superior courts are organized, all records and proceedings in probate court shall pass into the jurisdiction and possession of the superior court, "and the said court shall proceed to final judgment or decree, order or other determination in the several matters and causes as the territorial probate court might have done if this Constitution had not been adopted." Under this provision the superior court has complete jurisdiction in all matters which the old probate court had, and certainly now the superior court, under section 5153, may vacate and set aside orders made by it in the course of its probate jurisdiction. If appellants' position that the action must be brought in the same court is correct, the superior court, being the successor of the probate court, must be held to be the same court. Appellants further contend that, because there was no statutory provision for the old probate court to vacate and set aside its orders and judgments, none exists in the superior court for that purpose. Independent of the inherent powers of all courts to vacate and set aside their own orders and decrees for fraud, and independent of statute where the common law is in force and unmodified, a bill of review is the proper method of obtaining the vacation or annulment of an order or decree for errors apparent upon the face of the record or for fraud. 1 Black on Judgments (2d Ed.) § 301. It follows, therefore, whether there is or is not a statute upon the subject giving the superior court jurisdiction to review judgments for apparent error or fraud, being a court of general equity jurisdiction it has that power. If this were held to be an action to remove a cloud and quiet title and for possession, it could be maintained under the provisions of sections 5500-5508, 2 Ballinger's Ann. Codes & St. See *Porah v. Lee*, 29 Wash. 108, 69 Pac. 639; *Brown v. Calloway* (decided Feb. 29, 1904) 75 Pac. 630. The lower court therefore properly denied the demurrer.

Passing by many irregularities argued in the briefs relating to the appointment and qualification of the administrators, we shall consider the main question, which relates to

the validity of the sale of the real estate. The court below properly refused to find any actual fraud in fact on the part of the administrators in the conduct of the sale. The petition for the sale of the land substantially complied with the statute, but there was no service or attempt at service of the petition or notice of the hearing upon the minor heirs, except an insufficient publication directed to all interested parties. No guardian ad litem was appointed for them. They had no general guardian. No appearance was made by any person for them upon the hearing as to the necessity for the sale. The court nevertheless directed the sale of the land. The sale was made on the day provided in the notice. A return thereof was subsequently made, and, without an opportunity for objection, was confirmed, and a deed issued. The purchase price was paid, and the estate had the benefit thereof. Appellants contend that the statute relating to notice and sale was merely directory; that the proceedings are in rem, and, since the court had jurisdiction in rem, the sale was valid notwithstanding irregularities. Conceding that the probate court had jurisdiction of the real estate for the purpose of administration upon the appointment of executors or administrators, as was said in *Ackerson v. Orchard*, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605, still, before the heirs who were the beneficiaries under the will could be divested of their title, the substantial requirements of the statute must be complied with. The statute in force at the time the order was made provided that, when a petition for real estate was filed, the court should make an order directing all interested persons to appear at a time and place specified to show cause why the order should not be granted, and that this order should be personally served upon all persons interested in the estate at least ten days before the hearing, or published four successive weeks in a newspaper. Sections 1494, 1495, Code 1881. "If any of the devisees or heirs of the deceased are minors, and have a general guardian in the county, the copy of the order shall be served on the guardian. If they have no such guardian, the court shall, before proceeding to act on the petition, appoint some disinterested person their guardian for the sole purpose of appearing for them and taking care of their interests in the proceedings." Section 1497, Code 1881. This provision for the appointment of a guardian for minors was mandatory. If the court had jurisdiction over the estate, it was also necessary that it acquire jurisdiction over the persons of the minor heirs before proceeding to divest them of their title, because the statute expressly required the minor heirs to be represented. They could not waive this right, and the court could not waive it by noncompliance with the statute. *Fiske v. Kellogg*, 3 Or. 503. The case of *Bloom v. Burdick*, 1 Hill, 130, 37 Am. Dec. 299, is in point upon this question. It was there said, at page



139, 1 Hill, 37 Am. Dec. 299: "The surrogate undoubtedly acquired jurisdiction of the subject-matter on the presentation of the petition and account, but that was not enough. It was also necessary that he should acquire jurisdiction of the persons to be affected by the sale. It is a cardinal principle in the administration of justice that no man can be condemned or divested of his right until he has had the opportunity of being heard. He must, either by serving process, publishing notice, appointing a guardian, or in some other way, be brought into court; and, if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject-matter was not within its cognizance." When the statute required the appearance of the minor heirs by guardian ad litem before the court should make the order of sale, it was necessary for such appearance, even if the proceedings were in rem. The order of sale was therefore without the authority of law, and was void as to the minor heirs. *Wallace v. Grant*, 27 Wash. 130, 67 Pac. 578.

Appellants contend that, under the curative act of 1890 (section 6474, 2 Ballinger's Ann. Codes & St.) the heirs were not entitled to avoid the sale in this case. That section is as follows: "In case of an action relating to any estate sold by an executor, administrator or guardian, in which an heir or person claiming under the deceased, or in which the ward or any person claiming under him, shall contest the validity of the sale, it shall not be voided on account of any irregularity in the proceedings: provided, it appears (1) that the executor, administrator, or guardian was ordered to make the sale by the probate or superior court having jurisdiction of the estate; (2) that he gave a bond which was approved by the probate or superior judge, in case a bond was required upon granting the order; (3) that he gave notice of the time and place of sale, as in the order and by law prescribed; and (4) that the premises were sold accordingly, by public auction, and the sale confirmed by the court, and that they are held by one who purchased them in good faith." It would appear from this section that, if all the requirements named were complied with, other irregularities would be insufficient to avoid the sale, and, if all the requirements named were not fulfilled, then the sale may be avoided. In *Wallace v. Grant*, supra, we held that where a petition to mortgage or sell real estate was not verified, and failed to show that the personal estate was exhausted, or that the same was insufficient to pay the debts of the administration, the probate court did not acquire jurisdiction to make an order of sale or mortgage. In *Dormitzer v. German Savings & Loan Society*, 23 Wash. 132, 62 Pac. 862, at page 192, 23 Wash., 62 Pac. 862, we held that this section related only to irregularities, and did not go to the

jurisdiction of the court. And in *Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602, where the petition, in describing the lands to be sold, was so defective that the lands could not be located, it was held that this section did not cure the defect. In *Ackerson v. Orchard*, supra, where the court had jurisdiction, and the proper notice was given, and all the provisions of section 6474, supra, were complied with, it was held that other irregularities did not avoid the sale. As we have seen above, the probate court had no jurisdiction to order the sale, by reason of the absence of notice to the minor heirs, and failure to appoint a guardian ad litem for them; and therefore, under the authorities above named, the curative act does not apply, and the minors may therefore avoid the sale.

Appellant also contend that because the plaintiffs, after arriving at their majority, joined in a petition for the discharge of E. C. Millon as administrator, and for a distribution of the estate, and accepted the estate remaining, they are now estopped to question the validity of the sale. A number of authorities are cited to the effect that the settlement by a final account, distribution, and discharge of the administrator is an adjudication of all questions which were or should have been involved, and, so long as such final settlement stands, interested parties are bound by it. This is, no doubt, the correct and just rule, and, as to all questions which were or should have been adjudicated at that time, these respondents are bound; but the final account of E. C. Millon is not shown to include the sale of the land in question, or the proceeds thereof. In fact, we are unable to find any final account filed or acted upon at the final discharge of Mr. Millon. The record shows that nothing had been done by him during his administration of the estate. He was simply appointed, held the office for about three years without collecting or paying out any money, was discharged, and the property remaining, which consisted wholly of real estate, was distributed to the respondents. The final account of the former administrators, which involved the sale and the proceeds thereof, had long since, and during the minority of the respondents, been finally settled, so far as the administration was concerned. It was therefore not necessary for Mr. Millon to include in his final account matters which had already been settled. Nor was it necessary or proper for the court, upon the final discharge of Mr. Millon, upon its own motion to open up matters which had already been determined, and which were not then called to his attention; and this was not attempted to be done. Furthermore, it is not shown that the respondents, at the time they accepted a part of the estate, were informed or knew of their rights, or intended to accept this part in lieu of the whole. Nor is there any showing of any deception by the respondents, or changed relation to the proper-

ty by appellants. The principles of estoppel, therefore, do not apply. *Schnell v. Chicago*, 38 Ill. 382, 87 Am. Dec. 304; *Dorlarque v. Cress*, 71 Ill. 380.

Appellants contend that, in case the title to the real estate is avoided in this action, they should each be awarded their proportionate share of the original purchase price paid to the estate, and the taxes paid since sale, and the value of the improvements placed thereon. This relief was denied them by the court below. We think, in justice and equity, the relief prayed in that regard, except for permanent improvements, should have been allowed. This court, in *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250, in considering the question of permanent improvements on real estate, held that under the provisions of section 5511, Ballinger's Ann. Codes & St., where defendants held under color of title, in good faith, as these appellants do, the value of such improvements could only be set off as against damages, and no recovery could be had therefor. Hence appellants are not entitled to recover for the items of improvements. The land was purchased from the estate in good faith by the appellants and their predecessors in interest, and the purchase price thereof was paid into the estate, and used in the administration thereof, and these respondents received the benefit. They should not, under such circumstances, be permitted to avoid the sale without repaying the purchase price; and, upon the principles announced in *Packwood v. Briggs*, 25 Wash. 530, 65 Pac. 846, and subsequent cases, appellants should have a lien upon the realty for the items paid for taxes, for the reason that the taxes paid were necessary to protect the real estate from seizure and sale by the state, and these payments inured to the benefit of the respondents.

The judgment appealed from is therefore modified in respect of the purchase price paid for the lands at administrator's sale, which was \$9,100, and in respect of taxes paid by appellants since that time. The cause is remanded, with instructions to the lower court to determine the respective amounts due each of the appellants, with interest at the legal rate, and to make the amounts thereof preferred claims against the said estate; appellants to recover their costs.

HADLEY, ANDERS, and DUNBAR, JJ.,  
concur.

(34 Wash. 455)

TAYLOR v. HUNTINGTON et al.  
(Supreme Court of Washington. March 25,  
1904.)

JUDGMENT—VACATION—PRESUMPTIONS—JURISDICTION—TAX SALES—AMENDMENT OF STATUTE—PENDING ACTIONS.

1. A judgment of a court having general jurisdiction, foreclosing a tax lien, cannot be vacated on motion on the ground that, the procedure being specially conferred by statute, the court was without jurisdiction, because the af-

fidavit of publication of the notice was defective, and because it did not appear that the holder of the certificate of delinquency foreclosed had paid all accrued taxes, for the judgment was equally entitled to credit, whether the jurisdiction was generally or specifically conferred.

2. In a tax foreclosure suit, the statute in force when the action is instituted governs in all matters of procedure, and it is not affected by requirements subsequently enacted.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Chandler Huntington and others against George Taylor, Jr., to vacate a judgment of foreclosure of a tax lien. From an order denying the motion to vacate the judgment, the plaintiffs appeal. Affirmed.

John K. Brown and J. A. Kellogg, for appellants. Reed & Rutherford, for respondent.

DUNBAR, J. On the 15th day of March, 1901, the respondent, George Taylor, Jr., filed with the clerk of the superior court of King county his application for judgment foreclosing a tax lien or certificate of delinquency issued April 6, 1898, on the real property therein described, for the years 1894, 1895, 1896, in the sum of \$67.85 and interest. The application alleged the issuance of the certificate, and the payment by respondent, on the 6th day of April, 1900, of the taxes on said property for the years 1897, 1898, 1899. There is no allegation of the payment of the taxes for the year 1900. The application also alleges that more than three years have elapsed since the delinquency of said taxes, and their nonpayment, and prays for judgment of foreclosure and sale, etc. The summons and notice were returned by the sheriff of King county with the indorsement that the defendants could not be found, and, on the application of one of respondent's attorneys, service was made by publication. No appearance was made, and on the 12th day of July, 1901, judgment was rendered foreclosing the tax lien and ordering a sale of the property, which was thereafter sold to respondent, who is now in possession under said sale. On the 18th day of February, 1903, the appellants, the owners of the property, made a motion to set aside and vacate the judgment for the reason that the same was void for lack of jurisdiction in the court to render the same, which motion was subsequently denied; and, upon appeal from the order denying said motion, the case is now before this court.

The appellants contend that the judgment rendered by the superior court is void for want of jurisdiction in said court to render the same, for the following reasons: (1) The affidavit of publication of the publisher of the newspaper in which the notice and summons were published does not state that said newspaper, the White River Journal, was printed in King county, as required by

section 4878, Ballinger's Ann. Codes & St. (section 336, Pierce's Code). (2) It does not appear in the application for judgment, the recitals in the judgment, or elsewhere in the record, that the respondent, the holder of the certificate of delinquency foreclosed, or any one else, had, before applying for the judgment, paid all the taxes which had accrued on the property—particularly the taxes for 1900—as required by section 107 of the revenue law (section 8699, Pierce's Code). (3) It nowhere appears in the record that a copy of the notice was delivered to the county treasurer, as required by subdivision 5 of section 96 of the revenue law (section 8691, Pierce's Code). (4) The summons published was not in accordance with the statute, and its publication did not confer upon the court jurisdiction to render the judgment of foreclosure herein.

The principle contended for by the appellants for the purpose of overthrowing this judgment is that the rule that the judgment of a court of general jurisdiction imports absolute verity, and that all the necessary steps leading up to the judgment will be presumed to have been complied with, does not apply where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of common law; that in such case its decisions must be regarded and treated like those of courts of limited and special jurisdiction, and no presumption of jurisdiction will attend a judgment of the court, but that the facts essential to the special jurisdiction must appear on the face of the record; the contention being that the superior courts in this state are courts of general jurisdiction over all cases arising in the ordinary course of common law or of chancery. And it is conceded, under the rule announced above, that when, proceeding within such jurisdiction, they have proceeded to judgment according to the usual course of such proceedings, their judgments import absolute verity, and raise the presumption that all the facts necessary to confer jurisdiction exist; but it is argued that the case at bar discloses a case where the procedure arises under special jurisdiction conferred upon the superior courts by the revenue laws of the state, and that the steps conferring jurisdiction for the rendering of the judgment must appear in the record. *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *McClung v. Ross*, 5 Wheat. 116, 5 L. Ed. 46; *Pulaski County v. Stuart*, 28 Grat. 872; and *Freeman on Judgments* (3d Ed.) § 123—are cited to sustain this contention. *Harvey v. Tyler*, supra, does not seem to us to bear out the contention of the appellants. In distinguishing the case of *Kempe's Lessee v. Kennedy*, 5 Cranch, 173,

3 L. Ed. 70, from the case under consideration, the court said: "It is certainly true that there is a class of tribunals, exercising to some extent judicial functions, of which it may be said, in the language of Chief Justice Marshall, that they are [quoting from the case of *Kempe's Lessee*] 'courts of a special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction'"—and, after discussing the distinction contended for, said: "The transcripts of the judgments of exoneration produced in this case show that there were proper parties before the court, that the subject-matter of the exoneration of the land from delinquent taxes was before it, and that it rendered judgments exonerating it from all delinquent taxes. Can it be required, to give validity to these judgments, that the record shall show that every fact was proved upon which the judgment of the court must be supposed to rest? Such a ruling would overturn every decision made by this court upon that class of cases, from that of *Kempe's Lessee v. Kennedy*, already referred to, down to the present time." And the judgment was affirmed. *McClung v. Ross*, supra, does not seem to us to support the contention claimed; and *Pulaski County v. Stuart*, supra, based its decision upon the fact that the duty of the court was ministerial, rather than judicial, saying: "But where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common law, its action being ministerial only, and not judicial, in such case its decision must be regarded and treated like those of courts of limited and special jurisdiction, and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear upon the face of the record." *Galpin v. Page*, supra, is a noted case, and much is there said which supports the distinction contended for by the appellants, although the main reason for the rendition of the judgment in that case was that verity should not be imputed to a judgment where the service was a service by publication instead of a personal service, and that, where a certain state of facts was shown by the record, it was not competent, in aid of the judgment, to conclude that certain other facts had been presented to the court. *Freeman on Judgments*, however, after noticing the cases apparently maintaining the distinction, says at section 123: "The doctrine that the judgment of the courts of record are of any less force, or are to be subjected to any closer scrutiny, or that they are attended with any

less liberal presumptions, when created by virtue of a special or statutory authority, than when rendered in the exercise of ordinary jurisdiction, has been repudiated in some of the states; and the reasons sustaining this repudiation have been stated with such clearness and force as to produce the conviction that the doctrine repudiated has no foundation in principle, however strongly it may be sustained by precedent." Citing *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, and *Eitel v. Foote*, 39 Cal. 439, in support of that view; these cases determining squarely that no such distinction exists. This court, also, has spoken upon this subject, in a case exactly in point, viz., *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064, where *Eitel v. Foote*, supra, was cited with approval, the court saying: "Now, if the judgment sought to be avoided in this case has the same force and effect as a judgment of the same or a like court in any other action, it follows that, if valid, that judgment and the sale made under it effectually and completely cut off all right and title of the defendant Hawthorne, respondent's mortgagor, to the premises in question; and the said Hawthorne, not having redeemed the same from the sale, had thereafter no interest therein subject to mortgage or sale. And that such a judgment stands upon the same footing as a judgment in an ordinary action seems to us too plain for argument. But we are, however, not without authority upon the proposition. The point was raised and expressly determined in the case of *Eitel v. Foote*, 39 Cal. 439, in which the court said that the validity of the judgment in a tax suit is to be ascertained by the same tests, has the benefit of the same presumptions, and is subject to attack in the same mode and by the same means, as a judgment in an action of any other class." In discussing this proposition, Mr. Black, in his work on *Tax Titles* (2d Ed.) § 178, concludes: "It should be remarked, however, that in several of the states a different view obtains as to the nature of the jurisdiction of the courts in these proceedings. In these states it is held that the statute authorizing such proceedings does not create and confer any special and limited jurisdiction upon the courts, but simply gives to the state, county, or municipality, as the case may be, an additional remedy therein to collect its taxes and foreclose its tax liens against certain real property under certain conditions. Thus the designated courts have a general jurisdiction over the subject-matter. And it follows as a consequence from this view that the validity of a judgment in a tax suit is to be ascertained by the same tests, has the benefit of the same presumptions, and is subject to attack in the same mode as a judgment of a court of general jurisdiction in an action of any other class." Citing *Driggers v. Cassady*, 71 Ala. 529; *Young v. Lo-*

*rain*, 11 Ill. 637, 52 Am. Dec. 463; *Gunn v. Howell*, 27 Ala. 663, 62 Am. Dec. 785; *Well-shear v. Kelley*, 69 Mo. 343; *Eitel v. Foote*, 39 Cal. 439; *Carlisle v. Watts*, 78 Ala. 486; *Prout v. People*, 83 Ill. 154; *Turner v. Jenkins*, 79 Ill. 228. And this view must be correct under our constitutional provisions, for it is by the Constitution that the jurisdiction is conferred; and, as was forcibly said by Judge Stiles, in *In re Cloherty*, 2 Wash. St. 137, 27 Pac. 1064: "The state of Washington is a sovereign whose written Constitution is her visible charter. By the Constitution all the judicial power, which is a distinct branch of the sovereignty, is vested in the courts therein created, independently of all legislation. The jurisdiction of these courts is universal, covering the whole domain of judicial power—even to that growing out of the supposed existence of municipal ordinances."

But, outside of authority, there seems to us to be no reason which supports the distinction sought to be maintained. The reason why verity is imputed to the judgment of courts that are called "courts of general jurisdiction," or "courts of record," as distinguished from courts of limited jurisdiction, or inferior courts or tribunals, doubtless is that courts of the first class are presided over by men who are presumed to be learned in the law, aided and advised by practitioners who are also learned in the law, while courts of the other class are presided over by men of more limited learning and experience. But certainly it is the court upon which the distinction is conferred, rather than the accident of circumstances under which the same court is dealing on different occasions. The judgment of the court is equally entitled to credit, whether the jurisdiction is generally or specially conferred. Under the provisions of our Constitution, the superior court is constituted a court of general jurisdiction, and it remains a court of general jurisdiction, in the exercise of all its judicial functions, no matter whether it is exercising its jurisdiction under the provisions of the common law, of the Constitution, the probate, or any other branch of statute law. To be compelled to stop to inquire and determine whether the jurisdiction conferred upon the court was a common-law power, or whether it was expressly conferred by constitutional or statutory enactment, before the validity of its judgment or the verity to be imputed to such judgments could be determined, would be unnecessary, inconvenient, illogical, and confusing, and not in harmony with the spirit of our Code and Constitution. In addition to this, the third and fourth objections are answered by the fact that the requirements there spoken of were not made by the law in force at the time of the commencement of the action, and this court has said that the statute in force at the time an

action was instituted governs in all matters of procedure. *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, HADLEY, and ANDERS, JJ., concur.

(21 Wash. 463)

# MUIR v. WESTCOTT.

(Supreme Court of Washington. March 25, 1904.)

## POWER OF ATTORNEY—EXTENT OF AUTHORITY—EVIDENCE.

1. Where the owner of a bank, by power of attorney, grants authority to take charge of all his property, and particularly of the bank, to direct its policy, to vote his stock, to sell the stock, and to do all things incident to his business, whether the power was explicitly set forth or not, the attorney in fact had authority to dispose of the furniture of the bank for the benefit of the owner's creditors.

2. Where the owner of a bank had, by power of attorney, given full charge of a bank, and the exact extent of the power was in issue, a cablegram from the owner to the attorney directing him to take charge, and make the best settlement for creditors possible, was admissible in evidence, since it did not tend to vary, but only to explain, the power.

Appeal from Superior Court, Whatcom County; Jeremiah Neterer, Judge.

Action by Robert Muir, receiver of the Scandinavian-American Bank, against H. St. John, defendant, and G. H. Westcott, garnishee. From a judgment in favor of garnishee, plaintiff appeals. Affirmed.

Everett C. Ellis, for appellant. Dorr & Hadley, for respondent.

DUNBAR, J. On the 2d day of May, 1901, one S. M. Bruce, claiming authority to act under power of attorney from one H. St. John, principal defendant in this action, who was the owner of a bank situated in Whatcom county, Wash., known as the "Bank of Blaine," and was also the owner of stock and interests in various other banks in the state of Washington, executed and delivered to G. H. Westcott, garnishee and respondent herein, a bill of sale of the safe, fixtures, stationery, and books of said bank. On the same day, and as part and parcel of the same transaction, said Westcott executed a declaration of trust, by which he agreed to dispose of the property above mentioned for the benefit of the creditors of the Bank of Blaine. In pursuance thereof, Westcott sold the property referred to in said bill of sale, and proceeded to disburse the funds thereby obtained, but, before they had all been disbursed, appellant caused to be served upon him a writ of garnishment, to which Westcott made answer, declaring that he still had in his possession \$400.60 belonging to said trust, but denying that said funds belonged to defendant. This answer was controverted by the appellant. Before the case came on for trial, appellant made demand for

a copy of the bill of sale, which said copy was furnished, and disclosed that it had been executed by S. M. Bruce, attorney in fact for H. St. John. Bruce testified that he had executed and delivered to Westcott the instrument under discussion, which is Exhibit A in this case, and received from Westcott the declaration of trust, which is Exhibit C. Mr. Bruce was then permitted, over the objection of appellant, to testify that he had received a cablegram from London, from H. St. John, in cipher, which, interpreted, read: "Take charge and make best settlement for creditors possible." The court found that St. John, through his authorized agent and attorney in fact, S. M. Bruce, sold, assigned, and transferred unto said garnishee defendant, G. H. Westcott, those certain bank fixtures situate in and belonging to the Bank of Blaine, of which said bank the said H. St. John was proprietor, the property in controversy here being the safe, furniture, fixtures, etc., of the Bank of Blaine; that Bruce had authority to so dispose of said property, and that the property had passed from the possession of the defendant St. John; that by reason of the premises said sum of \$400.60 was held in trust by said garnishee defendant for the use and benefit of the creditors of said Bank of Blaine, and that no part of said sum belonged to the defendant, H. St. John, or to any person other than said creditors, and that the said garnishee defendant was not at the time of the writ of garnishment indebted to the said defendant H. St. John, and had not then any effects or property belonging to said H. St. John; found also that it was necessary for said garnishee defendant to employ counsel in the proceeding that had been brought against him, and that a reasonable sum as attorney's fees for the services of his attorneys in this behalf is \$40. Judgment was entered accordingly, dismissing the garnishment proceeding, and adjudging costs against the plaintiff, and entering judgment against the plaintiff for the sum of \$40 attorney's fees.

The power of attorney on which the defense in this case rests is as follows: "This Indenture Witnesseth: That H. St. John, hereinafter called the first party, has made and does hereby make, constitute and appoint S. M. Bruce, of Whatcom county, Washington, hereinafter called the second party, his true and lawful attorney in fact, to do and perform each and all and singular the following acts and things: The first party does hereby empower the second party in the name, place and stead of the first party, to take charge of all property, credits and effects belonging to the first party, or in which the first party has any interest, situated in the state of Washington, and especially in the county of Whatcom, and especially those properties known as the Bank of Blaine, the Citizens' National Bank of Fairhaven, and the Scandinavian-American Bank of New Whatcom, all in Whatcom county, Washing-

ton, and to direct the policies of said properties, and to attend any meeting or meetings of stockholders of said property that may be called or held in the absence of the first party from the said county, and to vote said stock at any meeting of stockholders in the name and stead of the first party, as fully and to the like purpose as if the first party were present and acting in person, and the second party is hereby further empowered to negotiate and sell said stocks as security for any loan or advance which the second party may be able to obtain on said stocks and securities, or any part or number of them; the said second party being hereby fully empowered to negotiate loans, and to execute and sign evidences of indebtedness for the purpose of raising money upon said stocks or properties as fully and to the like purpose as if the first party were present and acted in person; and the said second party is also empowered to give receipts, collect money, and to do generally all things incident to the business and business interests of the first party, the first party hereby confirming and ratifying all and singular every act or thing done by the second party under the powers here granted, whether the power to so act has been explicitly set forth or not, if the same is found to be convenient or advisable within the discretion of the second party, full authority being hereby given the second party to hypothecate, assign and transfer in the name of the first party any and all of the securities, stocks or property above set forth; and whatsoever act or thing the second party may do under the powers aforesaid, or in the exercise of any discretion or incidental act necessary to the carrying out of said powers, the first party will and does hereby ratify and confirm irrevocably and unconditionally." This instrument was duly signed and acknowledged by H. St. John.

It is earnestly contended by the appellant that no authority was conferred upon Bruce to dispose of the furniture of the bank for the benefit of creditors, or at all. The argument is that it was only the stock or securities which he was empowered in any event to dispose of; that under the law all powers of attorney receive a strict interpretation, and that the authority is never extended, by intentment or construction, beyond that which is given in terms or is absolutely necessary for carrying the authority into effect, and that authority must be strictly pursued. This power of attorney is so definite and explicit that it is difficult to discuss it, and, conceding the rule contended for by the appellant—that, where there is a power of attorney to do a particular act, followed by general words, these general words are not to be extended beyond what is necessary for doing that particular act for which the power of attorney is given—yet we think the power to sell the property under discussion was plainly and specifically given by the instru-

ment executed. The attorney in fact, at the very commencement, is not only empowered to take charge of the banks described therein, so far as stocks, securities, and money on hand is concerned, but he is empowered to take charge of all property, credits, and effects. The safe and other furniture of the bank are property, and they are effects belonging to the Bank of Blaine in the county of Whatcom, and the instrument recites that it especially refers to the property known as the "Bank of Blaine." It is true that power is given to direct the policies of said property, to attend meetings of stockholders, etc., and it is urged by the appellant that there is no such thing as directing the policies of the fixtures of the bank. But the defendant, in his anxiety to confer absolute authority and to escape the rule with relation to general authority which appellant is now invoking, undertook to specify authority to act in any emergency which should arise. It might become necessary, in the administration of the business of the banks, to attend meetings of stockholders and to vote said stock, and not necessary to sell any of the property of the bank, stock, or assets, or effects, or anything else. It might become necessary to attend such meetings, and also to sell and assign the stock and all the other property of the bank, and the instrument in more than one instance empowers the attorney in fact to sell the properties of the bank, after specifically describing stocks and securities. So that it was within the evident contemplation of the defendant St. John that other property than stock or securities should be controlled by the attorney in fact; and this power of attorney is particularly expressive in conveying power to do all things necessary to be done in the premises, whether the power to so act has been explicitly set forth or not, the only limitation being that it must be found to be convenient or advisable within the discretion of the second party. We think no error was committed by the court in finding that the attorney in fact did not exceed his authority in the execution of the bill of sale to Westcott.

It is also insisted by the appellant that the court erred in admitting the testimony of Mr. Bruce in relation to the additional instruction he received from defendant St. John, by cablegram, to the effect that he should take charge and make the best settlement for creditors possible. As we have often said, the admission of immaterial testimony in the lower court, where the case is tried de novo in this court, would not authorize a reversal of the judgment, but this court will disregard the testimony if it finds it immaterial, and try the cause on the testimony which is properly introduced. Although, in our judgment, there was no technical error in admitting this testimony, its effect was not to vary the terms of the written authority; it only tended to explain the written instrument, if any

explanation was necessary, and oral testimony in such cases is permissible for the purpose of explaining or expanding the written authority.

We do not conclude, from an investigation of the record, that the court abused its discretion in refusing to grant a new trial on the ground of newly discovered evidence, or on any other ground. The judgment is affirmed.

FULLERTON, C. J., and MOUNT and ANDERS, JJ., concur.

(30 Mont. 188)

**STATE ex rel. GNOSE v. DISTRICT COURT OF DEER LODGE COUNTY.**

(Supreme Court of Montana. March 31, 1904.)

**VENUE—CHARGE—MOTION—NECESSITY.**

1. Under Code Civ. Proc. § 615, as amended, which provides that the court or judge "must on motion change the place of trial in the following cases," etc., the court must change the venue in the cases prescribed, but only after a motion has been filed, and a showing made as required by the clause of the section invoked. The court cannot act of its own motion.

On writ of review by the state, on the relation of J. B. Gnose, against the district court of Deer Lodge county, to review an order of said court changing the venue in an action wherein J. B. Green was plaintiff and Daniel James was defendant. Order annulled.

W. H. Trippet and Geo. B. Winston, for relator.

HOLLOWAY, J. An action was commenced in the district court of Deer Lodge county by J. B. Gnose, plaintiff, against Daniel James, defendant. After issue was joined, the cause was set for trial. Thereafter, on the 28th day of January, 1904, the defendant in the action filed an affidavit under the provisions of subdivision 4 of section 180 of the Code of Civil Procedure, as amended by the Second Extraordinary Session of the Eighth Legislative Assembly, stating that he had reason to believe and did believe that he could not have a fair and impartial trial before the Honorable Welling Napton, district judge of the Fourth Judicial District, then presiding, by reason of the bias and prejudice of such judge. A motion for a change of venue was not made by either party, but the court, on its own motion, and over the objection of plaintiff, made an order changing the place of trial from the district court of Deer Lodge county to the district court of Lewis and Clarke county. Upon application, a writ of review was issued from this court to review the order.

The provisions for a change of venue in civil actions are found in section 615 of the Code of Civil Procedure, as amended by the Second Extraordinary Session of the Eighth Legislative Assembly: "Sec. 615. The court or judge must on motion change the place of trial in the following cases." The four sub-

divisions of the section then specify the particular circumstances under which a party may be entitled to a change of venue. The provisions of that section are mandatory, and require the district court to change the venue, but only after a motion has been filed and a showing made as required by the particular subdivision of the section under which the change of venue is sought. The court cannot act of its own motion, for, while a party may have an absolute right to a change of venue, it is a right that he may waive, and the court is without authority to invoke the statute in his behalf. *Miller v. Chaffin* (Colo. App.) 55 Pac. 201. In attempting to change the venue in this instance, the district court exceeded its jurisdiction.

The order is annulled. Order annulled.

BRANTLY, C. J., and MILBURN, J., concur.

(30 Mont. 172)

**FLANNERY v. CAMPBELL.**

(Supreme Court of Montana. March 29, 1904.)

**WATER COURSES—IRRIGATION—DIVERSION—DAMAGE TO CROPS—PLEADING—COMPLAINT—REPLY—INCONSISTENT ALLEGATION—JUDGMENTS—CONCLUSIVENESS—INCONSISTENT INSTRUCTIONS—APPEAL—THEORY OF CASE—CHANGE.**

1. Plaintiff alleged in her complaint a cause of action for defendant's diversion of water in an irrigation ditch, thereby depriving plaintiff of water sufficient to irrigate her crops, but did not plead or rely on certain admissions in defendant's answer in another case relating to the same ditch, or the judgment therein, either as an estoppel or *res judicata*. Defendant's answer denied plaintiff's complaint, and alleged facts showing that plaintiff had sufficient water, whereupon, in a reply, plaintiff denied such facts, and pleaded that defendant was estopped by his answer in the previous case, and by the judgment, from denying that plaintiff had been prevented from using "any" water. *Held* that, plaintiff having pleaded in her complaint that she did use a portion of the water, she thereby in effect contradicted her plea of estoppel or *res judicata*, and was therefore not entitled to the benefit of the same.

2. Plaintiff, in an action for diversion of water from an irrigation ditch, admitted in her complaint the use of some of the water, and in her reply claimed that defendant was estopped, by proceedings in another suit, to deny that plaintiff had been prevented from using any water during the season in question. The witnesses testified that some of the water was allowed to pass defendant's obstruction at all times, and the court charged that if defendant filed a verified answer in the previous suit, in which the right of plaintiff's landlord to use the irrigation ditch was denied, and admitted having prevented any water flowing through the ditch to the landlord's land during the time in question, defendant was estopped to deny such admission, but that if water was allowed to run in the ditch during the period in question it was plaintiff's duty to use the water if she needed the same, and if she failed to do so, and her crops were thereby injured, she could not recover damages so sustained. *Held*, that such instructions were inconsistent and contradictory.

3. Where an action was brought to determine the right of plaintiff's landlord to an interest in an irrigating ditch, to establish his right to use the ditch, and to enjoin defendant from in-

§ 1. See Pleading, vol. 39, Cent. Dig. § 352.

terfering with plaintiff's use thereof, in which defendant denied the landlord's right to the ditch, but it was subsequently determined that he was a tenant in common thereof, and an order previously issued, restraining defendants from deflecting the flow, was modified so as to allow 50 inches of water to flow to the landlord's premises, such judgment was not conclusive, in a subsequent action by the tenant for damages to crops by reason of defendant's alleged previous diversion, that defendant had deprived plaintiff of all the water which should have been permitted to flow on her land.

4. Where plaintiff relied in the trial court on an estoppel arising from defendant's admission in his answer in another suit and not on the proposition that the judgment in such suit was determinative of such facts, she could not change her position on appeal, and claim that the judgment was conclusive as to the facts on which the estoppel was based.

Commissioners' Opinion. Appeal from District Court, Gallatin County; W. L. Holloway, Judge.

Action by Ida B. Flannery against N. S. Campbell. From a judgment in favor of plaintiff, defendant appeals. Reversed.

McConnell & McConnell, for appellant. E. B. Hoffman and T. J. Walsh, for respondent.

CLAYBERG, C. C. Appeal from judgment and order overruling motion for a new trial. The action was instituted by respondent, Ida B. Flannery (plaintiff), against appellant, N. S. Campbell (defendant), to recover damages to crops caused by the alleged deprivation by defendant of the use of water for irrigating purposes on plaintiff's crops during the irrigation season of 1898. The only two errors alleged are: (1) That the court gave inconsistent and contradictory instructions. (2) That the evidence wholly fails to sustain the verdict.

1. Contradictory Instructions. The condition of the pleadings is peculiar, and a somewhat extended reference thereto seems necessary to a full understanding of the case.

Plaintiff's complaint contains allegations which, briefly stated, are as follows:

(1) That one Pat Toohey owned certain land.

(2) That it was arid, and required irrigation.

(3) That there is appurtenant to said land a certain water right through the Flannery ditch, which was owned by defendant, Patrick Toohey, Joseph Davis, and Benjamin Graham as tenants in common.

(4) That Toohey leased this land to the plaintiff.

(5) That she prepared the ground for seed, and planted certain crops.

"(6) That on or about the 7th day of July, 1898, and frequently thereafter during the irrigation season of 1898, defendant and said Joseph Davis, and each of them, wrongfully and unlawfully constructed dams and embankments in and near said Flannery ditch, and otherwise wrongfully and unlawfully interfered with and obstructed this plaintiff's use thereof, and the flow of the water therein, and plaintiff's use of the water right and

water ditch hereinbefore mentioned; and by reason of said wrongful and unlawful acts, and the interference and obstruction of the said Davis and this defendant, plaintiff was able to obtain and did use only a small part of the water to which said land was entitled by virtue of the said water right, and, during the greater portion of said irrigation season, was able to and did obtain or use no part of said water for the irrigation of said crops or other purposes; and plaintiff was unable to procure water from any other source with which to irrigate said crops, or any part thereof, and was unable to properly irrigate said crops, or any thereof, by reason of the said wrongful and unlawful acts and interference and obstruction by said defendant and said Davis with plaintiff's use of said water right and Flannery ditch; to plaintiff's great damage in the sum of eighteen hundred and eighteen and <sup>90</sup>/<sub>100</sub> (\$1,818.90) dollars."

In the seventh paragraph of the complaint she alleged specific damage to each of the crops which she had planted.

The defendant, in his answer to this complaint, denied generally or specifically all its material allegations, and in answer to paragraph 6, above quoted, says: "Defendant denies each and every allegation of paragraph 6, and alleges the truth to be as follows, to wit: That on the 7th day of July, 1898, he turned the water out of said ditch, at the head thereof, for the purpose of enabling him to put in a gate at a point at which he diverted the water from the same for use upon his said ranch; this diversion was done jointly by this defendant and said Joseph Davis; that they put in said gate on said 7th day of July, 1898, and that on the following day they turned the water back into the ditch at its head or junction with the East Gallatin river, and allowed the said water to flow down said ditch; that this defendant never diverted or used any of the water until the 13th day of July, 1898, but that said Davis did divert and use the same for irrigating his crops upon his said ranch during the 8th, 9th, 10th, 11th, 12th, and 13th days of July, 1898, and also a portion of it the 14th and 15th; that on the 15th day of July, 1898, Pat Toohey, who claimed to be the owner of the land, brought an action in the district court of Gallatin county against this defendant and said Joseph Davis, and enjoined them from using said water, and that the same was immediately turned back into the said ditch and allowed to flow down to the ranch or premises described in paragraph 1 of this complaint."

To this answer plaintiff filed a reply, in the first part of which she denies all the allegations of fact set forth in the answer, either specifically or generally, and then alleges, in substance, that defendant ought not to be permitted to deny that he prevented plaintiff from irrigating her crops, nor to make the allegations set forth in the sixth



paragraph of his answer, because on the 15th day of July, 1898, Toohey instituted suit against said Campbell and one Davis, wherein he sought a decree enjoining Campbell and Davis from interfering with his water right; that in his complaint he alleged that Campbell and Davis had wrongfully and unlawfully constructed dams and embankments in the Flannery ditch so as to completely destroy Toohey's right to the use thereof, and that they had prevented any water flowing through the ditch, and had ousted him from the possession of the ditch; that Campbell and Davis filed their joint answer, which was verified by Campbell. Plaintiff then quoted paragraphs 6 and 7 of said answer, wherein the defendants denied that plaintiff had any right to the ditch, or any part thereof, or any right to the use of the water therein, and admitted that Campbell and Davis had prevented any water flowing in said ditch upon the lands, and had threatened to continue to do so unless restrained. That a temporary injunction was issued against Campbell and Davis from interfering with Toohey's right to the ditch; that afterwards a judgment was entered in said case, whereby it was adjudged that Toohey was the owner of the lands described in the complaint and in this suit, and was a tenant in common with Graham, Davis, and Campbell in the Flannery ditch; that this defendant and Davis were each guilty of interfering with Toohey's right to said water, and that Toohey was entitled to injunction against them. She then alleges that the water and Flannery ditch, the real estate, and the interferences and obstructions mentioned in the complaint are the same as those in controversy in the Toohey Case, and that the defendant is the same Campbell who was a defendant in the Toohey Case; that at the time of the commencement of the injunction action, and during its pendency, and at the time of the commencement of this suit, plaintiff was the lessee of Toohey, and of the land and water right herein. The replication closes with the following prayer: "Wherefore plaintiff says that defendant herein should be and is estopped from denying the title of said Toohey in said lands described in the complaint herein, and from denying the right and title of said Toohey to said water right mentioned in the complaint and answer herein, and from making any and all of the allegations of the sixth paragraph of said answer herein, and from denying that plaintiff was prevented from irrigating her said crops upon said real estate by him, the said defendant."

The complaint, as above stated, bases the right of action upon the unlawful diversion of water by defendant. Plaintiff did not plead or rely in her complaint upon the admissions in defendant's answer in the Toohey Case, or the judgment in that case, either as an estoppel or res judicata, but tendered an issue

upon the fact of an unlawful diversion of the waters in question by the defendant. Defendant had a clear right to join issue on these allegations. Plaintiff had admitted by her complaint that defendant had allowed some of the water claimed by plaintiff to pass down to her, and that she had used it. This clearly appears from the following allegation, above quoted: "Plaintiff was able to obtain, and did use, only a small part of the water to which said land was entitled by virtue of the said water right." Defendant, in paragraph 6 of his answer, above quoted, meets the issues of paragraph 6 of the complaint, and alleges his version of the facts bearing thereon. In plaintiff's reply, above noted, she sought to plead an estoppel or res judicata against the facts set up in defendant's answer to the issue tendered by the complaint as above stated, claiming that this estoppel or res judicata prevented defendant from pleading, relying upon, or showing the existence of the facts which he had alleged in his answer. This condition, therefore, is disclosed by the pleadings: (1) The plaintiff alleges that defendant deprived her of water sufficient to irrigate her crops. (2) The answer denied this allegation, and set forth facts showing that she had ample water. (3) Plaintiff in her reply denied the existence of these facts, and then (4) alleged that defendant was estopped by his answer in the Toohey Case, and by the judgment in that case, from denying that plaintiff had been prevented from using any water. Thus it appears that plaintiff insists, by her replication, that the defendant is estopped from saying that plaintiff was not deprived of all the waters belonging to the leased land, yet we find in her complaint a direct allegation that she did use a portion thereof, thus by her own complaint contradicting the effect of her plea of estoppel or res judicata. This she cannot do. She cannot in her complaint take one position, and, in her replication to defendant's answer, take another one inconsistent with the allegations of her complaint. Code Civ. Proc. § 720; Laws 1899, p. 142; Hill v. Rich Hill Coal Min. Co., 119 Mo. 9, 24 S. W. 223; Merrill v. Suing (Neb.) 92 N. W. 618; Union Casualty, etc., Co. v. Bragg (Kan. Sup.) 65 Pac. 272; Johnson v. State Bank (Kan. Sup.) 52 Pac. 860.

But, again, the record, discloses that plaintiff's own witnesses, when sworn in her case in chief, testified that some of the water was allowed to pass the obstructions complained of at all times, thus contradicting the replication. By defendant's witnesses, when called upon the stand, it was disclosed, without objection, that from 70 to 80 inches of water, to which plaintiff was entitled at all times, passed the obstructions complained of. Plaintiff's attorney sought to avoid the effect of this testimony by a request for the following instruction, which was given by the court: "(8) The court instructs you that if you find from the evidence that the defendant

and Joseph Davis filed their answer verified by defendant Campbell in the injunction case of Toohey v. Campbell and Davis, in which answer they alleged that they denied the right of Toohey to use said Flannery ditch, or any part thereof, for any purpose, and that from July 7, 1898, till enjoined in said action, they had prevented any water flowing through said Flannery ditch upon the Toohey land, and that they intended to continue so to do, and that, unless restrained, they would continue to dam up and stop said ditch so that it could not be used by said Toohey, this defendant cannot be heard to say in this action that he did not do so, but said facts must be taken as true in this action, provided that you further find that the plaintiff was at said time the lessee of said Toohey, and as such in possession of said land, and entitled to the use of said Flannery ditch for irrigation." The court also gave the following instruction, requested by defendant, upon the same proposition: "(1) The court instructs you that if you believe from the evidence that water was allowed to run down said Flannery ditch on the 8th day of July, 1898, and subsequent days between that and the 13th, then it was the duty of the plaintiff to have used said water if she needed the same, and if she failed to do it, and her crops were injured thereby, she cannot be heard to recover such damage as she sustained by reason of failing to use said water between said dates." These instructions are absolutely inconsistent with and contradictory of each other, and we have no doubt but that, under the pleadings and the testimony given in the case, without objection on the part of plaintiff, instruction No. 8 above quoted is erroneous, and that instruction No. 1 is correct.

Counsel for respondents, in their brief, use the following language: "There was no estoppel. The former case of Toohey against Campbell and Davis did not estop any one. It did determine the truth, though, and, having been determined in that case, it cannot be again questioned by the parties thereto or their privies." We agree with counsel's statement that no estoppel was involved. The record discloses that upon the trial plaintiff offered in evidence the judgment roll in the Toohey Case. This judgment roll is not contained in the record, but the purpose of the suit is recited as having been as follows: "This was an action to determine the right of plaintiff to an interest in a certain water ditch known as the 'Flannery Ditch,' and to establish his right to the use of said ditch, to transmit water to his premises or ranch, and to enjoin the defendants from interfering with the plaintiff's said use of said ditch for said purpose." After this recital there is quoted, in full, paragraphs 5 and 6 of the complaint, and paragraphs 6 and 7 of the answer, in that suit. Then these additional

recitals: "A restraining order was issued in said case, and served on N. S. Campbell on the 15th day of July, 1898, and Joseph Davis on the 16th day of said month. One Benjamin Graham intervened in said suit. In the final decree the plaintiff, Toohey, established his right to the use of said ditch. The defendants, Campbell and Davis, had an undisputed right to the use of said ditch, through which to transmit their water which supplied their respective ranches; so, likewise, the intervener, Graham, had the undisputed right to use said ditch, and 142 inches of the waters of the East Gallatin river through said ditch. The plaintiff, Toohey, the defendants, Campbell and Davis, and the intervener, Graham, were made by said decree tenants in common in said ditch. The injunction or restraining order was modified on the 23d day of July, 1898, so as to allow only 50 inches of water to flow down to the plaintiff." From this showing in the record we cannot say that the judgment established or found that the defendants in that suit deprived the plaintiff of all water. We are bound by the recital in the record as to the purposes for which the suit was brought. Any interference with the rights of the plaintiff claimed and sought to be established and protected would have justified a judgment establishing such rights and protecting them against future interference by the injunction. It is quite apparent from the fact that the record quotes in full certain paragraphs of the complaint and answer, and from the further fact that plaintiff's counsel requested the court to charge the jury as above quoted, that counsel did rely in the court below upon an estoppel arising from defendant's admissions in his answer, and not upon the proposition that the judgment was determinative as to those facts. They, therefore, cannot be heard to change their position in this regard for the first time in this court.

The court erred, as alleged, in the first specification.

2. Failure of Evidence. Inasmuch as the case must be reversed and a new trial had, we do not deem it advisable to comment upon this point, or to review the evidence presented in the record.

We therefore advise that the judgment and order overruling defendant's motion for a new trial be reversed, and the case remanded for a new trial.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial.

HOLLOWAY, J., being disqualified, takes no part in this decision.

(63 Kan. 742)

## CITY OF EUDORA v. HARTIG et al.

(Supreme Court of Kansas. March 12, 1904.)

## MUNICIPAL CORPORATIONS—VACATION OF STREETS—POWERS OF COUNTY COMMISSIONERS.

1. By chapter 190, p. 248, Laws 1877, being chapter 115a, Gen. St. 1889, power was conferred on the county commissioners to vacate streets and alleys embraced within the corporate limits of a city of the first, second, or third class.

(Syllabus by the Court.)

In Banc. Error from District Court, Douglas County; C. A. Smart, Judge.

Action by Lothar Hartig, executor of Peter A. Hartig, and others, against the city of Eudora. Judgment for plaintiffs. Defendant brings error. Affirmed.

Bishop & Mitchell, for plaintiff in error. Brownell & Poehler and Geo. J. Barker, for defendants in error.

GREENE, J. This was an action brought by Peter A. Hartig to restrain the city of Eudora, a city of the third class, Charles Albright, street commissioner, and Frank Schaffer, marshal, of said city, from entering upon the lands described in his petition and opening streets and alleys thereon. All the lands described in plaintiff's petition were once within the corporate limits of the city of Eudora, and the streets in question had been surveyed, platted, and dedicated to the public. After the rendition of the judgment Peter A. Hartig died, and the cause was regularly revived in the name of plaintiffs. The city prosecutes error.

Many exceptions were saved to the ruling of the district court and are urged here, but the decision of one question will finally determine the rights of the parties. Plaintiff in error contends that while this land was embraced within the corporate limits of the city of Eudora the commissioners of Douglas county vacated the streets and alleys which the city and its officers are about to open. Upon this question the court below made the following findings: "On July 7, 1883, the plaintiff, with fifty-seven others, presented to the board of county commissioners of Douglas County, Kansas, a petition asking that body to vacate First street between I and H streets, Second street between I and E streets, Third street between F and C streets, D and E streets between the Wakarusa and Kansas rivers; also the alleys in blocks 102, 103, 104, 106, 109, 140, 141, 142, 174, 176, 177, and 210—which petition was granted by said board on August 6, 1883. All of said streets and alleys were embraced and included in the real estate in controversy. Said order of the board of county commissioners granting said petition has never been revoked or appealed from, except that about one year later the said board made an order revoking the first order. The last order was made without notice to any one. The said petition was presented and the order was made un-

der and pursuant to chapter 115a of the Laws of 1885." The city of Eudora contends that the commissioners had no power to vacate such streets and alleys, but, if they had, the order was afterwards set aside. The commissioners had no authority to open streets or alleys in an incorporated city, either by setting aside former orders vacating such streets or otherwise; consequently, if the order of July 7th vacating the streets and alleys was within the power of the commissioners, they could not thereafter annul or set it aside by any subsequent order. To ascertain whether the commissioners had power to vacate streets and alleys in such cities in 1883, reference must be had to the statute as it then existed. We find that chapter 108, Gen. St. 1868, conferred power upon the commissioners to vacate streets and alleys in towns and villages; that chapter 26, p. 80, Laws 1869, is the first general charter act providing for the incorporation and government of cities of the third class; and by subdivision 34, § 29, of that act the power to vacate streets and alleys was conferred upon such cities in the following language: "To open, widen or otherwise improve or vacate any street, avenue, alley or lane within the limits of the city, and also to create, open and improve any new street, avenue, alley or lane." This latter act was amended and revised. Chapter 108 of the General Statutes of 1868 was repealed by chapter 60, p. 118, Laws 1871. By section 55 of that act power was conferred upon the mayor and council "to open, widen, extend or otherwise improve any street, avenue, alley or lane; to create, open and improve any new street, avenue, alley or lane; and also to annul, vacate or discontinue the same whenever deemed necessary or expedient." In 1876 the Legislature enacted chapter 134, p. 317, which is entitled "An act providing for the vacation of streets, alleys and other public reservations." Section 3 reads: "Whenever it shall be desired to vacate any street, alley or other public reservation in any improved town site not embraced in any incorporated city, the person, persons or corporation so desiring shall give notice by advertising for six consecutive weeks in a weekly newspaper of general circulation in said town, that at the next regular session of the county commissioners of the county in which such town is located, a petition will be presented to said commissioners praying the vacation of such street, alley or other public reservation, describing the same properly." This section applies to improved town sites not embraced in any incorporated city. Under that act the commissioners had no power to vacate the streets and alleys embraced in the corporate limits of the city of Eudora. In 1877 chapter 190, p. 248, was enacted, which is entitled "An act providing for the vacation of streets, alleys, and other public reservations." Section 3 reads: "Whenever it shall be desired to vacate any block, lots, park, reservation.

street or alley, or any part of such block, park, reservation, street or alley, in any improved town site, the person, persons or corporations so desiring shall give notice by advertisement, for four consecutive weeks, in a weekly newspaper of general circulation in said town, that at the next regular session of the county commissioners of the county in which such town is located, a petition will be presented to said commissioners praying the vacation of such blocks, lots, park, reservation, street, alley, or any part of such block, park, lots, reservation, street or alley; describing the same properly." By this act the commissioners are granted the power to vacate the streets and alleys in any improved town site, omitting the clause "not embraced in any incorporated city," found in chapter 134, p. 317, Laws 1876. The only difference between chapter 134, p. 317, Laws 1876, and chapter 190, Laws 1877, is the omission from the latter of the clause "not embraced in any incorporated city." It appears the latter act was passed expressly to confer power upon the commissioners to vacate streets and alleys in any incorporated town site whether such streets and alleys were embraced in the corporate limits of a city or otherwise. This is the only construction that can be given these statutes which offers any reason for the enactment of the act of 1877. In support of this contention, chapter 66, p. 92, Laws 1893, seems applicable. Section 1 reads: "Where any town site, or portion of a town site, containing more than five acres, has been heretofore vacated by the board of county commissioners or by act of the Legislature, and such town site, or a portion of a town site, is a part of a city of the first, second or third class, and included within the corporate limits of such municipal corporation, then, from and after the passage of this act, the town site, or portion of a town site containing more than five acres, thus vacated, shall no longer be a part of such municipal corporation, nor included in the corporate limits thereof." The Legislature evidently was of the opinion that the commissioners had at some time possessed the power to vacate streets and alleys embraced within the corporate limits of a city, otherwise it would not have inserted the clause removing from the corporate limits of cities territory in which the commissioners had previously vacated streets and alleys. In 1897 the Legislature enacted chapter 267, p. 487 (chapter 115, Gen. St. 1901). This act conferred such jurisdiction upon the district court, and repealed chapter 115a of the General Statutes of 1889. Neither the act of 1871, which conferred power upon cities of the third class to vacate streets and alleys, nor the act of 1877, which conferred such power on the commissioners, was exclusive. While these acts were both in force, either tribunal might exercise such power when called upon. The Legislature may confer such

power on as many different tribunals as it may think expedient, and either of such tribunals may exercise such jurisdiction. *Baldwin v. Green*, 10 Mo. 410, was an action brought against Baldwin for a failure to work the roads over which Green was overseer. The only question presented was, did the act incorporating Platte City divest the county court of Platte county of its jurisdiction over that part of the road lying within the corporate limits of said town? The act of incorporation contains an enumeration of powers vested in the board of trustees. In the syllabus it is said: "An act incorporating a town and vesting the authorities of the town with certain powers does not divest the state or county courts of powers vested in them by a general law, unless the act of incorporation declares the powers vested in the corporation to be exclusive." In *Hornaday v. The State*, 63 Kan. 499, 65 Pac. 656, in speaking of the same power being conferred upon two different bodies of trustees, the court said: "We can see no good reason why the trustees for the different asylums, commonly known as the 'State Board of Charities,' should not be given power to condemn lands necessary for the erection of buildings for institutions the care of which comes within their jurisdiction. The conferring of such power is a matter of legislative discretion, which may be exercised by lodging the same in any number of boards or tribunals authorized to act in behalf of the state. In the statute authorizing the condemnation of lands for railway purposes, two methods for determining the value are provided—one by the board of county commissioners acting as appraisers, and the other by three commissioners selected by the district judge." Quoting from *Shoemaker v. Brown*, 10 Kan. 383, 392, it was said: "Indeed, it is a general rule that a mere grant of jurisdiction to a particular court, without words of exclusion as to other courts previously possessing the like powers, will only have the effect of constituting the former a court of concurrent jurisdiction with the latter." In *City of Ottawa v. Rohrbough*, 42 Kan. 253, 21 Pac. 1061, this court construed section 3 of the act of 1877 to apply to tracts of land surveyed and subdivided into lots and blocks by streets and alleys that had never been improved by occupancy or buildings or had been only partially improved, but not to the extent as would authorize the organization of a city, town, or village, and where there existed no corporate authority. We have no doubt of the power of the commissioners to vacate streets and alleys situated as described in that opinion. But, as heretofore said, the act of 1877 was passed expressly to amend that provision of the act of 1876, and to confer the power upon the commissioners to vacate streets and alleys in any incorporated town site whether within or outside the corporate limits of a city. This construction

gives effect and force to both acts. We are of the opinion, if the attention of the learned judge who wrote that opinion had been called to these particular provisions of the two acts, the decision in that case would have been otherwise. It was within the power of the board of county commissioners to make the order of July 7, 1883, vacating the streets and alleys in the city of Eudora.

The judgment of the district court is therefore affirmed.

(68 Kan. 683)

**PHILADELPHIA MORTGAGE & TRUST CO. v. HARDESTY et al.**

(Supreme Court of Kansas. March 12, 1904.)

**VENDOR AND PURCHASER—CONTRACT OF SALE—EVIDENCE.**

1. An owner of real estate which had been leased until the following March for \$50, payable October 1st, wrote in September to his agent authorizing a sale of the property for \$1,200, adding, "It is understood that this year's rents will come to us." *Held*, that this was in effect an instruction to sell subject to the lease, and did not authorize a sale for \$1,200 without a reservation of the rent.

2. Where, in the course of correspondence regarding the sale of a tract of land, an offer is made and accepted, but the buyer seeks to attach new conditions, and notifies the seller that unless these conditions are agreed to he will not buy, this, as to the buyer, is a reopening of the negotiations, permitting the seller also to impose new conditions, and the buyer cannot recover damages for the seller's refusal to convey, without showing a new agreement reached after such reopening.

(Syllabus by the Court.)

Error from District Court, Harper County; P. B. Gillett, Judge.

Action by J. P. Hardesty against the Philadelphia Mortgage & Trust Company and another. Judgment for plaintiff, and the trust company brings error. Reversed.

T. A. Nofztger, for plaintiff in error. E. O. Wilcox, for defendant in error Hardesty.

MASON, J. In September, 1901, the Philadelphia Mortgage & Trust Company, a corporation, was the owner of a half section of land in Harper county, which had been leased to J. P. Hardesty for the year expiring March 1, 1902, for the sum of \$50, due October 1, 1901, for which Hardesty had given his note. J. W. Clendenin and R. H. Lockwood, of Wichita, composing a firm known as J. W. Clendenin & Co., were agents of the Philadelphia Company with respect to this and other lands, but had no authority to effect a contract of sale, except upon terms to be submitted to and approved by their principal. On September 3, 1901, Hardesty wrote a letter to Clendenin & Co. relative to a purchase of this half section, and thus began a correspondence on the subject which continued until October 9th, and which he claims resulted in a valid contract for such purchase. The Philadelphia Company denied that a con-

tract had been made, and refused to convey the land, whereupon Hardesty sued it and Clendenin & Co. for damages for such refusal, and recovered a judgment against the corporation, which it is the purpose of this proceeding to review. The case was sent to the jury upon two principal issues of fact: First, whether Clendenin & Co. had made an agreement with plaintiff for the sale of the land; and, second, if so, whether they had authority to bind the corporation to such agreement. The jury found specially that the agents sold the property to plaintiff without reserving the rent, that they had no authority to make such a sale, but that the corporation had ratified it. There was no evidence of ratification, and therefore these findings would of themselves require a reversal if these issues were properly submitted to the jury. But there was no conflict of testimony upon these matters, and all substantial evidence affecting them was in writing. Whether the various letters and telegrams established the agency and the contract was purely a question of law. Whatever authority the agents had was derived from a letter written to them by the corporation, September 16th, giving a statement of terms on which a sale might be made, concluding with the words, "It is understood that this year's rents will come to us." The owner of the land, having leased it until the following March, was obviously not in a position to make a contract for immediate sale without reservation. It was necessary that the matter of possession and rent should be adjusted between buyer, seller, and tenant. The owner did not know that the proposed buyer was the tenant. In view of this situation, it must be held that the words just quoted from its letter constituted in effect an instruction to the agents that the sale must be made, if at all, subject to the lease. They, at any rate, so limited the other contents of the letter that no authority was granted to make the kind of sale the jury found was made, that is to say, a sale without a reservation of the season's rent. The judgment must on this account be reversed, unless it can be said that this finding was immaterial because outside of the issues, that the agents did make with plaintiff such a contract as was within their authority, that the plaintiff was ready and willing to carry it out, and that the defendant refused to do so.

The correspondence between Hardesty and Clendenin & Co. regarding the proposed sale included at least 10 letters and telegrams on each side. Various matters of difference arose, various conditions were sought to be imposed, and afterwards withdrawn, while in the meantime other questions had arisen. To present intelligently the question whether at any time the minds of the parties met upon all substantial matters and thus completed a contract, it is necessary to review these writings in some detail. The negotiation was begun by Hardesty writing to Clendenin & Co.,

asking the price of the land. They replied, saying that the price was \$1,200, to be paid half in cash and half on time at 6 per cent. interest. Hardesty then made an offer of \$1,100, \$600 down and \$500 on time. This offer the agents submitted to the owner, who, in the letter already referred to, authorized a sale (subject to the rent, as before noted) at \$1,200, half in cash and half by mortgage. This offer was reported to Hardesty by Clendenin & Co., who, however, stated the rate of interest required as 7 per cent., instead of 6, the rate mentioned in their correspondence with their principal. Hardesty replied, September 20th, with the telegram: "Will take land at twelve hundred, six hundred cash six on time six per cent interest as agreed in your letter answer at once." At this stage of the proceedings it is clear that there was no contract. But Clendenin & Co. immediately sent the following telegram to Hardesty: "Will sell you the land as per telegram 20th instant." At this point, therefore, that is, upon the sending of the latter telegram, it may be said that there was a definite proposal and acceptance, constituting a completed contract. The matter of the lease and rent not having been mentioned, the agents may be said to have agreed that a warranty deed should be at once delivered. This would leave the grantor liable to the grantee for the fair value of the use of the land from the time of sale to the ensuing March, in effect accomplishing a division of the season's rent between the buyer and seller, an arrangement presumably equitable, but one not authorized by the agents' instructions. Had Hardesty at this point offered to carry out the contract according to its very terms, he doubtless would have had a right to insist upon its performance, so far as the agents were concerned. But this contract, nothing yet having been stated to the contrary, contemplated the payment of the purchase price at the home of the vendor or that of its representatives. *Greenawalt v. Este*, 40 Kan. 418, 19 Pac. 803. It was incumbent upon the purchaser, in order to avail himself of the contract, to comply or offer to comply with that condition. Instead of doing so, he, upon the same day—the 20th—wrote to Clendenin & Co. inclosing a check for \$100, and asking that the deed be made to M. Hardesty (in itself a new condition), and be sent to the bank at Hazelton. These additional requirements authorized the agents of the vendor to consider the matter still open, and to impose new conditions on their own part. *Hinish v. Oliver*, 66 Kan. 282, 71 Pac. 520; *Egger v. Nesbitt*, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596. Upon the same day they wrote to Hardesty insisting upon 7 per cent. as the rate of interest, asking to whom the deed should be made, and offering to send the papers to Charles E. Morris, at Anthony. The controversy as to the rate of interest was finally settled by an agreement to pay the full purchase price in cash. In

their letter of the 20th, Clendenin & Co. for the first time expressed a willingness to make a deed to any one other than Hardesty himself. This letter, therefore, marks the first period in the negotiations, when it can be claimed that a contract for a deed to M. Hardesty (the wife of J. P. Hardesty) was under consideration, and to this letter was added: "Of course you understand that owner expects you to pay the rent agreed on for the land this year, and will have to be paid at the same time that you close up the sale." This was the first time that Clendenin & Co. had mentioned this matter in their correspondence with Hardesty, but, late as the requirement was made, it was within time, since a final agreement had not yet been reached.

On September 23d, Hardesty wrote to Clendenin & Co. about the matter of interest, offering to pay the full amount down, and continuing: "You can make deed to M. Hardesty, as instructed in former letter, and send it to the bank of Hazelton, Kansas, and on receipt of it will pay you \$1100, with the \$100 you already have got, will make the \$1200. So you see you have all cash instead of any time, which will suit you better. Of course, I demand an abstract deed clear of all incumbrance. Now if this don't suit you return the check for \$100.00 and the trade is off." The requirements insisted upon in this letter as to sending the deed to the Bank of Hazelton and furnishing an abstract had never been agreed to by Clendenin & Co., and it is too clear for argument that, whatever may have been the earlier condition of the negotiation, at the time this letter was written there was no contract between the parties. Clendenin & Co. on September 24th notified Hardesty that they had sent the deed to Morris, at Anthony, together with the note given for the rent. Morris was instructed to deliver the deed only upon the payment of the note as well as of the purchase price. On September 26th, Hardesty wrote as follows: "Just received a letter from one Charley Morris. Who is this Morris and what figure does he cut in our deal, ordering me to get my money out of the Bank of Hazelton and carry it around over the country and to hunt him up and take up deed? I stated in my letter to you that your money was in the Bank of Hazelton, to send the deed there and collect your money. I haven't the time to go and hunt up other parties in this deal unless there is something in it. My time is worth money to me at present. Send deed to the Bank of Hazelton and I will fix up the matter. Hoping to hear soon." Hardesty, however, did call upon Morris, and offered to pay \$1,100 for the deed, but refused to pay the note. He said to Morris that he did not consider that there was anything coming on the note; that he was entitled to the land for \$1,200, clear of all incumbrances. On the receipt of Hardesty's letter of the 26th, Clendenin & Co. wrote to him that they would

direct Morris to send the papers to the Hazelton bank. But on the next day they wrote him again, saying that, having heard from Morris that he had declined to pay the amount demanded for the note and deed, they would leave the papers at Anthony, and unless they were taken up by the following Monday would order their return. In this letter the matter of the rent is discussed at length. On October 2d Hardesty wrote that he had offered Morris \$1,100 for the deed. In this letter he did not refer to the note. On the same day Clendenin & Co. wrote to him, again refusing to send the papers to the Hazelton bank, and giving him until October 6th to take them up at Anthony. On October 7th, Hardesty wrote to Clendenin & Co. as follows: "I have just been over to the Bank of Hazelton and find the deed isn't there yet for the Davis land. I received a letter from you advising me to go to Hazelton and take up those papers. I want you to understand that I will not have anything to do with Morris in this matter. Now I will give you until the 15th of the month to send the deed to the Bank of Hazelton as you agreed to do. I had to borrow part of the money to settle the interest business and it is an expense to me right along. If you didn't want to sell the land to me for \$1200 clear of all incumbrance why did you do it. Or if you didn't intend to send deed to Hazelton at all, why did you say so. Now I will refer you to my letter of Sept. 23d. You had a chance then to return my check if you didn't want to sell the place for \$1200.00 which you didn't do and now you are into it. You will find \$1100 in the Bank of Hazelton to finish paying for that land, any day between this and the 15th of October." On October 8th, Clendenin & Co. sent Hardesty a check for \$50, retaining the remainder of the \$100 he had paid them, claiming it upon the rent. On the 10th, Hardesty returned their check and began his action for damages.

It thus appears that while at one time the correspondence between plaintiff and the owner's agents showed an offer to buy and an unconditional acceptance, thus making a valid contract, plaintiff himself repudiated this agreement, and insisted upon imposing additional conditions; that in the course of the new negotiations which followed, and before a further agreement had been reached, the requirement was made in behalf of the owner that plaintiff should pay the year's rent—in effect, that he should take the land subject to the lease; that this demand was never afterwards withdrawn, and was never acceded to. There was therefore no contract that could be enforced in this action, even apart from any question of the authority of the agents to make it. Plaintiff waived whatever rights he might have asserted under the terms of the original agreement, and a subsequent agreement was never reached.

The judgment is reversed, and a new trial ordered. All the Justices concurring.

(68 Kan. 831)

## HOFFMEIER v. KANSAS CITY, LEAVENWORTH R. CO.

(Supreme Court of Kansas. March 12, 1904.)

## INJURY TO EMPLOYE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

1. A conductor on a street car, struck, while collecting fares from the running board, by a pole negligently erected by the company near the track, cannot be held to have assumed the danger, or to have been negligent in not discovering it, unless it is shown that he had actual knowledge of it, or that it was so patent as to exclude his ignorance.

Error from District Court, Leavenworth County; J. H. Gillpatrick, Judge.

Action by Carl Hoffmeier against the Kansas City, Leavenworth Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

F. B. Dawes and L. H. Wulfekuhler, for plaintiff in error. A. L. Berger (H. L. Alden, of counsel), for defendant in error.

PER CURIAM. The record in this case presents the proceedings in an action for damages for personal injuries claimed to have been negligently inflicted. The decision depended upon the probative force of facts. The trial court dispensed with the service of the jury, and drew the definitive conclusion itself.

The plaintiff was the conductor of an electric street railway car. The car was without an aisle or other passageway lengthwise through it, and the conductor was obliged to perform his duties from a footboard running the length of the car on its outside. The electric current was conveyed to the car by a wire supported by poles placed at the side of the track, and at haphazard distances from it. These poles, in the long course of a tortuous track zigzagged from one side of it to the other, and, through a skimpy and niggard plan of construction, some of them were so near as to imperil the safety of a conductor in the performance of his duties in the collection of fares from passengers aboard the car. The plaintiff was struck by a pole on a trestle, and when knocked from the car fell some 25 or 30 feet before reaching the earth. This prodigality of the body and members of human beings was clearly occasioned by the negligence of the company maintaining the plant. The plaintiff, upon entering the defendant's service, accepted no risk arising from its negligence. He had a right to assume that the company had not set him to toil in the midst of danger. He had a right to assume the road was built with ordinary care and consideration for the safety of the men who were to operate it, and he was not obliged to make any independent investigation for hazards resulting from the disregard of such care. Without actual knowledge of his peril, or a patency so ample as to exclude ignorance, the plaintiff assum-

ed no risk in continuing to work under the conditions surrounding him.

Upon a demurrer to the plaintiff's evidence, every propitious fact it fairly supports is accepted as proved, and every favorable inference which may be fairly deduced must be indulged. So considered, the evidence on behalf of the plaintiff is such that a jury might say he stood acquitted of any knowledge of the jeopardy caused by the particular pole which felled him, and of any culpable carelessness in failing to observe it, and that his conduct at the time of his injury was that of a reasonably prudent man. Other elements essential to a recovery were admittedly established. Therefore the jury should have been permitted to weigh the testimony, and to approve or condemn the plaintiff's conduct as they saw fit.

The cases of *Rush, Adm'x, v. Mo. Pac. Rly. Co.*, 36 Kan. 129, 12 Pac. 582; *A., T. & S. F. R. Co. v. Schroeder*, 47 Kan. 315, 27 Pac. 965; *Clark v. Mo. Pac. Ry. Co.*, 48 Kan. 654, 29 Pac. 1138; and *Hall v. Wakefield & Stoneham Street Ry.*, 178 Mass. 93, 59 N. E. 668—relied upon by the defendant in error, were all decided upon the theory of actual knowledge of his danger by the employé.

The case of *St. Louis Cordage Co. v. Miller* (C. C. A.) 126 Fed. 495, cited to the court since the oral argument, cannot be followed. It collates almost 200 cases, and not one of them from this state. It adopts principles in direct conflict with *St. L., Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; *A., T. & S. F. R. Co. v. Rowan*, 55 Kan. 270, 39 Pac. 1010; *Railway Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938; *Rouse v. Ledbetter*, 56 Kan. 348, 43 Pac. 249; and numerous other cases decided by this court. Besides, the distinguished judges of the Court of Appeals were themselves divided in opinion as to whether or not the case should have been submitted to the jury—a plain indication that such was the only proper course.

The case of *Glenmont Lumber Co. v. Roy* (C. C. A.) 126 Fed. 524, follows *St. Louis Cordage Co. v. Miller* as an authority. Judge Thayer dissented, as he did in the former case, and, among other things, said: "At all events, juries should be permitted to find, in such cases as this, whether the servant, with a full knowledge and appreciation of the risk, agreed with his master to assume it and absolve him from liability. This is an inference of fact, and juries should be left to determine it. It is an invasion of the province of the jury to do otherwise."

The legal principles involved in this case were announced last month (January, 1904) in the case of *Buoy v. Clyde Milling Co.* (Kan.) 75 Pac. 466, as they have been time and again since the organization of the court, and, as heretofore in such cases, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

(68 Kan. 393)

## KIMMEL v. BEAN et al.

(Supreme Court of Kansas. March 12, 1904.)  
BANKS—DEPOSIT BY AGENT—APPLICATION TO DEBT.

1. A bank which receives from an agent for deposit in his own name the money of his principal, without notice of the agency, is protected, in applying it to a past-due debt of the depositor, to the same extent as in paying it out upon his checks, whenever such application is authorized by the agent, either expressly or by legal implication, and such authority ordinarily arises from the making of a deposit, without other directions, where the debt to which it is applied is an overdraft.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; D. M. Dale, Judge.

Action by S. W. Kimmel against R. T. Bean and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Adams & Adams, for plaintiff in error.  
Houston & Brooks, for defendants in error.

MASON, J. On April 20, 1900, S. W. Kimmel, of Garber, Okl., shipped to a Wichita commission firm known as the "Wichita Live Stock Commission Company" a car load of hogs, with directions to sell and send him the net proceeds by draft. The hogs were sold to Jacob Dold & Son on April 25th, and the commission company at once mailed to Kimmel their personal check upon the Kansas National Bank of Wichita, where they had had an account for several years, for \$1,016.16, being the amount for which the sale was made, less the commission and expenses. Dold & Son paid for the hogs, April 26th, with a check made payable to the order of the commission company, drawn upon another Wichita bank. The company at once indorsed the check and deposited it in their bank, receiving credit upon their deposit account, and it was paid on the same day. Kimmel deposited the check sent him by the commission company with his local banker, and it was forwarded for collection through the ordinary banking channels, reaching Wichita May 1st, when it was presented to the bank on which it was drawn, which refused payment. Kimmel then sued the bank for the amount of the check, alleging that the deposit of the proceeds of the sale of the hogs was made without his authority and in violation of his instructions, and that the bank knew all the circumstances connected with the transaction. The bank answered, denying knowledge of the relations of plaintiff and the commission company, and alleging that when the Dold check was deposited the company's account was overdrawn by more than that amount, that the overdraft had been permitted upon an agreement that it should forthwith be made good by deposits, and that the check when deposited was ap-

¶ 1. See *Banks and Banking*, vol. 6, Cent. Dig. § 359.



plied to such overdraft, without notice of plaintiff's claim. Plaintiff replied with a general denial. Upon the trial the court sustained a demurrer to plaintiff's evidence, and rendered judgment accordingly, which plaintiff now seeks to reverse.

The evidence was mainly directed to the question of the bank's knowledge of the commission company's business. Substantially the same facts were shown in this regard as in *Martin v. Bank*, 66 Kan. 655, 72 Pac. 218, which grew out of a similar claim against the same bank made by another shipper. Here, as in that case, an effort was made to show such intimacy of dealing between the bank and the commission company as to justify charging the former with actual or constructive notice of plaintiff's interest in the check deposited by the latter. In fact, however, little more was shown than that the bank knew that the company were engaged in the commission business, and that their account was sometimes overdrawn. The evidence on this point, being stated in some detail in the *Martin* Case, will not be further reviewed. Following the conclusion reached in that case, we hold that the bank must be deemed not to have had notice of the relation of the commission company to the shipper. Plaintiff claims that the record does not show that the account of the commission company was overdrawn to the amount of the Dold check at the time it was deposited. The evidence in this regard is not as full as might be desired, but we think that upon the consideration of the entire testimony it sufficiently appears that such was the fact. Indeed, it is perhaps to be inferred that the overdraft was allowed to be created in virtue of a statement by the commission company that they had funds ready to deposit against it, having reference to this very check. The question incidentally suggested in *Martin v. Bank*, *supra*, is therefore fairly presented: Can a bank be held to account to the owner of a fund which has been deposited by an agent in his own name and applied upon the agent's overdraft, the bank having no knowledge of the agency? The strongest case cited in support of the contention of plaintiff in error for an affirmative answer to this question is that of *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906; *Id.*, 49 Neb. 125, 68 N. W. 358. The third paragraph of the syllabus reads: "F., a commission merchant, deposited in bank money realized from the sale of live stock consigned to him by C., his account with the bank being at the time largely overdrawn. Held, regardless of the question of notice, that the bank is accountable to C., and that it cannot apply the money so deposited in satisfaction of F.'s indebtedness." Under the evidence in that case as stated in the opinion, it might well have been said that the bank was chargeable with notice, but no account was taken of this fact as a basis for the conclusion reached. In the opinion a number of cases are cited, one of

which, *Davis v. Panhandle Nat. Bank* (Tex. Civ. App.) 29 S. W. 926, seems to be entirely in point, holding that, where an agent deposits the money of his principal in his own name, the bank cannot hold it for the debt of the agent, although it has no knowledge of the agency, unless it would otherwise lose its claim. No authorities are cited or arguments presented in support of this conclusion, the opinion merely stating that the court did not see upon what principle the bank should be allowed to retain the money, and that it was perfectly manifest that it had no right to do so. A brief review of the other cases cited will show that they do not go so far as the Nebraska decision. In *Penney v. Deffell*, 4 De G., M. & G. 372, it was held that trust funds deposited by a trustee in his own name, together with money of his own, could be followed by the beneficiary, but the controversy was between the beneficiary and the executors of the trustee, the bank making no claim. In *Van Alen v. American Nat. Bank*, 52 N. Y. 1, the bank likewise made no claim to the money in controversy, and it was held that it could be required to pay it to the real owner, although it was deposited in the name of another, who gave the real owner a check for it. The questions discussed were purely technical. In *Burnett v. First Nat. Bank of Corunna*, 38 Mich. 630, an agent deposited funds of his principal in his own name. Some six months later he died, and the bank then attempted to apply the deposit to a debt of the decedent, the character of which is not shown in the reported decision. It was held that this could not be done, the case turning upon the fact that the agent never authorized the money to be applied to his debt. In *Third Nat. Bank v. Stillwater Gas. Co.*, 36 Minn. 75, 30 N. W. 440, it was merely held that money obtained by a bank by fraud could be recovered by the real owner, although it had passed through several hands. In *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90, the money involved was not paid to the bank as a deposit, but for a specific purpose, and as this was not performed it was held that on the insolvency of the bank it should go to the owner, and not to the general creditors. In *Baker v. New York Nat. Ex. Bank*, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150, it was held that a bank, having notice of the trust character of a fund deposited by a firm in their own name, with the addition of the word "agents," could not apply it to the debt of the firm. In *Whitley v. Foy*, 59 N. C. 34, 78 Am. Dec. 236, the bank had actual notice that money deposited in the name of one person was owned by another; moreover, the controversy was between the real owners and the administrators of the depositor. In *Central Nat. Bank v. Conn. Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693, and *Union Stockyards Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724, the facts were held to give the

banks notice of the trust character of the deposits involved. *First Nat. Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986, 8 L. R. A. 788, 20 Am. St. Rep. 257, cited on rehearing, 49 Neb. 125, 68 N. W. 358, was another controversy between the beneficial owner of a trust fund and the administrators of the trustee. In *Hutchinson v. Manhattan Co.* (Super. N. Y.) 29 N. Y. Supp. 1103, a check was deposited by an agent for collection only, and it was held that the bank could not hold it for the debt of the agent, because this was contrary to the intention of all the other parties in interest, including the agent. The decision, moreover, was reversed by the Court of Appeals. See 44 N. E. 775. In *Clemmer v. Drovers' Nat. Bk.* (Ill.) 41 N. E. 728, the bank knew of the trust character of the deposit. These are all the cases cited on this branch of the case by the Nebraska court. The same doctrine is announced in 2 *Morse on Banks & Banking*, § 590, citing this case, that of *Burtnett v. First Nat. Bank*, 38 Mich. 630, which has already been commented upon, and *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933, which only declares the right of the real owner of property to hold it against the trustees in bankruptcy of one to whose care it had been confided.

Plaintiff in error also cites *Farmers' & Merchants' Bank v. Farwell*, 58 Fed. 683, 7 C. C. A. 391. Expressions are found in the opinion in that case favorable to his contention, but the decision turned largely upon the fact that the money sought to be held by the bank did not reach it by any act of its debtor, or even with his knowledge, but was deposited in his name by his attorney through mistake.

A conclusion different from that of the Nebraska court is reached in *Smith v. Des Moines National Bank*, 107 Iowa, 620, 78 N. W. 238, where the authorities bearing upon the matter are collected and reviewed. The scope of the opinion is indicated by a paragraph of the syllabus, reading as follows: "A cestui que trust cannot recover trust moneys which were deposited in a bank by the trustee in his own name, and which, without notice of their trust character, the bank applied to a matured individual note of the trustee, surrendering the note to the latter." We think this decision is in accordance with the weight of authority and with the better reason. The facts there presented differed in no material respect from those now under consideration, except that the depositor expressly agreed that the bank might apply the deposit to his debt, and the bank surrendered the note which evidenced it. Where a depositor carries an account with a bank as a part of his usual business, continually drawing checks and making deposits, sometimes having a balance to his credit and sometimes being overdrawn, it seems clear that the mere act of making a deposit is equivalent to an agreement that it shall apply against any overdraft that may exist at the time.

Presumptively that would seem to be the very purpose of the deposit. "It has long been settled that a banker who has advanced money to another has a general lien, on all securities of the latter which are in his hands, for the amount of his general balance, unless such securities were delivered to him under a particular agreement limiting their application." *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366. "When a depositor opens an account in a bank, that very act, in the absence of an agreement to the contrary, authorizes the appropriation of his deposit balance to any matured claims the bank may hold against him, the same as if he then executed an agreement in writing to that effect." *Meyers v. New York County Nat. Bank* (Sup.) 55 N. Y. Supp. 504, 506. But if the general rule were otherwise, the circumstances of this case, already stated, would amount to an authority to the bank from its customer to apply the deposit to the overdraft. And there seems no just ground for making a distinction, for any purpose here involved, between the payment of a past-due debt that is evidenced by a note and the payment of one that is a mere matter of book account. No such distinction is made where the question relates to the consideration for the transfer of negotiable paper. *Draper v. Cowles*, 27 Kan. 484; *Mann v. Bank*, 30 Kan. 422, 1 Pac. 579. Indeed, the very principle of protection to the innocent purchaser of commercial paper is invoked by defendant in error. The check deposited in this case was a negotiable instrument. The substantial controversy is as to its ownership. The bank acquired it from one who had the apparent title, without notice of any other claim. The argument that these considerations are sufficient to sustain the defendant's position seems sound. But the business was conducted as a cash transaction. The commission firm might have collected the Dold check themselves and deposited the cash in the bank, and the question presented would not have been materially different. The principle upon which transfers of negotiable instruments in payment of, and even as security for, existing debts are upheld, is the desirability of promoting their currency. *Birket v. Elward* (Kan.) 74 Pac. 1100. Surely no greater currency should be given to notes and bills than to actual money.

"The rule has been settled, by a long line of cases, that money obtained by fraud or felony cannot be followed by the true owner into the hands of one who has received it bona fide and for a valuable consideration in due course of business. \* \* \* It is said that the case is to be governed by the doctrine, established in this state, that an antecedent debt is not such a consideration as will cut off the equities of third parties in respect of negotiable securities obtained by fraud. But no case has been referred to where this doctrine has been applied to money received in good faith in payment of a

debt. It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no earmark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business, and in good faith, upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world." *Stephens v. Bd. of Education*, 79 N. Y. 183, 35 Am. Rep. 511.

"If a trustee or other fiduciary person, in violation of his own duty, uses trust money to pay an antecedent debt of his own to a creditor, who has no notice of the breach of trust, or that the money is subject to the trust, in such a manner that the money is received as a general payment, and not as a distinct and separate fund, then the money becomes free from the trust, and cannot be followed by the beneficiary into the hands of the creditor, although, in general, an antecedent debt does not constitute a valuable consideration." *Pomeroy's Eq. Jur.* § 1048.

In addition to the authorities cited in *Smith v. Des Moines National Bank*, see *Bank v. Bank*, 60 Kan. 621, 57 Pac. 510; *Goshen National Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Holly v. Missionary Society*, 180 U. S. 284, 21 Sup. Ct. 395, 45 L. Ed. 531; and *Meyers v. New York County Bank*, *supra*. The syllabus in the last-named case reads: "A bank, having previous authority to apply a customer's deposit to his debt, can appropriate it to his debt, though the deposit was, in part, money of the depositor's ward, the bank having no knowledge of the fact."

We think that a bank which receives from an agent for deposit in his own name the money of his principal, without notice of the agency, is protected in applying it to a past-due debt of the depositor, to the same extent as in paying it out upon his check, whenever such application is authorized by the agent, either expressly or by legal implication, and that such authority ordinarily arises from the making of a deposit upon an overdrawn account, when no other directions are given.

The judgment is affirmed. All the Justices concurring.

(14 Okl. 81)

# MILLER v. DELAWARE INS. CO. OF PHILADELPHIA.

(Supreme Court of Oklahoma. March 4, 1904.)

## INSURANCE—SEVERABLE CONTRACT.

1. Where an insurance policy is issued, and different classes of property are insured, each class being separated from the others, and insured for a specific amount, and there is a breach of the conditions of the contract as to one class of the property insured, the contract should be considered not as one entire in itself, but as one which is severable, and in which the separate amounts specified may be distinguished, and a recovery had for one or more of them without regard to the other, provided the contract is not affected by any question of fraud, act condemned by public policy, or any increase of the risk of the company on the whole property insured because of the breach.

(Syllabus by the Court.)

Error from District Court, Custer County; before Justice C. F. Irwin.

Action by S. H. Miller, trustee, against the Delaware Insurance Company of Philadelphia. Judgment for defendant, and plaintiff brings error. Reversed.

R. N. McConnell, W. H. Criley, and Shar-tel, Kenton & Wells, for plaintiff in error. Howard & Ames, for defendant in error.

PANCOAST, J. This action was brought in the court below by the plaintiff in error as trustee of the bankrupt estate of one J. R. Graham. The defendant, the insurance company, wrote a policy of insurance on the property of Graham, insuring him in the sum of \$1,725 against loss by fire for one year, and apportioned the insurance as follows: \$225 on his one-story building, \$250 on his store furniture and fixtures, counters, shelves, etc., and \$1,250 on his stock of general merchandise located in the building. The entire property was destroyed by fire. It is agreed that at the time of the fire, the building was of the value of \$1,200, furniture and fixtures \$400, and the stock of merchandise \$8,500. All conditions as to proof of loss and other matters are agreed upon, leaving in the case but one proposition to be decided, which arises out of one of the provisions of the policy, which is as follows:

"(1) The assured will take an itemized inventory of the stock hereby insured at least once in each calendar year, and unless such inventory shall have been taken within twelve (12) calendar months prior to the date of this policy, the same shall be taken in detail within thirty days after said date or this policy shall be null and void from and after the expiration of said thirty days, and upon demand of the assured within three months from the date of this policy, the unearned premium for the unexpired time of this policy shall be returned.

"(2) The assured will keep a set of books which shall clearly and plainly present a com-

¶ 1. See *Insurance*, vol. 23, Cent. Dig. §§ 384, 634, 650, 702.

plete record of the business transacted, including all purchases as well as shipments of said stock, both for cash and credit, from the date of the inventory, provided for in the first section of this clause, and during the continuance of this policy.

"(3) The assured will keep such books and inventories and also the last preceding inventory securely locked in a fireproof safe at night and at all times when the building mentioned in this policy or the portion thereof containing the stock described therein, is not actually open for business; or failing in this, the assured will keep such books and inventories at night and at all such times in some place not exposed to fire which would ignite or destroy the aforesaid building; and in case of loss, the assured specifically warrants, agrees and covenants to produce such books and inventories for the inspection of this company. In the event of failure on the part of the assured to keep and produce such books and inventories for the inspection of said company, this entire policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

It is not contended here that the stipulation contained in the record upon which the case was tried shows a compliance with the clause of the policy just set forth, and by reason of the failure of the assured to comply with this clause of the policy it is claimed on behalf of the insurance company that the entire policy became null and void, and that no recovery whatever can be had thereon; while, on the other hand, it is conceded that nothing can be recovered on account of the loss of the stock of merchandise, but it is contended that the policy is severable, and, while no amount can be recovered because of the loss of merchandise, yet the plaintiff in error is entitled to recover for the loss of the building and the furniture, counters, shelves, etc. An examination of the authorities shows that courts are to some extent at variance upon this proposition, one line holding that the general rule, "Void in part, void in toto," should apply to these cases, while another line holds that forfeitures are not favored in the law, and will not be enforced if any reasonable interpretation can be made which will prevent them. The authorities applying this last rule hold that a policy insuring various classes of property, describing it separately, and specifying separate amounts on each class, is not avoided by a breach of the contract as to any property included therein except that covered by the forfeiture clause, which in this case is that which was required to be inventoried, and a record made of the business concerning which books of account were required to be kept. This question is presented for the first time in this court, and a rule must be laid down which will probably be followed hereafter in this territory. The question is therefore one of more than ordinary importance.

It seems that this forfeiture clause is not embodied in the main printed matter of the policy, but is contained in what is termed "the inventory and iron-safe clause," which is attached to all policies covering stocks of merchandise; and when policies are issued which do not cover stocks of merchandise this "inventory and iron-safe clause" is not attached. This "inventory and iron-safe" provision is intended to have reference only to such articles of merchandise as constitute stock in trade, and the purpose of the clause is to provide evidence from which to determine what the actual loss sustained is in case of fire. The store fixtures and furniture, as well as the building, were never designed to be inventoried or covered by the inventory clause. To make an inventory of the furniture, fixtures, and building would in no way furnish any evidence of the amount of the loss sustained. General merchandise, however, is a character of property which is at all times changing. The amount of stock in trade on hand one day is but little, if any, evidence of what may be on hand at another time. Upon the one hand, the stock is being depleted by sales made, while upon the other it is being replenished by purchases. All business men know that the amount of stock kept by any merchant fluctuates very materially, and it is but a reasonable business requirement that proper inventories be made and proper books of account be kept, in order that in case of loss there may be some satisfactory evidence as to what was the value of the property destroyed. On the other hand, buildings and other property which is not being depleted and restored as is the case with merchandise do not require the making of inventories and keeping books of account. Hence when policies are issued which do not cover merchandise, this "inventory and iron-safe" clause is not attached, because it would be of no benefit whatever to either party to the contract. This being so, and forfeitures not being favored in the law, a large majority of the courts have held policies to be severable which cover different classes of property, and in which there is a distinct and separate amount placed upon each separate class, when the contract is not affected by any question of fraud, unlawful act condemned by public policy, or increase of the risk, on account of the breach, on the whole property insured; and that no recovery can be had on such policies, in case of a breach, for that part of the property covered by the forfeiture clause, but that recovery can be had for all other property covered by the policy. The cases which uphold the rule last mentioned are *Western Ins. Co. v. Stoddard* (Ala.) 7 South. 379; *Manchester Fire Ins. Co. v. Feibelman* (Ala.) 23 South. 759; *Firemen's Fund Ins. Co. v. Barker* (Colo. App.) 41 Pac. 514; *Commercial Ins. Co. v. Anna Spankneble*, 52 Ill. 53; *Hartford Fire Ins. Co. v. John*

Walsh, 54 Ill. 164, 5 Am. Rep. 115; Phoenix Ins. Co. v. Pickel (Ind. Sup.) 21 N. E. 547, 2 Am. St. Rep. 393; Rogers v. Phoenix Ins. Co. (Ind. Sup.) 23 N. E. 498; German Ins. Co. of Freeport v. York (Kan.) 29 Pac. 586, 30 Am. St. Rep. 313; Continental Ins. Co. v. Ward (Kan.) 31 Pac. 1079; Kans. Farmers' Ins. Co. v. Saindon (Kan.) 36 Pac. 983; Mitchell v. Mississippi Home Ins. Co. (Miss.) 18 South. 86, 48 Am. St. Rep. 535; Loehner et al. v. Home Ins. Co., 17 Mo. 247; Trabue et al. v. Dwelling House Ins. Co. (Mo.) 25 S. W. 848; Wright v. Fire Ins. Ass'n of London (Mont.) 31 Pac. 87, 19 L. R. A. 211; State Ins. Co. v. Schreck (Neb.) 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. Rep. 696; German Ins. Co. v. Fairbank (Neb.) 49 N. W. 711, 29 Am. St. Rep. 459; Johansen v. Home Fire Ins. Co. (Neb.) 74 N. W. 866; Home Fire Ins. Co. v. Bernstein (Neb.) 75 N. W. 839; Merrill v. Agricultural Ins. Co., 73 N. Y. 452; Coleman et al. v. New Orleans Ins. Co. (Ohio) 31 N. E. 279, 16 L. R. A. 174, 34 Am. St. Rep. 565; Roberts et al. v. Sun Mutual Ins. Co. (Tex. Civ. App.) 35 S. W. 955; Sun Mutual Ins. Co. v. Tufts et al. (Tex. Civ. App.) 50 S. W. 181; Loomis v. Rockford Ins. Co. (Wis.) 45 N. W. 813, 8 L. R. A. 834, 20 Am. St. Rep. 96. The principal courts holding the contrary doctrine are those of Minnesota and Iowa, while Vermont has also held that, where the contract is affected by some "all-pervading vice, it is void in toto."

We think that the rule should be established here that where, by a policy, different classes of property are insured, and each class is separated from the others, and insured for a specific amount, and there is a breach of the contract as to one class of the property insured, the contract should be considered not as one entire in itself, but as one which is severable, and in which the separate amounts specified may be distinguished, and a recovery had for one or more of them without regard to the other, provided the contract is not affected by any question of fraud, unlawful act condemned by public policy, or any increase of the risk to the company on the whole property insured, because of the breach. Some of the cases cited above do not arise out of a condition entirely parallel with the one under consideration, but the principle is the same in all. In those cases in which the question of fraud, acts condemned by public policy, or increase of risk was involved, the court discusses the proposition arising in cases similar to the one here. This rule, we think, is sound, just, and fair to all parties. In this case separate policies could have been written covering the several classes of property insured, but for convenience sake different classes of property are covered by the one policy, and specific amounts placed thereon. When property is listed and insured in this way, the contract should be considered as to each specific amount, as though that were

the only amount contained in the policy. It follows that the trial court erred in rendering judgment in this case. The judgment should have been for the plaintiff in error in the sum of \$475, being the amount in the policy apportioned to and covering the building, furniture, fixtures, counters, shelves, etc.

We perhaps ought not to conclude this opinion without noticing more specifically the contention of defendant in error as to the word "entire" contained in the "inventory and iron-safe" clause, if for no other reason than for the energy displayed by counsel in his argument on this provision of the contract. After admitting that it would be futile to do otherwise than to admit that by far the greater number of cases to be found in the books hold that a contract of insurance is divisible, counsel's every sentence glistens with the energy displayed in treating the subject, and he plainly shows that he has no patience at all with the courts which have held against his contention on this subject. Beyond that, he says the contract as contained in this record has never been construed, to his knowledge; that the wording of the contracts under consideration by the courts in several cases cited did not contain the language used in this contract, in this: that because of the use of the clause, "This entire policy shall become null and void," the contract is not divisible; and that because of this clause the meaning of the contract as a whole is changed from those considered by the several courts referred to. He argues that the word "entire" has no limitation, as here used, and that no qualification can be found; that all of the words which were previously held to qualify had been omitted, and that it stands without limitation or qualification, meaning the whole and every part of the contract; that it was framed expressly for the purpose of making it free from doubt; that it belongs to the entire policy; that it is of recent origin, and is attached to every country risk, and is stripped of every word that has previously been held to warrant the courts in holding the contract divisible. We think that the word "entire," as here used, does not warrant a change of construction in this class of contracts from that laid down by the courts referred to and that which we have used here, and we feel quite sure that this clause is contained in the policies in the cases considered by some of the courts, particularly in Loehner et al. v. Home Insurance Company, supra. In that case the court says a policy insuring separate amounts on a building and its contents is not avoided as to the personality by a forfeiture of the insurance on the realty, caused by a change in the title thereto, though it provided that the entire policy be avoided by any change in the title to the subject of insurance. If, as is indicated by counsel's argument, this clause was placed in this slip of paper for

the purpose of avoiding the construction placed upon those clauses used for a similar purpose, and it was calculated that this peculiarly worded clause would carry greater protection to the insurance company than was fair, just, and equitable, then the courts will hesitate to so construe the language as to give an insurance company an unfair advantage. If the building, stock of merchandise, and store fixtures in this case had each been covered by separate policies, two of those policies would not have carried this clause, and two of those policies could have been recovered upon, even though the third could not. As stated before, the purpose of the clause evidently was to provide evidence to show the loss sustained, and counsel is in error when he claims that the purpose of the clause was to provide against fraud. Fraud would vitiate the contract regardless of any such provision, and a proper protection to the company would not require any such condition to be inserted in the contract. So far as this record shows—and no doubt it is a fact—the failure to make this inventory and to keep the books of account as provided in the contract was an act of negligence on the part of the assured. He was the only person who suffered thereby. A failure to observe that feature of the contract in no way added to the liability of the company or its risk.

Having reached the conclusion herein stated, the judgment of the trial court must be reversed. The trial court is therefore directed to vacate the judgment rendered, and to enter judgment in favor of the plaintiff in error for the sum of \$475 and costs. All the Justices concurring, except IRWIN, J., who tried the case below, not sitting, and BURFORD, C. J., absent.

(13 Okl. 624)

#### BALDWIN v. KEITH.

(Supreme Court of Oklahoma. March 4, 1904.)

RESULTING TRUST—ACTION TO DECLARE—PETITION—SUFFICIENCY—PUBLIC LANDS—SECRETARY OF INTERIOR—VESTED RIGHTS—INDIAN ALLOTMENT.

1. A petition in an action to declare a resulting trust, which does not allege and show upon its face that the plaintiff has a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and, being respected, would have given him the patent, does not state facts sufficient to constitute a cause of action.

2. In an action to declare a resulting trust, where the plaintiff claims the land under the homestead laws, an essential averment of the petition, and one without which the petition does not state a cause of action, is that the plaintiff has resided upon, cultivated, and improved the land for a period of time and to an extent that upon final proof he would be entitled to a patent thereon.

3. It is not sufficient that the patentee ought not to have received the patent. It must affirmatively appear, from the allegations of the petition, that the claimant was entitled thereto, and that, in consequence of the erroneous rulings of the Secretary of the Interior on the facts existing, it was denied him.

4. It is within the power of the Secretary of the Interior to deny an application to make a homestead entry made by a person who has no equities in the land, when such land is covered by an Indian allotment, even though such Indian allotment has been erroneously made, when the equities in favor of the allottee are such that a great injustice would be done the allottee if such allotment should be canceled and set aside.

5. No vested right is obtained in a piece of government land by reason of the filing of a contest against an Indian allotment, where such contest does not result in the cancellation of the allotment entry.

6. No vested right is obtained in a piece of government land by reason of an application to make a homestead entry thereon, when such application to enter is denied, and the entry is never made.

(Syllabus by the Court.)

Error from District Court, Canadian County; before Justice Clinton F. Irwin.

Action by John H. Baldwin against Mary Keith. Judgment for defendant, and plaintiff brings error. Affirmed.

J. H. Everest, for plaintiff in error.

PANCOAST, J. This was an action to declare a resulting trust, brought in the district court of Canadian county.

The petition alleges, among other things, that the plaintiff was a citizen of the United States, possessing all the qualifications necessary to make entry under the homestead laws; that on April 23, 1892, the plaintiff in error instituted a contest, against the defendant in error, at the local land office in Oklahoma City, Okl., alleging as a matter of contest that the defendant in error was not an Indian, but was an American citizen, and was not entitled to make an allotment entry under the provisions of section 4 of the act of February 8, 1887, c. 119, 24 Stat. 389, she being the daughter of a white citizen of the United States; also, that the tract of land in question, being the northeast quarter of section 11, township 12 north, of range 6 west, of the Indian Meridian, Canadian county, was not subject to entry as an Indian allotment under the act of February 8, 1887, for the reason that the tract was a part and parcel of the tract purchased from the Seminole Indians, and opened to settlement under the provisions of the act of March 2, 1889, c. 412, § 13, 25 Stat. 1005, to homestead settlers. The application for contest being rejected by the local office, an appeal was taken to the Commissioner of the General Land Office, and from there to the Secretary of the Interior, the Secretary, in his decision, sustaining the local office, and dismissing the contest. On the 23d day of February, 1895, plaintiff in error made application at the said United States Land Office to enter the quarter section of land as a homestead, which application was rejected by the local office as being in conflict with the Indian allotment of the defendant in error. An appeal was taken from the action of the local office to the Commissioner of the General Land Office, and from there to the Secretary of the

Interior, whose decision thereon was adverse to the plaintiff in error, and sustained the action of the local office. The application was dismissed. Upon the hearing of the motion for review before the Secretary, the plaintiff in error filed affidavits showing that he had established a residence upon the land in February, 1894, had built a house, and made other improvements, but was removed by the action of the defendant in error. Copies of the decision of the Secretary of the Interior in the contest, and application to enter, are made part of the petition by exhibits. The petition also alleges that a patent was issued to the defendant in error in March, 1896. A demurrer was filed to this petition, and sustained upon the ground that the petition did not state facts sufficient to constitute a cause of action. The plaintiff elected to stand upon his petition, and brings the case here.

It appears from the decision of the Secretary, attached to the petition, that it was held that the defendant in error is a member of the Cheyenne and Arapahoe Tribe of Indians; that under the provisions of section 4 of the treaty of October 28, 1867 (15 Stat. 593), defendant in error selected and was allotted a tract of land of 320 acres, which land was supposed to be within the Cheyenne and Arapahoe Reservation, and was set apart to her and her family; that buildings were placed thereon, and improvements made of a valuable character; that afterwards it was discovered that the land was not in the Cheyenne and Arapahoe Reservation, but was a part of the land ceded to the United States by the Seminole and Creek Indians, and, that fact being called to the attention of the department, the Secretary of the Interior directed that 160 acres of the land occupied by her should be allotted to her under the provisions of section 4 of the act of 1887; that an application was made by the defendant in error, and the allotment approved by the Secretary; further, that by article 3 of the act of March 3, 1891, c. 543, 26 Stat. 989, ceding to the United States the Cheyenne and Arapahoe Indian Reservation, each member of that tribe of Indians over 18 years of age had a right to select 160 acres of land to be owned in severalty; that under that agreement an allotment of 160 acres was made to the defendant in error within said reservation, and a trust patent issued thereon. Subsequently, it having been held by the department that she and others similarly situated could not be allowed to hold two allotments, she relinquished her trust patent, which action was approved by the Secretary, and the trust patent canceled by his order, with directions for the issuance to her of a trust patent under section 4 of the act of February 8, 1887, for her first allotment of the land inside of the Creek and Seminole cession, being the land now in controversy. A patent for this land was issued to her March 16, 1896. It also appears from

the said decision that the Secretary found the facts in said contest case and application to enter to be as follows: That Baldwin, the plaintiff in error, was a mere contestant and applicant to enter the land; that Mrs. Keith was located upon the land by an Indian agent, in pursuance to treaty provisions supposed at the time to be applicable thereto; that she has continued in the occupation and cultivation of the land for almost a quarter of a century; that she relinquished another allotment, to which she was lawfully entitled, in order that she might retain this land; that there were no equities in Baldwin's favor, but that there were many in Mrs. Keith's favor. Other statements are contained in the petition, which are deemed unnecessary to be set forth here. The single proposition is presented, does the petition state facts sufficient to constitute a cause of action?

The Secretary decided the case in favor of the defendant in error upon the equities, which he found to be in her favor, and held that the government alone could question the existing allotment and the trust patent theretofore issued to her, and that whatever supervisory authority was vested in the Secretary in the premises should be unhesitatingly exercised in behalf of the defendant in error, and for that reason the contest was dismissed. His decision was based upon the authority of *Williams v. The United States*, 138 U. S. 514, 11 Sup. Ct. 457, 34 L. Ed. 1026, in which case it is held by the Supreme Court of the United States, in an application by a state for the selection of certain state lands, that "it was within the power of the Secretary to deny the application of the state and refuse to approve the selection, and to hold the title within the general government until, within the limits of the existing law, or by special act of Congress, a party who, misinformed and misunderstanding its rights, has placed large improvements on the property, shall be enabled to obtain title from the government." That "it is obvious, it is common knowledge, that, in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities are anticipated, and which are therefore not provided for by express statute, may sometimes arise, and therefore that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice."

As far as can be gleaned from the record before us and the statement of facts contained therein, the decision of the Secretary was undoubtedly correct. We are not favored with a brief on behalf of the defendant in error, and are therefore unable to determine what her position was in the court below, and upon what theory the demurrer was sustained. However, separate and apart from the principle laid down in *Williams v. The United States*, supra, it is quite obvious

that the plaintiff in error cannot maintain this action because of one elementary principle underlying all actions to declare a resulting trust. That is: "To entitle a party to relief against a patent of the government of the United States, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and, being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of the erroneous rulings of these officers on the facts existing, it was denied him." *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61; *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428; *Parker v. Lynch et al.*, 7 Okl. 631, 56 Pac. 1082.

If we were to concede that the defendant in error had no right to the patent to the land in controversy, by what right can the plaintiff in error contend that he is entitled to a patent thereto? In the petition it is alleged that he made application to file a contest, which contest was not entertained, but was rejected. This application to contest the allotment entry of the defendant in error gave the plaintiff in error no vested right in the land. A contestant who secures a cancellation of an entry has a preference right for a certain number of days, but this preference right is contingent upon the success of the contest. Here, the contest was not successful. Therefore the plaintiff in error gained nothing whatever by reason of his contest. There being no cancellation of the entry, he obtained no interest in the land.

Again, he made application to enter the land. This application gave him no vested right, and particularly when the land was covered by an allotment entry. But it is alleged the plaintiff in error established a residence upon the land and made improvements thereon. This, however, was at a time when the allotment entry of the defendant in error was in full force and effect, and at a time when the land was not subject to another entry.

Further, there was no showing made, at the time of filing the original application to enter, that the plaintiff in error was a resident upon the land, nor was this showing made until after the decision was rendered against him by the Secretary of the Interior, and upon motion for review. This showing was by affidavit, and under all rules of pleading, both in court and the Department of the Interior, a showing that the plaintiff in error was a resident upon the land, and had the interests of a resident—whatever they may be—could not be heard by the Secretary of the Interior, on appeal, on the motion for review.

But, notwithstanding this, still the plaintiff in error cannot maintain this action upon the theory that he had established a residence

upon the land, because he had not resided thereon a sufficient length of time to entitle him to a patent therefor, even though the defendant in error had had no right whatever to the property. The petition does not contain an allegation that the plaintiff in error resided upon the land for any specific time, other than is shown by a copy of the affidavit which was filed before the Secretary of the Interior on the motion for review. Before the plaintiff in error could acquire an interest in this land by residence, he must have established his residence at a time when it was not covered by some entry segregating it from the public domain. At the date at which he claims he established his residence the land was covered by the allotment entry of the defendant in error, and the plaintiff in error could acquire no interest therein. But even were we to look at the facts as shown by the copy of the affidavits contained in the record, still the record shows that the plaintiff in error did not reside upon the land for a period exceeding two years. This would not entitle him to a patent from the government. He had not resided there a sufficient length of time to enable him to make final proof under the homestead laws, and, not being entitled to a patent from the government, he cannot maintain this action to declare a resulting trust.

The action of the trial court in sustaining the demurrer to the petition being correct, the judgment dismissing the action and for costs is affirmed. All the Justices concurring, except IRWIN, J., who tried the case below, not sitting.

(13 Okl. 643)

#### THWING v. WINKLER.

(Supreme Court of Oklahoma. March 4, 1904.)

##### ATTACHMENT—AFFIDAVIT—FRAUD—ASSIGNMENT OF DEBT—RIGHTS OF ASSIGNEE.

1. A positive statement in an affidavit of attachment in the language of the statute that the plaintiff's debt was fraudulently contracted, or that he fraudulently incurred the liability or obligation for which the suit has been brought, is sufficient, under the statute, to authorize the issuance of an attachment.

2. Fraud committed in the inception of a debt is, in its nature, personal between the contracting parties, and does not follow an assignment of the debt.

3. The right of an assignee of a chose in action to procure a writ of attachment exists only against his immediate assignor, on the ground that the debt or obligation was fraudulently contracted.

(Syllabus by the Court.)

Error from District Court, Kingfisher County; before Justice Clinton F. Irwin.

Action by F. H. Thwing against F. L. Winkler. Judgment for defendant, and plaintiff brings error. Affirmed.

E. H. Gamble and Noffsinger & Hinch, for plaintiff in error. Matthew John Kane, for defendant in error.

¶ 1. See Attachment, vol. 5, Cent. Dig. § 303.



HAINER, J. This was an action brought by F. H. Thwing, plaintiff in error, against F. L. Winkler, to recover the sum of \$4,250 on a check. The material averments in the petition are as follows: That on the 11th day of June, 1903, the defendant, for a valuable consideration, gave his check on the First National Bank of Kingfisher, Okl., payable to the order of J. T. Long, for the sum of \$4,250. That before said check was presented to the First National Bank for payment the said J. T. Long, for a valuable consideration, sold, transferred, and delivered said check to the City National Bank of Kansas City, Mo. That on the 15th day of June, 1903, the said City National Bank presented said check to the First National Bank of Kingfisher for payment. Payment was refused, and the check was protested for nonpayment at the request of the City National Bank. That subsequently, to wit, on the 18th day of June, 1903, the City National Bank, for a valuable consideration, indorsed, transferred, and delivered said check to F. H. Thwing. The plaintiff, upon the filing of the petition, caused an attachment to be issued, based upon the following ground: "That said defendant fraudulently contracted the debt and incurred the liability and obligation for which the above-named suit has been brought, and has failed to pay the price and value of said articles and things delivered, which, by said contract, he was bound to pay upon delivery." The defendant moved to dissolve the attachment upon the following grounds: (1) Because the affidavit of attachment was insufficient; (2) because the affidavit of attachment was not true; and (3) for the reason that the facts stated in the plaintiff's petition show upon their face that the plaintiff was not entitled, under the law, to an order of attachment in said cause. A hearing was had upon the petition of the plaintiff, the affidavit of attachment, and the following stipulation of facts, to wit: "That this action is brought on a certain check; that said check was given by the defendant to one J. T. Long in payment for a certain stock of merchandise; that said check, after being so accepted by the said Long was assigned to the City National Bank of Kansas City, Missouri, and by that bank forwarded to the Kingfisher National Bank for payment, where the said check was protested, and returned to the City National Bank of Kansas City, Missouri, after which the said City National Bank assigned said check to the plaintiff, F. H. Thwing, and F. H. Thwing brought this action upon said check." The motion to dissolve the attachment was sustained, from which order the plaintiff appeals.

But two questions are involved in this appeal: (1) Is the affidavit of attachment sufficient? And (2) is the plaintiff entitled to an order of attachment? We think the first question must be answered in the affirmative, and the second in the negative. Sec-

tion 190 of our Civil Code (St. 1893, § 4068) provides that the plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant upon the ground, among other things, that the defendant "fraudulently contracted the debt or fraudulently incurred the liability or obligation for which suit is about to be or has been brought." The affidavit of attachment is sworn to positively, and is in the language of the statute, and hence is sufficient in form to authorize the issuance of an attachment. This brings us to the second proposition, and which, in our opinion, is decisive of this case. In our opinion, the plaintiff, upon the facts disclosed in the petition, affidavit, and the agreed statement of facts, was not entitled to an order of attachment in this case. The plaintiff is seeking to invoke the aid of the statute in collecting an indebtedness upon a check on the ground that fraud was committed by the defendant in selling a stock of merchandise to one J. T. Long. Conceding that the defendant committed a fraud upon J. T. Long in the sale of the stock of merchandise which is the primary cause of this controversy, such fraud would not be available to the plaintiff in this case in his action upon the check. The plaintiff in error became the owner of the debt by purchase, and there is no privity between him and the defendant. Fraud committed in the inception of a debt is, in its nature, personal between the contracting parties, and does not follow an assignment of the debt. The right of an assignee of a chose in action to procure a writ of attachment exists only against his immediate assignor, on the ground that the debt or obligation was fraudulently incurred. Thwing would have no right to maintain an action to set aside the sale between Winkler and Long on the ground of fraud. Neither could the right of action be assigned by Long to Thwing, because, if fraud was committed in the sale, it was a wrong personal to Long. *Cheshire Provident Inst. v. Johnston*, 5 Fed. Cas. 580, No. 2,659. It follows that, if the plaintiff could have no such remedy, he has no right to cause an attachment to be issued on the ground that the debt was fraudulently contracted.

The judgment of the court below is affirmed. All the Justices concurring, except IRWIN, J., who tried the case below, not sitting.

(13 Okl. 646)

#### THWING v. HUMPHREY.

(Supreme Court of Oklahoma. March 4, 1904.)

#### ATTACHMENT—AFFIDAVIT—FRAUD—ASSIGNMENT OF DEBT.

1. A positive statement in an affidavit of attachment in the language of the statute that the plaintiff's debt was fraudulently contracted, or

¶ 1. See Attachment, vol. 5, Cent. Dig. § 303.

that he fraudulently incurred the liability or obligation for which suit has been brought, is sufficient, under the statute, to authorize the issuance of an attachment.

2. Fraud committed in the inception of a debt is, in its nature, personal between the contracting parties, and does not follow an assignment of the debt.

3. The right of an assignee of a chose in action to procure a writ of attachment exists only against his immediate assignor, on the ground that the debt or obligation was fraudulently contracted.

(Syllabus by the Court.)

Error from District Court, Kingfisher County; before Justice Clinton F. Irwin.

Action by F. H. Thwing against Grant Humphrey. Judgment for defendant, and plaintiff brings error. Affirmed.

E. H. Gamble and Noffsinger & Hinch, for plaintiff in error. Matthew John Kane, for defendant in error.

HAINER, J. This is an action brought by F. H. Thwing against Grant Humphrey to recover the sum of \$4,250 on a check drawn on the First National Bank of Kingfisher, and made payable to the order of J. T. Long. Prior to presentation for payment the check was sold and transferred by Long to the City National Bank of Kansas City, Mo., and by said bank presented to the First National Bank of Kingfisher for payment. Payment was refused, and the check was ordered protested. On the 18th day of June, 1903, the City National Bank, for a valuable consideration, sold and transferred said check to F. H. Thwing, the plaintiff in error, who is now the owner and holder thereof. Upon the filing of the petition, the plaintiff caused an attachment to be issued on the ground that the debt was fraudulently contracted. A motion was filed to dissolve the attachment on the ground that the attachment affidavit was insufficient, and on the ground that the plaintiff's petition shows upon its face that he was not entitled to an order of attachment. The motion was sustained, and the plaintiff appeals from the order dissolving the attachment.

The petition, affidavit of attachment, and agreed statement of facts in this case are identical with those in the case of F. H. Thwing v. F. L. Winkler (cause No. 1,367) 75 Pac. 1126, and upon that authority the judgment of the court below is affirmed. All the Justices concurring, except IRWIN, J., who tried the case below, not sitting.

(13 Okl. 557)

#### In re MILLER.

(Supreme Court of Oklahoma. March 3, 1904.)

#### BANKRUPTCY—DISMISSAL OF PETITION—APPEAL BOND—REVIEW.

1. Where an order is made dismissing an involuntary petition in bankruptcy without adjudication, before an appeal to this court can be perfected from such order of dismissal an appeal bond must be given, approved, and filed in the trial court.

2. The record in such case in this court should recite the fact that such bond was given, filed, and approved; and, if it fails to do so, the appeal will be dismissed on motion.

3. Where the record in this court, in a case on appeal, does not show that it contains all the evidence presented at the hearing below, it presents no error, that can be reviewed by this court, arising upon a question of evidence.

(Syllabus by the Court.)

Error from District Court, Caddo County; before Justice F. E. Gillette.

In the matter of B. F. Miller, bankrupt. From an order dismissing the petition, petitioner brings error. Affirmed.

R. N. McConnell and Chambers & Weaver, for plaintiff in error. Shartel, Keaton & Wells, for defendants in error.

PANCOAST, J. This was an action in bankruptcy, commenced in the district court of Caddo county, by the Slaydem-Kirksey Woolen Mills, of Waco, Tex., Carroll, Brough & Robinson, and Eskridge & Cheatham, of Oklahoma City, on July 11, 1902, filing an involuntary petition in bankruptcy against B. F. Miller, of Bridgeport, Okl., asking that Miller be declared a bankrupt because of having committed certain acts of bankruptcy alleged therein. At the time of filing the petition, on application a receiver was appointed to take charge of the bankrupt's property. A restraining order was also issued in the case, restraining the Alton-Dawson Mercantile Company, and one C. J. Tuohy, their agent, from selling the property alleged to be the property of the bankrupt, and which the Alton-Dawson Mercantile Company held under a chattel mortgage from B. F. Miller. The order directed the receiver to take immediate charge of the assets of Miller, including the mortgaged property. On July 14, 1902, the Alton-Dawson Mercantile Company filed an application to dissolve the restraining order and the order appointing the receiver, and praying that such order be set aside. In this application they made a showing of their claim, and the conditions under which they held the property covered by their mortgage. A hearing was had upon said application, and on the 18th day of July, 1902, the court dissolved the injunction, and set aside the order appointing the receiver, and ordered the property held by the receiver to be returned. On the 23d of July, 1902, the Alton-Dawson Mercantile Company, claiming to be a creditor of B. F. Miller, entered an appearance in the action, and asked to be heard in opposition to the prayer of the petition, and to be allowed to show why the petition should be dismissed without an adjudication; and, among other reasons alleged why adjudication should not be made, was that the petitioning creditors filing the petition did not in the aggregate have provable claims against Miller in the amount of \$500. This applica-

¶ 2. See Bankruptcy, vol. 6, Cent. Dig. § 926.

tion was verified, and was heard on August 8, 1902. All parties being present, after hearing the evidence and argument of the counsel, the court sustained the application, and dismissed the petition. The petitioners, feeling aggrieved, pray an appeal to this court.

A motion has been filed to dismiss this appeal for various reasons, which have been argued at length, some of which are probably well founded. To notice them in detail, however, would require an opinion of great length—far greater, we think, than the nature of the case warrants. We will therefore pass some of the propositions contended for without notice, and mention only those which we deem of most importance and as decisive of the case, calling attention to one only, which, as the record stands, is sufficient to warrant a dismissal, but which might probably have been cured had the appellant exerted as much energy in bringing to this court a proper record, as he has in laboring to convince this court that the imperfect record is sufficient to enable us to review the errors complained of. This question arises upon the giving of an appeal bond, which appellee claims has not been given because the record does not disclose it. It is conceded, and properly so, that, before an appeal can be allowed or perfected in a case like the one at bar, an appeal bond must be given and approved, the court fixing the amount, and the same filed and made a part of the record in the case. The bond, however, being given in the trial court, the record, in order to be perfect, should recite that such bond has been given, approved, and filed. The record in this case is entirely silent upon this point, and instead of the appellant suggesting a diminution of the record, and having the clerk certify to this court the record showing the bond to have been properly given and approved, he asserts that the bond was given, and argues that this court should presume it to have been given, because the court below would not have issued a citation without having first approved the bond. It seems strange to what extent counsel will labor to direct an appellate court around and over by a circuitous route to arrive at a conclusion that should be easily reached and made certain with one small part of the energy exerted. The law requiring the appeal bond to be taken in the trial court, the only way that this court can ascertain the fact that an appeal bond has been given is by an examination of the record on file. If the record is silent on this point, and does not affirmatively show what is required, it is imperfect, and, unless the record is perfected by certifying the omitted parts to this court, which duty devolves upon the appellant, the cause on motion should be dismissed. However, if the appeal should be dismissed without having been heard upon its merits, possibly a new citation might be had and the appeal perfected, and for that reason alone we pass this proposition without

further comment, to deal with one including more of the merits of the case.

Upon the application of the Alton-Dawson Mercantile Company to dismiss the petition in bankruptcy without adjudication, the record shows, by the journal entry of the court, that evidence was introduced upon the hearing, and the court, after hearing the evidence and arguments of counsel, being fully advised in the premises, found that the petition should be and the same was dismissed, for the reason that the petition, together with the proof of claims, did not show facts sufficient to entitle the petitioners to an adjudication in bankruptcy; in other words, that the petitioners' claims did not, in the aggregate, amount to \$500, unless there was included the sum of \$170, which the petitioners allege they had received, and which they say was an unlawful preference under the bankruptcy law, and which they offered to return and refund. There is no statement in the petition of any fact that would enlighten the court as to the nature of what is termed the "unlawful preference" which is offered to be returned. The statement is more of a conclusion than of a fact. The petition should have shown facts sufficient to make it appear from a reading of it that the payments made were of such a character as to constitute preferences under the law, and not only that, but of such a character as to constitute such a preference as, when refunded, would allow the petitioners to participate in the proceedings in bankruptcy, and, by refunding the preferences, prove their claims against the estate.

It seems that the record shows that with this petition the petitioners filed proof of their claims, but what this proof of claims shows is impossible to be determined by this court, because the record does not contain such proof of claims. They are not included in the record. Counsel for appellant concede that the record is imperfect in this particular, and concede that without the proof of claims being included in the record there is nothing to show to this court the facts in relation to the nature of the preferences spoken of, but try to avoid such defect by hiding behind the claim that they are not responsible for it; that it was the duty of the clerk to certify to this court that part of the record, they having included it in their præcipe. Counsel, however, are mistaken, for the præcipe does not contain any request for the clerk to certify that part of the record. The record contains every paper included in the præcipe. This defect might possibly also have been avoided if proper steps had been taken to perfect the record, but no attempt whatever has been made to do so, notwithstanding the attention of appellant has been called to the defect ever since June 17th, when the appellee's brief was filed. As was held in a case recently decided by this court—*In re French and Holmes*, 75 Pac. 278—a record that does not

show that it contains all the evidence will present no error that can be reviewed by this court arising upon a question of evidence. There is nothing in the record here that will enable this court to review the action of the trial court upon this proposition. From the journal entry it is conclusively shown that the court heard evidence, but what that evidence was we cannot determine, as no part of it is included in the record. While the reason that the trial court assigned for the dismissal of the petition was that the petition, together with the proof of claims, did not show facts sufficient to entitle the petitioners to an adjudication, yet there may have been other evidence offered by the respective parties, and, in that event, if the court had based its conclusions upon an erroneous ground, yet if there was other evidence heard which would sustain the conclusions reached, the judgment of dismissal should stand.

Having carefully examined all propositions contended for, and the record presenting no error, the judgment of the trial court is affirmed. All of the Justices concurring, except GILLETTE, J., who tried the case below, not sitting.

(13 Okl. 582)

**BARNES v. BENHAM et al.**

(Supreme Court of Oklahoma. March 4, 1904.)

**APPEAL—ERRORS NOT ARGUED ARE WAIVED—TRIAL—REFUSAL TO HEAR ARGUMENT—TAKING CASE UNDER ADVISEMENT.**

1. It is not sufficient to simply suggest in a brief that the trial court committed error in a finding or ruling, but counsel must point out specifically in what such error consists. An appellate court is not required to seek for errors, but to pass upon those to which its attention is directed.

2. Where a case is tried to the court, and it is satisfied as to the evidence and the law applicable to the matter in issue, it is not compelled to listen to argument of counsel.

3. When a case is tried to the court, without a jury, it may, in its discretion, after hearing all of the evidence, take the matter under advisement until the next term, at which time it may, in open court, render judgment.

(Syllabus by the Court.)

Error from District Court, Kingfisher County; before Justice Clinton F. Irwin.

Action by Allen J. Barnes against Allen A. Benham and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Bradley & Bradley and John T. Bradley, for plaintiff in error. D. K. Cunningham, for defendants in error.

**BURWELL, J.** This is an action concerning real estate. Judgment was for the defendants, and plaintiff appeals.

The appellant suggests that the judgment is against the weight of the evidence; that the court erred in admitting certain affida-

vits and depositions, and in overruling objections of plaintiff to questions asked by the defendants, citing the court to the pages on which the affidavits and depositions may be found. It is a rule of this court that questions not argued will be considered as waived, and we do not believe that a mere suggestion that the judgment is against the weight of the evidence is an argument of that question within the spirit of the rule. In almost every case that is appealed to this court, the petition in error and the brief of appellant contain a statement that the judgment is against the weight of the evidence; and counsel expect this court to carefully read, in many instances, hundreds of pages of typewritten evidence, weigh it, and determine this question without any other suggestion from them. Something more is required. If the evidence is insufficient, an attorney ought to be able, in a concise analysis thereof, to point out to the court in what respect it is defective or inadequate to support the judgment, and where this is not done this court will assume that the verdict and judgment was justified under the evidence. And this same rule applies to the suggestion that it was an error to admit the affidavits and depositions, and to overrule the objections of plaintiff to the introduction of certain evidence. The rulings of the court on these matters may have been prejudicial error, but we assume that they were not, as counsel have not attempted to point out wherein the error consists. This case was tried to the court, without a jury. After the evidence was all in, court adjourned, and there was no order continuing the case for the term. Such an order was not necessary. The adjournment of the term by operation of law continued every case on the docket till the next term, just as effectually as though an order were made in each case.

Nor can we say that it was error to decline to hear arguments of counsel before adjourning the term, or at all, for that matter. Where a case is tried to a court, and after the evidence is all in it is fully satisfied as to the weight of the evidence and the law of the case, it is not compelled to listen to arguments; and the appellate court will inquire, not as to whether attorneys were denied the privilege of arguing the case, but as to whether the judgment is correct. The mere fact that the judgment was not rendered until the succeeding term after the evidence was introduced is immaterial. *Tarpenning v. Cannon*, 28 Kan. 665. Of course, as held by some of the cases cited by appellant, a judge cannot render a judgment in vacation which the law requires to be rendered by the court in term time; but the court may hear all of the evidence at one term and take the case for consideration until the next, and if at the next term it renders its judgment in open court the judgment will not be void, nor will such

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 3093.

continuance, for the purpose of deliberation, constitute error.

Judgment affirmed, at cost of appellant. All of the Justices concurring, except IRWIN, J., who tried the case below, not sitting, and BURFORD, C. J., absent.

(14 Okl. 3)

**BECKNER v. HENQUENET.**

(Supreme Court of Oklahoma. March 4, 1904.)

**NEW TRIAL—MOTION FOR—NEWLY DISCOVERED EVIDENCE.**

1. Evidence will not be reviewed unless the case-made or bill of exceptions contains all of the evidence pertaining to the subject about which it is alleged that error has been committed; and when the certificate of the trial judge contains a statement to the effect that all of the evidence introduced upon the trial is contained in the case-made, but the record itself shows upon its face that it is not, and that material depositions were omitted therefrom, the record is the best evidence, and will prevail over such certificate. A new trial will not be granted on the ground of newly discovered evidence unless the case-made or bill of exceptions contains all of the evidence, so that it may be determined as to whether such evidence is newly discovered, or is in fact merely cumulative.

(Syllabus by the Court.)

Error from District Court, Blaine County; before Justice Beauchamp.

Action by Augustus Henquenet against William A. Beckner. Judgment for plaintiff, and defendant brings error. Affirmed.

Lookabaugh Bros., for appellant. Seymour Foose, for appellee.

BURWELL, J. The plaintiff recovered judgment for \$15 and costs against the defendant for damages done by defendant's cattle to plaintiff's crops. Defendant appeals. Although the judge's certificate recites that fact, the record does not contain all of the evidence. Hence it is impossible to say that the judgment is not supported by the weight thereof. *Pappe v. American Fire Ins. Co.*, 8 Okl. 97, 56 Pac. 860; *Ragains v. Geiser Manufacturing Co.*, 10 Okl. 544, 63 Pac. 687. Nor can we determine that the newly discovered evidence was not cumulative, merely.

The judgment of the lower court is affirmed, at cost of appellant. All of the Justices concurring, except BEAUCHAMP, J., who presided at the trial below, not sitting, and BURFORD, C. J., absent.

(13 Okl. 648)

**BELCHER v. WASSON et al.**

(Supreme Court of Oklahoma. March 4, 1904.)

**APPEAL—TRANSCRIPT—REVIEW.**

1. A transcript of the record of the district court presents no question in this court for review of the action of the court for errors of law occurring upon the trial of the case.

(Syllabus by the Court.)

Error from District Court, Grant County; before Justice Pancoast.

Action by G. H. Belcher against H. I. Wasson and Clayton Reed. Judgment for defendants, and plaintiff brings error. Affirmed.

Mackey & Simons, for plaintiff in error. Sam P. Ridings and H. I. Wasson, for defendants in error.

HAINER, J. This case comes here on a transcript of the record of the district court, duly certified by the clerk of the court. The errors assigned in the petition in error relate solely to matters which occurred upon the trial of the case. It appears that, after the jury was impaneled and sworn to try the cause, the defendants moved to dismiss the case for the reason that there had never been a proper and sufficient affidavit in replevin filed in said cause. The court sustained the motion, to which ruling of the court the plaintiff excepted, and asked leave to file an amended replevin affidavit, which leave was granted upon the terms that the plaintiff pay all costs that had accrued up to that time. To which order requiring the plaintiff to pay the costs the plaintiff excepted, and refused to comply therewith. Thereupon the court, upon motion of the defendants, discharged the jury and dismissed the case. This question cannot be reviewed upon the record before us, for the reason that such a motion, and the rulings of the court thereon, without a bill of exceptions or case-made, do not constitute a part of the record proper, which can be brought to this court by a transcript. *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382; *Black v. Kuhn*, 6 Okl. 87, 50 Pac. 80.

The judgment of the court below is therefore affirmed. All the Justices concurring, except PANCOAST, J., who tried the case below, not sitting.

(13 Okl. 632)

**OLIGSCHLAGER v. GRELL.**

(Supreme Court of Oklahoma. March 4, 1904.)

**APPEAL—DISMISSAL—CASE-MADE—INSUFFICIENCY.**

1. Where a case-made is signed by the trial judge, but is not attested by the clerk of the court, and the seal of the court is not thereto attached, it is not sufficiently authenticated, as required by the statute, to constitute a valid case-made, and the judgment of the trial court cannot be reviewed, and the appeal will be dismissed. *Stallard v. Kuapp*, 60 Pac. 234, 9 Okl. 591, followed.

(Syllabus by the Court.)

Error from District Court, Garfield County; before Justice J. L. Pancoast.

Action between Peter Oligschlager and Herman Grell. From a judgment, Oligschlager brings error. Dismissed.

Chas. West, for plaintiff in error. H. J. Sturgis, for defendant in error.

HAINER, J. This case is brought here upon what purports to be a case-made. The record discloses the fact that the certificate

is signed by the trial judge, but that it is not attested by the clerk of the court, nor is the seal of the court attached thereto.

Section 568 of our Code (St. 1893, § 4444) provides that: "The case, and amendments shall be submitted to the judge, who shall settle and sign the same, and cause it to be attested by the clerk, and the seal of the court to be thereto attached. It shall then be filed with the papers in the case." It will thus be seen that the statute requires the judge to sign the case-made, and also cause it to be attested by the clerk, and the seal of the court to be attached thereto, in order to constitute a valid case-made. This provision of our statute is mandatory. *Stallard v. Knapp*, 9 Okl. 591, 60 Pac. 234.

It further appears that this case was never filed in the district court, as required by the statute.

It follows that, the case not being authenticated, and not being filed in the court below, as required by the statute, it cannot be reviewed in this court, and the appeal will therefore be dismissed. All the Justices concurring, except *PANCOAST, J.*, who tried the case below, not sitting.

## MEMORANDUM DECISIONS.

**BAKER v. SAN FRANCISCO GAS & ELECTRIC CO.** (S. F. 2,828,)\* (Supreme Court of California. Jan. 20, 1904.) Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge. Action by Emma C. Baker against the San Francisco Gas & Electric Company. Judgment for defendant. Plaintiff appeals. Affirmed. Van Ness & Redman, for appellant. Bishop, Wheeler & Hoefler, for respondent.

**PER CURIAM.** This is a companion case to S. F. No. 2,829, of the same title, in which an opinion has been filed (75 Pac. 342); and on the authority of that case the judgment herein appealed from is affirmed.

**PEOPLE v. MATHEWS et al.** (S. F. 3,471.) **SAME v. BELLOLI.** (S. F. 3,473.) (Supreme Court of California. Jan. 30, 1904.) In Banc. Appeals from Superior Court, Santa Clara County; A. L. Rhodes, Judge. Proceedings by the people against one Matthews and others and one Belloli. From judgments for defendants, the people appeal. Affirmed. U. S. Webb, Atty. Gen., and E. E. Cothran, for the People. John E. Richards (F. B. Brown, of counsel), for respondents.

**PER CURIAM.** The two above-entitled cases are exactly like the case of *People v. Worswick* (S. F. 3,472, this day decided) 75 Pac. 662, except that different offices are involved; and upon the authority of said case of *People v. Worswick* the judgment in each of the above-entitled cases is affirmed.

In re **SCOTT'S ESTATE. OWENS v. CHAMBERLIN et al.** (S. F. 3,621.) (Supreme

Court of California. Dec. 30, 1903.) Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge. Petition by H. M. Owens, as guardian, for partial distribution of the estate of Angelia R. Scott, deceased. From an order denying the petition, petitioner appeals, making Mortimer S. Chamberlin and Rachael Johonnott respondents. Affirmed. F. J. Hennessy, for appellant. Houghton & Houghton, for respondents. Philip G. Galpin, for devisees.

**PER CURIAM.** The question presented by this appeal, waiving minor points made by respondent as to the sufficiency of the record, etc., is the same as that presented by the appeal of Eugene Wormell (S. F. No. 3,600, this day decided) 75 Pac. 44; and upon the authorities of the last-named case the order appealed from in the case at bar is affirmed.

**CITY COUNCIL OF CRIPPLE CREEK et al. v. PEOPLE ex rel. HANLEY et al.** (Court of Appeals of Colorado. Feb. 8, 1904.) Error to District Court, Teller County. Mandamus by the people, at the relation of James E. Hanley and another, against the city council of the city of Cripple Creek and others, to compel defendants to restore each of relators to the position of alderman. From a judgment in favor of relators, defendants bring error. Reversed. Charles C. Butler, James Owen, Geo. H. Kohn, and Temple & Crump, for plaintiffs in error. Frank J. Hangs and G. Q. Richmond (E. C. Stimson, of counsel), for defendants in error.

**GUNTER, J.** This case presents the same question as ruled in *City Council of City of Cripple Creek et al., Plaintiffs in Error v. Ferguson*, Defendant in Error (No. 2,983, decided at the present term of this court) 75 Pac. 603; and for the same reason as justified the reversal of that case this must be reversed. Reversed.

**CURRIER v. CLARK.\*** (Court of Appeals of Colorado. Nov. 9, 1903.) Appeal from Weld County Court. Action by Horace G. Clark against Henry F. Currier. Judgment for plaintiff. Defendant appeals. Reversed. Charles D. Todd, for appellant. Esteb & Wolff and H. N. Haynes, for appellee.

**PER CURIAM.** Decisive of this case is the question ruled in *Lydia W. Currier and H. F. Currier v. Horace G. Clark* (decided at the present term) 75 Pac. 927. For reasons there stated, judgment reversed. Reversed.

**LITCH v. PEOPLE ex rel. TOWN OF STERLING.** (Court of Appeals of Colorado. March 14, 1904.) Appeal from Logan County Court. M. Litch was convicted before a police magistrate for violation of a liquor ordinance, and appealed to the county court, where he was again found guilty, and again appeals. Reversed. Allen & Webster and H. E. Munson, for appellant. Geo. E. McConley, for appellee.

**MAXWELL, J.** The facts in this case are stated in *Litch v. People*, 75 Pac. 1079. The same questions are presented in this case as in that, and for the reasons there given the judgment will be reversed. Reversed.

**LITCH v. PEOPLE ex rel. TOWN OF STERLING.** (Court of Appeals of Colorado. March 14, 1904.) Appeal from Logan County Court. M. Litch was convicted before a police magistrate for violation of a liquor ordinance, and appealed to the county court, where he was again found guilty, and again appeals. Affirm-

\*Rehearing denied February 19, 1904.

\*Rehearing denied March 14, 1904.

ed. Allen & Webster and H. E. Munson, for appellant. Geo. E. McConley, for appellee.

MAXWELL, J. The facts in this case will be found in the opinion rendered in *M. Litch v. People of the State of Colorado*, etc., 75 Pac. 1083. The questions presented for determination are the same as in that case, and for the reasons there given the judgment of the county court will be affirmed. Affirmed.

ISABELLA GOLD MIN. CO. v. GLENN et al. (Supreme Court of Colorado. March 7, 1904.) Appeal from District Court, El Paso County; Wm. P. Seeds, Judge. Action between the Isabella Gold Mining Company and Lee Glenn and others. From a judgment in favor of the latter, the former appeals. On motion to dismiss appeal. Denied. Hall, Babbitt & Thayer and John K. Vanatta, for appellant. C. W. Franklin, for appellees.

PER CURIAM. The motion to dismiss the appeal in this case is based upon the ground of the insufficiency of the abstract of record filed by appellant. The same question has been considered in the case of *Venner v. Denver Union Water Company* (No. 4,742) 75 Pac. 927; and for the reasons stated in the opinion denying a similar motion in that case the motion in this is overruled. Motion overruled.

ATCHISON, T. & S. F. R. CO. v. OSBORN. (Supreme Court of Kansas. March 12, 1904.) Error from District Court, Harper County; P. B. Gillett, Judge. Action by M. H. Osborn against the Atchison, Topeka & Santa Fe Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed. A. A. Hurd and O. J. Wood, for plaintiff in error. I. P. Campbell & Son and S. S. Sisson, for defendant in error.

PER CURIAM. The cases cited by plaintiff in error on misconduct of counsel in addressing the jury are not in point. In all of them matters not in evidence were stated. In this case the deposition from which Mr. Campbell read in his argument was before the jury in its entirety. The controversy which arose when Mr. Campbell was reading a part of Morgan's answer, with the demand that he read all of it, must have refreshed the recollection of the jury as to the part omitted, which they had already heard. The failure to properly burn fire guards was not found to be the sole ground of negligence of the railroad company, so that the origin of the fire beyond the right of way would not exempt the company from liability. Other acts of negligence than a failure to burn fire guards were alleged in the petition, and such other negligent acts were necessarily found against the company in the general verdict. *Railroad Co. v. Chace*, 64 Kan. 380, 67 Pac. 853. This case has been pending since 1891. It has been twice in this court. 58 Kan. 768, 51 Pac. 286; 64 Kan. 187, 67 Pac. 547, 91 Am. St. Rep. 189. The judgment of the court below will be affirmed.

BECKHAM v. BURRTON STATE BANK. (Supreme Court of Kansas. March 12, 1904.) Error from District Court, Reno County. Action by W. E. Beckham against the Burrton State Bank. Judgment for defendant. Plaintiff brings error. Affirmed. Carr W. Taylor and J. U. Brown, for plaintiff in error. Geo. A. Vandever and F. L. Martin, for defendant in error.

PER CURIAM. Plaintiff's action was one to recover damages for the publication of an alleged libel. The libelous matter was contained in a letter written by the defendant's cashier, which closed with the following sentence: "I hope you will give this matter due consideration, and trust that you will treat it as strictly con-

fidential." The action was begun more than one year after the writing of the letter, and is barred unless saved by the allegation which the petition contained, that its publication was not discovered, by reason of fraudulent concealment, until within one year prior to the commencement of the action. Admitting that the matter contained in the letter was libelous, and admitting that the sentence quoted above amounts to a fraudulent concealment, upon neither of which we express an opinion, the question falls within the principle discussed and decided by this court in the case of *A. T. & S. F. Ry. Co. v. Atchison Grain Co.*, 75 Pac. 1051, and will be governed by the ruling in that case. It follows that the judgment of the district court in sustaining the demurrer of the defendants to the petition, and rendering judgment against the plaintiff for costs, is correct, and must be affirmed.

CITY OF LEAVENWORTH v. ASHBY et al. (Supreme Court of Kansas. Feb. 6, 1904.) Error from District Court, Leavenworth County; J. H. Gillpatrick, Judge. Action by R. Ashby and others against the city of Leavenworth. Judgment for plaintiffs. Defendant brings error. Affirmed. F. P. Fitzwilliam, for plaintiff in error. Wm. Dill, for defendants in error.

PER CURIAM. The damage sustained by the defendants in error did not result from a defective planning of the improvement in the street, but was occasioned by the negligent acts of the agents of the city in carrying out the plan. The case was tried in the court below on this theory, and the judgment is amply supported by the evidence. The judgment of the court below will be affirmed.

KOEPP v. CONSOLIDATED ELECTRIC LIGHT & POWER CO. (Supreme Court of Kansas. March 12, 1904.) Error from Court of Common Pleas, Wyandotte County; William G. Holt, Judge. Action by William F. Koepf against the Consolidated Electric Light & Power Company. Judgment for defendant. Plaintiff brings error. Affirmed. John A. Hale and Bird & Pope, for plaintiff in error. Harkless, Chrysler & Histed and A. L. Berger, for defendant in error.

PER CURIAM. In 64 Kan. 735, 68 Pac. 608, this case was decided adversely to plaintiff in error. A judgment in his favor was reversed, and a new trial granted, for the reason that the negligence alleged and proved was not the proximate cause of the injury. After the case was remanded, plaintiff below filed a third amended petition. His counsel says in his brief: "The third amended petition of the plaintiff merely enlarged the cause of action already stated in the second amended petition by inserting other allegations material to the case."

\* \* \* The cause of action in both petitions is the same." Counsel further states that the third amended petition "gives a new version of an old story." A general demurrer was sustained to this pleading, of which plaintiff below complains. The proceeding in error impresses us as an attempt to obtain a rehearing in the original case. Counsel for plaintiff in error says: "The third amended petition, like the second, merely charged common negligence, and the negligence in both cases was charged to be the crossing of uninsulated electric light wires with uninsulated telephone wires of Radford." The judgment of the court below will be affirmed.

MANLEY v. OSBORNE et al. (two cases). (Supreme Court of Kansas. Feb. 6, 1904.) Errors from District Court, Atchison County; W. T. Bland, Judge. Actions by Ada M. Os-

borne and others against Reuben M. Manley, executor. Judgments for plaintiffs. Defendant brings error. Reversed. L. F. Bird, for plaintiff in error. Jackson & Jackson, for defendants in error.

**PER CURIAM.** These are companion cases to *Manley v. Mayer* (just decided) 75 Pac. 550, involving the same questions. For the reasons given in the opinion filed in that case, the same order is made in each of these

**MANLEY v. PARK.** (Supreme Court of Kansas. Feb. 6, 1904.) Error from District Court, Atchison County; W. T. Bland, Judge. Action by Anna O. Park against Reuben M. Manley, executor. Judgment for plaintiff. Defendant brings error. Reversed. L. F. Bird, for plaintiff in error. Jackson & Jackson, for defendant in error.

**PER CURIAM.** This case is in all respects similar to that of *Manley v. Park* (just decided) 75 Pac. 557, and will be disposed of in the same manner.

**PACIFIC EXP. CO. v. STATE ex rel. COUNTY ATTORNEY OF GRAHAM COUNTY.** (Supreme Court of Kansas. Feb. 6, 1904.) Error from District Court, Graham County; Chas. W. Smith, Judge. Action by the state, on the relation of the county attorney of Graham county, against the Pacific Express Company. Judgment for relator, and defendant brings error. Reversed. Loomis, Blair & Scandrett, for plaintiff in error. A. L. Williams, N. H. Loomis, R. W. Blair, and H. J. Harwi, for defendant in error.

**PER CURIAM.** The judgment in this case is reversed, on the authority of *State v. Estep*, 66 Kan. 416, 71 Pac. 857.

**STATE v. HEITMAN.** (Supreme Court of Kansas. Feb. 6, 1904.) Appeal from District Court, Shawnee County; Z. T. Hazen, Judge. Charles Heitman was convicted of violating the liquor law, and appeals. Affirmed. C. A. Magaw, for appellant. C. C. Coleman, Atty. Gen., W. I. Jamison, and J. R. McNary, for the State.

**PER CURIAM.** This is an appeal from a conviction for a violation of the prohibitory liquor law. We have given attention to the points of error raised by counsel for the appellant, and find in them nothing requiring a reversal of the judgment. The judgment of the court below will be affirmed.

**STATE v. TROSPER.** (Supreme Court of Kansas. Feb. 6, 1904.) Appeal from District Court, Graham County; Chas. W. Smith, Judge. John D. Trospen was convicted of violating the liquor law, and appeals. Affirmed. George W. Jones, for appellant. C. C. Coleman, Atty. Gen., for the State.

**PER CURIAM.** The appellant appeals from a conviction of selling intoxicating liquors and maintaining a nuisance. Errors are predicated on the giving of certain instructions, refusing to give others requested by appellant, and in overruling appellant's application for a continuance of the trial. The instructions given are not subject to the criticism made, and fairly state the law. Those refused, which contain a correct statement of the law, were substantially embodied in the instructions given by the court. There was no prejudice resulting to the appellant by reason of the court refusing to grant a continuance, even if the application be considered sufficient. An examination of the record discloses no prejudicial error in the proceedings, as against the appellant. The judgment of the court below is affirmed.

**WARNER, Sheriff, v. OVERTON.** (Supreme Court of Kansas. Feb. 6, 1904.) Error from District Court, Hamilton County; Wm. Easton Hutchison, Judge. Action by Earlie Overton against J. A. Warner, sheriff. Judgment for plaintiff, and defendant brings error. Affirmed. Whitcomb & Hamilton, Hoskinson & Hoskinson, and U. T. Tapscott, for plaintiff in error. Geo. Getty and Geo. J. Downer, for defendant in error.

**PER CURIAM.** No error was committed in refusing the change of venue. There was little in the testimony tending to prove local prejudice, or that a fair and impartial trial could not be had in Hamilton county. At least, it cannot be said that the court abused its discretion in denying the application. There is sufficient proof of the ownership of the cattle by Earlie Overton to sustain the findings and judgment. There was no such confusion of theories in the case as will give any good reason for complaint, nor do we find anything material in the objections to rulings on testimony. The case was fairly submitted on the instructions, and the judgment will be affirmed.

**MASON, J.,** having been of counsel, did not sit.

**LAMM et al. v. PARROT SILVER & COPPER CO. et al.** (Supreme Court of Montana. Feb. 1, 1904.) Appeal from District Court, Silver Bow County; Wm. Clancy, Judge. Action by Daniel Lamm and another against the Parrot Silver & Copper Company and others. From an order granting a temporary injunction, certain defendants appeal. Reversed. A. J. Shores, Forbis & Evans, W. W. Dixon, C. F. Kelley, and D. Gay Stivers, for appellants. John J. McHatton, for respondents.

**BRANTLY, C. J.** Appeal by defendants Parrot Silver & Copper Company, a Montana corporation, and H. A. Gallwey, its general manager, from an order of the district court of Silver Bow county granting a temporary injunction to restrain said corporation and its officers and directors from permitting the Amalgamated Copper Company to vote certain shares of stock owned by it in the said Montana corporation; also to restrain the defendants from paying to the Amalgamated Company any dividends on its shares, and from transferring any of those shares upon the books of the corporation. This cause was submitted at the same time and upon the same facts as was the cause entitled *MacGinniss v. B. & M. C. C. & S. M. Co. et al.* (this day decided) 75 Pac. 89. Plaintiffs sue as minority shareholders in the Parrot Silver & Copper Company. The questions involved and the relief sought are substantially the same as in the other case. The decision in that case is therefore conclusive of this, and for the reasons stated in the opinion therein the order appealed from is reversed, and the cause is remanded. Reversed and remanded.

**MILBURN and HOLLOWAY, JJ.,** concur.

**LANE v. HUMPHREYS.** (Supreme Court of Montana. Feb. 12, 1904.) Appeal from District Court, Rosebud County; C. H. Loud, Judge. Action by Clarence R. Lane against N. J. Humphreys. From a judgment for plaintiff, defendant appeals. Affirmed. E. J. Dierks, F. & H. Collins, and Sydney Sanner, for appellant. T. J. Porter and J. C. Lyndes, for respondent.

**PER CURIAM.** By stipulation of counsel this case presents for decision questions identical with those in *Lane v. Bailey* (decided this day) 75 Pac. 191. On the authority of that case, therefore, the judgment is affirmed.



**MacGINNISS v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO.** et al. (Supreme Court of Montana. Feb. 1, 1904.) Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by John MacGinniss against the Boston & Montana Consolidated Copper & Silver Mining Company and others. From an order granting a temporary injunction, certain defendants appeal. Reversed. A. J. Shores, Forbis & Evans, W. W. Dixon, C. F. Kelley and D. Gay Stivers, for appellants. John J. McHatton, for respondent.

**BRANTLY, C. J.** Appeal from an order granting a temporary injunction. This cause was submitted to the district court at the same time and upon the same facts as was the cause entitled *John MacGinniss v. B. & M. C. C. & S. M. Co.* et al. (this day decided) 75 Pac. 89. The question involved is whether the plaintiff is entitled to an injunction pendente lite to restrain the defendant Boston & Montana Company and its officers and directors from permitting the Amalgamated Company to vote the same shares of stock held by it in the Montana Company which are the basis of the other action, and also to restrain the payment of dividends upon said shares, etc. The Amalgamated Company is not a party. The decision in *MacGinniss v. B. & M. C. C. & S. M. Co.*, supra, is determinative of this case, and for the reasons stated in the opinion therein the order is reversed, and the cause is remanded. Reversed and remanded.

**MILBURN and HOLLOWAY, JJ.**, concur.

**MILLER v. SCOTTISH UNION & INTERNATIONAL FIRE INS. CO.** (Supreme Court of Oklahoma. March 4, 1904.) Error from District Court, Custer County; before Justice C. F. Irwin. Action by S. H. Miller, trustee, against the Scottish Union & International Fire Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed. R. N. McConnell, W. H. Criley, and Shartel, Keaton & Wells, for plaintiff in error. Howard & Ames, for defendant in error.

**PANCOAST, J.** The same questions are involved in this case that were involved in the case of *Miller v. Delaware Ins. Co. of Philadelphia* (No. 1,338) 75 Pac. 1121; in both cases there being a stipulation that the decision in this case should follow the decision in that one, except as to the amount of recovery, all other questions being identical. Upon the authority of case No. 1,338, the judgment of the court below in this case is reversed, and the court is directed to enter judgment in favor of plaintiff in error for the sum of \$175 and costs. All the justices concurring, except **IRWIN, J.**, who tried the case below, not sitting, and **BURFORD, C. J.**, absent.

**FROMAN v. FROMAN.** (Supreme Court of Oregon. Feb. 1, 1904.) Appeal from Circuit Court, Linn County; R. P. Boise, Judge. Suit by Laura Ella Froman against Thomas Froman. From a decree in favor of defendant, plaintiff appeals. Affirmed. Dan R. Murphy and Gale S. Hill, for appellant. J. R. Wyatt, for respondent.

**PER CURIAM.** This is a suit for divorce. Both parties seek affirmative relief. The decree in the court below was in favor of the defendant. No questions of law are involved. The evidence is voluminous, and is of such a

character as ought not to be embodied in an opinion. We have examined the record with care, and concur in the conclusions of the trial court. The decree is, therefore, affirmed.

**WOLVERTON, J.**, took no part in the decision.

**TAYLOR v. HUNTINGTON** et al. (Supreme Court of Washington. March 25, 1904.) Appeal from Superior Court, King County; Boyd J. Tallman, Judge. Action by Chandler Huntington and others against George Taylor, Jr., to vacate a judgment of foreclosure of a tax lien. From an order denying the motion to vacate judgment, defendants appeal. Affirmed. John K. Brown and J. A. Kellogg, for appellants. Reed & Rutherford, for respondent.

**PER CURIAM.** For the reasons assigned in *Taylor v. Huntington* (No. 4,950, just decided) 75 Pac. 1104, the judgment in this case is affirmed.

**STATE ex rel. SMITH v. GILLESPIE,** County Clerk, et al. (Supreme Court of Wyoming. Feb. 18, 1904.) Mandamus by the state, on relation of S. H. Smith, against J. D. Gillespie, county clerk, and others, to compel the issuance of a license to relator to carry on certain games within the county. On reserved questions from the district court. Lonabaugh, Blake & Hamilton, for relator. J. F. Hoop and E. R. French, for defendants.

**POTTER, J.** This is a suit in mandamus to require the issuance to relator of licenses for the carrying on of the games of faro and roulette. It involves the same question this day decided in the case of *State ex rel. Hynds v. Cahill, County Clerk, et al.*, 75 Pac. 433. Several other questions are stated in the order sending the cause to this court, which need not be decided. One question only is discussed in the brief of counsel for relator, so far as the constitutionality of the act known as chapter 65, p. 68, of the Laws of 1901 is concerned, viz.: Was the fact of the signing of the bill by the Speaker of the House entered upon the House Journal in compliance with the provisions of section 28 of article 3 of the Constitution? No contention is made in the brief of any other irregularity in the passage of the act in question. Some other questions are discussed, such as whether mandamus will lie, and whether the law as it originally stood, authorizing the licensing of gambling games, was void as against morality and public policy. A decision of those questions is evidently not required, if the act of 1901 be held constitutional and valid. The whole matter has been considered at length in the case of *State ex rel. Hynds v. Cahill, County Clerk*, and it will be unnecessary, therefore, to here state the reasons for our conclusion. We hold that the entry in the House Journal is a substantial compliance with the Constitution in the respect complained of, and that it does appear therefrom that the Speaker of the House signed the bill in question in the manner and at the time required by the section of the Constitution aforesaid, and that chapter 65, p. 68, of the Laws of 1901 is a valid and constitutionally enacted law of this state. For all the purposes of the case this is the only question that need be decided, and is a sufficient answer to the reserved questions, so far as they are involved in the determination of the matter before the district court.

**CORN, C. J.**, and **KNIGHT, J.**, concur.











